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.

RECORD ON APPEAL

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-4112

JANE DOE, an adult woman over the age of 18

PLAINTIFF(S)

TCSC, LLC, d/b/a HENDRICK TOYOTA OF NORTH CHARLESTON

DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED
2017 APR -5 PM 2:52
JULIE J. ARMSTRONG
CLERK OF COURT

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : The Motion to Compel Arbitration is denied. Formal Order to Follow.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge | 2060 **Judge Code** | 4/4/2017 **Date**

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	}	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NUMBER: 2016-CP-10-4112
JANE DOE, an adult woman over the age of 18, Plaintiff, v. TCSC, LLC, d/b/a HENDRICK TOYOTA OF NORTH CHARLESTON, Defendant.	}	

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

This matter came before the court for a hearing on Defendant's Motion to Compel Arbitration and to stay the instant litigation under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, [the "FAA"] which was filed on December 9, 2016. The Plaintiff filed a Memorandum in Opposition to Defense Motion to Compel Arbitration on February 17, 2017 and a Supplemental Memorandum in Opposition to Defense Motion to Compel Arbitration on February 22, 2017. Oral argument was heard in the matter on February 22, 2017 from Edward D. Buckley, Jr., attorney for the Defendant and Anthony E. Forsberg, attorney for the Plaintiff. At the conclusion of the argument, the court took the matter under advisement. Upon further consideration of the oral argument, a review of the written submissions of the parties and the record before the court, additional oral argument was requested. In advance of that additional argument, Plaintiff filed an Affidavit of Jane Doe in Support of Plaintiff's Memoranda in Opposition to Defendant's Motion to Compel Arbitration on March 31, 2017. The parties reconvened before the court on April 4, 2017

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with Edward D. Buckley, Jr. and Nicholas J. Rivera appearing on behalf of the Defendant and Anthony E. Forsberg appearing for the Plaintiff. Based on the oral arguments, submissions of the parties, the record before the court and the caselaw of this State, for the following reasons, I hereby find that the Defendant's Motion to Compel Arbitration and to stay the instant litigation is DENIED.

SUMMARY OF THE CASE

On or about June 11, 2011, Plaintiff purchased a 2011 Toyota RAV 4 from Rick Hendrick Toyota Scion of North Charleston, the Defendant in this matter. It is alleged that as part of that vehicle purchase sales documentation, she was presented with and signed a document entitled "Arbitration Agreement", which document was attached to the Defendant's Motion to Compel Arbitration and which forms the contract basis for the Defendant's motion. That document states, in pertinent part:

> Any claim or dispute, whether in contract, tort, statute or otherwise...between you and us...which arises out of or relates to your credit application, purchase, lease or condition of this vehicle, your purchase, lease agreement or financing contract or any resulting transaction or relationship...shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

The Plaintiff acknowledges in her filed Affidavit that she did sign the Arbitration Agreement.

The Complaint alleges that some four years and seven months later, on December 16, 2015, Plaintiff found herself at the same dealership to receive service on her previously purchased 2011 RAV 4. During that visit, she spoke with Richard Smith, an employee and salesman for the Defendant. As she was curious to see if she could potentially afford to purchase a new car, Smith had the Plaintiff complete a credit application, and in doing so the dealership collected personal and private identifying data from the Plaintiff including her name, address, telephone number and birth date, among other information. After discussing some potential vehicles for purchase and the cost of the same, the Plaintiff did not choose to purchase a new vehicle from the Defendant dealership

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that day. Plaintiff alleges that Smith thereafter persisted in contacting the Plaintiff by telephone over the following weeks in order to convince her to buy another car from the Defendant dealership.

Ultimately the Plaintiff purchased a vehicle from a different dealership. The Complaint alleges that on January 19, 2016 at 10:20 am, Smith called from the Defendant dealership to follow up on the Plaintiff as a prospective sale. The Plaintiff informed him that she had already purchased a vehicle elsewhere. It is then alleged that within ten minutes of learning that the sales lead he had been working since December 15, 2015 was dead, on January 19, 2016 at 10:30 am, Richard Smith, acting as an employee and agent of the Defendant, posted the following ad on Backpage.com, a sexually oriented website used to offer and solicit sexual encounters including prostitution:

> **Needing it Now - 35**
> Posted: Tuesday, January 19, 2016 10:30 am
> I really need a good pounding. My husband is
> always out of town and I can host. 843-XXX-XXX (redacted).
> Send pictures and ask for [Jane Doe]
>
> Poster's age: 35
>
> Location: Charleston, Mt. Pleasant
> Post ID: 12XXXX81 charleston

Finally, the Plaintiff states in her Complaint that thereafter, within hours, she began to receive phone calls and texts on the personal and private cell phone number she had given the dealership through Smith from individuals indicating (in explicit terms) that they sought to meet with her for sexual encounters in response to the Backpage.com advertisement posted by the employee of the Defendant. It is this disturbing, outrageous and incredibly invasive internet posting which forms the basis of the Plaintiff's allegations in the instant litigation.

The Plaintiff initiated litigation against the Defendant alleging several causes of action sounding in tort, specifically the torts of Outrage, Intentional Infliction of Emotional Distress,

Invasion of Privacy, Defamation/Libel Per Se, General Negligence, Gross Negligence, Negligent Hiring, Negligent Training and Negligent Supervision. The Defendant filed an Answer on October 11, 2016 and thereafter moved to compel arbitration on December 9, 2016 relying upon the existence of the 2011 Arbitration Agreement.

It is the Plaintiff's position that the Arbitration Agreement she signed in 2011 as part of her separate and distinct purchase transaction of a vehicle from the Defendant's dealership did not contemplate such outrageous acts as were allegedly committed against her in 2016 and as such, the 2011 Arbitration Agreement does not apply to the torts alleged to have been committed by the Defendant and its agents, servants and employees. This court agrees.

STANDARD OF REVIEW

The Arbitration Agreement at issue herein is governed by the FAA[1], but the FAA's "Savings Clause", 9 U.S.C.A. § 2 (West), states, in pertinent part:

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

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles v. United Healthcare Corp.*, 338 S.C.29, 524 S.E.2d 839 (Ct. App. 1999). *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). Arbitration will be denied if a court determines that no agreement to arbitrate existed. *Lucey v. Meyer*, 401 S.C. 122, 139, 736 S.E.2d 274, 283 (Ct. App. 2012). In determining whether an agreement to arbitrate exists, "the court should apply ordinary state-law principles that govern the formation of contracts." *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir.1998) (quoting

[1] The parties to this case concede as much in their respective briefs.

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); see also *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir.1997) ("Courts decide whether there is an agreement to arbitrate according to common law principles of contract law."). Additionally, the U.S. Supreme Court has held that "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011).

LAW AND ANALYSIS

In her two memoranda filed in opposition to the Defendant's Motion to Compel Arbitration and at oral argument, the Plaintiff raised several grounds for denying the enforceability of the Arbitration Agreement, which are summarized as follows: (1) the "outrageous and unforeseeable torts exception" prevents arbitration of her present claims, (2) that there was no meeting of the minds as to the Arbitration Agreement, (3) that the Arbitration Agreement constituted an adhesion contract and (4) that the Arbitration Agreement was unconscionable and therefore unenforceable.

For reasons more fully explained herein below, I conclude as a matter of law that the outrageous and unforeseeable torts alleged to have been committed against the Plaintiff in this matter in January 2016 could not have been contemplated by the parties when they entered into the 2011 Arbitration Agreement. I further find that by applying the expectations of a reasonable man, it could not have been the intention of the parties to include such outrageous torts in the 2011 Arbitration Agreement so there was no meeting of the minds between the parties. I find that because a party cannot be required to submit to arbitration a dispute which she has not agreed to submit, the 2011 Arbitration Agreement does not apply to the present dispute that has arisen between the parties. Finally, I find that the Arbitration Agreement constituted an unconscionable adhesion contract which is voidable at law. On essentially similar facts, the Supreme Court of South Carolina has reached

the same conclusion, which precedent I find supports my determination on the matter under consideration.

I. <u>The Outrageous and Unforeseen Torts Exception Applies to This Case</u>

In the matter of *Aiken v. World Finance Corp. of SC*, 373 S.C. 144, 644 S.E.2d 705 (2007), the consumer plaintiff signed several arbitration agreements in connection with obtaining loans from the defendant company. In order to apply for those loans, the plaintiff was required to provide certain non-public, personal information to the defendant. At some point thereafter, employees of the defendant misappropriated the personal and private information of the plaintiff and used it to obtain sham loans and to pocket the proceeds of those loans. Upon learning his personal information had been misused in this fashion, the plaintiff brought an action against the defendant business for outrage and emotional distress, negligence, negligent hiring and supervision and unfair trade practices. The defendant answered, moved to dismiss and also filed a motion to compel arbitration. The trial court denied the defendant's motion to compel arbitration. Thereafter the Court of Appeals affirmed. On certiorari, affirming the lower court, the South Carolina Supreme Court held:

> Both state and federal policy favor arbitration of disputes and unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118–19 (2001). However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.* at 596, 553 S.E.2d at 118. Given these principles, courts generally hold that broadly-worded arbitration agreements apply to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Id.* at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir.2001)).

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149–150, 644 S.E.2d 705, 708 (2007)

I find that the matter presently before this trial court is squarely on point with the *Aiken* case. The torts allegedly committed against the Plaintiff in the matter *sub judice* bear absolutely no

relationship, much less a significant relationship, to the 2011 Arbitration Agreement's stated scope of:

> Any claim or dispute, whether in contract, tort, statute or otherwise...between you and us...which arises out of or relates to your credit application, purchase, lease or condition of this vehicle, your purchase, lease agreement or financing contract...

Counsel for the Defendant stated during oral argument that the reason the Plaintiff found herself at the dealership in December of 2015 was because of an ongoing relationship which had commenced with her purchase of the 2011 Toyota RAV 4 in June of 2011. Specifically, counsel argued that the dealership had occasionally sent mailers to the Plaintiff in order to entice her to trade in her 2011 vehicle for another. Essentially, the Defendant argued that but for the 2011 car purchase, the Plaintiff would not have been sent the trade-in mailers and therefore would not have found herself present in the dealership nor would she have independently contemplated the potential of purchasing another vehicle from the dealership. I find this claimed connection to be too tenuous to bring the December 2015 meeting between Plaintiff and Smith or the January 2016 alleged tortious acts under the penumbra of the 2011 Arbitration Agreement. Again, I find support for this opinion within the four corners of the *Aiken* case which states:

> [Defendant] primarily argues that because [Plaintiff's] contracts with [Defendant] gave the conspirators access to [Plaintiff's] information in order to carry out their crimes, there is a significant relationship between [Plaintiff's] claims and the underlying loan agreement, thereby warranting arbitration. ***We find this argument unpersuasive.*** In our opinion, the "relationship" asserted by [Defendant] between [Plaintiff's] tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of "significant." Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. ***Such a result is illogical and unconscionable***. *See Seifert v. U.S. Home Corp.*, 750 So.2d 633, 638 (Fla.1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement."). *See also, The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 209, 588 S.E.2d 136, 140

(Ct.App.2003) ("[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties."). (emphasis added)

Aiken v. World Finance Corp. of SC, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007).

In other words, a plaintiff's claims raised in a Complaint must have a significant relationship to the contract for the arbitration agreement to cover the lawsuit in question. Adopting the language of our Supreme Court, I find the mere fact that the Plaintiff may have received a trade-in mailer from the Defendant, or that she had returned to the dealership to service her car purchased in 2011, is insufficient to create a "significant relationship" between the asserted claims and the 2011 Arbitration Agreement. Likewise, I find the suggestion of Defendant that the dispute would not have arisen but for the existence of the 2011 sales contract including the Arbitration Agreement and the consequent relationship between the parties is insufficient by itself to transform the present dispute into one "arising out of or relating to" the 2011 Arbitration Agreement. To avoid an illogical and unconscionable result, I find that the 2011 Arbitration Agreement has no application to the alleged 2016 torts.

In analyzing the proper application of law in *Aiken*, the Supreme Court went on to state:

...[W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, ***this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.***

In this case, we find the theft of [Plaintiff's] personal information by [Defendant's] employees to be outrageous conduct that [Plaintiff] could not possibly have foreseen when he agreed to do business with [Defendant]. Consequently, in signing the agreement to arbitrate, [Plaintiff] could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that [Plaintiff's] claims for unanticipated and unforeseeable tortious conduct by [Defendant's] employees are not within the scope

of the arbitration agreement with [Defendant].

> This Court merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. ***To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal.***

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) (emphasis supplied).

Just as in *Aiken*, it would be absurd for this court to find that the Jane Doe Plaintiff in this action, acting as a reasonable person at the time she was purchasing her car in 2011, would have foreseen that nearly five years later upon a return visit to the same dealership an employee would misappropriate her personal, private information and place it on a sex website. The *Aiken* Court stated in a footnote:

> [T]he rule we set forth today is based on the concept of the expectations of a "reasonable man," a standard deeply rooted in tort law. Therefore, a determination of foreseeability under the rule is to be made from the standpoint of the injured party; not this Court. We do not believe that this Court should proclaim that fraudulent acts such as identity theft are foreseeable in the course of normal business dealings

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007).

Likewise, this trial court will not proclaim as foreseeable the outrageous and tortious acts of the Defendant or Defendant's employees in this matter. As she sat across from a salesperson in June of 2011, signing documents to consummate the purchase of her new car, including the very Arbitration Agreement at issue in this motion, the Plaintiff could never have foreseen the outrageous events that unfolded on January 19, 2016. If the possibility of such alleged tortious conduct by the Defendant had been foreseeable, any reasonable consumer most certainly would not have agreed to buy a vehicle from that dealership. There can be no question that in 2011 the Plaintiff herein did not knowingly agree to arbitrate her present claims arising out of such unforeseeable and outrageous conduct. As a matter of public policy, as the facts are virtually indistinguishable, it would be

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inconsistent with the law of the *Aiken* case for this court to find that the instant Plaintiff's claims arising from the outrageous and unforeseeable conduct of the Defendant's employee are subject to the 2011 Arbitration Agreement. I find that they are not.

II. The Continued Viability of the Outrageous and Unforeseen Torts Exception Despite the *Concepcion* line of U.S. Supreme Court Cases

The Defendant also argued in support of its Motion to Compel Arbitration that by way of the Supremacy Clause, the *Concepcion*[2] line of US Supreme Court cases trump South Carolina law on the issue of whether the Federal Arbitration Act, 9 U.S.C. §1, *et seq*,. displaces state laws prohibiting outright the arbitration of a particular type of claim. While it may be true that the FAA does have this effect on state laws directly addressing *only* arbitration agreements, this court is not confronted with a State law, rule or caselaw that "outright prohibits" a particular type of claim. Rather, in keeping with the Savings Clause of the FAA[3], since the 2011 Arbitration Agreement in this case is a contract, and since South Carolina and US Supreme Court case law requires courts to honor the parties' expectations[4] embodied in their contracts, the "outrageous and unforeseeable tort exception" - which our Supreme Court has held is grounded in the general contract principle of effectuating the parties' contractual expectations - can apply equally to any contract. As such, the exception is a

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[2] The U.S. Supreme Court cases of *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed. 2d 902 (1996), *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed. 2d 742, 563 U.S. 333 (2011) and *DIRECTV, Inc. v. Imburgia*, 136 S.Ct 463, 193 L.Ed.2d 365 (2015) were all briefed and argued by the Defendant at oral arugment.

