

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Appellate Case No. 2017-001897

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Marcus Kevin Grant,  
individually and in a  
representative capacity for all  
others similarly situated,

Respondent,

v.

Jud Kuhn Chevrolet,

Appellant.

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RECORD ON APPEAL

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**RECEIVED**  
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SC Court of Appeals

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 15-CP-26-8921

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all others similarly situated, )

Plaintiffs, )

vs. )

Jud Kuhn Chevrolet, )

Defendant. )

**ORDER COMPELLING ARBITRATION**

The Defendant moved to compel Bilateral (Non-Class) Arbitration. On July 31, 2017 the Court ruled from the Bench that the case would go to arbitration with the American Arbitration Association, but reserved judgment on whether the arbitration could proceed bilaterally only or as a Class. The parties were allowed to submit supplemental briefs on the issue of bilateral versus class arbitration. The Court finds that the case may proceed as a class action in arbitration.

**I. Arbitration with the AAA.**

The following arbitration clause appears in the contract to purchase the vehicle:

**ARBITRATION REQUIRED BY THIS AGREEMENT.** The parties agree that instead of litigation in a court, any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order, including the validity or lack thereof of this contract, to any other document or agreement between the parties relating to sale of the motor vehicle, or to any other document or agreement between the parties relating to the motor vehicle, including the parties' retail installment contract, if any, shall be settled by binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules. Such arbitration shall be conducted in Columbia, SC. Each party will pay its own costs, and any filing fee charged by the American Arbitration Association shall be split evenly between the parties. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

Arbitration clauses are favored in the State and Federal Courts. When interstate commerce is involved in a transaction, State arbitration law is preempted by the Federal Arbitration Act. Nevertheless, the Federal Arbitration Act provides that an arbitration clause may be unenforceable if it is held to be unconscionable under a State's contract law. Simpson v. M.S.A. of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). The South Carolina Supreme Court has approached adhesion contracts between a consumer and automobile retailer with "considerable skepticism." Id. An arbitration clause can be unconscionable if the expenses of arbitration as compared to the Court system are unaffordable to the Plaintiff so as to prohibit the Plaintiff from being able to vindicate his claims in arbitration. The Plaintiff must have some forum to vindicate his rights.

The Courts have recognized what is referred to as "The Effective Vindication Exception to the FAA." See Am. Express Co. v. Italian Colors Rest. \_\_\_ U.S. \_\_\_, 133 S.Ct. 2304 (2013) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985). The Effective Vindication Exception to the FAA requires that an Arbitration Agreement which prohibits the use of the judicial forum must also provide for an effective and accessible alternative forum. If the Plaintiff cannot afford the alternative forum, then the arbitration clause is unconscionable and would be unenforceable under the savings clause of the FAA. The effective vindication exception to the FAA recognizes that an arbitration clause cannot work to totally deprive a Plaintiff of any forum to hear his claim. A Plaintiff must be able to vindicate his claim somewhere.

The Plaintiff claims that he cannot effectively vindicate his rights in arbitration, citing three provisions of the arbitration clause, as follows:

1. The Agreement requires the application of the Commercial Arbitration Rules of the American Arbitration Association. The Plaintiff is a consumer and purchased the vehicle for

personal use. The Plaintiff claims he cannot afford the fees under the Commercial Arbitration Rules.

2. The arbitration clause requires each party to pay its own costs. The fees charged by the AAA will be split between the parties. The filing fees and arbitrator fees under the Commercial Arbitration Rules can range from \$750 to several thousand dollars, depending on the length of the hearing and the charges of each individual arbitrator. The Plaintiff claims he cannot afford these fees.

3. The arbitration clause requires arbitration in Columbia, SC. Both the Plaintiff and Defendant are located in Horry County, South Carolina, approximately a three (3) hour drive from Columbia. The Plaintiff claims it is unreasonable and unconscionable to require consumers to travel three (3) hours to an arbitration proceeding.

The Court has considered the Affidavit of counsel setting forth the anticipated costs in arbitration of an individual claim as well as a class action. The court has also considered Affidavits attaching the Administrative Fee Schedules of the Commercial Arbitration Rules of the AAA as well as the Supplementary Rules for Class Arbitrations showing the fees for a class action filing.

In the case of Bradford v. Rockwell Semi-Conductor Systems, Inc., 238 F.3d 549 (4<sup>th</sup> Cir. 2001), the Fourth Circuit Court of Appeals ruled that evaluating whether arbitration is a financially adequate substitute to litigation will be decided on a case by case basis. The Court stated that this analysis should focus “among other things” on three issues:

The Claimants ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims. [238 F.3d at 556.]

After considering these issues as outlined by the Fourth Circuit, this Court finds that the cost differential in this case is not so substantial as to deter the bringing of this claim. Therefore, the Court finds that arbitration with the AAA is appropriate.

**II. Class vs. Bilateral Arbitration.**

The present case has been styled as a Class Action under the Dealers Act. The Dealers Act specifically provides for class actions. S.C. Code Ann. §56-15-110(2) provides “When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief.”

The South Carolina Supreme Court addressed class actions under the Dealers Act in the case of Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I). The Court found that an Arbitration Agreement which prohibited class actions in direct contravention of the Dealers Act is against public policy. (Notably, there is no such class action prohibition in the arbitration clause at issue in the case before us.) The Court noted that in addition to specifically providing for class actions, the Dealers Act also provides that “Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.” S.C. Code §56-15-130. The Court went on to hold, “Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State’s public policy and is void and unenforceable.” (Emphasis added.) The Court affirmed the Trial Court’s Order in result, denying the Motion to Compel Arbitration.

Shortly after the opinion in Herron I was issued, The United States Supreme Court published its opinion in the case of AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011). In Concepcion, The United States Supreme Court overturned a decision of the California Courts which invalidated a class action waiver in an arbitration provision based upon the preemption of the FAA. The United States Supreme Court then accepted certiorari on the Herron I case and remanded the Herron I case with instructions for the South Carolina Supreme Court to reconsider its opinion in Herron I in light of the Concepcion case. The South Carolina Supreme Court affirmed Herron I because the issue of preemption had not been preserved for review in the South Carolina proceedings. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). (Herron II).

The arbitration agreement in Herron I contained a class action waiver. The Court struck the waiver on public policy grounds but implied that the waiver was severable and the arbitration clause could be saved. The Court struck the entire arbitration clause at the Defendant's request. The Arbitration Agreement in the present case does not have a class action waiver. Therefore, the present case is even stronger than Herron I and this Court has even more reason to deny the Respondent's request for bilateral arbitration.

In 2015, the United States Supreme Court once again overturned a California decision denying arbitration. In DirecTV v. Imburgia, 577 U.S. \_\_\_\_ (2015), the Court addressed an arbitration clause which contained a class action waiver with a self-defeating clause. The waiver specified that the entire arbitration provision was unenforceable if the "law of your state" made class-action waivers unenforceable. The lower court reasoned that since the law of California did not allow class action waivers, and since that rule was the "law of your state" the entire arbitration agreement was unenforceable by its own self-defeating terms. The Supreme Court disagreed,

reasoning that the lower court had asked the wrong question. The court stated, “Thus the underlying question of contract law at the time [the lower court] made its decision was whether the ‘law of your state’ included invalid California law. We must now decide whether answering that question in the affirmative is consistent with the [FAA].” (Emphasis in original.) *Id.* at \_\_\_\_.

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

The facts of the present case, however, are very different from the facts of DirectTV. The first and foremost distinction is that DirectTV and prior cases concerned the States’ attempts to defeat arbitration altogether, which would frustrate the liberal Federal Policy in favor of arbitration as set forth in the FAA. In the present case, however, the Court has already ruled in favor of arbitration. Therefore, the issue of class treatment is separate from the enforceability of the arbitration clause.

The second distinction is that the arbitration clause in the present case contains no class action waiver. Therefore, there is no conflict between the state’s public policy of allowing class actions under the Dealers Act and the FAA’s liberal policy favoring arbitration. Both of these interests can be served.

The Third distinction is that the class action provision of the Dealers Act applies to all situations which arise under the Act. It does not target arbitration as the California law did in DirecTV. The class action provision of The Dealers Act allows for a class action in any contract to purchase a vehicle, with or without an arbitration clause. The Dealers Act was adopted in 1962, long before arbitration became popular. In 1962, the South Carolina legislature could not possibly have intended to target arbitration clauses. There is no evidence in the record to suggest that arbitration clauses were used in Automobile purchase Agreements in 1962. The purpose of providing for class actions under the Dealers Act was most certainly to provide a practical economical remedy for a large group of car buyers who have suffered the same type harm. The purpose was not to defeat arbitration clauses, or to frustrate the purposes of the FAA.

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

In the case of Oxford Health Plans, LLC v. Sutter, 569 U.S. \_\_\_\_\_ (2013), the United States Supreme Court, in a unanimous decision, affirmed an arbitrator’s decision to allow a class action to proceed in arbitration based upon the arbitrator’s interpretation of the contract. The arbitration clause at issue stated as follows:

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one Arbitrator. [Id.]

Obviously, this particular arbitration clause says nothing about class actions. Therefore, the agreement between the parties was arguably “silent” as to class actions. Nonetheless, the

arbitrator found that the intent of the arbitration clause was “to vest in the arbitration process everything that is prohibited from the Court process.” Id. The U.S. Supreme Court went on to state the Arbitrator’s reasoning as follows: “And a class action, the arbitrator continued, ‘is plainly one of the possible forms of civil action that could be brought in a Court’ absent the agreement.” Id. Accordingly, he concluded that ‘on its face, the arbitration clause... expresses the parties’ intent that class arbitration can be maintained’” Id.

The United States Supreme Court ruled that the arbitrator’s decision to allow this interpretation of the contract would not be overturned under the appellate standard of review of the Federal Arbitration Act. The Court went on to distinguish its Stolt-Nielsen decision by noting as follows: “The parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on Class Arbitration.” Id. (emphasis added).