[3] A written provision in any...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.A. § 2 (West)

[4] "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011)

"ground that exists in law or at equity for the revocation of any contract" as contemplated by the FAA's Savings Clause, 9 U.S.C. § 2 (West) and does not conflict with Federal substantive law of arbitrability.

Further buttressing my conclusion in this matter is the more recent case of *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 791 S.E.2d 128, (2016), reh'g denied (Oct. 24, 2016). In that matter, the South Carolina Supreme Court addressed the Supremacy Clause argument and reaffirmed the viability of what has come to be known as the "outrageous and unforeseeable torts exception" to the policy of the United States and South Carolina courts favoring arbitration of disputes. It is upon this exception that the Plaintiff relies, among other things, in resisting the defense's motion to compel arbitration. In *Parsons*, a majority of the Court held that the "outrageous and unforeseeable torts exception" remains a viable principle of law in South Carolina after *Concepcion*, because it embodies a generally applicable principle of contract law, that being effectuating the intent of the parties, a bedrock principle of contract law that is not applicable only to arbitration contracts.

In the concurring and dissenting opinion of Justice Hearn, it was stated that abolishing the exception, which the defendant in this motion argued is applicable only to arbitration, could lead to absurd results, such as forcing parties to arbitrate behavior that they clearly did not contemplate upon entering the contract or arbitration agreement. *Id.* at 791 S.E. 2d 128, 134-135. *See also, Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011) ("Even though there is [a] presumption in favor of arbitration, the courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties." (additional citation omitted) (internal quotation and alteration marks omitted)); *See also, e.g., Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (explaining a contract "interpretation which

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establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided"). It is this absurd result the Defendant seeks and which this court refuses to allow.

In her dissent in *Parsons*, which was joined by Justices Hearn and Beatty (thus resulting in a majority of the Court preventing Justices Pleicones and Kittredge from overruling *Aiken* and its progeny) Acting Justice Jean Toal stated eloquently, "[a]s I read our precedents, the so-called 'outrageous and unforeseeable tort exception to arbitration' is merely a label for this Court's application of a longstanding contract principle - effectuating the parties' contractual expectations." *Parsons*, at 791 S.E. 2d 128, 137. She characterized the label attached to the exception as "...a misnomer. ***The analysis underlying the exception - defining the scope of the agreement by effectuating the parties' contractual expectations - is equally applicable to contracts and arbitration agreements.***" *Id.* at 137. (emphasis added).

Because the legal principle of effectuating the parties' expectations relative to a contract applies equally to arbitration agreements and other contracts alike, this court finds that doing so is contemplated by the FAA's Savings Clause and therefore is a proper ground upon which to determine whether to apply the Arbitration Agreement at issue here. I find that the parties could not reasonably have expected the alleged torts to have occurred and therefore they could not have agreed to arbitrate them.

III. No Meeting of the Minds

South Carolina common law has long required that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975). The "meeting of minds" required to make a contract is not based on secret purpose or intention on the

part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893–894 (1989). In the instant case, the Defendant seeks to enforce an arbitration agreement entered into during the purchase of an automobile in 2011 in order to prevent the Plaintiff from bringing personal injury claims in State Court which arose not from the "credit application, purchase, lease or condition ***of [that] vehicle***" as stated in the 2011 Arbitration Agreement, but rather which arose from the wrongful conduct of the Defendant's employee nearly five (5) years after the unrelated vehicle purchase was consummated. Certainly no reasonable person presented with the 2011 Arbitration Agreement as part of a car sales package would ever conceive that the agreement could extend to cover the Plaintiff's present claims of wrongdoing on the part of the Defendant and its employee. Considering the mechanics of a typical car sale, a buyer presented with multiple pages of documentation to sign in order to close the deal would never consider that an arbitration agreement which refers to potentially having to arbitrate claims arising from the "credit application, purchase, lease or condition ***of this vehicle***" could reasonably include arbitrating claims arising if a salesperson outrageously violated the personal privacy of the buyer some five years after the fact in connection with a wholly separate, potential, unconsummated car deal. In this particular case, the Defendant did not bring this possibility to the attention of the Plaintiff, nor did she ever contemplate it, as stated in her Affidavit. As there was no meeting of the minds on this essential and material term when the parties entered into the 2011 Arbitration Agreement, the arbitration contract is deemed void *ab initio*. If no contract existed, it cannot be used to subject the Plaintiff's present claims to arbitration.

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles v. united Healthcare Corp.*, 338 S.C.29, 524 S.E.2d 839

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(Ct. App. 1999); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). Arbitration will be denied if a court determines no agreement to arbitrate existed. *Lucey v. Meyer*, 401 S.C. 122, 139, 736 S.E.2d 274, 283 (Ct. App. 2012). In determining whether an agreement to arbitrate exists, "the court should apply ordinary state-law principles that govern the formation of contracts." *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir.1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); see also *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir.1997) ("Courts decide whether there is an agreement to arbitrate according to common law principles of contract law."). Applying the common law contract principle that there must be a meeting of the minds, I find no agreement to arbitrate existed between these parties.

IV. The Unconsiconability of Arbitration Agreement and Adhesion Contract

Pursuant to the South Carolina Commercial Code, a contract, or a clause of a contract, may be attacked at law if it was unconscionable at the time it was made. S.C. Code Ann. § 36–2–302 (1976). As recognized by the FAA's Savings Clause, this is a separate ground which exists at law or in equity for the revocation of any contract which does not apply solely to arbitration contracts. "If the court finds that a contract clause was unconscionable at the time it was made, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result." S.C. Code Ann. § 36–2–302(1) (1976), *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998). Unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac–Cadillac–Buick Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996) (emphasis added) (citing *Jones Leasing v. Gene Phillips and*

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Assocs., 282 S.C. 327, 318 S.E.2d 31 (Ct. App.1984)), *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

"A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005), quoting 17A Am. Jur. 2d *Contracts* § 279 (2004). Absence of meaningful choice on the part of one party speaks to the fundamental fairness of the bargaining process. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E. 663 (2007). "In determining whether a contract was tainted by an absence of meaningful choice, courts take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.* at 25, 644 S.E.2d at 669. As the South Carolina Supreme Court noted in *Simpson*, the "loss of the right to a jury trial" and foregoing statutorily provided remedies are also relevant to this determination. *Id.* at 27, 644 S.E.2d at 670. Furthermore, an adhesion contract for the purchase of an automobile receives "considerable skepticism". *Id.* at 27, 644 S.E.2d at 669–670.

An adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis where the terms are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C 531, 541, 542 S.E.2d 360, 365 (2001). As explained in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 86, 749 S.E.2d 139, 148–149 (Ct. App. 2013), in the context of a typical vehicle sale, aside from the name of the desired vehicle and cost figures dependent upon the agreed price, the remaining terms of a vehicle sale, many of which are quite significant, are pre-printed and, presumptively, non-negotiable. Such pre-printed terms include, *inter alia*, disclaimers of warranty, arbitration provisions, prejudgment interest, attorney's fees, choice of law, and severability clauses. In the case *sub judice*, the Plaintiff

alleged by Affidavit that the 2011 Arbitration Agreement was one of many documents presented to her during the consummation of the purchase of the 2011 Toyota RAV4 from the Defendant. As stated in her filed Affidavit, the closing documents were hastily presented and they were apparently represented as necessary to close the deal on the vehicle.

I find that the Arbitration Agreement, as part of the overall package of sales documents, was an adhesion contract and accordingly, as the South Carolina Supreme Court has opined, warrants considerable skepticism by this trial court. In *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26, 644 S.E.2d 663, 669 (2007), quoting the Ohio Supreme Court, our Supreme Court held that "the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. ***In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.***" *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859, 866 (1998).

In determining if an arbitration agreement even existed, in addition to looking at whether there was a meeting of the parties' minds, this court looks at the nature of the injuries alleged to have been suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged agreement; and the conspicuousness of the arbitration agreement. See, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E. 663 (2007). In examining these issues, it is clear that the Plaintiff's alleged injuries were not of the type normally considered in a commercial consumer setting such as a vehicle sale. Furthermore, it is likewise obvious that in the grand scheme of things, the Plaintiff in this matter is not a substantial business concern of the Defendant; she is but one customer purchasing one vehicle from a major

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automotive sales giant. Her overall impact on the business of the Defendant is presumably negligible. It is obvious to the court that in the context of the 2011 sales transaction, the Defendant possessed substantially more bargaining power than the Plaintiff and used that power to its advantage in consummating the vehicle sale in 2011. Additionally, the Plaintiff, when compared to a car dealership, lacks the level of business sophistication relative to the dealership and its sales people in the context of making a car deal. In the "take it or leave it" type of transaction that is a typical car deal, the Plaintiff is normally at a disadvantage. Whether there was any surprise in the inclusion of the Arbitration Agreement in this case is plain to see by the nature of the present dispute: the Plaintiff could never have suspected that the type of injuries she allegedly suffered at the hands of the Defendant and its employee could be subject to binding arbitration. The 2011 Arbitration Agreement itself is unconscionable to the extent it abrogates the Plaintiff's right to have a jury of her peers hear and decide the merits of her present claims. This court has the power to either refuse to enforce the Arbitration Agreement as a whole contract or limit the application of the unconscionable clause to avoid an unconscionable result. I find that the Arbitration Agreement is unenforceable as a whole.

CONCLUSION

In resisting the Defendant's Motion to Compel Arbitration, the Plaintiff herein has sought for the court to define the scope of the parties' contractual expectations relative to the Arbitration Agreement at issue. For the reasons exhaustively explained herein, I conclude that the Arbitration Agreement does not apply to the outrageous and unforeseeable torts alleged by the Plaintiff. I also conclude that the 2011 car sale which produced the Arbitration Agreement was a wholly separate and distinct event compared to the 2015 meeting between Plaintiff and Defendant's employee Richard Smith and his alleged actions taken in 2016 with regard to the Plaintiff's personal and

private identifying information. The Arbitration Agreement simply does not relate to or cover the alleged tortious actions of the Defendant and its employees, servants and agents.

I further conclude that there was no meeting of the minds, nor could there ever have been a meeting of the minds between the parties, as to the unforeseeable actions of the Defendant's employee Richard Smith and the prospective applicability of the Arbitration Agreement to such acts. Given that there was no meeting of the minds to include such acts in the Arbitration Agreement, it is axiomatic that there can be no contract to include them, and if there is no contract, there is no agreement to arbitrate the present dispute arising between the Plaintiff and the Defendant.

Finally, I additionally conclude that the 2011 Arbitration Agreement was an unconscionable adhesion contract, worthy of considerable skepticism by this court and I conclude that, based on all of the facts and circumstances of the present matter, there is no doubt that a true agreement never existed between these parties to submit the Plaintiff's present disputes with the Defendant to binding arbitration.

Based on the allegations of the Complaint, the briefs submitted by the parties, oral arguments and the information contained in the record, for the reasons set forth herein above, I hereby

ORDER that the Defendant's Motion to Compel Arbitration is **DENIED**. I further

ORDER that this matter is not stayed and that the parties shall proceed with litigation forthwith.

AND IT IS SO ORDERED!

April 26, 2017
Charleston, SC

The Honorable R. Markley Dennis, Jr.
Presiding Circuit Court Judge for the
Ninth Judicial Circuit

KME/18

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JANE DOE, an adult woman over the age of 18,

Plaintiff,

v.

TCSC, LLC, d/b/a HENDRICK TOYOTA OF NORTH CHARLESTON,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2016-CP-10-4112

FILED
2016 AUG -9 AM 11:3[illegible]
JULIE J. ARMSTRONG
CLERK OF COURT
BY

SUMMONS
Jury Trial Demanded

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber, Anthony E. Forsberg, Esquire, at his office located at 465 W. Coleman Boulevard, Suite 302, Mount Pleasant, South Carolina, 29464, within thirty (30) days after service hereof, exclusive of the day of such service.

YOU ARE HEREBY GIVEN NOTICE FURTHER that if you fail to appear and defend and fail to answer the Complaint as required by this Summons within thirty (30) days after the service hereof, exclusive of the day of such service, judgment by default will be entered against you for the relief demanded in the Complaint.

THE MASON LAW FIRM, P.A.

BY: _____

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Attorneys for Plaintiff

Mount Pleasant, South Carolina
August 9, 2016

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NUMBER: 2016-CP-10-4112
JANE DOE, an adult woman over the age of 18, Plaintiff, v. TCSC, LLC, d/b/a HENDRICK TOYOTA OF NORTH CHARLESTON, Defendant.	**COMPLAINT** *Respondeat Superior* *Outrage/ IIED* *Invasion of Privacy* *Defamation/Libel Per Se* *General Negligence* *Gross Negligence* *Negligent Hiring* *Negligent Training* *Negligent Supervision* ***Jury Trial Demanded***

FILED
2016 AUG -9 AM 11:35
JULIE J. ARMSTRONG
CLERK OF COURT
BY

NOW COMES the Plaintiff above-named, complaining of the Defendant herein, and would respectfully show unto this Honorable Court as follows:

1. That Plaintiff Jane Doe was, at all times relevant to this Complaint, a resident of the State of South Carolina, County of Charleston. At all times relevant to the matters complained of herein, the Plaintiff was a woman over the age of eighteen (18). She is referred to in the Complaint as "Jane Doe" in light of the nature of the matters giving rise to this Complaint in order to preserve her privacy in a matter that is of a sensitive and highly personal nature, in order to avoid the risk of retaliatory physical or mental harm, and upon the belief that proceeding anonymously will not pose any risk of unfairness to the opposing private party. The Defendant will be informed of her identity upon their written agreement to maintain her identity as confidential as to the public record or, if the Defendant refuses to do so, upon order of the Court after a motion seeking an order to compel that compliance.

2. That Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston is, and was at all times relevant to this Complaint, a corporation organized and existing under the laws of the State of South Carolina.

3. That Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, at all times relevant to this Complaint, owned property and/or transacted business in the County of Charleston, State of South Carolina.

4. That the things and matters alleged herein are within the jurisdiction of this Honorable Court.

5. That venue is proper in this Court.

6. That Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, among other things, does business in the County of Charleston, State of South Carolina, at 7151 Rivers Avenue, North Charleston, SC 29406 as "Hendrick Toyota of North Charleston" and it is primarily engaged in the business of selling new and used automobiles.

7. That on or about December 16, 2015, Plaintiff took her 2011 Toyota RAV4 to the Defendant's place of business for mechanical service. Prior to that date, over the course of several weeks, Plaintiff received a number of postal mail solicitations from Defendant indicating that the dealership was interested in purchasing the Plaintiff's vehicle and that a free appraisal could be conducted at the store.

8. On the date Plaintiff took her vehicle in to the Defendant's shop for service, she also agreed to have her vehicle appraised by the dealership while she waited for the service to be completed.

9. On December 16, 2015, Plaintiff was introduced to Richard William Smith, Jr., an agent, servant and employee of the Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston. It was represented that Smith could arrange for the appraisal of Plaintiff's vehicle. Plaintiff allowed Smith to conduct the appraisal on behalf of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston to determine whether it would be economically feasible to trade-in her RAV4 towards the purchase of another vehicle. At the time, Plaintiff was not actively seeking to purchase a vehicle, but was curious to see what value she could receive if she traded in her vehicle.

10. Plaintiff allowed Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston to apply for credit on her behalf to determine whether she qualified to purchase another vehicle, and if so, in what amounts.

11. During the initial meeting with Smith, Plaintiff advised him that she and her husband were looking at the possibility of purchasing a car with a third row seat because they had two young children and another on the way. At the time of this initial meeting, Plaintiff was five (5) months pregnant and was visibly showing signs of her pregnancy.

12. During her initial meeting with Smith, as part of the credit application process, the Plaintiff completed documents presented to her on behalf of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston and provided her confidential and private information, including her name, address, telephone number, social security number, date of birth and e-mail address to the Defendant dealership through its agent, servant and employee, Richard William Smith, Jr.

13. After conducting the appraisal and running her credit, on behalf of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, Smith offered to sell the Plaintiff another vehicle,

a Toyota Highlander, which was much more expensive than the Plaintiff was comfortable with. Plaintiff indicated that she was not interested in consummating a purchase of that vehicle.

14. After some discussion, Smith's manager came out and advised Plaintiff that there was another vehicle more in her price range. Despite being more affordable, the asking price for that vehicle was still well above what the Plaintiff was willing to pay for another vehicle.

15. Seeking to end the discussion, Plaintiff advised Smith she needed to leave the dealership to get to work and that, in any event, she would have to discuss any potential purchase with her husband.

16. As Plaintiff attempted to depart, on behalf of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, Smith continued to question Plaintiff about when she would be able to return with her husband to look at cars. Plaintiff explained that her schedule and that of her husband were very busy, that her husband was on call for work quite often, that choosing an exact time to reschedule was difficult especially so close to the impending Christmas holidays, and that she would have to call back.

17. On behalf of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, Smith aggressively continued his questions and tried to pin the Plaintiff down to a date of December 22, 2015 for her to return to the dealership with her husband to look at vehicles.

18. After continuing to explain the difficulty of setting a firm return date right then and there, the Plaintiff left the dealership without scheduling a follow up date and time with Smith and Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston.

19. For the next eight or nine days following December 16, 2015, on behalf of Defendant

TCSC, LLC d/b/a Hendrick Toyota of North Charleston, Smith called the Plaintiff almost daily and, on some occasions, called twice in one day.

20. Smith left voicemail messages for the Plaintiff on December 17, 2015 at 9:59 am, December 18, 2015 at 9:32 am, December 18, 2015 at 5:50 pm, December 22, 2015 at 6:13 pm and on December 26, 2015 at 3:47 pm, each time representing he was calling "from Hendrick Toyota".

21. The majority of the time Plaintiff did not answer the calls. After January 1, 2016, the calls continued, but were not as frequent.

22. On or about Tuesday, January 19, 2016 at approximately 10:20 am, Smith again called the Plaintiff from the dealership, Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston. Plaintiff answered the call and, after ascertaining that it was Smith, she politely advised Smith that she had purchased another vehicle elsewhere since visiting the dealership on December 16, 2015.

23. On Tuesday, January 19, 2016 at 10:30 am the following advertisement was posted on the website "www.backpage.com" in the subsection listed as "Charleston / Domination & Fetish":

> **Needing it Now - 35**
> Posted: Tuesday, January 19, 2016 10:30 am
> I really need a good pounding. My husband is
> always out of town and I can host. 843-XXX-XXX.
> Send pictures and ask for [Jane]
>
> Poster's age: 35
>
> Location: Charleston, Mt. Pleasant
> Post ID: 12XXXX81 charleston

24. Upon information and belief, while present at the dealership going about his employer's business in his role as a salesman for the Defendant, within minutes of learning that the

Plaintiff had purchased a vehicle from another dealership despite his repeated efforts to secure her business for himself and his employer, the Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston named herein, on behalf of himself and Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston Richard William Smith, Jr. posted the aforementioned advertisement on backpage.com, posing as the Plaintiff and using the Plaintiff's first name, telephone number and birthdate (albeit modifying the month) he had obtained in his role as an agent, servant and employee of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston to accomplish the posting online.

25. That at all times relevant to this Complaint, the Plaintiff was a married woman.

26. On or about Tuesday, January 19, 2016 at approximately 1:07 pm, Plaintiff received a text message on her personal cell phone from an unknown number which stated: "[Jane]?".

27. On or about Tuesday, January 19, 2016 at approximately 3:08 pm, Plaintiff received a text message on her personal cell phone from an unknown number which stated:

> Hey my name is john I'm 24 live in mount pleasent [sic] and saw you had posted just looking for a good one was wondering if you were down?

28. On or about Wednesday, January 20, 2016 at approximately 10:56 pm, Plaintiff received a voicemail from an unknown man which stated:

> Hi, yes...this call's for [Jane]. This is JR calling from Summerville. Uhhh, very interested in your ad from Backpage. Uhhh, please reply. I would love to get in contact with you...ummm, very interested.

29. On or about Thursday, January 21, 2016 at approximately 1:42 am, Plaintiff received a voicemail from an unknown man which stated:

> Hello [Jane], this is Shameless. I'm calling you about your ad that's saying how much you need it. My number is (843) XXX-XXXX. Talk to you soon I hope.

30. On or about Thursday, January 21, 2016 at approximately 2:19 am, Plaintiff received a text message on her personal cell phone from an unknown number which stated: "Hey :)".

31. On or about Thursday, January 21, 2016 at approximately 8:51 am, Plaintiff received a text message on her personal cell phone from an unknown number which stated: "Strapon + peg me?".

32. On or about Thursday, January 21, 2016 at 9:00 am, after listening to the voicemails which had been left on her personal cell phone the night before which indicated that the callers were responding to an ad "she" had posted on backpage.com, Plaintiff and her husband visited the website to investigate.

33. Plaintiff and her husband located the advertisement mentioned in this Complaint.

34. Plaintiff did not post the advertisement mentioned in this Complaint.

35. Plaintiff's husband did not post the advertisement mentioned in this Complaint.

36. Plaintiff did not respond to any of the text or voicemail messages received in response to the advertisement mentioned in this Complaint.

37. Upon investigation of the website and the sub group in which the advertisement had been posted, Plaintiff learned that the backpage.com website's "Charleston Domination and Fetish" page was used to post advertisements for individuals seeking to offer or receive sex and to arrange to engage in sexual activities with others. Essentially, the website hosted advertisements for prostitution, among other sexual acts.

38. Plaintiff immediately became concerned for her personal safety and that of her family, apprehensive, scared, nervous, vexed, nauseous, mentally stressed, anxious, felt shame and humiliation and otherwise became severely emotionally distressed due to the fact that she had been contacted directly on her private personal cell phone six (6) times by different individuals actively seeking her out to engage in sexual activities as a direct result of the information posted on backpage.com.

39. Plaintiff reported the ad to backpage.com and requested that it be immediately removed from the website indicating that her personal information and identity had been misappropriated and that she had not posted the ad.

40. Plaintiff was advised by the backpage.com moderators that in order to have the advertisement removed, she would have to file a police report.

41. The advertisement was eventually removed from backpage.com, however, as of August 2, 2016, a simple Google search of the internet using as the sole search parameter her private cell phone telephone number originally posted by Smith resulted in an identical copy of the advertisement being located on a separate (and very graphic) sexually oriented website. In fact, a link to the advertisement posted on the second sexually oriented website, www.asexyservice.com, is the very first search result that appears when one searches for her private cellular telephone number.

42. In early February 2016, through the local print and television news media, the Plaintiff became aware of the arrest of a man from Summerville, SC who was accused of violently assaulting and stabbing women whom he had contacted through backpage.com.

43. Upon learning this information, over and above her then-present mental state, Plaintiff became increasingly concerned for her personal safety and that of her family, increasingly apprehensive, increasingly scared, increasingly nervous, increasingly vexed, increasingly nauseous, increasingly mentally stressed, increasingly anxious, felt additional shame and humiliation and became otherwise even more severely emotionally distressed given that she had been contacted on her personal cell phone by a man specifically indicating he was from Summerville and was responding to "her ad" on backpage.com.

44. On Febraury 9, 2016 Plaintiff consulted a private investigator in an effort to track down the identity of the individual or individuals who had misappropriated her personal information and posted the advertisement on backpage.com.

45. On Febraury 9, 2016 Plaintiff also reported the misappropriation of her identity to the Mount Pleasant Police Department and filed a formal police report.

46. Following an investigation by detectives working with the Mount Pleasant Police Department, the source of the posting was tracked back to Richard William Smith, Jr. who was thereafter arrested on May 6, 2016 and was criminally charged with 2nd Degree Harassment.

47. That in connection with the arrest of Richard William Smith, Jr., Plaintiff has been contacted by the Town Of Mount Pleasant and subpoenaed to attend and participate in the criminal trial of Mr. Smith as a witness.

48. That, in addition to the extreme emotional distress caused by the initial discovery that her identity and private information had been misappropriated and used to solicit sex on the internet through www.backpage.com, her learning that despite her efforts to remove it, her personal

information is still available on the internet and is still linked as of August 2, 2016 to the sexually oriented website www.asexyservice.com, along with her necessary involvement in the ongoing criminal matter pending against Mr. Smith have been additional sources of extreme stress and anxiety and further compound her deep emotional distress.

49. That, at the time of the filing of this Complaint, the criminal matter has been twice postponed, again creating an additional source of extreme stress and anxiety for the Plaintiff and the uncertainty of when the criminal matter may be ultimately resolved further compounds her extreme emotional distress.

50. That the combination of the initial invasion of her privacy, the numerous contacts from random men seeking extra-marital and bizarre sex, the embarrassment of her unwitting involvement in this debacle are all constantly on the mind of the Plaintiff, adding to her severe emotional distress which interferes with her day-to-day enjoyment of life.

FOR A FIRST CAUSE OF ACTION
(Respondeat Superior)

51. Plaintiff repeats and realleges the foregoing allegations of the Complaint as if set forth herein verbatim.

52. On December 16, 2015, and at all times relevant to this Complaint, Richard William Smith, Jr. was an agent, servant and employee of the Defendant.

53. That, upon information and belief, Richard William Smith, Jr. was present at the dealership and "on the clock" when he posted the Plaintiff's name and private phone number information on backpage.com.

54. That Richard William Smith's relationship with the Plaintiff arose solely from his position as an agent, servant and employee of the Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston.

55. That, upon information and belief, Richard William Smith, Jr. was in possession of the name and other personal information of the Plaintiff solely due to his position as an agent, servant and employee of the Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston when he posted the Plaintiff's name and private phone number information on backpage.com.

56. That the telephone contact Richard William Smith, Jr. made with the Plaintiff on January 19, 2016 at approximately 10:20 am on behalf of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston to follow up on his previous attempts to sell her a vehicle was incidental to his role as an agent, servant and employee of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston.

57. That all of the actions of Richard William Smith, Jr. complained of herein were carried out in furtherance of his employer's business, that being the pursuit of potential customers to solicit the sale of new and used vehicles to, and were carried out while he was immediately about the business of his employer and master, Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston.

58. That Richard William Smith, Jr. was working in connection with the business of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston and was acting within the scope of his employment on January 19, 2016 at 10:30 at the time he posted the complained of advertisement on backpage.com.

59. That, upon information and belief, the actions of Richard William Smith, Jr. in posting the complained of advertisement on backpage.com were undertaken to punish or harm the Plaintiff for failing to purchase a vehicle from the Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston.

60. Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston is vicariously liable for the actions of its agent, servant and employee, Richard William Smith, Jr.

61. The actions of Richard William Smith, Jr. caused severe emotional distress and injury and damage to the Plaintiff, for which his employer, Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, is liable to the Plaintiff under the legal doctrine of *respondeat superior*.

FOR A SECOND CAUSE OF ACTION
(Outrage/Intentional Infliction of Emotional Distress)

62. Plaintiff repeats and realleges the foregoing allegations of the Complaint as if set forth herein verbatim.

63. That Richard William Smith, Jr., acting in furtherance of his employer's business and while about the business of his employer, that being the pursuit of potential customers to solicit the sale of new and used automobiles to, intentionally or recklessly inflicted severe emotional distress on the Plaintiff or was substantially certain that such distress would result from his complained of conduct.

64. That the actions of Richard William Smith, Jr. complained of herein, to wit: posting personal and private information about the Plaintiff on a sexually oriented website and suggesting that she wished to solicit random strangers to engage in rough sex with her at her home in the absence of and without the knowledge of her spouse while she was pregnant were so extreme and

outrageous as to exceed all possible bounds of decency and would be regarded as atrocious and utterly intolerable in this civilized community.

65. That Richard William Smith, Jr. intentionally or recklessly inflicted severe emotional distress on the Plaintiff or was substantially certain that such distress would result from his conduct.

66. The emotional distress suffered by the Plaintiff was and continues to be so severe that no reasonable person could be expected to endure it.

67. The actions of Richard William Smith, Jr. caused severe emotional distress and injury and damage to the Plaintiff, for which his employer, Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, is liable to the Plaintiff under the legal doctrine of *respondeat superior*.

FOR A THIRD CAUSE OF ACTION
(Invasion of Privacy)

68. Plaintiff repeats and realleges the foregoing allegations of the Complaint as if set forth herein verbatim.

69. That Richard William Smith, Jr., acting in furtherance of his employer's business and while about the business of his employer, that being the pursuit of potential customers to solicit the sale of new and used automobiles to, intentionally and publicly revealed facts about the Plaintiff, to wit: her name, private telephone number, marital status, age and town of residence in connection with his public posting of a salacious advertisement for soliciting extramarital sexual activities on the internet, purportedly in her name.

70. That there was no legitimate public interest in the disclosure of the name or private telephone number of the Plaintiff in connection with the false and salacious sexual solicitation advertisement.

71. That the disclosure of the Plaintiff's private information in connection with the false and salacious sexual solicitation advertisement was highly offensive and was likely to cause serious mental injury to the Plaintiff, a person of ordinary sensibilities.

72. That said disclosure on Plaintiff's private information constituted an invasion of privacy.

73. That Plaintiff was damaged as alleged herein.

74. The actions of Richard William Smith, Jr. caused severe emotional distress and injury and damage to the Plaintiff, for which his employer, Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, is liable to the Plaintiff under the legal doctrine of *respondeat superior*.

FOR A FOURTH CAUSE OF ACTION
(Defamation/Libel Per Se)

75. Plaintiff repeats and realleges the foregoing allegations of the Complaint as if set forth herein verbatim.

76. That Richard William Smith, Jr., acting in furtherance of his employer's business and while about the business of his employer, that being the pursuit of potential customers to solicit the sale of new and used automobiles to, made false and defamatory statements about the Plaintiff on backpage.com, to wit: claiming that the Plaintiff, in obvious reference to extramarital and adulterous sexual activity, was "needing it now", "really need[ed] a good pounding", that her "husband is always out of town and I can host."

77. These false and defamatory written statements were not subject to any privilege.

78. These false and defamatory written statements were made to numerous third parties via publication on the internet.

79. That Richard William Smith, Jr., acting in furtherance of his employer's business and while about the business of his employer, that being the pursuit of potential customers to solicit the sale of new and used automobiles to, was at fault for posting these false and defamatory statements about the Plaintiff.

80. That the actions of Richard William Smith, Jr. constitute actionable libel *per se* in so far as they involve written and printed word which tend to degrade a person, that is to reduce her character or reputation in the estimation of her friends, acquaintances or the public or to disgrace her or to render her odious, contemptible or ridiculous, and to accuse her of seeking to engage in the immoral act of adultery.

81. That Richard William Smith, Jr., acting in furtherance of his employer's business and while about the business of his employer, that being the pursuit of potential customers to solicit the sale of new and used automobiles to, acted with ill will, recklessness and with conscious indifference of the Plaintiff's rights in posting the false and defamatory statements on the internet as alleged.