In the present case there is no such unusual stipulation. On the contrary, the arbitration clause in the present case anticipates that all matters which could be brought forth in a Court system could also be brought forth in arbitration, which would include class actions.

There are at least three ways in which the present arbitration clauses speak to class wide arbitration. First, the arbitration clause states that “The parties agree that instead of litigation in a court, any dispute, controversy or claim... shall be settled by binding arbitration...” (Emphasis added.) Just as the arbitrator found in Sutter, I find that the present arbitration clause “vests” in the arbitrator everything that is prohibited from the Court process.

Second, in the present case there is the added indicator that class actions are specifically provided for under the Dealers Act which has been declared to be the public policy of this state by our Courts in Heron I and Heron II.

The entire agreement between the dealer and the purchaser is subject to the provisions of the South Carolina Manufacturers, Distributors and Dealers Act (Dealers Act). The Dealers Act is very specific in terms of the rights of consumers to band together in a class action. S.C. Code Ann. §56-15-110(2) provides “When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief.” This is a specific consumer remedy recognizing that some losses suffered by consumers may be so small that the loss would not warrant the filing of a single action. The Dealers Act recognizes that consumers are particularly vulnerable to abusive fees charged by dealers and therefore specifically provides for consumers to band together to seek justice against these unscrupulous charges and activities.

The arbitration clauses contained in the purchase agreement in this case cannot be read separately from the requirements and the protections provided by the Dealers Act. These protections are presumed to be a part of any contract and therefore the arbitration clauses are not silent as to whether a class action can be brought in arbitration. The provisions of the Dealers Act are required in every Contract of Sale. As stated by the South Carolina Supreme Court in Herron I, the class action provision is non-waivable.

Third, the agreement specifically calls for arbitration in the AAA. The AAA specifically provides Supplementary Rules for Class Arbitrations. (See Affidavits.) The AAA is set up to handle class arbitrations. The AAA has handled numerous class arbitrations in the past and is well equipped to handle this relatively simple class action. (See AAA website)

Stolt-Nielsen indicates that there must be a contractual basis for concluding that a party agreed to class action treatment. By designating the AAA as the arbitration forum, the Defendant

dealer is charged with knowledge of the AAA rules. The AAA has provided for class action treatment in arbitrations since its rules became effective on October 8, 2003. The dealer is charged with knowledge of this provision for class treatment and it has specifically designated the AAA as the forum to handle arbitrations. Therefore, there is in fact a contractual basis for class treatment.

**Conclusion**

It is, therefore, ordered that this matter be stayed, pending arbitration before the AAA. The arbitrator for the AAA may treat this matter as a class action.<sup>1</sup>

**IT IS SO ORDERED.**

---

Benjamin H. Culbertson, Circuit Court Judge  
For the Fifteenth Judicial Circuit

Conway, SC  
August \_\_, 2017

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<sup>1</sup> This Court renders no decision as to the propriety of designating this action as a class action. The ruling hereunder is that this action may be arbitrated as a class action if so designated by the arbitrator.



Horry Common Pleas

**Case Caption:** Marcus Kevin Grant VS Jud Kuhn Chevrolet

**Case Number:** 2015CP2608921

**Type:** Order/Stay

Presiding Circuit Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2017-08-25 10:16:32 page 11 of 11

ELECTRONICALLY FILED - 2017 Aug 25 11:07 AM - Horry - COMMON PLEAS - CASE#2015CP2608921

11/6/16 - 4:24 pm

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS

Marcus Kevin Grant, individually and in a )  
representative capacity for all others similarly )  
situated, )  
Plaintiff(s) )

CIVIL ACTION COVERSHEET

15 CP 26 8921

vs. )  
Jud Kuhn Chevrolet, )  
Defendant(s) )

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2015 DEC 28 AM 8:15  
HORRY COUNTY  
CLERK OF COURT

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.  NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- |   |  |  |  |
|---|--|--|--|
| <input type="checkbox"/> Contracts<br><input type="checkbox"/> Constructions (100)<br><input type="checkbox"/> Debt Collection (110)<br><input type="checkbox"/> General (130)<br><input type="checkbox"/> Breach of Contract (140)<br><input type="checkbox"/> Fraud/Bad Faith (150)<br><input type="checkbox"/> Failure to Deliver/Warranty (160)<br><input type="checkbox"/> Employment Discrim (170)<br><input type="checkbox"/> Employment (180)<br><input type="checkbox"/> Other (199) | <input type="checkbox"/> Torts - Professional Malpractice<br><input type="checkbox"/> Dental Malpractice (200)<br><input type="checkbox"/> Legal Malpractice (210)<br><input type="checkbox"/> Medical Malpractice (220)<br><input type="checkbox"/> Previous Notice of Intent Case # 20__-NI-_____<br><input type="checkbox"/> Notice/ File Med Mal (230)<br><input type="checkbox"/> Other (299)                     | <input type="checkbox"/> Torts - Personal Injury<br><input type="checkbox"/> Conversion (310)<br><input type="checkbox"/> Motor Vehicle Accident (320)<br><input type="checkbox"/> Premises Liability (330)<br><input type="checkbox"/> Products Liability (340)<br><input type="checkbox"/> Personal Injury (350)<br><input type="checkbox"/> Wrongful Death (360)<br><input type="checkbox"/> Assault/Battery (370)<br><input type="checkbox"/> Slander/Label (380)<br><input type="checkbox"/> Other (399)  | <input type="checkbox"/> Real Property<br><input type="checkbox"/> Claim & Delivery (400)<br><input type="checkbox"/> Condemnation (410)<br><input type="checkbox"/> Foreclosure (420)<br><input type="checkbox"/> Mechanic's Lien (430)<br><input type="checkbox"/> Partition (440)<br><input type="checkbox"/> Possession (450)<br><input type="checkbox"/> Building Code Violation (460)<br><input type="checkbox"/> Other (499)  |
| <input type="checkbox"/> Inmate Petitions<br><input type="checkbox"/> PCR (500)<br><input type="checkbox"/> Mandamus (520)<br><input type="checkbox"/> Habeas Corpus (530)<br><input type="checkbox"/> Other (599)  | <input type="checkbox"/> Administrative Law/Relief<br><input type="checkbox"/> Reinstate Drv. License (800)<br><input type="checkbox"/> Judicial Review (810)<br><input type="checkbox"/> Relief (820)<br><input type="checkbox"/> Permanent Injunction (830)<br><input type="checkbox"/> Forfeiture-Petition (840)<br><input type="checkbox"/> Forfeiture-Consent Order (850)<br><input type="checkbox"/> Other (899) | <input type="checkbox"/> Judgments/Settlements<br><input type="checkbox"/> Death Settlement (700)<br><input type="checkbox"/> Foreign Judgment (710)<br><input type="checkbox"/> Magistrate's Judgment (720)<br><input type="checkbox"/> Minor Settlement (730)<br><input type="checkbox"/> Transcript Judgment (740)<br><input type="checkbox"/> Lis Pendens (750)<br><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)<br><input type="checkbox"/> Confession of Judgment (770)<br><input type="checkbox"/> Petition for Workers' Compensation Settlement Approval (780)<br><input type="checkbox"/> Other (799) | <input type="checkbox"/> Appeals<br><input type="checkbox"/> Arbitration (900)<br><input type="checkbox"/> Magistrate-Civil (910)<br><input type="checkbox"/> Magistrate-Criminal (920)<br><input type="checkbox"/> Municipal (930)<br><input type="checkbox"/> Probate Court (940)<br><input type="checkbox"/> SCDOT (950)<br><input type="checkbox"/> Worker's Comp (960)<br><input type="checkbox"/> Zoning Board (970)<br><input type="checkbox"/> Public Service Comm. (990)<br><input type="checkbox"/> Employment Security Comm (991)<br><input type="checkbox"/> Other (999) |
| <input type="checkbox"/> Special/Complex /Other<br><input type="checkbox"/> Environmental (600)<br><input type="checkbox"/> Automobile Arb. (610)<br><input type="checkbox"/> Medical (620)<br><input checked="" type="checkbox"/> Other (699)<br><input type="checkbox"/> Sexual Predator (510)  | <input type="checkbox"/> Pharmaceuticals (630)<br><input type="checkbox"/> Unfair Trade Practices (640)<br><input type="checkbox"/> Out-of State Depositions (650)<br><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)<br><input type="checkbox"/> Pre-Suit Discovery (670)  |  |  |

Clay Walker

copy

Submitting Party Signature: \_\_\_\_\_

Date: December 21, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all others similarly situated, )  
 )  
Plaintiffs, )

vs. )

Jud Kuhn Chevrolet, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 15-CP-21 8921

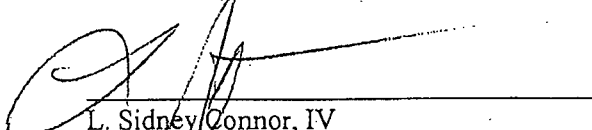
HORRY COUNTY  
2015 DEC 28 AM 8:15  
MELANIE HARRIS-WARD  
CLERK OF COURT

SUMMONS  
(Class Action/Dealers' Act)  
JURY TRIAL DEMANDED

TO: ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHER, CONNELL & CONNOR, P.C.

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

December 21, 2015

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

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

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all others similarly situated, )

Plaintiffs, )

vs. )

Jud Kuhn Chevrolet, )

Defendant. )

COMPLAINT  
(Class Action/Dealers' Act)  
JURY TRIAL DEMANDED

HORRY COUNTY  
2015 DEC 28 AM 8:15  
MELANIE HUBBARD  
CLERK OF COURT

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

1. The named Plaintiff, Marcus Kevin Grant, is a citizen and resident, of the State of South Carolina, County of Marion.
2. The Defendant Jud Kuhn Chevrolet is a company organized and existing pursuant to the laws of the State of South Carolina, primarily doing business in Horry County, South Carolina.
3. This court has jurisdiction over the parties and subject matter of this case.