82. The actions of Richard William Smith, Jr. caused severe emotional distress and injury and damage to the Plaintiff, for which his employer, Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston, is liable to the Plaintiff under the legal doctrine of *respondeat superior*.

FOR A FIFTH CAUSE OF ACTION
(General Negligence / Negligent Hiring / Negligent Supervision/ Negligent Training/ Gross Negligence)

83. Plaintiff repeats and realleges the foregoing allegations of the Complaint as if set forth herein verbatim.

84. Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston obtained personal and private information from the Plaintiff through its agent servant and employee, Richard William Smith, Jr., in connection with the conduct of its business.

85. Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston owed Plaintiff a duty to safeguard her personal and private information from any use other than for the conduct of its business.

86. Defendant was negligent, willful, wanton, reckless, grossly negligent, and its conduct constituted negligence *per se*, in one or more of the following particulars, to wit:

(a) in failing to properly or adequately protect the personal and private customer information provided by the Plaintiff to the dealership in connection with its appraisal and credit application processes in direct violation of its own internal privacy policy; to wit:

(i) the Defendant failed to utilize the personal and private customer information obtained from the Plaintiff solely for the express purposes of processing transactions, maintaining a customer account, responding to a court order or legal investigation, reporting to credit bureaus or for offering services or products to the Plaintiff,

(ii) the Defendant failed to utilize the services of its self described "Safeguards Coordinator" to protect the personal and private customer information of the Plaintiff from misuse and abuse by its agent, servant and employee, Richard William Smith, Jr.

(b) in its hiring of Richard William Smith, Jr. without properly or adequately vetting him to determine his trustworthiness with regard to maintaining the confidentiality of personal and private customer information he would necessarily receive in the conduct of the dealership's business; and,

(c) in failing to properly or adequately train Richard William Smith, Jr. in the maintenance of confidentiality and the proper use of private and confidential customer information gathered on behalf of his employer in the conduct of the employer's business; and,

(d) in failing to properly or adequately supervise Richard William Smith, Jr. with regard to his use of private and confidential customer information collected on behalf of his employer in the conduct of the employer's business; and,

(e) in failing in all respects to give even slight care to the actions of its agent servant and employee, Richard William Smith, Jr., with regard to his actions regarding the Plaintiff and her private, personal and confidential customer information.

ALL of which were a direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the statutes and laws of the State of South Carolina, in such cases made and provided.

87. That each of the aforementioned negligent acts and omissions of the Defendant proximately caused the injuries and damages sustained by the Plaintiff herein.

88. That as a direct and proximate result, the Defendant herein should be held liable for the damages sustained by the Plaintiff as a result of its own direct negligence as alleged in addition to its derivative liability arising under the legal doctrine of *respondeat superior* for the actions of its agent servant and employee Richard William Smith, Jr.

89. That the Plaintiff believes that pursuant to the laws of the State of South Carolina, the Plaintiff is entitled to an award of both actual damages and punitive damages to be assessed against the Defendant in an amount to be determined by the jury in this case.

WHEREFORE, the Plaintiff prays for the following:

A) A trial by jury;

B) Judgment for actual and punitive damages against the Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston both on direct claims and those arising under the legal doctrine of *respondeat superior*;

C) Judgment for all those elements of damages permitted pursuant to the South Carolina statutory and common law, all of which are more particularly set forth in the Complaint;

D) A judgment for the costs and disbursements of this action; and,

E) For such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

THE MASON LAW FIRM, P.A.

BY: _____

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Attorneys for the Plaintiff

Mount Pleasant, South Carolina
August 9, 2016

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
JANE DOE,	)	CASE NO. 2016-CP-10-4112
	)	
PLAINTIFF,	)	**DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT**
	)	
vs.	)	**(JURY TRIAL DEMANDED)**
	)	
TCSC, LLC D/B/A HENDRICK TOYOTA OF NORTH CHARLESTON,	)	
	)	
DEFENDANT.	)	

TO: ANTHONY E. FORSBERG, ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendant, TCSC, LLC d/b/a Hendrick Toyota of North Charleston (hereinafter referred to as "Hendrick" or "the Defendant"), by and through its undersigned attorneys, hereby answers the Plaintiff's Complaint as follows:

Each and every allegation contained in Plaintiff's Complaint not expressly admitted below is denied.

1. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 1 of Plaintiff's Complaint, and therefore denies the same.

2. The Defendant admits the allegations contained in Paragraph 2 of the Plaintiff's Complaint.

3. The Defendant admits the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

4. The allegations contained in Paragraph 4 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent that a response is required,

this Defendant lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 4 of the Plaintiff's Complaint, and therefore, denies the same.

5. The allegations contained in Paragraph 5 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent that a response is required, this Defendant lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 5 of the Plaintiff's Complaint, and therefore, denies the same.

6. The Defendant admits the allegations contained in Paragraph 6 of the Plaintiff's Complaint.

7. The Defendant admits the allegations contained in Paragraph 7 of the Plaintiff's Complaint that alleges that Plaintiff visited the dealership on or around December 16, 2015. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those remaining allegations contained in Paragraph 7 of the Plaintiff's Complaint, and therefore denies the same.

8. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 8 of the Plaintiff's Complaint, and therefore denies the same.

9. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 9 of the Plaintiff's Complaint, and therefore denies the same.

10. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 10 of the Plaintiff's Complaint, and therefore denies the same.

11. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 11 of the Plaintiff's Complaint, and therefore denies the same.

12. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 12 of the Plaintiff's Complaint, and therefore denies the same.

13. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 13 of the Plaintiff's Complaint, and therefore denies the same.

14. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 14 of the Plaintiff's Complaint, and therefore denies the same.

15. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 15 of the Plaintiff's Complaint, and therefore denies the same.

16. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 16 of the Plaintiff's Complaint, and therefore denies the same.

17. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 17 of the Plaintiff's Complaint, and therefore denies the same.

18. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 18 of the Plaintiff's Complaint, and therefore denies the same

19. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 19 of the Plaintiff's Complaint, and therefore denies the same

20. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 20 of the Plaintiff's Complaint, and therefore denies the same

21. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 21 of the Plaintiff's Complaint, and therefore denies the same

22. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 22 of the Plaintiff's Complaint, and therefore denies the same

23. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 23 of the Plaintiff's Complaint, and therefore denies the same

24. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 24 of the Plaintiff's Complaint, and therefore denies the same

25. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 25 of the Plaintiff's Complaint, and therefore denies the same

26. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 26 of the Plaintiff's Complaint, and therefore denies the same

27. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 27 of the Plaintiff's Complaint, and therefore denies the same

28. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 28 of the Plaintiff's Complaint, and therefore denies the same

29. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 29 of the Plaintiff's Complaint, and therefore denies the same

30. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 30 of the Plaintiff's Complaint, and therefore denies the same

31. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 31 of the Plaintiff's Complaint, and therefore denies the same

32. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 32 of the Plaintiff's Complaint, and therefore denies the same

33. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 33 of the Plaintiff's Complaint, and therefore denies the same

34. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 34 of the Plaintiff's Complaint, and therefore denies the same

35. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 35 of the Plaintiff's Complaint, and therefore denies the same

36. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 36 of the Plaintiff's Complaint, and therefore denies the same

37. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 37 of the Plaintiff's Complaint, and therefore denies the same

38. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 38 of the Plaintiff's Complaint, and therefore denies the same

39. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 39 of the Plaintiff's Complaint, and therefore denies the same

40. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 40 of the Plaintiff's Complaint, and therefore denies the same

41. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 41 of the Plaintiff's Complaint, and therefore denies the same

42. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 42 of the Plaintiff's Complaint, and therefore denies the same

43. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 43 of the Plaintiff's Complaint, and therefore denies the same

44. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 44 of the Plaintiff's Complaint, and therefore denies the same.

45. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 45 of the Plaintiff's Complaint, and therefore denies the same.

46. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 46 of the Plaintiff's Complaint, and therefore denies the same.

47. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 47 of the Plaintiff's Complaint, and therefore denies the same.

48. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 48 of the Plaintiff's Complaint, and therefore denies the same.

49. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 49 of the Plaintiff's Complaint, and therefore denies the same.

50. The Defendant lacks sufficient knowledge or information to form a belief as to the truth of those allegations contained in Paragraph 50 of the Plaintiff's Complaint, and therefore denies the same.

FOR A RESPONSE TO THE FIRST CAUSE OF ACTION
(Respondeat Superior)

51. In response to Paragraph 51 of Plaintiff's Complaint, the Defendant re-alleges and incorporates all previous paragraphs in this Answer as if fully repeated verbatim herein.

52. The Defendant denies the allegations contained in Paragraphs 52 through 61 of the Plaintiff's Complaint and demands strict proof thereof.

FOR A RESPONSE TO THE SECOND CAUSE OF ACTION
(Outrage/Intentional Infliction of Emotional Distress)

53. In response to Paragraph 62 of Plaintiff's Complaint, the Defendant re-alleges and incorporates all previous paragraphs in this Answer as if fully repeated verbatim herein.

54. The Defendant denies the allegations contained in Paragraphs 63 through 67 of the Plaintiff's Complaint and demands strict proof thereof.

FOR A RESPONSE TO THE THIRD CAUSE OF ACTION
(Invasion of Privacy)

55. In response to Paragraph 68 of Plaintiff's Complaint, the Defendant re-alleges and incorporates all previous paragraphs in this Answer as if fully repeated verbatim herein.

56. The Defendant denies the allegations contained in Paragraphs 69 through 74 of the Plaintiff's Complaint and demands strict proof thereof.

FOR A RESPONSE TO THE THIRD CAUSE OF ACTION
(Invasion of Privacy)

57. In response to Paragraph 75 of Plaintiff's Complaint, the Defendant re-alleges and incorporates all previous paragraphs in this Answer as if fully repeated verbatim herein.

58. The Defendant denies the allegations contained in Paragraphs 76 through 82 of the Plaintiff's Complaint and demands strict proof thereof.

FOR A RESPONSE TO THE THIRD CAUSE OF ACTION
(General Negligence/Negligent Hiring/Negligent Supervision/Negligent Training/Gross Negligence)

59. In response to Paragraph 83 of Plaintiff's Complaint, the Defendant re-alleges and incorporates all previous paragraphs in this Answer as if fully repeated verbatim herein.

60. The Defendant denies the allegations contained in Paragraphs 84 through 89 of the Plaintiff's Complaint, including subparts therein, and demands strict proof thereof.

61. As to the unnumbered "WHEREFORE" Paragraph following Paragraph 89, including subparts therein, the allegations of the Plaintiff are denied.

FURTHER ANSWERING BY WAY OF AFFIRMATIVE DEFENSES

For a First Affirmative Defense
(Failure to State a Claim)

62. One or more of Plaintiff's claims fails to state facts sufficient to constitute a cause of action against the Defendant. Therefore, Plaintiff's claims against the Defendant should be dismissed under Rule 12(b)(6), SCRCP with prejudice.

For a Second Affirmative Defense
(Lack of Proximate Cause)

63. The Defendant alleges that the Plaintiff's alleged damages, if any, are not the proximate result of any act or omission of the Defendant.

For a Third Affirmative Defense
(No Knowledge or Foreseeability)

64. It is alleged that the Defendants were negligent in hiring Mr. Smith. The Defendant did not know or foresee that the alleged actions of Mr. Smith would create an alleged harm to third parties. The Defendant's conduct did not fall below the acceptable hiring standard.

For a Fourth Affirmative Defense
(No Master-Servant Relationship)

65. Mr. Smith was acting for some independent purpose of his own, wholly disconnected with the furtherance of Hendrick's business, his conduct falls outside the scope of his employment.

For a Fifth Affirmative Defense
(No Master-Servant Relationship)

66. Mr. Smith stepped aside from Hendrick's business for some purpose wholly disconnected with his employment; any alleged relationship between Mr. Smith and Hendrick was temporarily suspended.

For a Sixth Affirmative Defense
(No Master-Servant Relationship)

67. The alleged acts were not reasonably necessary to accomplish the purpose of the employee's employment, and not in furtherance of the alleged master's business.

For an Seventh Affirmative Defense
(Punitive Damages)

68. The imposition of punitive or exemplary damages against the Defendant would violate its constitutional rights under the Due Process clauses in the Fifth and Fourteenth Amendments to the Constitution of the United States, the Excessive Fines clause in the Eighth Amendment to the Constitution of the United States, the Double Jeopardy clause in the Fifth Amendment to the Constitution of the United States, similar provisions in applicable State Constitutions, and/or the common law and public policies of pertinent States, and/or applicable statutes and court rules, in the circumstances of this litigation, including but not limited to:

a. imposition of such punitive damages by a jury which (1) is not provided standards of sufficient clarity for determining the appropriateness, and the appropriate size, of such a punitive damages award, (2) is not adequately and clearly instructed on the limits on punitive damages imposed by the principles of deterrence and punishment, (3) is not expressly prohibited from awarding punitive damages, or determining the amount of an award thereof, in whole or in part, on the basis of invidiously discriminatory characteristics, including the corporate status, wealth, or state or residence of the Defendant, (4) is permitted to award punitive damages under a standard for

determining liability for such damages which is vague and arbitrary and does not define with sufficient clarity the conduct or mental state which makes punitive damages permissible, and (5) is not subject to trial court and appellate judicial review for reasonableness and the furtherance of legitimate purposes on the basis of objective standards;

b. imposition of such punitive damages, and determination of the amount of an award thereof, where applicable state law is impermissibly vague, imprecise, or inconsistent;

c. imposition of such punitive damages, and determination of the amount of an award thereof, employing a burden of proof less than clear and convincing evidence;

d. imposition of such punitive damages, and determination of the amount of an award thereof, without bifurcating the trial and trying all punitive damages issues only if and after the liability of the Defendant have been found on the merits;

e. imposition of such punitive damages, and determination of the amount of an award thereof, under any state's law subject to no predetermined limit, such as a maximum multiple of compensatory damages or a maximum amount;

f. imposition of such punitive damages, and determination of the amount of any award thereof, based on anything other than the Defendant's conduct in connection with the sale of the products alleged in this litigation, or in any other way subjecting the Defendant to impermissible multiple punishment for the same alleged wrong; and/or

g. imposition of punitive damages by the jury as opposed to the Court, as the issues of the imposition and amount of punitive damages are matters of constitutional fact that must be determined by the Court, not the jury.

For an Eighth Affirmative Defense
(Additional Defenses)

69. The Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserve the right to amend their Answer to assert any such defenses.

WHEREFORE, having fully answered Plaintiff's Complaint and asserted these affirmative defenses, the Defendant prays that the Plaintiff's Complaint be dismissed together with the costs and disbursement of this action and for such other and further relief as this Court deems proper.

YOUNG CLEMENT RIVERS, LLP

By: _____

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Nicholas J. Rivera
nrivera@ycrlaw.com
P.O. Box 993
Charleston, South Carolina 29402
(843) 724-6671
Attorneys for the Defendant

Charleston, South Carolina

Dated: 10/10/16

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 10th day of October, 2016.

_____

State of South Carolina.,
)
)
)
County of Charleston.

In the Common Pleas
Court of Charleston

Case No. 2016-CP-10-04112

Jane Doe.,

Plaintiff.,

-vs-

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

Defendant.

Transcript of Record

February 22, 2017
Charleston, South Carolina

B E F O R E:

The Honorable R. Markley Dennis, Junior, judge.

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

Mr. Anthony E. Forsberg, Esquire
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Wanda Nelson, CVR-M
Official Court Reporter
To The Honorable John C. Hayes, III
Sixteenth Judicial Circuit
Union and York Counties

I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

WITNESS	BY:	PAGE NO.

No witnesses were called.

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EXHIBITS

NO.	DESCRIPTION	ID.	EVD.

No Exhibits were received into the record.

(COURT IN SESSION, ON THE RECORD AT 09:42 AM.)

THE COURT: If you all will identify yourselves please and the parties you are representing.

MR. FORSBERG: Anthony Forsberg from the Mason Law Firm. Your Honor, I represent Jane Doe, the Plaintiff.

THE COURT: Okay.

MR. BUCKLEY: Ed Buckley, your Honor. I represent the defendant.

THE COURT: Okay. And it's your motion I believe, Mr. Buckley. I have the memo, memorandum is incorporated for purposes of review. All your submissions that are on file.

MR. FORSBERG: Your Honor, I actually have an additional memorandum.

THE COURT: All right. That's fine.

MR. FORSBERG: That is a supplement of the one that was filed on Friday because we got there last night.

THE COURT: Thank you. No problem.

MR. BUCKLEY: Your Honor, this is my motion on behalf of the Defendant to compel arbitration.

THE COURT: Yes, sir.

MR. BUCKLEY: This is a somewhat unusual case and arbitration agreement in itself. This is one of the few arbitration agreements I've ever seen that actually incorporates some language that some of the Federal courts

have talked about in cases that have been of some important in more recent cases in South Carolina before our Supreme Court.

Our case involves an arbitration agreement where Jane Doe actually purchased a vehicle in 2011 from the Hendrick dealership. In that agreement in connection with that purchase she signed a separate stand-alone arbitration agreement.

THE COURT: Yeah.

MR. BUCKLEY: And that arbitration agreement is unique in many respects. It actually gives her the opportunity to pick the forum. It requires that my client pay the cost. It is not the typical one sided -- An easier contract that you see and it surprised me to find it.

In this case Mrs. Doe ended up servicing her vehicle over the years at the dealership and in connection with her continued service with the dealership she received one or more flyer's from the company inviting her to trade in her vehicle and purchase a new vehicle from the dealership.

After receiving one of those flyers, and in the course of having her vehicle serviced, she decided to have her vehicle appraised. She further authorized the sales manager who was assigned to assist her to -- actually conduct a credit application which of course requires collection of non-profit private information.

THE COURT: Right.

MR. BUCKLEY: She then ends up getting her credit report back and all that and they determined two different vehicles that she would be qualified to purchase. As it turns out she decided not to purchase either vehicle.

There is a fairly long history of communications between the salesman and her over a period of about a month. And after the final communication it's alleged that the salesman took private information that he obtained through the credit application process, including her telephone number and her cell phone number, her first name and her date of birth, which of course was incorrectly posted on a web site.

That web site where he posted information involved -- it's called Backpagedotcom. I had never heard of before this case. Apparently it's a hook up and prostitution web site and he posted the following essentially.

I need a good accounting, my husband is out of town a lot. Call Christine, here's the number, Mount Pleasant, Charleston, date of birth, age thirty five.

That conduct forms the basis of this law suit. It is our contention, your Honor, that the contract is written in such a way that two things need to be addressed by the court and then the remainder of the case needs to be sent to arbitration.

Number one, the court needs to evaluate whether or not Federal law applies to this case. If Federal law applies to the case then a whole different set of rules from what you and I are used to dealing with involve the arbitrability of this dispute.

The parties in their agreement actually agreed that this arbitration agreement -- any arbitration under this arbitration agreement shall be governed by the Federal Arbitration Act (9 USC Section 1FC) and not by any state law concerning arbitration. Clearly FAA applies. It probably would anyway but we don't have to argue that.

In addition, the language of the agreement in the second paragraph which I've highlighted says 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 -- you go all the way to the end.

THE COURT: Right.

MR. BUCKLEY: --- shall be decided in arbitration and not by court action. The US Supreme Court and the Fourth Circuit have both addressed the issue of arbitrability which this court must determine first.

Where is that determination made? Is it made in the court or is it made in arbitration? Where the parties have clearly and unmistakably included language in their

agreement that says it is their intent to have that determined in arbitration the court is compelled to submit the case to arbitration stay this case and compel the arbitration. That is what we have here. It is not this court's function to determine that in this case under this agreement.

The plaintiff has alleged, or asserted, in their memorandum in opposition to our motion -

THE COURT: I'll let you respond to him. Let's see what he argues -

MR. BUCKLEY: Okay.

THE COURT: --- about that.

MR. BUCKLEY I do want to say -- Well, I'll respond then. I'll read his tort section later.

THE COURT: Okay. That will be fine.

Mr. Forsberg, why should -- and I grant the motion.

MR. FORSBERG: You shouldn't grant the motion, your Honor, because the contract in and of itself didn't have a meeting of the minds. The contract in and of itself never formed. And the cases that are cited in -

THE COURT: How did it not form?

MR. FORSBERG: Well, because you have to have a meeting of the minds with all the essential terms of the contract. And one of the essential terms of this contract is that these types of situations would be subject to

arbitration.

THE COURT: Well wouldn't that always defeat anybody's situation that said I didn't agree to arbitration?

MR. FORSBERG: No, your Honor, not necessarily because in this particular -

THE COURT: Well let me ask you one other question just for my edification.

MR. FORSBERG: Sure.

THE COURT: This agreement was one of many documents signed when she purchased the automobile, correct?

MR. FORSBERG: Yes, sir.

THE COURT: Okay. And she got the automobile?

MR. FORSBERG: She did.

THE COURT: And she used the automobile and used the facility?

MR. FORSBERG: She did.

THE COURT: Pursuant to all the agreements that she had?

MR. FORSBERG: Presumably so.

THE COURT: But this wasn't a meeting of the minds.

MR. FORSBERG: I'm sorry.

THE COURT: But this being a part of that was just simply wasn't a meeting of the minds.

MR. FORSBERG: Well you have to look at the Akin case, your Honor, which we've argued in our primary brief. In a

situation like this the Supreme Court of South Carolina has determined that outrageous torts -

THE COURT: I have granted three, I think, since it -- I think it was Bucklers, one of Buckler's decisions, but I have -- I've used that case. In fact two, recently with respect to some construction litigation. So I'm familiar with that; I understand that, but those cases -- Well at least the one that I had was clearly -- One of 'em I remember. You either accept this or you don't get anything, and this is not the case here. People -- You had choices here and you made some choices, your client made some choices.

I mean clearly this one is I think distinguishable. Now the court in Columbia may disagree with me but I think it is.

MR. FORSBERG: Well hopefully we won't need to go to Columbia.

THE COURT: I hope you won't either. Just go to arbitration and then whatever is left over you have fun.

MR. FORSBERG: Again, your Honor, we don't believe that this is subject to arbitration.

THE COURT: I appreciate it. I do. I really do. Based on everything I've read -- I mean I understand your position. I'm familiar with what you're arguing and I've done it before.

MR. FORSBERG: Well, are you speaking about my unconscionability argument?

THE COURT: Yeah, absolutely. I mean I've used it.

MR. FORSBERG: Okay.

THE COURT: I just don't think it's unconscionable here. I mean you've got somebody that to me -- I'll give you an analogy for the reviewing court's benefit. To me its analogous to someone typically -- Where I've seen this and it's kind of the double edge sword because it was in a arbitration situation. They utilized all the discovery of litigation; if fact kept it going for about two years. Then when it came time for trial they said, whoa, wait a minute, this is arbitration we demanded it be arbitrated. I said, huh-huh, you can't use this and take advantage of all the benefits of this side and then kick it over into arbitration. I think that's unfair.

I think the same is true here. You can't get the benefits of everything that you received and then say, oh, wait a minute, this part is not part of my contract. I don't know so I just think it's part of it and I think -- I don't think it fits the unconscionability part. Language like this bothers me too but it doesn't bother the court. It says everything that you've got, every cause of action you can have against me; so you can argue that up the street.

MR. FORSBERG: Your Honor, to that point where you say that every case that you can have against me the Supreme Court specifically it -

THE COURT: It said it in a certain case. It didn't just say because if you take it that broadly there'd be no arbitration cause nobody wants to arbitrate for some reason. I don't' know why. Apparently there must be -- And the Supreme Court has said, both the U.S. Supreme Court and our Supreme Court says no, that's part of the business world. And that's why we're seeing more and more of it. That's why we're not seeing as much litigation one of the reasons and other means of dispute resolution but you can argue that and maybe they'll change their mind and that will be great.

MR. FORSBERG: And again, I would just state for the record, your Honor, as you pointed out -

THE COURT: You don't have to. Your memorandum has stated succinctly your positions clearly. I understand it and I don't fault you. I - If I was standing where you are I'd be arguing it just as passionately as you are. Unfortunately I just can't -- I can't agree with you. And I've read it so, you know, your memorandum stands for the reasons you think I should deny it. I think the memorandum submitted by the Defense counsel I think -- and I've read it, I've read his arbitration -- I read the arbitration

agreement. Its not one of those ones that causes me to say that's unconscionable. So I think you're correct in so far as whether or not this court determines because I'd have to -- I'd have to redraft it. I'd have to rewrite the contract. The contract is this is what we select and I think therefore it takes us out of making that determination, so it's part of the old agreement I think as a whole.

But anything else? I cut you off, I want you to feel free to supplement anything that you have in your writing but your writing's are very thorough and I appreciate that Mr. Forsberg.

MR. FORSBERG: Thank you, your Honor. I would just point out that I'm relying, as you probably do already understand, on the fact that arbitration is a matter of contract. And if we go back to the beginning, if the contract itself isn't what somebody contracted to do they can't be forced to do it. And that's a thread that runs throughout all the cases you've mentioned and all the cases that were even cited by the Defense, that the Supreme Court of the United States has determined that, that you've got the ability to look before we even get to the contract. Did the contract come into existence? And if you don't have a meeting of the minds as to all of the material in the essential parts of the contract -

THE COURT: Well let me ask you a question, because I've read a number of cases where the Supreme Court enforced the arbitration and the party from the other side was arguing what you're arguing. Basically you're saying look, this can never be part of it. Why would anybody do that?

MR. FORSBERG: I'm not, your Honor.

THE COURT: Well then tell me why this is unique to this particular person?

MR FORSBERG: Because the cases that --

THE COURT: No, no. Why is this factual unique and all the other cases don't apply?

MR. FORSBERG: That's what I'm telling your Honor. I'm distinguishing those cases from this. Those cases -- The Supreme Court said in each of those cases that the state law that was preempted by the FAA was preempted because that law did not place arbitration on equal footing with other contracts. In this particular situation the case that we're trying to have the court apply to this situation ,the Akin case, does apply to any type of contract because at it's root it deals with whether there was a meeting of the minds.

THE COURT: Okay.

MR. FORSBERG: And so -

THE COURT: I appreciate that. You'd always have that

argument wouldn't you?

MR. FORSBERG: You may always have the argument but you may not always be right.

THE COURT: Yeah, and you're not here, so, thank you.

MR. FORSBERG: I appreciate that, your Honor.

THE COURT: Okay. Thank you very much, I appreciate it.

MR. BUCKLEY: I do have to just, for the record, in the event we go somewhere and not here, your Honor.

THE COURT: All right. Sure.

MR. BUCKLEY: The plaintiff raises two new basis to challenge -

THE COURT: Okay. In his supple -

MR. BUCKLEY: --- the arbitration arbitrability or enforcement of the arbitration agreement in her memorandum in response to my memorandum.

THE COURT: And I haven't read that yet.

MR. BUCKLEY: The court cannot consider a new ground. It's not a rebuttal of anything I said. The two grounds or the three grounds that she actually raises that were never raised in her opposition memorandum are adhesion contract unconscionabilty that are both under the same --

THE COURT: Well, why don't you do this? I'll let you file a supplement to it.

MR. BUCKLEY: Well, your Honor, just for the record I

just want to point out that I don't think you can even consider that under the rules. And the third ground is --

THE COURT: Well I think I can. So my feeling is if you feel you need to supplement it then I'll take it under advisement.

MR. BUCKLEY: Okay, your Honor. But the third ground that I need to mention is ---

THE COURT: And I need to read this.

MR. BUCKLEY: --- another meeting of the minds. The other thing I do need to bring up for the court is that in the Parson's case Justice Pleicones wrote very recently, you know, October of 2016 and he and Justice Kittredge concurred. He said that the entire outrageous torts exception to the enforcibility of contracts of arbitration contracts has only ever been applied in the context of arbitration contracts or arbitration agreements.

As such and under the Federal precedent of Embergia Conceptcia and Doctors Care or whatever that third case is I provided to the court, U.S. Supreme Court, under those three cases where the state treats differently the interpretation and enforcement of arbitration agreements compared to the general treatment of contracts. Generally it violates Section 2 of the FAA which says you have to treat, you know, you have to treat 'em on equal footing.

So I need to raise that issue in case we go way beyond

--

THE COURT: Well why don't you do this? And in fairness to you I've read your first one, I haven't read your supplement so I need to read that. You submit whatever you want in response to this and then if necessary we'll reconvene if I think argument is necessary. If not then I'll simply send you an email, both of you, and ask one of you to prepare the order. Okay.

MR. BUCKLEY: Thank you, your Honor.

MR. FORSBERG: Thank you, your Honor.

THE COURT: Thank you. Thank you very much. And thank you, Mr. Forsberg. I'm sorry for cutting you off but I want to read this too but thank you.

MR. FORSBERG: Thank you, your Honor. I think you'll find it very interesting.

THE COURT: I'm looking forward to it.

We're off the record.

(END OF TRANSCRIPT OF RECORD.)

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 11th and 12th days of August, 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda S. Nelson
Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: July 14 / 2016

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Jane Doe,	)	2016-CP-10-4112
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
TCSC, LLC d/b/a Hendrick Toyota of North Charleston,	)	
	)	
DEFENDANT.	)	
	)	

April 4, 2017

Charleston, South Carolina

B E F O R E:

The Honorable R. Markley Dennis, Jr.

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

Anthony Forsberg, Esquire
For the Plaintiff

Edward Buckley, Esquire
For the Defense

I N D E X

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

THE COURT: Thank y'all. And I did this after reading everything and told you if I needed further argument I would give you the opportunity.

I was embarrassed to realize when I was reading it the agreement that I was looking at I make an assumption. The 2011 car that was the subject of that was a car that was ultimately I guess traded in or done something with for the new car?

MR. FORSBERG: Somewhere else, Your Honor.

THE COURT: I am just saying my thought was for some reason I was thinking that the agreement dealt with a car that they were negotiating for, and it didn't. It was a car that had nothing to do with all the interaction with this company in 2015.

There had been some interaction with this company for another car, but that was four years prior -- or that was another company altogether?

MR. BUCKLEY: If I could address that.

THE COURT: Sure, Mr. Buckley.

MR. BUCKLEY: Ed Buckley for the defendant and the moving party. The timing was that 2011 she actually bought a RAV-4.

THE COURT: Right. From this -- from the defendant ---

MR. BUCKLEY: From this dealership.

THE COURT: Yeah. Okay.

MR. BUCKLEY: Signed the agreement that we are here before you on. And during the course of the next few years she had the vehicle serviced routinely at the dealership.

THE COURT: Right.

MR. BUCKLEY: She received a flyer from that dealership saying, you know, we need used cars.

THE COURT: We want to buy your car.