**FACTUAL ALLEGATIONS**

4. On or about July 31, 2015, Plaintiff purchased a new vehicle from the Defendant Jud Kuhn Chevrolet.
5. The Defendant Jud Kuhn Chevrolet had the Plaintiff sign a Purchase Agreement with a preprinted "closing fee" of \$399.00.
6. S.C. Code §37-2-307 (2000) provides as follows:

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of Ten & No/100 (\$10.00)

Dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

7. A closing fee is allowed only for the reimbursement of costs which are actually incurred by the dealer and necessary to the closing transaction. Freeman v. JLH Investments, LP, Opinion No. 27586 filed November 4, 2015, S.C. Sup. Ct.

#### CLASS ALLEGATIONS

8. Plaintiff brings this action in a representative capacity for all persons similarly situated pursuant to Rule 23 of the South Carolina Rules of Civil Procedure and S.C. Code §56-15-110(2).

9. The class consists of those persons who have purchased vehicles from Jud Kuhn Chevrolet and were charged a closing fee.

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

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

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

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

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

#### FOR A FIRST CLAIM (Negligence)

15. The allegations of Paragraph Nos. 1 through 14 are incorporated as if fully set forth herein.

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

17. The Defendant has negligently violated the Dealers Act in one or more of the following particulars:

- a. In failing properly to register with the Department of Consumer Affairs;
- b. In failing to include the closing fee in the advertised price of the motor vehicles which includes the window sticker of the vehicle;
- c. In failing to display the closing fee in a conspicuous location in the motor vehicle dealership;
- d. In failing to have any disclosure approved by the South Carolina Department of Consumer Affairs; and
- e. In charging a closing fee which does not represent closing costs actually incurred by the Defendant.

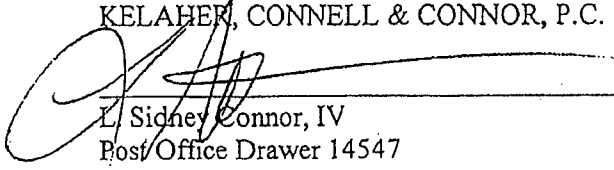
18. The aforementioned acts and omission's in violation of the Dealers Act were negligent, arbitrary, reckless, and willful.

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

20. Plaintiff prays for judgment against the Defendant for the amount of the closing fee for each class member, doubled pursuant to the Dealers Act, plus punitive damages up to three times the actual damages, plus costs and attorney's fees pursuant to the Dealers Act.

WHEREFORE, having fully pled his complaint, the Plaintiff prays for the relief as requested herein and for such other and further relief as this court may deem just and proper for the benefit of Plaintiff and all class members.

KELAHER, CONNELL & CONNOR, P.C.

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

December 21, 2015

**COPY**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
 )  
Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all other similarly situated, )  
 )  
Plaintiff )  
 )  
v. )  
 )  
Jud Kuhn Chevrolet, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
Civil Action No. 2015-CP-26-8921

ANSWER  
(Jury Trial Requested)

2015 DEC -2 11:10:54

Defendant, answering the Complaint of the above-named Plaintiff, hereby alleges as follows:

**FIRST DEFENSE**

1. Each and every allegation of the Complaint which is not hereinafter specifically admitted or denied is denied.
2. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶ 1 of the Complaint and therefore denies the same.
3. Defendant admits ¶ 2 of the Complaint.
4. Paragraph 3 of the Complaint states a legal conclusion which Defendant is neither required to admit nor deny.
5. Defendant denies ¶ 5 of the Complaint.
6. Defendant admits so much of ¶ 5 of the Complaint as alleges that the Plaintiff agreed to pay a closing fee or administrative fee in the amount of \$399.00.
7. Answering ¶ 6 of the Complaint, Defendant states that S.C. Code Section 37-2-307 speaks for itself, and denies ¶ 6 of the Complaint to the extent inconsistent therewith.

8. Paragraph 7 of the Complaint states a legal conclusion which Defendant is neither required to admit nor deny.

9. Answering ¶ 8 of the Complaint, Defendant states that the Complaint speaks for itself.

10. Paragraphs 9 through 14 of the Complaint states pure conclusions of law unsupported by any facts which Defendant is neither required to admit nor deny. To the extent that ¶¶ 9 through 14 of the Complaint can be construed to allege the existence of any fact, Defendant denies ¶¶ 9 through 14 of the Complaint.

11. Answering ¶ 15 of the Complaint, Defendant incorporates by reference ¶¶ 1 through 10 of this Answer as if stated verbatim herein.

12. Defendant admits so much of ¶ 16 of the Complaint as can be construed to allege that it is a motor vehicle dealer as defined in the Dealers Act, S.C. Code Ann. § 56-15-10 et seq.

13. Defendant denies ¶¶ 17 through 19 of the Complaint.

14. Answering ¶ 20 of the Complaint, Defendant denies that Plaintiff is entitled to relief.

**SECOND DEFENSE**  
(Mandatory Arbitration)

15. Plaintiff's claims are subject to mandatory arbitration.

**THIRD DEFENSE**  
(Representative Capacity)

16. Pursuant to the arbitration clause in Plaintiff's contract, Plaintiff cannot serve as a class representative or assert claims in a representative capacity.

**FOURTH DEFENSE**  
(Voluntary Payment)

17. Plaintiff's claims is barred under the voluntary payment rule.

**FIFTH DEFENSE**  
(Rule 12(b)(8))

18. Plaintiff's claim should be dismissed because another claim already exists between the same parties on the same claim. Plaintiff is a putative member of a class action filed against Defendant concerning closing fees in Aiken County, State of South Carolina.

**SIXTH DEFENSE**  
(Standing/Capacity)

19. Because an action already exists filed by another who purports to represent the Plaintiff in this case, Plaintiff lacks standing and/or capacity to maintain this action.

**SEVENTH DEFENSE**  
(Unconstitutional Statutory Provisions)

20. S.C. Code Ann. § 37-2-307, as construed by the South Carolina Supreme Court in *Freeman v JLH Investments*, is unconstitutionally vague.

**EIGHTH DEFENSE**  
(Rule 12(b)(6))

21. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action for violation of the Dealer's Act, S.C. Code Ann. § 56-15-10 et seq.

**NINTH DEFENSE**  
(Rule 23, SCRPC)

22. Upon information and belief, Plaintiff will not be able to plead and prove the prerequisites for maintaining a class action under Rule 23.

**TENTH DEFENSE**  
(Exclusive Remedy)

23. The South Carolina Consumer Protection Code provides the exclusive remedy for alleged violations of Section 37-2-307. Moreover, upon information and belief, the Consumer Protection Code does not authorize a representative action in this case.

**ELEVENTH DEFENSE**

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

24. Closing fees charged in motor vehicle transactions are authorized by the closing fee statute and the accompanying administrative interpretation. At all relevant times, Defendant complied with these requirements, and/or the administrative interpretation, and therefore should be entitled to safe harbor protections of the Consumer Protection Code.

**TWELFTH DEFENSE**

(Section 37-5-202(7), Good Faith Error)

25. To the extent that any violation of the Consumer Protection Code occurred, which Defendant denies, such violation was unintentional and resulted from a bona fide error not withstanding the maintenance of procedures reasonably adapted to avoid the error.

**THIRTEENTH DEFENSE**

(Filed Rate Doctrine)

26. Defendant has been required to and did at all relevant times file the maximum amount of its closing fee with the Department of Consumer Affairs. The Department of Consumer Affairs has accepted and approved the filed closing fee. Plaintiff's claims are therefore barred by the filed rate doctrine.

**FOURTEENTH DEFENSE**

(Injury Reasonably Avoidable)

27. Plaintiff's injury was reasonably avoidable. He was aware of the closing fee and had the option to walk away from the purchase. As a result, no violation of the Dealer's Act occurred.

**FIFTEENTH DEFENSE**

(Statutory and Punitive Damages Unconstitutional)

28. An award of statutory double damages or punitive damages in this case would violated the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution.

**SIXTEENTH DEFENSE**  
(Comparative Negligence)

29. Plaintiff is barred from relief in whole or in part by his comparative negligence.

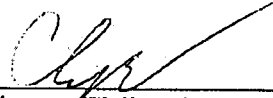
**SEVENTEENTH DEFENSE**  
(Mitigation of Damages)

30. Plaintiff is barred from relief to the extent that he failed to mitigate damages.

WHEREFORE, having answered the Complaint, Defendant prays that:

- a. the Complaint be dismissed with costs assessed against the Defendant; and
- b. for such other and further relief as the court deems just and proper.

Respectfully submitted,



H. Clayton Walker, Jr.  
Robert L. Reibold  
WALKER | REIBOLD  
Post Office Box 61140  
Columbia, SC 29260  
(803) 454-0955

ATTORNEYS FOR DEFENDANT

2/19, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the plaintiff's document has been served upon all plaintiff by mailing a copy properly addressed and with sufficient postage affixed thereto this 19 day of Feb, 2016.

Walker & Reibold Attorneys at Law

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Marcus Kevin Grant, Individually and in a representative capacity for all other similarly situated,

Plaintiff

v.

Jud Kuhn Chevrolet

Defendant.

IN THE COURT OF COMMON PLEAS

**COPY**

CASE NO.