MR. BUCKLEY: Let us appraise your car. While she was in for service she had them appraise her car.

THE COURT: Right.

MR. BUCKLEY: At that point she -- they say can we go ahead and apply for credit ---

THE COURT: Right.

MR. BUCKLEY: --- to see if you can get credit -- or financing approval. And during that process is where the scenario we are here about in court began.

THE COURT: And that car is no longer in existence with her?

MR. FORSBERG: No, Your Honor, it is not.

THE COURT: And ---

MR. FORSBERG: She did trade it in.

THE COURT: That is what I was saying. Because the complaint talks about they couldn't reach an agreement

and therefore she went somewhere else and bought another car, correct?

MR. FORSBERG: Correct.

MR. BUCKLEY: Yes, sir.

THE COURT: Given -- and I don't know why; I thought it was with the car that she ultimately. Which in reading it even further it is somewhat far-reaching, but it says it clearly. But I can't jump from a car four years before and say this covers everything that could possibly happen between these entities that doesn't specifically involve this car. And that is my concern.

And so for that reason it really I agree with you, Mr. Forsberg, I think it would go -- it would be unconscionable to extend it that broadly. So that is why I had -- I asked you to come back in.

Now if y'all -- y'all have briefed it thoroughly, but if anybody needs to put anything else on the record I wanted to afford you an opportunity to do that.

But I have incorporated both briefs. And I just agree with you, Mr. Forsberg.

MR. FORSBERG: Thank you, Your Honor. And I am certainly not going to argue anything ---

THE COURT: No.

MR. FORSBERG: --- considering that ruling. But you asked if I wanted to put anything on the record. And I

did file an affidavit ---

THE COURT: You did.

MR. FORSBERG: --- on Jane Doe the other day. And I indicated that I have the original affidavit ---

THE COURT: Just file it.

MR. FORSBERG: Well, we need it to be filed under seal because she has signed it in her own name ---

THE COURT: Well, then don't file it.

MR. FORSBERG: Okay. If the one you have got ---

MR. BUCKLEY: I am not going to object to it.

THE COURT: I have got the affidavit of Jane Doe. That is all ---

MR. FORSBERG: Okay.

THE COURT: At this point it stays there as far as I am concerned.

MR. FORSBERG: Okay. Thank you, Your Honor.

THE COURT: And, frankly, to be candid with you I really am relying primarily on my error from the earliest part reading it as it was presented, and I just simply I made a mistake.

And I am sorry for the inconvenience to everybody. But I have to own up to it. I just -- it just really I was misapplying that. But ---

MR. BUCKLEY: While we are here, Your Honor, there was a case about five years ago that I would like you to

look at.

THE COURT: Yeah, that I didn't get it right, Mr. Buckley?

Thank you all. I appreciate it. We will just -- I will just do a Form 4 that says motion to -- or if you want a formal -- do you need a formal order or will a Form 4, motion denied, compel arbitration?

MR. FORSBERG: I don't -- I don't know that we necessarily need an order.

THE COURT: Okay. Good. We will -- we will just do that. I will do a Form 4 that says the motion to compel arbitration is denied.

MR. FORSBERG: Okay.

THE COURT: Okay.

MR. FORSBERG: Thank you, Your Honor.

THE COURT: Thank you so much. Appreciate it. Again, I apologize for inconveniencing you all.

MR. FORSBERG: No problem. Your Honor, may I -- I apologize. To the extent that Mr. Buckley has already indicated to me that he intends to appeal the decision if it was that way ---

THE COURT: Well, then you go ahead and prepare your order based on your memorandum.

MR. FORSBERG: Okay.

THE COURT: Okay. Thank you.

MR. FORSBERG: And I will prepare something and circulate it.

THE COURT: Thank you. We will do a Form 4 that says motion denied, formal order to follow.

(WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.*)*

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on April 4, 2017.

I do further certify that I am neither of kin, Counsel, nor interest to any party hereto.

PHYLLIS NORTON, CVR

Date: June 14, 2017

Certified Transcript Provided For: YCR - Hines
Certification Reference #061417

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
JANE DOE,	)	CASE NO. 2016-CP-10-4112
	)	
PLAINTIFF,	)	**DEFENDANT'S MOTION TO COMPEL ARBITRATION**
	)	
vs.	)	
	)	
TCSC, LLC D/B/A HENDRICK TOYOTA OF NORTH CHARLESTON,	)	
	)	
DEFENDANT.	)	

TO: ANTHONY E. FORSBERG, ESQUIRE, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, TCSC, LLC d/b/a Hendrick Toyota of North Charleston (hereinafter referred to as "Hendrick" or "the Defendant"), by and through its undersigned counsel, will move before the Presiding Judge of the Ninth Judicial Circuit in Charleston County, South Carolina within ten (10) days of the date of this Motion, or as soon thereafter as counsel may be heard, for an order to stay the above action and to compel arbitration under the Federal Arbitration Act.

The parties executed an Arbitration Agreement which contains an arbitration clause that allows either party 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)" which "arises out of or relates to your credit application, purchase, lease, or condition of this vehicle, your purchase, lease agreement, or financing contractor or any resulting transaction or relationship . . . ." A copy of the Arbitration Agreement containing the arbitration clause is attached hereto as Exhibit "A".

In support of this Motion, Defendants will rely on the pleadings; the binding agreement referenced herein; any memorandum submitted prior to the hearing of this motion and any other evidence to be submitted.

YOUNG CLEMENT RIVERS, LLP

By: _____

Edward D. Buckley, Jr.
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Nicholas J. Rivera
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P.O. Box 993
Charleston, South Carolina 29402
(843) 724-6671
Attorneys for the Defendant

Charleston, South Carolina

Dated: December 9, 2016

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 9th day of December, 2016.

_____

Arbitration Agreement

Customer Name [redacted] Date 05/11/2011

Deal Number 2540 VIN [redacted]

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.

In this Arbitration Agreement, "you" refers to the buyer(s) signing below. "We," "us," and "our" refer to the Dealer signing below and anyone to whom the Dealer assigns this Arbitration Agreement.

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 this vehicle, your purchase, lease agreement, or financing contract 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. Arbitration shall be conducted by the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration 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 in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the seller of the vehicle is a party to the claim or dispute, in which case the hearing will be held in the federal district where this Arbitration Agreement was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. 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. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. 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.

You and we retain any rights to self-help remedies, such as repossession. 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 or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract. 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. Notwithstanding any other provision of this Arbitration Agreement, the validity and scope of the waiver of class action rights shall be decided by the court and not by the arbitrator.

[redacted]
Buyer

Buyer

TOYOTA SCION OF NORTH CHARLESTON
Dealer

By:

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NUMBER: 2016-CP-10-4112
JANE DOE, an adult woman over the age of 18, Plaintiff, v. TCSC, LLC, d/b/a HENDRICK TOYOTA OF NORTH CHARLESTON, Defendant.	

PLAINTIFF'S MEMO IN OPPOSITION TO DEFENSE MOTION TO COMPEL ARBITRATION

NOW COMES the Plaintiff, Jane Doe, by and through her undersigned counsel, and hereby respectfully submits this Memorandum of Law in Opposition to Defendant's Motion to Compel Arbitration. This matter is before the court on the motion of Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston which seeks to stay this litigation and to compel arbitration of the matter pursuant to the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*). For the reasons set forth herein, the Plaintiff requests that this Honorable Court deny the Defendant's Motion and instead issue an Order that this matter proceed with litigation in this court.

FACTS

On or about December 16, 2015, while at the Defendant car dealership on Rivers Avenue in North Charleston, Plaintiff was introduced to salesman Richard Smith and a conversation ensued about her potentially purchasing a vehicle from the dealership. During that meeting, as part of

creating a "new opportunity" profile in the dealership computer system and in having the Plaintiff complete a credit application, Mr. Smith collected personal and private identifying data from the Plaintiff including her name, address, telephone number and birthdate, among other information. After receiving information about some potential vehicles and the cost of the same, the Plaintiff did not choose to purchase a new vehicle from the Defendant dealership that day. Salesman Richard Smith persisted in contacting her by telephone over the following weeks in order to convince her to buy a car. Ultimately the Plaintiff purchased another vehicle from another dealership and within minutes of learning that information in a follow-up phone call made to the Plaintiff from the dealership on January 19, 2016 at 10:20 am, Richard Smith, acting as an employee and agent of the Defendant, posted the following ad on Backpage.com, a sexually oriented website used to offer and solicit sexual encounters including prostitution:

> **Needing it Now - 35**
> Posted: Tuesday, January 19, 2016 10:30 am
> I really need a good pounding. My husband is
> always out of town and I can host. 843-XXX-XXX (redacted).
> Send pictures and ask for [Jane Doe]
>
> Poster's age: 35
>
> Location: Charleston, Mt. Pleasant
> Post ID: 12XXXX81 charleston

Thereafter, within hours, the Plaintiff began to receive phone calls and texts on the personal and private cell phone number she had given to Richard Smith from individuals indicating (in no uncertain terms) that they wanted to meet up with her for sexual encounters in response to the Backpage.com advertisement posted by the employee of the Defendant. It is this disturbing, outrageous and incredibly invasive internet posting which forms the basis for the instant litigation.

Four years and seven months before this disgusting, outrageous and unauthorized advertisement was posted by Hendrick employee Richard Smith, on or about June 11, 2011 the Plaintiff purchased a 2011 Toyota RAV 4 from Rick Hendrick Toyota Scion of North Charleston, the Defendant in this matter. As part of that vehicle purchase sales documentation, she was presented with and signed a document entitled "Arbitration Agreement", which is attached to the Defendant's Motion to Compel Arbitration. That document stated, in pertinent part, the following:

> Any claim or dispute, whether in contract, tort, statute or otherwise...between you and us...which arises out of or relates to your credit application, purchase, lease or condition of this vehicle, your purchase, lease agreement or financing contract or any resulting transaction or relationship...shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

It is upon this clause that the Defendant now relies in asking this Court to force the Plaintiff to arbitrate her pending claims.

LEGAL ARGUMENT

The claims of the Plaintiff set forth in this litigation sound in tort, specifically the torts of Outrage, Intentional Infliction of Emotional Distress, Invasion of Privacy, Defamation/Libel Per Se, General Negligence, Gross Negligence, Negligent Hiring, Negligent Training and Negligent Supervision. It is the Plaintiff's position that the Arbitration Agreement she signed in 2011 as part of her purchase of a vehicle from the Defendant's dealership did not contemplate such outrageous acts and as such does not apply to these torts alleged to have been committed by the Defendant and its agents, servants and employees. The Supreme Court of South Carolina agrees.

In the matter of *Aiken v. World Finance Corp. of SC*, 373 S.C. 144, 644 S.E.2d 705 (2007), the consumer plaintiff signed several arbitration agreements in connection with obtaining loans from the defendant company. In order to apply for those loans, the plaintiff was required to provide

certain non-public, personal information to the defendant. At some point thereafter, employees of the defendant misappropriated the personal and private information of the plaintiff and used it to obtain sham loans and to pocket the proceeds of those loans. Upon learning his personal information had been misused in this fashion, the plaintiff brought an action against the defendant business for outrage and emotional distress, negligence, negligent hiring and supervision and unfair trade practices. The defendant answered, moved to dismiss and also filed a motion to compel arbitration. The trial court denied the defendant's motion to compel arbitration. Thereafter the Court of Appeals affirmed. On certiorari, affirming the lower court, the South Carolina Supreme Court held:

> Both state and federal policy favor arbitration of disputes and unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118–19 (2001). However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.* at 596, 553 S.E.2d at 118. Given these principles, courts generally hold that broadly-worded arbitration agreements apply to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained. *Id.* at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir.2001)).
>
> [Defendant] primarily argues that because [Plaintiff's] contracts with [Defendant] gave the conspirators access to [Plaintiff's] information in order to carry out their crimes, there is a significant relationship between [Plaintiff's] claims and the underlying loan agreement, thereby warranting arbitration. ***We find this argument unpersuasive.*** In our opinion, the "relationship" asserted by [Defendant] between [Plaintiff's] tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of "significant." Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. ***Such a result is illogical and unconscionable***. *See Seifert v. U.S. Home Corp.*, 750 So.2d 633, 638 (Fla.1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement."). *See also*, *The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 209, 588 S.E.2d 136, 140

(Ct.App.2003) ("[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.").

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149–150, 644 S.E.2d 705, 708 (2007)

The matter before this Honorable Court is squarely on point with the *Aiken* case. The torts committed against the Plaintiff in the matter *sub judice* bear absolutely no relationship to the Arbitration Agreement's stated scope of:

> Any claim or dispute, whether in contract, tort, statute or otherwise...between you and us...which arises out of or relates to your credit application, purchase, lease or condition of this vehicle, your purchase, lease agreement or financing contract...

In analyzing the matter in *Aiken*, the Supreme Court went on to state:

> ...[W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, ***this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.***
>
> In this case, we find the theft of [Plaintiff's] personal information by [Defendant's] employees to be outrageous conduct that [Plaintiff] could not possibly have foreseen when he agreed to do business with [Defendant]. Consequently, in signing the agreement to arbitrate, [Plaintiff] could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that [Plaintiff's] claims for unanticipated and unforeseeable tortious conduct by [Defendant's] employees are not within the scope of the arbitration agreement with [Defendant].
>
> This Court merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. ***To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal.***

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) (emphasis supplied).

Just as in the *Aiken* case it would be absurd for the court to find that the Jane Doe Plaintiff in this action, acting as a reasonable person at the time she was purchasing her car in 2011, would have foreseen that nearly five years later upon a return visit to the same dealership an employee would misappropriate her personal, private information and place it on a sex website. The *Aiken* Court stated in a footnote:

> [T]he rule we set forth today is based on the concept of the expectations of a "reasonable man," a standard deeply rooted in tort law. Therefore, a determination of foreseeability under the rule is to be made from the standpoint of the injured party; not this Court. We do not believe that this Court should proclaim that fraudulent acts such as identity theft are foreseeable in the course of normal business dealings

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007).

Likewise, this court should not proclaim as foreseeable the outrageous and tortious acts of the Defendant or Defendant's employees in this matter. As she sat across from a salesperson in June of 2011, signing documents to consummate the purchase of her new car, including the Arbitration Agreement at issue in this motion, the Plaintiff could never have foreseen the outrageous events that unfolded on January 19, 2016. There can be no question that in 2011 she did not knowingly agree to arbitrate her present claims arising out of such unforeseeable and outrageous conduct. As a matter of public policy, as the facts are virtually indistinguishable, it would be inconsistent with the law of the *Aiken* case for this court to find that the instant Plaintiff's claims arising from the outrageous conduct of the Defendant's employee are subject to the 2011 Arbitration Agreement.

CONCLUSION

Based on the case law presented herein, the Plaintiff respectfully requests this Honorable Court deny the Defendant's motion to compel arbitration and to order that this matter shall forthwith proceed with litigation in this court of common pleas.

Respectfully submitted,

THE MASON LAW FIRM, P.A.

BY: _____

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Attorneys for the Plaintiff

Mount Pleasant, South Carolina
February 17, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the pleading or paper to which this certificate is affixed was served upon the party(ies) to this action by hand, or by depositing a copy of the same in the U.S. Mail, first class postage pre-paid and addressed to the proper attorney(s) of record for such other party(ies) on this, the 17th day of February, 2017, in Mount Pleasant, South Carolina.

THE MASON LAW FIRM, P.A.

BY: _____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON JANE DOE, PLAINTIFF, vs. TCSC, LLC D/B/A HENDRICK TOYOTA OF NORTH CHARLESTON, DEFENDANT.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2016-CP-10-4112 **TCSC, LLC. D/B/A HENDRICK TOYOTA OF NORTH CHARLESTON'S MEMORANDUM IN SUPPORT OF MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION**

This matter is before the court on Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston's (hereinafter referred to as "Defendant" or "Hendrick") motion filed December 9, 2016, to stay proceedings and compel arbitration under the Federal Arbitration Act, 9 U.S.C. §1, et seq. ("FAA"). The Defendant hereby submits this memorandum in support of its motion.

STATEMENT OF FACTS

It is undisputed that the Plaintiff, Jane Doe, purchased a 2011 Toyota RAV4, from Hendrick on June 11, 2011. During the process of purchasing the vehicle, the parties executed an Arbitration Agreement which reads, in pertinent part, as follows:

> 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 arise out of or relates to your credit application, purchase, lease, or condition of this vehicle, your purchase, lease agreement, or financing contract 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 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. (emphasis added.)

(Def.'s Mot. to Compel Arbitration, *Exhibit A*).

After purchasing her RAV4, the Plaintiff continued her relationship with the Defendant, and on December 16, 2015, she took the vehicle to Hendrick for mechanical service. (Compl. ¶ 7). On the same day, the Plaintiff also elected to have her vehicle appraised and applied for credit for a potential transaction with Hendrick that involved the purchase of a larger vehicle and the anticipated trade-in of her 2011 Toyota RAV4 (Compl. ¶ 8-11). Although no deal was finalized on December 16, 2011, communication continued between Plaintiff and an employee of Hendrick, Mr. Richard William Smith, Jr. (Compl. ¶ 19). On January 19, 2016, Plaintiff informed Mr. Smith that she had purchased another vehicle elsewhere since last visiting the dealership. (Compl. ¶ 22). The alleged acts of Mr. Smith giving rise to the lawsuit occurred on the same day, according to the Plaintiff's Complaint. (Compl. ¶ 23). The Plaintiff contends that the Defendant's salesman, Mr. Smith, utilized personal, non-pubic information he obtained through the credit application process to commit one or more torts to injure her. (Compl. ¶24.)

The Plaintiff commenced this lawsuit by filing a Summons and Complaint on August 9, 2016, in Charleston County. Hendrick answered on October 11, 2016 denying all liability. Hendrick filed this Motion to Compel Arbitration on December 9, 2016.

STANDARD OF REVIEW

The agreement, by its express terms, is governed by the FAA and cases interpreting its meaning, not state law. In deciding whether a party may be compelled to arbitrate a dispute, this court should "apply ordinary state law principles that govern the formation of contracts," *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995),

and "the federal substantive law of arbitrability," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). In other words, "state law determines questions concerning the validity, revocability, or enforceability of contracts generally, but the Federal Arbitration Act ... create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 417 n. 4 (4th Cir.2000) (internal quotation marks and citations omitted).

Where the parties agree that the scope of the agreement and/or the arbitrability of dispute shall be decided in arbitration, rather than in court, those agreements must be enforced. *Peabody Holding Co., LLC v. United Mine Workers of Am., In'l Union*, 665 F.3d 96, 98 (4th Cir. 2012).

DISCUSSION

I. THE ARBITRATION AGREEMENT PROVIDES THAT QUESTIONS OF THE INTEPRETATION AND SCOPE OF THE AGREEMENT AND THE ARBITRABILITY OF THE CLAIMS OR DISPUTE ARE TO BE RESOLVED IN ARBITRATION AND NOT BY A COURT ACTION.

This court must first determine who decides the arbitrability issue. *See Peabody*, 665 F.3d at 101 (stating "First, we determine *who* decides whether a particular dispute is arbitrable: the arbitrator or the court."). "[I]f contracting parties wish to let an arbitrator determine the scope of his own jurisdiction, they must indicate that intent in a clear and specific manner." *Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999)[1]. The United States Supreme Court has stated that there must be a provision in an agreement's arbitration clause that "clearly and unmistakably" provides that the arbitrator determines the scope of his jurisdiction in order to negate the presumption that the court decides the scope of the arbitrator's jurisdiction. *AT&T*

[1] The Court in *Carson* further stated "Those who wish to let an arbitrator decide which issues are arbitrable need only state that 'all disputes concerning the arbitrability of particular disputes under this contract are hereby committed to arbitration,' or words to that clear effect." *Carson,* 175 F.3d 325, 330–31 (4th Cir. 1999).

Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649, 106 S. Ct. 1415, 1418, 89 L. Ed. 2d 648 (1986); *Peabody Holding Co.,* 665 F.3d at 102; *Virginia Carolina Tools, Inc. v. International Tool Supply, Inc.,* 984 F.2d 113, 117 (4th Cir.1993).

In this case, the Arbitration Clause clearly and unmistakably states: "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*) . . . shall at your or our election, be resolved by neutral, binding arbitration and not by court action." (emphasis added). The Arbitration Agreement before this court clearly and unmistakably provides that the interpretation and arbitrability of the claim or dispute is to be decided by the arbitrator, and not by a court. The court must enforce these contractual provisions and refer this dispute to arbitration for interpretation of the agreement and determination of the agreement's scope, and the arbitrability of this dispute.

II. A VALID ARBITRATION AGREEMENT EXISTS BETWEEN THE PARTIES UNDER THE FEDERAL ARBITRATION ACT

A. Federal and State Law favor Arbitration

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, 590, 553 S.E.2d 110, 115 (2001). The Federal Arbitration Act ("FAA") reflects both a "liberal federal policy favoring arbitration" and "the fundamental principle that arbitration is a matter of contract." *Concepcion*, 131 S.Ct. at 1745 (internal quotes omitted). The FAA specifically provides the following mandate:

> [W]ritten provision in any . . . 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, . . . 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.

Thus, courts must "place arbitration agreements on an equal footing with other contracts" and "enforce them according to their terms." *Concepcion*, 131 S.Ct. at 1745 (internal citations omitted). The FAA is a statement of Congressional intent in upholding private parties' arrangements for dispute resolution. *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 813 (4th Cir. 1989). Thus, the policies of the Act should be effectuated whenever possible, and the courts should rigorously enforce agreements to arbitrate. *Id.*

South Carolina courts similarly favor arbitration. "It is the policy of this state to favor arbitration of disputes." *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). "The policy of the United States and this State is to favor arbitration of disputes." *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995).

B. The Federal Arbitration Act 9 U.S.C. §1, et seq., controls

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997). In this case, the parties agreed that the FAA, rather than state law, applies to the arbitration agreement.

1. The Parties have confirmed in their agreement that the FAA Applies

The Arbitration Agreement clearly states that the FAA applies: "Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et, seq.) and not by any state law concerning arbitration." (Def.'s Mot. to Compel Arbitration, *Exhibit A*). The South Carolina Supreme Court has held that the FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. at 539, 542 S.E.2d at 363-364 (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). In

Munoz, the South Carolina Supreme Court, in compelling arbitration, reasoned: "Here, the arbitration agreement, which applies to 'this contract and the relationships which result from this contract,' provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms." *Id.* The plain language of this agreement requires that the FAA governs, rather than South Carolina law. Federal law requires that the interpretation and scope of the agreement as well as the arbitrability of this dispute be decided in arbitration.

2. The transaction involved Interstate Commerce

Even if the parties had not specifically agreed that the arbitration provisions would be governed by the FAA, the federal statutory scheme would control, because the contract and the relationships between the parties involve interstate commerce. The South Carolina Supreme Court has stated: "Unless the parties have contracted to the contrary, the FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz*, 343 S.C. at 538-539, 542 S.E.2d at 363, *citing Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834 (1995); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996). In other words, any arbitration agreement regarding a transaction "involving interstate commerce" is enforceable under the FAA.

Undoubtedly, the Arbitration Agreement containing the Arbitration Clause affected interstate commerce. In *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 79, 749 S.E.2d 139, 145 (S.C. Ct. App. 2013), the South Carolina Court of Appeals stated 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."; *See also 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 at n. 1 (S.C. 2007) (finding a vehicle trade-in contract involves interstate commerce).

Here, the Arbitration Agreement involved the purchase of a vehicle from Hendrick and potential trade-in of the same vehicle. The Plaintiff's vehicle was appraised, and she provided information to allow the Defendant to apply for credit on her behalf. She contends that the personal information secured for the purpose of determining "[W]hether it would be economically feasible to trade in her RAV4 towards the purchase of another vehicle" was misused. (Compl. ¶ 9). Both the nature of the ongoing relationship and the clear language of the agreement invoke the FAA.

C. The parties formed a valid and binding arbitration agreement

One who signs a contract is bound by its terms, even if he signed the contract without reading it. *Regions Bank v. Schmauch,* 354 S.C. 648, 663, 582 S.E.2d 432, 440 (S.C. Ct.App.2003) (citing *Sims v. Tyler,* 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981)) ("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. *Id.* One who signs a written instrument has the duty to exercise reasonable care to protect himself. *Id.* Anyone challenging the enforceability of an arbitration agreement bears the burden of proving the provision is unenforceable. *Green Tree Fin. Corp. Ala. v. Randolph,* 531 U.S. 79, 91 (2000). *see also First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.,* 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) (holding that "a party to a contract incorporating an arbitration provision cannot escape the

obligation of such a provision by simply declaring: 'But I did not read the whole agreement.' "). In this case, the Plaintiff admits she signed the Arbitration Agreement at issue. (Pl. Mem. in Opp'n at p. 3).

D. The arbitrator must determine whether Plaintiff's claims fall within the scope of this arbitration agreement

Courts considering the scope of an arbitration agreement must construe the agreement broadly. In this agreement, the parties stipulated that both the scope of the agreement and the arbitrability of "Any claim in dispute" must be decided in arbitration, not in court. (Def.'s Mot. to Compel Arbitration, *Exhibit A*). Thus, both the scope of the agreement and arbitrability of this dispute must be arbitrated, not litigated.

III. SOUTH CAROLINA'S OUTRAGEOUS TORTS EXCEPTION VIOLATES THE FAA.

The Outrageous Torts Exception adopted in *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007), is the only legal authority cited by the Plaintiff to defeat the Arbitration Agreement's enforceability. As Justice Pleicones wrote in *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, the Supremacy Clause forbids state courts from disfavoring federal law. 418 S.C. 1, 791 S.E.2d 128 (2016), *reh'g denied* (Oct. 24, 2016).

The FAA is federal law. The United States Supreme Court has decided several cases where it invalidated various state law rules which imposed differential treatment of arbitration contracts as compared to all other contracts. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) and *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 193 L. Ed. 2d 365 (2015) are authoritative interpretations of the FAA, and the judges of every state are required to follow their holdings.

In *Concepcion*, a consumer agreement for the sale and servicing of cell phones included a provision disallowing classwide arbitration procedures. *AT&T Mobility LLC*, 563 U.S. at 1744. The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.* at 1744. In analyzing California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts, the United States Supreme Court held "Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748.

In *DIRECTV*, service contracts with its customers included an arbitration provision that stated that it would be unenforceable if the "law of your state" made waivers of class arbitration unenforceable with another section providing that the arbitration "shall be governed by the Federal Arbitration Act." *DIRECTV, Inc.*, 136 S. Ct. at 466. The California law at issue, which required the availability of class arbitration, interfered with the fundamental attributes of arbitration. *Id.* The Supreme Court concluded that in ruling that "law of your state" included state laws that were invalidated by federal law, the California court did not "place arbitration contracts on equal footing with all other contracts." *Id.* at 468–69 (internal quotation marks omitted).

In the case of *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996), the Court struck down a Montana statute requiring a special notice upon contracts containing arbitration provisions. That notice provision was nearly identical to South Carolina's statutory notice provision. In *Casarotto*, the United States Supreme Court held that a Montana court could not apply its own state law to an arbitration provision when that law was designed to apply only to

arbitration contracts, not to any other types of contracts. *Id.* at 681. The United States Supreme Court found § 27–5–114(4), MCA, directly conflicts with § 2 of the FAA, because Montana's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. *Id.* The United States Supreme Court held that Montana's law impermissibly discriminated against arbitration provisions and, therefore, violated the FAA. *Id.*

The Outrageous Torts Exception applies only to arbitration arguments, not to all contracts. As such, it violates the FAA as interpreted in *Concepcion, DIRECTTV*, and *Casarotto*. The doctrine cannot be enforced under the Supremacy Clause.

IV. THIS CASE MUST BE STAYED

This Defendant moves to stay this action pending completion of arbitration. The FAA requires a stay under the following circumstances:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3. Accordingly, this Defendant asks this court to stay all judicial proceedings pending arbitration in accordance with the Arbitration Agreement. *See Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (S.C. Ct. App. 2002). (Holding "the FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties.")

CONCLUSION

The parties agreed that the interpretation and scope of this Arbitration Agreement, as well as the arbitrability of the claim or dispute shall be decided by the arbitrator. The court must enforce those provisions and refer this case to arbitration. Hendrick and the Plaintiff formed a valid, binding arbitration agreement subject to the FAA, agreeing that it would be governed by federal law, not state law.

The Plaintiff, in her Memorandum in Opposition to Defense Motion to Compel Arbitration, she asserts two (2) grounds in support of her argument that the parties' agreement should not be enforced. First, she emphasizes the passage of five (5) years between the date of her agreement and the acts complained of in this case. Secondly, she argues that her case fits squarely within the Outrageous Torts Exception adopted by the South Carolina Supreme Court in *Aiken*, such that the agreement cannot be enforced.

In *Aiken*, several years had passed between the date of the contract requiring arbitration and the acts giving rise to Aiken's lawsuit. *Aiken*, 373 S.C. 144. The court in *Aiken* specifically held that timing of the tortious acts was not relevant to the arbitrability of Plaintiff's claims. *Id.* at 151.

The Outrageous Torts Exception applies only to arbitration arguments, not to all contracts. As such, it violates the FAA as interpreted in *Concepcion* and *DIRECTTV*. The doctrine cannot be enforced under the Supremacy Clause.

This court must stay this action and compel arbitration.

[SIGNATURE ON FOLLOWING PAGE]

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Dated: February 21, 2017

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 21st day of February, 2017.

_____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NUMBER: 2016-CP-10-4112
JANE DOE, an adult woman over the age of 18, Plaintiff, v. TCSC, LLC, d/b/a HENDRICK TOYOTA OF NORTH CHARLESTON, Defendant.	

PLAINTIFF'S SUPPLEMENTAL MEMO IN OPPOSITION TO DEFENSE MOTION TO COMPEL ARBITRATION

The Plaintiff, Jane Doe, by and through her undersigned counsel, hereby respectfully submits this Supplemental Memorandum of Law in Opposition to Defendant's Motion to Compel Arbitration.

LEGAL ARGUMENT

The FAA contains the following language:

> A written provision in any...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.A. § 2 (West)

The Plaintiff will concede that the Arbitration Agreement in question both specifically refers to the

FAA as governing its application and that the purchase of the 2011 Toyota RAV 4 was a transaction which involved interstate commerce. However, as set forth in 9 U.S.C. §2, the Plaintiff takes the position that the 2011 Arbitration Agreement itself should be voided, and therefore deemed unenforceable, "upon such grounds as exist at law or in equity for the revocation of any contract".