2015-CP-26-8921

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney: L. Sidney Connor, IV, Esq. Bar No.: 1363 Address: PO Drawer 14547, Surfside Beach, SC 29587 phone: 843-238-5648 fax: 843-238-5050 e-mail: <a href="mailto:sconnor@classactlaw.com">sconnor@classactlaw.com</a> other:	Defendant's Attorney: H. Clay Walker, Jr., Esq. Bar No. 5779 Address: PO Box 61140, Columbia, SC 29260 phone: 803-454-0955 fax: 803-454-0956 e-mail: <a href="mailto:cwalker@walkerreibofd.net">cwalker@walkerreibofd.net</a> other:
---	--

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Motion to Compel Arbitration

Estimated Time Needed: 15 minutes Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

- Written motion attached  
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for  Plaintiff /  Defendants

November 30, 2016  
Date submitted

**SECTION III: Motion Fee**

PAID - AMOUNT: \$25.00

- EXEMPT: (check reason)
- Rule to Show Cause in Child or Spousal Support
  - Domestic Abuse or Abuse and Neglect
  - Indigent Status  State Agency v. Indigent Party
  - Sexually Violent Predator Act  Post-Conviction Relief
  - Motion for Stay in Bankruptcy
  - Motion for Publication  Motion for Execution (Rule 69, SCRPC)
  - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

Other:

**JUDGE'S SECTION**

- Motion Fee to be paid upon filing of the attached order.  
 Other:

JUDGE

CODE: \_\_\_\_\_ Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_

Date Filed: \_\_\_\_\_

MOTION FEE COLLECTED: \_\_\_\_\_

CONTESTED - AMOUNT DUE: \_\_\_\_\_

SCCA/233 (11-03)

**COPY**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 Marcus Kevin Grant, individually )  
 and in a representative capacity for )  
 all other similarly situated, )  
 )  
*Plaintiff* )  
 )  
 v. )  
 )  
 Jud Kuhn Chevrolet, )  
 )  
*Defendant.* )  
 )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-8921

NOTICE OF MOTION AND MOTION  
 TO COMPEL ARBITRATION

2015 DEC - 6 AM 10:14  
 HORRY COUNTY

TO: L. SIDNEY CONNER, ESQUIRE, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof or as soon thereafter as counsel may be heard, Defendant will, pursuant to Rule 12(b)(1), SCRCPC, and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, move before the presiding judge of the Horry County Court of Common Pleas at the Horry County Courthouse for an order compelling Plaintiff Marcus Grant to individually arbitrate his claims, and staying this case pending the completion of arbitration. "Arbitration is a favored method of settling disputes in South Carolina." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).

As grounds for this motion, Defendant would show the Court the following:

1. Or about July of 2013, Plaintiff purchased a used a 2010 Chevrolet Camaro from the Defendant. The transaction involved interstate commerce. For example, the purchase was financed by GM Financial, located in Arlington, Texas. Plaintiff also enrolled in an on-star program. Finally, as part of the transaction, Plaintiff enrolled in a U.S. Key Replacement Plan administered by Brickell Financial Services-Motor Club, Inc., located in Miami, Florida.

COPY

2. The parties agreed to arbitrate all disputes in connection with the purchase. The contract to purchase the vehicle contained an arbitration clause, which reads:

**ARBITRATION REQUIRED BY THIS AGREEMENT.** The parties agree that instead of litigation in a court, any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order, including the validity or lack thereof of this contract, to any other document or agreement between the parties relating to sale of the motor vehicle, or to any other document or agreement between the parties relating to the motor vehicle, including the parties' retail installment contract, if any, shall be settled by binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules. Such arbitration shall be conducted in Columbia, SC. Each party will pay its own costs, and any filing fee charged by the American Arbitration Association shall be split evenly between the parties. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

(Purchase Order).

3. This arbitration clause is broad, and the claims asserted by Plaintiff fall within the scope of the arbitration clause. The Complaint alleges that in connection with the purchase of his automobile, Plaintiff was improperly charged a fee for the Defendant's work in closing the transaction, or, alternatively, that the fee charged for closing the transaction was in excess of what is permitted by law. This dispute is one "relating to the sale of the motor vehicle" or to the Purchase Order, which reflects the assessment of the closing fee. Any doubts as to whether the dispute falls within the scope of the arbitration clause should be resolved in favor of arbitration. *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323 (unless a court can say with positive assurance that an arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered). Because the parties agreed to arbitrate, and the claims asserted fall within the arbitration clause, arbitration must be ordered.

4. Defendant, however, cannot be required to arbitrate with Plaintiff if Plaintiff acts in a representative capacity. The United States Supreme Court has held that "a party may not be

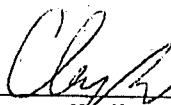
compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 683 (2010) (emphasis in original). It explained that:

[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.

*Id.* at 684. Accordingly, because the arbitration agreement does not affirmatively state that class actions are permitted, class actions are not permitted.

Therefore, Defendant asks this Court to enter an order compelling Plaintiff to arbitrate his dispute with Defendant in an *individual* capacity only and staying this case pending arbitration. This motion is based upon the pleadings, applicable law, and the affidavit of Gregg Smith filed herewith. I certify that consultation with opposing counsel concerning the subject matter of this motion would serve no useful purpose.

Respectfully submitted,



H. Clayton Walker, Jr.  
Robert L. Reibold  
Walker Reibold, LLC  
PO Box 61140  
Columbia, SC 29260  
(803) 454-0955  
(803) 454-0956/facsimile  
[cwalker@walkerreibold.net](mailto:cwalker@walkerreibold.net)

2016 DEC -6 AM 10:14

11/30, 2016

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been served upon all Counsel by mailing a copy properly addressed and with sufficient postage affixed thereto this 30<sup>th</sup> day of Nov, 2016.  
Cesair Oese  
Walker & Reibold, Attorneys at Law

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF Horry )

Civil Action No. 2015-CP-26-8921

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all other similarly situated, )

*Plaintiff* )

AFFIDAVIT IN SUPPORT OF MOTION  
TO COMPEL ARBITRATION

v. )

Jud Kuhn Chevrolet, )

*Defendant.* )

PERSONALLY APPEARED BEFORE ME the undersigned, who being duly sworn,  
deposes and says that:

2015 DEC -5 AM 10:14  
Horry County  
Clerk of Court

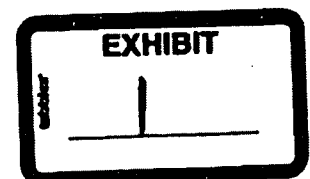
1. I am over 18 years of age, am competent to testify, and have personal knowledge  
of the matters set forth herein. I have read the Complaint filed in this action.

2. In July of 2013, I was the finance manager for the Defendant Jud Kuhn Chevrolet.

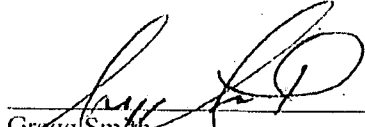
3. I was involved in the transaction involving Marcus Grant described in the  
Complaint.

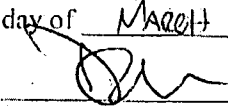
4. Attached hereto are true and accurate copies of the following documents  
which were executed in Plaintiff's transaction:

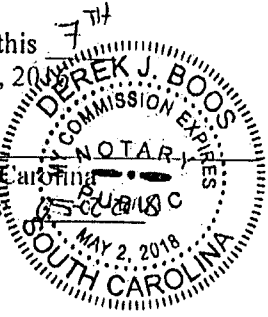
- a. Retail Buyer's Order
- b. On Star Subscription Confirmation
- c. US Key Replacement Plan; and



d U.S. Treasury Check endorsed as partial payment.

  
\_\_\_\_\_  
Gregg Smith

SWORN TO before me this 7<sup>TH</sup>  
day of March, 2014  
  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires 5-2-18





**JUD KUHNS CHEVROLET**  
 PHONE: (843)399-4400  
 3740 HIGHWAY 9 EAST  
 LITTLE RIVER, SC 29566

**RETAIL BUYERS ORDER**

Salesman SURAN K ROBERTS

Date Ordered 07/06/2013

Date of Delivery 070613

Driver's License # 008989537

E-Mail Address \_\_\_\_\_

Home Phone # (843)250-5304

Work Phone # (843)752-4810

County HORRY Zip 29574

CUST #: 51949

DEAL #: 53418

Purchaser(s) MARCUS KEVIN GRANT

Purchaser(s) \_\_\_\_\_

Address 1805 HERULE TANE

City MULLINS

SC

Enter my order for: Yr. 2010 Make CHEVROLET Model CAMARO Type 2DR COUPE Color RED JEWEL

Stock # PJ315 Mileage 15642 Serial # 251C1EVS9A9125266

DISCLAIMER OF WARRANTIES BY DEALER: This only express warranties, if any, applying to the motor vehicle are those stated by the manufacturer. DEALER MAKES NO EXPRESS WARRANTIES OF THE MOTOR VEHICLE.  
 The above motor vehicle is being sold "AS IS" and "WITH ALL FAULTS" and DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.  
 DEALER NEITHER ASSUMES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR DEALER ANY LIABILITY IN CONNECTION WITH THE SALE OF THIS VEHICLE. PURCHASER SHALL NOT BE ENTITLED TO RECOVER FROM THE DEALER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS, OR INCOME, OR INCIDENTAL DAMAGES.  
 THE INFORMATION DISPLAYED ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISION IN THE CONTRACT OF SALE.

IF TRADE-IN IS INVOLVED PLEASE SIGN AFFIDAVIT ON PAGE 2

Allowance		N/A
Payoff	N/A	Good Until
Payoff Ducted By		
Balance Owed To		
Street	City	State
Account No.		
Make Used Car		Year
Serial No.		
Model		
Mileage		

Fin Holder GM FINANCIAL  
 Address PO BOX 182673  
 City ARLINGTON  
 State TX Zip 76010-2673

PURCHASER MAY CHOOSE THE PERSON WHICH THE INSURANCE IS OBTAINED FROM  
 NAME OF INSURER \_\_\_\_\_  
 POLICY NUMBER \_\_\_\_\_  
 PURCHASER IS NOT REQUIRED TO OBTAIN CREDIT LIFE INSURANCE COVERAGE AND/OR A & H INSURANCE

PRICE	27900	00
ELECTRONIC TITLING	21	15
TOTAL PRICE	27921	15
TRADE IN ALLOWANCE / DISCOUNT		N/A
SUB TOTAL / TRADE DIFFERENCE	27921	15
ADMINISTRATIVE FEE	399	00
TOTAL (AMT. TO BE TAXED)	28320	15
SALES TAX 5.000 %	300	00
TAG & TITLE FEES	116	00
TOTAL CASH PRICE	28736	15
BALANCE OWED ON TRADE		N/A
REBATE		N/A
CASH DUE ON DELIVERY	2500	00
TOTAL CASH DOWN PAYMENT	2500	00
UNPAID BALANCE	26236	15
FOR CREDIT LIFE		N/A
FOR CREDIT DEBITILITY		N/A
FOR SERVICE CONTRACT		N/A
WAP		N/A
FOR		N/A
TOTAL OTHER CHARGES AND ALLOWANCE FOR TO OTHERS ON YOUR BEHALF		N/A
TOTAL UNPAID AMOUNT FINANCED	26236	15

ARBITRATION REQUIRED BY THIS AGREEMENT: The parties agree that in the event of litigation in a court, any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order, including the validity or lack thereof of this contract, or to any other document or instrument between the parties hereto shall be settled by binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules. Such arbitration shall be conducted in Columbia, SC. Each party shall pay its own costs, and any filing fee charged by the American Arbitration Association shall be split evenly between the parties. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

THIS PURCHASE ORDER IS FINAL WITH REGARD TO PRICE and shall not be affected by any marketing programs, including but not limited to coupons, special incentives, rebates or special financing programs.  
 THIS AGREEMENT IS NOT BINDING UNTIL ACCEPTED BY DEALER'S AUTHORIZED REPRESENTATIVE. IF ACCEPTED, DEALER SHALL NOT BE OBLIGATED TO SELL THE MOTOR VEHICLE UNTIL COMMITMENT IS OBTAINED BY A BANK OR FINANCE COMPANY TO PURCHASE A RETAIL INSTALLMENT CONTRACT BETWEEN THE PARTIES HERETO BASED ON THE TERMS HEREOF AND THE PARTIES SIGN SUCH RETAIL INSTALLMENT CONTRACT OR UNTIL PURCHASER PAYS TO DEALER THE AMOUNT SHOWN ON PAGE 1 AS THE BALANCE DUE AFTER TRADE-IN OR DOWN PAYMENT. If accepted by dealer, Dealer does not agree to extend credit to Purchaser, and this Purchase Order shall not be construed as an agreement to extend such credit. However, Dealer reserves the right, as its sole option and discretion, to extend credit.  
 THE ADDITIONAL TERMS AND CONDITIONS ARE INCORPORATED BY REFERENCE, WHICH MEANS THAT THEY ARE PART OF THIS CONTRACT JUST AS IF THEY WERE PRINTED HERE. PURCHASER ACKNOWLEDGES RECEIPT OF A TRUE AND COMPLETED COPY OF THIS PURCHASE ORDER, AND AUTHORIZES INVESTIGATION OF PURCHASER'S CREDIT AND EMPLOYMENT HISTORY AND THE RELEASE OF INFORMATION CONCERNING SUCH CREDIT AND EMPLOYMENT HISTORY.

WITNESSE THE SIGNATURE OF THE PURCHASER AND CO-PURCHASER, IF ANY, this 06 day of JULY, 2013  
 Purchaser Marcus K. Grant Co-Purchaser N/A  
 Accepted by Dealer MARCUS KEVIN GRANT

(BY: \_\_\_\_\_)

ADDITIONAL TERMS AND CONDITIONS ON PAGE 2

LIENHOLDER

ADDITIONAL TERMS AND CONDITIONS

- 1. **DEFINITIONS:** As used in this Purchase Order the terms (a) "Dealer" shall mean that Dealer which is named on page 1 hereof, which shall become a party to this agreement only when an authorized representative of the Dealer signs page 1; (b) "Purchaser" shall mean any party signing this Purchase Order as such on page 1 hereof, including the Co-Purchaser, if any; (c) "Proprietor" means a motor vehicle which was originally sold by the manufacturer for rental purposes and later repurchased by the manufacturer and/or the Dealer; (d) "Factory Executive" means a motor vehicle owned and used by the manufacturer prior to sale to Dealer; (e) "Demo" means a motor vehicle used by the employees of the Dealer prior to sale.
- 2. **WARRANTY OF PURCHASER:** Purchaser warrants to Dealer that Purchaser has good title to any listed trade-in vehicle and that trade-in vehicle is free from any encumbrance and all debts except those which are identified and specifically set forth on page 1. If additional amount is needed in clear title of all items, Purchaser agrees to pay such amount to the Dealer immediately. Purchaser further agrees to pay to Dealer the cost of obtaining a duplicate title to the trade-in vehicle, if necessary. Purchaser assumes and agrees to pay, unless prohibited by law, and starting in sales or usage taxes imposed on or applicable to the transaction covered by this Purchase Order, regardless of which party may have primary tax liability therefor. Further Purchaser warrants that Purchaser is 18 years of age or older and will execute all documents necessary to transfer title to trade-in vehicle to the Dealer.
- 3. **DELIVERY AND DOCUMENTARY FEE:** The "Delivery and Documentary Fee" shown on page 1 may be changed by the Dealer for reimbursement of fees paid and for services rendered by the Dealer for the Purchaser which are not required by law to be performed or paid by Dealer, but which are customarily provided by motor vehicle dealers in the competitive marketplace. The amount of the fee does not necessarily represent the actual costs or expenses to Dealer but to an estimate based on Dealer experience. If the amount is less than Dealer's actual costs or expenses, then Dealer shall retain the difference as additional profit; if more, Dealer shall absorb the difference by reducing its profit. Examples of the fees paid or services rendered include, but are not limited to: cleaning the vehicle; preparing documents related to the sales contract; computing; collecting and remitting the motor vehicle usage tax to the County Clerk; transferring the title to any trade-in to Dealer's name; an inspection by the local sheriff's office for vehicles previously registered out of state; preparing an odometer disclosure form, if needed; determining the amount of financed balance, if any, owed on any trade-in vehicle and obtaining a release of the lien on the vehicle from the appropriate financing institution; obtaining and obtaining license plates if required; securing physical damage insurance if requested; securing power of attorney authorization where required; verification of physical damage insurance; clerical necessities such as record keeping, costs of temporary tags, costs of forms (determination of warranty terms, key tags, buyers orders, etc.); sufficient amounts of gasoline for delivery; and possible late rate charges that the Dealer assesses when work exceeds factory time scheduled, e.g. water leaks, air leaks, squeaks, rattles, etc.
- 4. **FAILURE TO OBTAIN FINANCING:** Dealer is not obligated to sell under this Purchase Order unless financing is approved by a lending institution satisfactory to Dealer at Dealer's sole discretion (or until Purchaser pays the Balance Due After Trade-In or Down Payment to Dealer in cash). If approval of financing is not obtained or Purchaser does not pay the balance shown on page 1 to Dealer in cash within seven (7) days from the date of this agreement, the Purchaser shall return the vehicle delivered under this Purchase Order, less Dealer's expenses and/or damages, including but not limited to repair of any physical damage to the vehicle, \$1.00 per mile in excess of 25 miles per day or 150 miles, whichever is less, reasonable attorney fees and costs associated with enforcing this agreement, plus any other incidental and consequential damages Dealer suffers as a result of the failure to obtain approval of financing or payment shown on page 1. If the trade-in vehicle has been sold by Dealer, then Purchaser shall be entitled to reimbursement of the actual cash value of the trade-in vehicle, less the expenses and/or damages described above, regardless of the amount of any trade allowance and/or discount allowed by the Dealer. Purchaser agrees to indemnify and save Dealer from liability for any and all debts, obligations, damages, claims, demands, actions, suits, proceedings or judgments of any kind or nature, arising directly or indirectly from, as a result of, or otherwise connected with this Purchase Order or Purchaser's possession of the motor vehicle, as well as from the costs, including reasonable attorney fees, of defending against them. Purchaser shall maintain in full force and effect insurance to cover damage to the motor vehicle and liability arising from the operation of the same.
- 5. **INSPECTION AND ACCEPTANCE OF VEHICLE:** If the motor vehicle purchased is a new vehicle, it is possible that some minor scratches, dents, or damage may have occurred to the vehicle as a result of shipping. These units are inspected upon arrival at the dealership, and all of the minor damage except the shipment of flaws is corrected in Dealer's shop using authorized factory personnel. Dealer agrees to inspect the vehicle with Purchaser at the time of delivery and discuss any of these items, should Purchaser request. If the motor vehicle being purchased is a used vehicle, Purchaser accepts it in its present condition. Inasmuch as the vehicle is used, it is possible that it has previous body, structural, or mechanical problems and has been repaired. Purchaser acknowledges the right was offered to obtain an independent inspection and evaluation of the vehicle to determine the nature or extent of any prior repairs. The used vehicle may also have previously been issued a rebuilt or salvaged title from a state licensing authority prior to the Dealer's purchase thereof.
- 6. **IN EITHER CASE, THE PURCHASER, BY EXECUTING THIS DOCUMENT, ACKNOWLEDGES THAT PURCHASER HAS INSPECTED THE VEHICLE ITSELF, AND ACCEPTS IT IN ITS PRESENT CONDITION, IN BOTH PHYSICAL APPEARANCE AND MECHANICAL OPERATION.**
- 7. **MOTOR VEHICLE AIR CONDITIONING UNIT:** If the motor vehicle being purchased is a used vehicle, Purchaser understands that it may be equipped with an air conditioning unit which requires a refrigerant known as R12, commonly known as Freon. Purchaser acknowledges that federal law prohibits (or will prohibit) the further production of Freon. If the air conditioning unit requires repair or major service, it may become necessary to convert to use a refrigerant other than Freon. Purchaser acknowledges that the entire cost of such repair and/or conversion shall be borne by Purchaser shall have no obligation relating to the air conditioning unit or its conversion at any time, now or in the future. Purchaser may obtain a detailed publication on this subject from the United States Environmental Protection Agency, The Office of Air and Radiation Stratospheric Protection Division.
- 8. **ADDITIONAL DOCUMENTS:** The Purchaser, before or at time of delivery of the motor vehicle covered by this Purchase Order, will execute such other forms of agreement or documents as may be required by the terms and conditions of this Purchase Order.
- 9. **CONSEQUENTIAL DAMAGES: PURCHASER SHALL NOT BE ENTITLED TO RECOVER FROM DEALER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS, LOSS OF INCOME, OR ANY OTHER INCIDENTAL DAMAGES.**
- 10. **FINALITY OF AGREEMENT:** Purchaser agrees that this Purchase Order including all of the terms and conditions on both pages hereof, and any other documents signed by Purchaser on this date (and any retail installment contract as described below) cancels and supersedes any prior agreement, and as of this date, the written documents comprise the complete and exclusive statement of the terms of the agreement relating to the subject matters covered hereby. This Purchase Order can be modified only by a writing signed by the parties hereto or the duly authorized representative of the parties. Purchaser is not relying upon any opinion, promise, statement, or representation made by any salesperson or other employee of the Dealer that is not set out in the written agreements. If any provision in these agreements is determined to be unenforceable, the remaining provisions shall remain in full force and effect. The validity, construction and enforceability of these agreements shall be governed by the laws of South Carolina except to the extent that such laws are superseded by federal law.