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles v. united Healthcare Corp.*, 338 S.C.29, 524 S.E.2d 839 (Ct. App. 1999). *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663, (2007) Arbitration will be denied if a court determines no agreement to arbitrate existed. *Lucey v. Meyer*, 401 S.C. 122, 139, 736 S.E.2d 274, 283 (Ct. App. 2012). In determining whether an agreement to arbitrate exists, "the court should apply ordinary state-law principles that govern the formation of contracts." *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir.1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); see also *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir.1997) ("Courts decide whether there is an agreement to arbitrate according to common law principles of contract law.").

I. No Meeting of the Minds

South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975). The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893–894 (1989). In the

instant case, the Defendant seeks to enforce an arbitration agreement entered into during the purchase of an automobile in order to prevent the Plaintiff from bringing personal injury claims in State Court which arose not from the "credit application, purchase, lease or condition ***of this vehicle***" as stated in the Arbitration Agreement, but rather from the wrongful conduct of the Defendant's employee nearly five (5) years after the unrelated vehicle purchase was consummated. Certainly no reasonable person presented with the Arbitration Agreement as part of a car sales package could ever conceive that the agreement would extend to cover the present claim. Considering the mechanics of a typical car sale, a buyer presented with reams of documentation to sign in order to close the deal would never consider that an arbitration agreement which refers to potentially having to arbitrate claims arising from the "credit application, purchase, lease or condition ***of this vehicle***" would include a salesperson violating the personal privacy of the buyer some five years after the fact in connection with a wholly separate car deal. In this particular case, the Defendant did not bring this possibility to the attention of the Plaintiff, nor did she ever contemplate it. As such, given that the Defendant now claims this was an essential and material term of the agreement, there was no meeting of the minds and the contract should be deemed void *ab initio*. If no contract existed, it cannot be subject to arbitration.

II. Adhesion Contract and Unconscionability of Agreement

Pursuant to the South Carolina Commercial Code, a contract, or a clause of a contract, may be attacked at law if it was unconscionable at the time it was made. S.C. Code Ann. § 36–2–302 (1976). "If the court finds that a contract clause was unconscionable at the time it was made, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result." S.C. Code Ann. § 36–2–302(1) (1976), *Lackey v. Green Tree*

Fin. Corp., 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998). Unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac–Cadillac–Buick Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996) (emphasis added) (citing *Jones Leasing v. Gene Phillips and Assocs.*, 282 S.C. 327, 318 S.E.2d 31 (Ct. App.1984)), *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

"A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005), quoting 17A Am. Jur. 2d *Contracts* § 279 (2004). Absence of meaningful choice on the part of one party speaks to the fundamental fairness of the bargaining process. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E. 663 (2007). "In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.* at 25, 644 S.E.2d at 669. As the South Carolina Supreme Court noted in *Simpson*, the "loss of the right to a jury trial" and foregoing statutorily provided remedies are also relevant to this determination. *Id.* at 27, 644 S.E.2d at 670. Furthermore, an adhesion contract for the purchase of an automobile receives "considerable skepticism". *Id.* at 27, 644 S.E.2d at 669–*70.

An adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis where the terms are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C 531, 541, 542 S.E.2d 360,

365 (2001). As explained in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 86, 749 S.E.2d 139, 148–149 (Ct. App. 2013), in the context of a typical vehicle sale, aside from the name of the desired vehicle and cost figures dependent upon the agreed price, the remaining terms of a vehicle sale, many of which are quite significant, are pre-printed and, presumptively, non-negotiable. Such pre-printed terms include, *inter alia*, disclaimers of warranty, arbitration provisions, prejudgment interest, attorney's fees, choice of law, and severability clauses. In the case *sub judice*, the 2011 Arbitration Agreement was one of many pre-printed documents presented to her during the consummation of the purchase of the 2011 Toyota RAV4 from the Defendant. The documents were hastily presented in a "take it or leave it" fashion as they were apparently necessary to close the deal on the vehicle so the Plaintiff could receive her keys and drive off in her new car. The Arbitration Agreement, as part of the overall package of sales documents, was an adhesion contract and accordingly, as the Supreme Court has opined, warrants considerable skepticism by this trial court. In *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26, 644 S.E.2d 663, 669 (2007), quoting the Ohio Supreme Court, our Supreme Court held that "the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. ***In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.***" *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859, 866 (1998).

In determining if an arbitration agreement even existed, in addition to looking at whether there was a meeting of the parties' minds, this court should look at the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise

in the inclusion of the challenged clause; and the conspicuousness of the clause. In examining these issues, it is clear that the Plaintiff's alleged injuries were not of the type normally considered in a commercial consumer setting such as a vehicle sale. Furthermore, it is likewise obvious that in the grand scheme of things, the Plaintiff in this matter is not a substantial business concern of the Defendant; she is but one customer with one vehicle. Her overall impact on the business of the Defendant is negligible. It should also be obvious to the court that in the context of the initial sales transaction, the Defendant possessed substantially more bargaining power than the Plaintiff and used that power to its advantage in consummating the sale in 2011. Additionally, the Plaintiff, when compared to a car dealership, lacks the level of business sophistication relative to the dealership and its sales people in the context of making a car deal. In the take it or leave it type of transaction that is a car deal, the Plaintiff is at a disadvantage. Whether there was any surprise in the inclusion of the Arbitration Agreement is plain to see by the nature of the present dispute; the Plaintiff could never have suspected that the type of injuries she suffered at the hands of the Defendant and its employee would be subject to binding arbitration. The arbitration agreement itself is unconscionable to the extent it abrogates the Plaintiff's right to have a jury of her peers hear and decide the merits of her claims. This court has the power to the court either refuse to enforce the Arbitration Agreement as a whole contract or limit the application of the unconscionable clause to avoid any unconscionable result. The court should determine that the Arbitration Agreement is unenforceable as a whole.

III. Supreme Court Cases Are Distinguishable from the Instant Case

It bears mention that the United States Supreme Court cases cited by the Defendant are all distinguishable from the instant case based on the simple fact that in each instance, the state law that

was found to have been pre-empted by the FAA was specific to arbitration and not contracts in general.

The Savings Clause of the FAA "permits agreements to arbitrate to be invalidated by generally applicable contract defenses", including unconsiconability and meeting of the minds, but not by defenses that apply only to arbitration. *AT&T Mobility, LLC v. Concepcion,* 131 S.Ct. 1740, 1746 (2011). The Supreme Court held in each of the cases cited by the Defendant that the challenged state law did not place arbitration contracts on "equal footing with all other contracts". *DIRECTTV v. Imburgia*, 136 S.Ct. 463, 471 (2015), *Doctor's Associates, Inc. v. Casarotto*, 116 S.Ct. 1652, 1656 (1996), *AT&T Mobility, LLC v. Concepcion,* 131 S.Ct. 1740, 1745 (2011). Conversely, in this matter, the *Aiken* case controls because the reasoning applied by the South Carolina Supreme Court finds its root in general principals applicable to all contracts; with no meeting of the minds, a contract is unenforceable. A party cannot be made to do that which he has not agreed by contract to do. The Plaintiff herein did not agree in June of 2011 (or in December of 2016) to arbitrate outrageous tort claims she may have against the Defendant dealership. No Plaintiff to any contract can be made to perform anything which they did not contract to perform. "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations". *Id.* at 1750.

CONCLUSION

This trial court, applying general principles of contract law and the holding of the *Aiken* Court should find that no arbitration agreement existed due to both the unconscionability of the contract and the clear fact that there could have been no meeting of the minds on what is an essential and material element of the subject agreement. The Arbitration Agreement should be disregarded and this Court should deny the Defendant's Motion to Compel arbitration and rather order that

litigation shall proceed.

Respectfully submitted,

THE MASON LAW FIRM, P.A.

BY: _____

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Attorneys for the Plaintiff

Mount Pleasant, South Carolina
February 22, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the pleading or paper to which this certificate is affixed was served upon the party(ies) to this action by hand, or by depositing a copy of the same in the U.S. Mail, first class postage pre-paid and addressed to the proper attorney(s) of record for such other party(ies) on this, the 22 nd day of February, 2017, in Mount Pleasant, South Carolina.

THE MASON LAW FIRM, P.A.

BY: _____

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	}	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NUMBER: 2016-CP-10-4112
JANE DOE, an adult woman over the age of 18, Plaintiff, v. TCSC, LLC, d/b/a HENDRICK TOYOTA OF NORTH CHARLESTON, Defendant.	}	

AFFIDAVIT OF JANE DOE IN SUPPORT OF PLAINTIFF'S MEMORANDA IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION

PERSONALLY APPEARED before me, Jane Doe (whose actual identity as the real party in interest was first confirmed) who after being duly sworn, deposes and says as follows:

1. That I am the actual party denominated as "Jane Doe" in the above styled matter and I have confirmed my true identity to the Notary Public attesting to this Affidavit.

2. That I am over the age of eighteen (18) years.

3. I am currently a resident of Charleston County, State of South Carolina.

4. I am the individual who has initiated the instant litigation against the above named defendant and I am making this sworn affidavit in the name of Jane Doe in order to protect and preserve my anonymity with regard to the sensitive nature of the allegations made in the Complaint.

5. An identical version of this Affidavit has been executed in my true name and provided to the Court for an *in camera* review and filing under seal in keeping with the agreement

of opposing counsel to maintain my anonymity with regard to any public document filings.

6. That on or about June 11, 2011 I visited the Toyota Scion of North Charleston dealership owned by the named Defendant for the purpose of purchasing a new vehicle.

7. During the sales process, I was presented with and signed (in my true name) an Arbitration Agreement, a redacted copy of which is attached to this Affidavit.

8. That the purpose of the Arbitration Agreement was not explained to me by the salesperson or anyone associated with the dealership at the time it was presented to me.

9. That the document was provided to me as part of a packet of documents, each being placed in front of me in rapid succession for my signature in order to consummate the purchase of the vehicle.

10. That although I did have the opportunity to read the document prior to signing, it was represented to be a necessary document as part of the car deal I was entering into and that it was just another document necessary to close the deal.

11. That at no time was it explained to me that by signing the document I was agreeing to relinquish my right to a jury trial if the dealership, its agents or employees ever committed outrageous tortious acts against me personally.

12. It was my understanding from a review of the document when presented to me that it related to issues surrounding my purchase of the car, not my personal interactions with the dealership, its servants, agents and employees.

13. That in reviewing the document at the time it was signed, it was my understanding and belief that the Arbitration Agreement related solely to matters connected to my credit application, my purchase of, my lease of, or the condition of the vehicle I was buying or to the terms

of the purchase agreement, the lease agreement or my financing contract or any resulting transaction or relationship I may have had with the dealership *as a result of those enumerated things*, as that was what the document specifically stated.

14. When I signed the Arbitration Agreement, I did not expect or believe that doing so would prevent me from litigating any future personal injury claims that may have arisen against the dealership for actions taken by its agents, servant or employees.

15. I understood the purpose of the Arbitration Agreement to be limited to matters relating specifically to the vehicle I was purchasing, including any injuries I may have suffered in tort due to negligent repair or other similar tortious acts or omissions by the dealership relative to that vehicle.

16. That I would not have signed this Arbitration Agreement if it were clear on its face that the dealership or its employees, servants and agents could commit personal torts against me wholly unrelated to the vehicle itself and then claim those must be arbitrated.

17. For example, I would not have agreed that Rick Hendrick Toyota Scion of North Charleston could make me arbitrate a claim for personal injury from falling in a pothole in their parking lot simply because I purchased a car from them.

18. Likewise, I would not have expected the Arbitration Agreement to remove my right to a jury trial if an employee of the dealership negligently ran me over in the parking lot, or if one of the employees punched me in the nose.

19. I certainly would not have agreed to give up my right to a jury trial had I known that the dealerships employees would potentially put my personal and private information, including my name and cell phone number on a sex website purporting to solict deviant sexual acts.

20. None of these things are related to my purchase of the car in 2011 and it never entered my mind when signing the Arbitration Agreement that the dealership could ever claim that such acts would be subject to arbitration if they occurred.

21. When I signed the Arbitration Agreement, my understanding was that any injuries or disputes subject to arbitration had to be related to the vehicle itself, work negligently performed on the vehicle at the dealership or related my payment or financing of the vehicle.

22. More to the point, I never would have signed the Arbitration Agreement if the intention of the dealership to arbitrate any disputes arising out of any source whatsoever was brought to my attention rather than stored away in the mind of the dealership and its employees, servants and agents.

23. My purpose and intention in signing the Arbitration Agreement was to consummate the purchase of the car, and to arbitrate matters relating to the car, not to give up might right to a jury trial if the dealership, its servants, agents or employees injured me directly and personally through outrageous acts or negligence not involving my vehicle.

24. From the circumstances of the sales transaction, I did not, and could not, have known that at the time I signed the Arbitration Agreement in 2011, the dealership intended to arbitrate all tort claims including the instant outrageous tort claim arising from its employee posting my personal and private information on a sexually oriented prostitution website four and a half years after I bought the car from the dealership.

25. The December 2015 meeting at the dealership between myself and Richard Smith which led to this lawsuit was a wholly separate and distinct transaction from the June 2011 car purchase; it did not relate to my previous credit application for the 2011 purchase, it did not relate

my actual purchase of the car in 2011, it did not relate to any lease of a car in 2011, it did not relate the condition of the vehicle I bought in 2011 nor did the December 2015 meeting relate to the terms of the 2011 purchase agreement or my 2011 financing contract.

26. But for the fact that I returned to the same dealership to possibly buy a new car, in no way, shape or form did the December 2015 meeting giving rise to this litigation have any relation whatsoever to my June 2011 car purchase or the "car related" items enumerated in the Arbitration Agreement signed in connection with that prior transaction. In December 2015, I simply inquired whether I would qualify for credit to potentially purchase another separate vehicle, which would have been subject to a new and separate sales agreement, contract and presumably a new Arbitration Agreement.

27. I acknowledge that I have been provided (or retained) a copy of this Affidavit.

FURTHER THE AFFIANT SAYETH NAUGHT!

SWORN TO BEFORE me
this 31st day of March, 2017

AE Forsberg
Notary Public for South Carolina
My Commission Expires: 3/31/26

AE FORSBERG NOTARY PUBLIC MY COMMISSION EXPIRES 3/31/2026 SOUTH CAROLINA

Jane doe
JANE DOE, Plaintiff
(*identical copy signed in my true name)

Arbitration Agreement

Customer Name [redacted] Date 05/11/2011

Deal Number 2640 VIN [redacted]

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.

In this Arbitration Agreement, "you" refers to the buyer(s) signing below. "We," "us," and "our" refer to the Dealer signing below and anyone to whom the Dealer assigns this Arbitration Agreement.

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 this vehicle, your purchase, lease agreement or financing contract 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. Arbitration shall be conducted by the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration 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 in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the seller of the vehicle is a party to the claim or dispute, in which case the hearing will be held in the federal district where this Arbitration Agreement was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. 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. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. 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.

You and we retain any rights to self-help remedies, such as repossession. 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 or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract. 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. Notwithstanding any other provision of this Arbitration Agreement, the validity and scope of the waiver of class action rights shall be decided by the court and not by the arbitrator.

[redacted]
Buyer

Buyer

TOYOTA SCION OF NORTH CHARLESTON
Dealer

By:

Certificate of Counsel

In accordance with Rule 210(c), SCACR, the undersigned counsel for Appellant certifies that this Record on Appeal contains all material presented to the lower court that was proposed to be included in the appellate record by any party and not any other material. The undersigned also certifies that this Record on Appeal complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: _____

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Dated: 4/3/18