PURCHASER AGREES TO PAY ANY DIFFERENCE (SHORTAGE) BETWEEN THE BALANCE DUE ON TRADE-IN (SHOWN ABOVE), WHICH IS THE PAYOFF GIVEN TO DEALER BY PURCHASER'S LIENHOLDER AND THE AMOUNT OF THE ACTUAL PAY-OFF. PURCHASER ALSO AGREES TO PAY ANY DIFFERENCE (SHORTAGE) IN SALES OR USE TAX IMPOSED OR APPLICABLE TO THE TRANSACTION COVERED BY THIS PURCHASE ORDER AND ANY TAX LIENS ON THE TRADE-IN. ANY OVERTAGES WILL BE REFUNDED BY DEALER TO PURCHASER.

AFFIDAVIT TO BE USED WHEN TRADE-IN IS INVOLVED

Purchaser is the sole, true and lawful owner(s) of the trade-in vehicle described (with current year paid registration on page 1 of this Retail Buyers Order and Purchaser certifies that the Purchaser is of legal age and competent to make this contract. Purchaser hereby sells and transfers to Judd Kuhn Pre-Owned Advantage said vehicle and Purchaser warrants Purchaser has absolute title thereto and that said vehicle is free from any liens or encumbrances of any nature except as disclosed on page 1 hereof. Purchaser hereby represents, warrants, and guarantees that the trade-in vehicle has not been damaged beyond normal wear and tear and is not nor has it been subject to salvage title or to the operation of the laws of South Carolina or any other jurisdiction regarding salvage titles or vehicles. Purchaser makes the representations, warranties, and guarantees herein with full knowledge and understanding that the Seller herein is relying upon them and for the purpose of inducing the Seller to accept the trade-in for the value stated. Purchaser will transfer title and said trade-in vehicle upon execution of this contract or in the event it is not available at the time this contract is executed Purchaser hereby agrees that Seller is given a power of attorney to apply for a duplicate certificate of title to transfer to said vehicle on Purchaser's behalf.

"I HAVE READ AND AGREE TO ALL ABOVE TERMS AND CONDITIONS."

Signature NIA Harlan K. Grant

LIENHOLDER

Date N/A

# OnStar Subscription Confirmation

(Please give a copy to your customer)

<b>VEHICLE INFORMATION</b>
MAKE: CHEVROLET
MODEL: Camaro
YEAR: 2010
VIN: 2G1FC1EV9A9125266
Activation Date: July 6, 2013



*OVD  
Dmn  
GO NINE*

MARCUS GRANT, WELCOME!

Follow the simple steps below to begin enjoying the safety and convenience of OnStar right away!

Start by pressing the blue OnStar button located on your rear view mirror or console to ensure your OnStar service activation is complete. The advisor will:

- Offer to enroll you in OnStar Vehicle Diagnostics at no additional charge as part of your OnStar subscription (e-mail address required).
- You may share your diagnostic information with your dealer by enrolling in Dealer Maintenance Notification. Ask your dealer about their participation in the program.
- Offer you Hands-Free Calling minutes at a special promotional price.
- Answer any questions you may have about the OnStar Service that comes with your vehicle.

### 3 MONTHS ON US

Vehicle purchase includes 3 Months of the OnStar Directions & Connections Plan.

This Plan includes:

- Access to OnStar Hands-Free Calling
- OnStar Vehicle Diagnostics
- Automatic Airbag Deployment Response
- Remote Door Unlock
- Roadside Assistance
- Crisis Assist
- Stolen Vehicle Location Assistance
- Turn-by-Turn Navigation (if equipped)
- Emergency Services

Visit [onstar.com](http://onstar.com) for coverage maps, details and system limitations. Services vary by model and conditions.

### ACTIVE ONSTAR SUBSCRIBER DISCOUNT



Some insurance companies offer a discount for vehicles equipped with OnStar.

Take this coupon to your insurance provider to see if you are eligible.

<b>VEHICLE INFORMATION</b>
VIN: 2G1FC1EV9A9125266
Customer Name: marcus grant
Activation Date: July 6, 2013

**U.S. KEY**  
KEY REPLACEMENT PLAN

GKR 0080114

MEMBER INFORMATION			
MARCUS KEVIN GRANT			
(114.3) 250-5 300			
1805 MERLIE LANE MULLINS SC 29579	Company Name	E-mail Address	Telephone Number
Street Address	City	State	Zip

DEALER/LENHOLDER INFORMATION			
JUD KUHN CHEVROLET 3740 HWY 9 LITTLE RIVER SC 29566			
GM FINANCIAL	PO BOX 102073 ARLINGTON TX 76096-2073	Dealer Code	
Lenholder	Address	City	State Zip

VEHICLE INFORMATION					
2010 CHEVROLET CAMARO RED JEWEL					
Year	Make	Model	Cnr Color	Odometer Reading	Vehicle Identification Number
				15642	2G1FC1EV9A9125266

VEHICLE TYPE		MEMBERSHIP PERIOD	
<input type="checkbox"/> Automobile (CLASS 1 & 2)	<input type="checkbox"/> Motorcycle/Scooter (CLASS 3 & 4)	<input type="checkbox"/> Powersport/RV (CLASS 0)	EFFECTIVE DATE: 07/06/2013
<input checked="" type="checkbox"/> 1 Year <input type="checkbox"/> 2 Years <input type="checkbox"/> 3 Years <input type="checkbox"/> 4 Years <input type="checkbox"/> 5 Years		EXPIRATION DATE: _____	
		PURCHASE PRICE: \$ N/A	

- DEFINITIONS:**
- Membership means the rights to the benefits within this U.S. Key Replacement Plan Agreement.
  - WE, US, OUR and Road America means Bickel Financial Services-Motor Club, Inc. the Road America Motor Club, its Administrator and Officer on this Membership, located at 7300 Corporate Center Drive, Suite 801 Miami, FL 33126. (For Mississippi and Wisconsin members, services are provided by Bickel Financial Services-Motor Club, Inc. For California members, services are provided by Road America Motor Club, Inc.) All entities are referred to as "Road America" throughout this Agreement.
  - YOU or YOUR mean the purchaser of this Membership.
  - Registered Vehicle or Registered Vehicle means the vehicle identified above by Vehicle Identification Number, Year, Make, and Model.
  - Key(s) means up to two (2) properly functioning master keys and transponders (where applicable) provided to YOU at the time of the Registered Vehicle's original delivery. Eligible Key(s) means those Key(s) and additional keys owned by YOU and contained on YOUR key ring with the U.S. Key key tab attached to the key ring.
  - The Eligible Key(s) must have the U.S. Key key tab attached to the key(s) to be applicable.

- ADDITIONAL MEMBERSHIP BENEFITS INCLUDE:**
- |   |  |                        |
|---|--|------------------------|
| A. 24-Hr Vehicle Ignition Lock-Out Assistance | D. Key Recovery                                | G. Sewing Connection   |
| B. 24-Hr Home Lock-Out Assistance             | E. Emergency Towing Assistance                 | H. Custom Trip Routing |
| C. Additional Key Replacement Coverage        | F. Emergency Travel Expense (Automobiles Only) |                        |
- This Membership commences on the Effective Date and continues thereafter depending on which Membership Period (Term) is selected above unless cancelled. All claims must be reported to Road America during the term of this Membership.

PRIOR AUTHORIZATION	
Prior to the initiation of any service under this Membership, YOU must first receive prior authorization by contacting Road America Motor Club at 1-866-518-7602.	
You have read this Membership in its entirety and fully understand its contents and acknowledge receipt and copy thereof. You also acknowledge receipt of at least two (2) sets of properly functioning master keys and/or transponders (where applicable) for the Registered Vehicle above.	
<i>Marcus K Grant</i> 07/06/2013	07/06/2013
MEMBER SIGNATURE	DATE
<i>[Signature]</i>	DATE

**U.S. KEY**  
KEY REPLACEMENT PLAN

If you have lost or damaged your keys,  
are locked out of your car or house,  
please call 24 hours a day, 7 days a week  
**EMERGENCY SERVICE**  
(866) 518-7602

\* This membership is effective for the term selected on your Membership application. See application for complete details, terms and conditions.

CLAIMS AND CUSTOMER SERVICE (866) 518-7602

Top White—U.S. Key • Canary—Dealer • Green—Member • Bottom White Page—Member

USWC GKR 06/12

United States Treasury

16-51  
000 K 881,208,750

Check No.



07 01 13 24 KANSAS CITY, MO  
3091 19557920 36000201 V3 C619 01A2

3091 19557920

Pay to  
the order of

MARCUS KEVIN GRANT  
1805 MERRIE LN  
MULLINS SC 29574

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COMP

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VOID AFTER ONE YEAR

PERSONAL USE ONLY



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*Marcus Kevin Grant*



Court has approached adhesion contracts between a consumer and automobile retailer with “considerable skepticism.” *Id.* An arbitration clause can be unconscionable if the expenses of arbitration as compared to the Court system are unaffordable to the Plaintiff so as to prohibit the Plaintiff from being able to vindicate his claims in arbitration. The Courts have recognized that the Plaintiff must have some forum to vindicate his rights and therefore the Courts have formulated what is known as the Effective Vindication Exception to the FAA.

#### **EFFECTIVE VINDICATION EXCEPTION TO THE FAA**

The Courts have recognized what is referred to as “The Effective Vindication Exception to the FAA.” See *Am. Express Co. v. Italian Colors Rest.*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2304 (2013) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The Effective Vindication Exception to the FAA requires that an Arbitration Agreement which prohibits the use of the judicial forum must also provide for an effective and accessible alternative forum. If the Plaintiff cannot afford the alternative forum, then the arbitration clause is unconscionable and would be unenforceable under the savings clause of the FAA. The effective vindication exception to the FAA recognizes that an arbitration clause cannot work to totally deprive a Plaintiff of any forum to hear his claim. A Plaintiff must be able to vindicate his claim somewhere.

The effective vindication exception to the FAA has most recently been explained and upheld in the case of *Nesbitt v. FCNH, Inc.*, 811 F.3d 371 (10<sup>th</sup> Cir. 2016). In *Nesbitt*, the Plaintiff filed a wage and hour claim against the Defendant. The Defendant was a for profit occupational school. The Plaintiff claimed that she was required to perform massage therapy for customers of the for-profit school but was not compensated for those services. The Plaintiff

claimed that this was a violation of the Fair Labor Standards Act and various Colorado wage and hour laws. She brought the claim as a class action.

The arbitration clause in Nesbitt is similar to the arbitration clause in the present case in that it required arbitration to be conducted in accordance with the Commercial Rules of the American Arbitration Association. The Nesbitt arbitration clause went even further, however, and precluded the Plaintiff from bringing a class action. The Defendant moved to stay the proceedings and to compel the Plaintiff to arbitrate her individual claims against the Defendants. The Defendant also moved to deny the Plaintiff the right to represent a class. The District Court denied the Defendants' motion. The Tenth Circuit then affirmed the District Court's ruling finding that the requirement for the Plaintiff to arbitrate her claims denied her an effective vindication of her rights. The Court cited its prior ruling in Shankle v. BG Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10<sup>th</sup> Cir. 1999). In Shankle the Court noted that the Arbitration Agreement required the Plaintiff to pay for half the arbitrator's fees and found that she could not afford such a fee. Based on the same rationale, the Nesbitt court rejected the Defendant's argument that the Plaintiff had failed to satisfy her burden on the effective vindication issue because she presented no evidence regarding the cost of prosecuting her class action. The Court stated, "We are under no obligation to consider this argument, however, because the Defendants failed to raise it below." 811 F.3d at 379.

The arbitration clause in the case at bar makes arbitration unaffordable to the Plaintiff in three particulars;

1. The Agreement requires the application of the Commercial Arbitration Rules of the American Arbitration Association. The Plaintiff is a consumer and purchased the vehicle for personal use. The Plaintiff cannot afford the fees under the Commercial Arbitration Rules.

2. The arbitration clause requires each party to pay its own costs. The fees charged by the AAA will be split between the parties. The filing fees and arbitrator fees under the Commercial Arbitration Rules can range from \$750 to several thousand dollars, depending on the length of the hearing and the charges of each individual arbitrator. The Plaintiff cannot afford these fees.

3. The arbitration clause requires arbitration in Columbia, SC. Both the Plaintiff and Defendant are located in Horry County, South Carolina, approximately a three (3) hour drive from Columbia. It is unreasonable and unconscionable to require consumers to travel three (3) hours to an arbitration proceeding.

In the present case, the Plaintiff has presented an Affidavit of counsel setting forth the anticipated cost in arbitration of an individual claim as well as a class action. The Plaintiff has also provided Affidavits attaching the Administrative Fee Schedules of the Commercial Arbitration Rules of the AAA as well as the Supplementary Rules for Class Arbitrations showing the fees for a class action filing. The Plaintiffs have also presented an Affidavit of the Plaintiff showing the Plaintiff's hourly wages to be \$17.16, that his living expenses consume all of his wages and that he has little or no discretionary income. The Plaintiff cannot afford either the cost of an individual arbitration or a class arbitration under the Fee Schedules of the AAA. Therefore, the Plaintiff has no forum for the effective vindication of his rights. Under the savings clause of the FAA, the arbitration clause in this case does not provide an affordable forum for the effective vindication of Plaintiff's claim.

In the case of Bradford v. Rockwell Semi-Conductor Systems, Inc., 238 F.3d 549 (4<sup>th</sup> Cir. 2001), the Fourth Circuit Court of Appeals ruled that evaluating whether arbitration is a

financially adequate substitute to litigation will be decided on a case by case basis. The Court stated that this analysis should focus “among other things” on three issues:

The Claimants ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims. [238 F.3d at 556.]

In the case at bar, the Plaintiff has filed Affidavits which address these three issues:

1. **No ability to pay.** The Plaintiff makes only \$17.16 per hour and has limited ability to pay costs and fees and no ability to pay the arbitration fees and costs as set forth in the AAA’s fee schedule for either commercial arbitration or for class action arbitration.
2. **Cost differential.** The Affidavits make clear that the anticipated cost differential between a claim in State Court and arbitration is the difference between the State Court filing of \$150 and the commercial filing of \$750 plus arbitrator’s fees or the class action filing fee of \$3,350. Probably the biggest difference in costs is that the Plaintiff does not have to pay for a Judge in State Court but would have to pay at least half the costs of an arbitrator under the AAA Arbitration Rules and under the provisions of the arbitration clause itself. If just the filing fee is considered, the filing fee of \$750 under the Commercial Arbitration Rules is five times higher than the filing fee in State Court. Therefore, this differential is a multiple of five. The filing fee under the class action rules is over twenty-two times higher than the filing in State Court. These multiples do not even begin to consider the additional costs of one-half of the arbitrator’s fees. Therefore, the expected cost differential between arbitration and litigation in Court is substantial.
3. **Substantial.** The cost differential between arbitration and litigation in Court is so substantial that it would deter the bringing of claims and would make it impossible for this particular Plaintiff to bring an action based upon his meager income. The cost differential is five times under the most conservative approach even when arbitrator’s fees are not considered. When arbitrator’s fees are considered under the Commercial Rules, this multiple could easily be twenty times or more the costs involved in State Court. This multiple increases exponentially when the filing fees and arbitrator’s fees for class arbitrations are considered.

The case of Gonzalez v. Menard, Inc., 534 F.Supp.2d 815 (ND. Ill. 2008) addressed the issue of the costs of Class Action Arbitration fees and expenses. That case addressed the very same supplemental rules from the AAA. The District Court found that the Plaintiff’s had

demonstrated that arbitration would be “prohibitively expensive” and therefore the Court denied the Defendant’s Motion to Compel Arbitration. The District Court had this biting comment as to the Defendant’s true purposes:

[The Defendants’] response equates to an in terrorem effort to discourage this or any other proposed class action, an effort that runs counter to the basic principles that are implicit in Fed.R.Civ.P.23.

Likewise, in the present case, the Defendant’s main goal is to frustrate the purposes of South Carolina’s Rule 23 as well as the specific provisions for class treatment contained in the Dealer’s Act which are intended to protect consumers.

The Defendant cites the United States Supreme Court Case of Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010). That case, however, did not involve the issue of effective vindication. The Stolt-Nielsen case is an appeal from an arbitration panel’s decision allowing a class action to go forward. The arbitration clause at issue was “silent” on class wide arbitration. The Supreme Court held that imposing class arbitration on parties who have not agreed to authorize class arbitration was inconsistent with the Federal Arbitration Act. The present case is significantly different and distinguishable.

First, the present case concerns a consumer and not sophisticated business entities. Stolt-Nielsen involved sophisticated business entities who were in fact shippers and shipping companies who shipped their goods internationally. The issue of the costs of arbitration or the costs of class arbitration was not discussed at all in Stolt-Nielsen. There was no analysis of financial ability. In the present case, the Plaintiff Marcus Kevin Grant is a consumer with very limited financial ability. His Affidavit states that he makes \$17.16 an hour.

Second, the arbitration clause in Stolt-Nielsen was indeed “silent” as to class action treatment in arbitration. In the present case, however, the arbitration clause at issue is not silent

as to class action treatment. The entire agreement between the dealer and the purchaser is subject to the provisions of the South Carolina Manufacturers, Distributors and Dealers Act (Dealers Act). The Dealers Act is very specific in terms of the rights of consumers to band together in a class action. S.C. Code Ann. §56-15-110(2) provides “When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief.” This is a specific consumer remedy recognizing that some losses suffered by consumers may be so small that the loss would not warrant the filing of a single action. The Dealers Act recognizes that consumers are particularly vulnerable to abusive fees charged by dealers and therefore specifically provides for consumers to band together to seek justice against these unscrupulous charges and activities. The arbitration clause contained in the purchase agreement in this case cannot be read separately from the requirements and the protections provided by the Dealers Act. These protections are presumed to be a part of any contract and therefore the Purchase Agreement and the arbitration clause are not silent as to whether a class action can be brought in arbitration.

The South Carolina Supreme Court addressed class actions under the Dealer’s Act in the case of Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I). The Court found that an Arbitration Agreement which prohibited class actions in direct contravention of the Dealers Act is against public policy. The Court noted that in addition to specifically providing for class actions, the Dealers Act also provides that “Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.” S.C. Code §56-15-130. The Court went on to hold, “Stated succinctly, the Legislature has made clear that the public policy of this State is to provide

consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." (Emphasis added.) The Court affirmed the Trial Court's Order in result, denying the Motion to Compel Arbitration.

Shortly after the opinion in Herron I was issued, The United States Supreme Court published its opinion in the case of AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011). In Concepcion, The United States Supreme Court overturned a decision of the California Courts which invalidated a class action waiver in an arbitration provision based upon the preemption of the FAA. The United States Supreme Court then accepted certiorari on the Herron I case and remanded the Herron I case with instructions for the South Carolina Supreme Court to reconsider its opinion in Herron I in light of the Concepcion case. The South Carolina Supreme Court affirmed Herron I because the issue of preemption had not been preserved for review in the South Carolina proceedings. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). (Herron II).

The arbitration clauses in Herron I and Concepcion contained a class action waiver. But the Arbitration Clause in the present case DOES NOT have a class action waiver. Therefore, the Arbitration Clause must be read to be consistent with the Dealers Act which specifically provides for class treatment.

The contract was entered in Horry County, South Carolina. Both parties are residents of South Carolina. Presumably, the Defendant has a South Carolina Dealer's license. The Defendant is subject to the Dealer's Act and is charged with knowledge of the Class Action provisions of the Act. All parties to the transaction are aware of the application of the Dealer's Act. Therefore, the Contract of Sale is NOT SILENT as to class actions. The Purchase

Agreement and Arbitration Clause are both subject to the Dealer's Act and the provision for Class Actions.

These distinctions are so significant as to make Stolt-Nielsen inapplicable to the analysis of the case at bar. The effective vindication exception dictates that, if the costs of arbitration make arbitration prohibitive to the Plaintiff, then the arbitration clause would be unconscionable and voidable under the savings clause of the FAA. Under the facts of this particular case, the costs of arbitration, either under the Commercial Rules or under the Supplementary Rules for Class Arbitrations would prohibit the Plaintiff from being able to bring any case and to seek any remedy at law in any forum. Therefore, the arbitration provision is voidable and the Plaintiff should be allowed to proceed in State Court.

Even if this Court finds that the arbitration clause is not voidable due to the financial hardship on the Plaintiff, this Court should not prohibit class treatment of this action in arbitration.

As mentioned above, the Stolt-Nielsen case is distinguishable from the facts of this case. Most notably for this particular argument, the arbitration clause in Stolt-Nielsen was "silent" as to class action treatment in arbitration, whereas the arbitration clause in this particular case cannot be read to be silent because it must be consistent with the South Carolina law regarding dealers. The Dealers Act specifically allows for class actions and therefore the Dealers Act cannot be overruled simply because it is not specifically mentioned in the dealers contract or in the arbitration clause.

Secondly, the agreement specifically calls for arbitration in the AAA. The AAA specifically provides Supplementary Rules for Class Arbitrations. (See Affidavits.) The AAA is

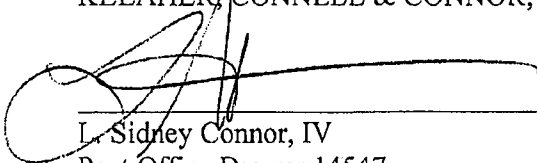
set up to handle class arbitrations. The AAA has handled numerous class arbitrations in the past and is well equipped to handle this relatively simple class action. (See AAA website)

Stolt-Nielsen indicates that there must be a contractual basis for concluding that a party agreed to class action treatment. By designating the AAA as the arbitration forum, the Defendant dealer is charged with knowledge of the AAA rules. The AAA has provided for class action treatment in arbitrations since its rules became effective on October 8, 2003. The dealer is charged with knowledge of this provision for class treatment and it has specifically designated the AAA as the forum to handle arbitrations. Therefore, there is in fact a contractual basis for class treatment.

#### CONCLUSION

The Plaintiff requests the Court to deny the Defendant's Motion to Compel Arbitration. But if the Court does compel arbitration, the Plaintiff requests the Court to allow the class action to proceed forward under the AAA's Supplementary Rules for Class Arbitrations.

KELAHER, CONNELL & CONNOR, P.C.



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Post Office Drawer 14547  
Surfside Beach, SC 29587  
(843) 238-5648  
sconnor@classactlaw.net  
Attorney for Plaintiffs

January 27, 2017

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 15-CP-26-8921

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all others similarly situated, )

)  
)  
Plaintiffs, )

)  
)  
vs. )

)  
)  
Jud Kuhn Chevrolet, )

)  
)  
Defendant. )  
)

**AFFIDAVIT OF MARCUS KEVIN GRANT**

**PERSONALLY APPEARED BEFORE ME**, Marcus Kevin Grant, who being duly sworn, deposes and states as follows:

1. That he is over twenty-one (21) years of age and competent to give this Affidavit.
2. That those things stated herein are of his own personal knowledge unless otherwise stated.
3. That he is the Plaintiff in the captioned action.
4. That the amount in controversy in this case concerns a fee charged by the dealer in the amount of \$399.00 described as an administrative fee, also known as a closing fee.
5. That the filing fee for this case filed in State Court in Horry County was \$150.00.
6. The arbitration clause in the Purchase Agreement requires the application of the Commercial Arbitration Rules of the American Arbitration Association.
7. Upon information and belief, the American Arbitration Association also has consumer arbitration rules which are designed for consumers. I am a consumer in this case because I purchased a vehicle from a dealer for personal use.
8. I believe it is expensive, unfair and unconscionable to require arbitration pursuant to the Commercial Arbitration Rules and Fee Schedule when I am a consumer and my claim is so small.

*(MK)*

9. That, upon information and belief and according to the website of the American Arbitration Association, the filing fee under the Commercial Arbitration Rules would be \$750.00 for this case. (See Fee Schedule, attached)

10. That the Commercial Arbitration Fee Schedule provides that "Arbitrator compensation is not included in either schedule. Unless the parties' agreement provides otherwise, Arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award."

11. That the arbitration clause contained in the Purchase Agreement states that fees charged by the AAA will be split evenly between the parties.

12. Upon information and belief, arbitrator fees for Commercial Arbitration are at least \$300 per hour.

13. My hourly wage is \$17.16. My living expenses consume all of my wages. I have little or no discretionary income.

14. I cannot afford to pay an initial filing fee of \$750.00 plus one-half of an arbitrator's fees at \$300 per hour.

15. The costs imposed upon me by the arbitration clause would prohibit me from being able to proceed with my claim against the dealer for wrongfully charging me a closing fee of \$399.00.

16. I have filed this claim as a class action.

17. The AAA's Supplementary Rules for Class Arbitrations requires an initial filing fee of \$3,350. See attached Rules.

18. I cannot afford the Arbitration filing fees and costs of either the Commercial Arbitration Fee Schedule or the costs set out in the Supplementary Rules for Class Actions. These high costs would prohibit me from bringing any claim in arbitration and I would have no way of presenting my claim or the claims of the class.

19. The arbitration clause in the Purchase Agreement also requires that the arbitration take place in Columbia, South Carolina.

20. Traveling to Columbia, South Carolina is unreasonable and expensive because I live near Horry County and the dealer is located in Horry County and all of the facts surrounding this case took place in Horry County.

21. Any witnesses which I may call to the arbitration would also have to travel from Horry County to Columbia, South Carolina.

22. This additional burden of requiring me and my witnesses to travel to Columbia, South Carolina for an arbitration involving a claim of \$399.00 is unreasonable, burdensome, expensive, and unconscionable, and would prohibit me from proceeding with my claim in arbitration, either individually or as a class.

23. In summary, the application of commercial arbitration rules, the requirement of splitting the arbitration fees, and the requirement to arbitrate in a remote location in Columbia, South Carolina, individually and collectively, are unconscionable because they would prohibit me from being able to pursue my claim and the claims of the class.

24. Further the Affiant sayeth not.

Marcus Kevin Grant  
Marcus Kevin Grant

SWORN TO before me this  
27 day of January, 2017

A. Sidney Connor III  
Notary Public for South Carolina  
My Commission Expires: 6/17/24



# COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES

## Administrative Fee Schedules

Amended and Effective July 1, 2016

For all cases determined to be international by the AAA-ICDR, the International Fee Schedule shall apply. An international case is generally defined as having either the place of arbitration or performance of the agreement outside the United States, or having an arbitration agreement between parties from different countries. To view the International Fee Schedule, visit [info.adr.org/internationalfeeschedule](http://info.adr.org/internationalfeeschedule).

The AAA offers parties two options for the payment of administrative fees.

For both schedules, administrative fees are based on the amount of the claim or counterclaim and are to be paid by the party bringing the claim or counterclaim at the time the demand or claim is filed with the AAA. *Arbitrator compensation is not included in either schedule.* Unless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award.

**Standard Fee Schedule:** A two-payment schedule that provides for somewhat higher initial filing fees but lower overall administrative fees for cases that proceed to a hearing.

**Flexible Fee Schedule:** A three-payment schedule that provides for lower initial filing fee and then spreads subsequent payments out over the course of the arbitration. Total administrative fees will be somewhat higher for cases that proceed to a hearing.

**Standard Fee Schedule**

Amount of Claim	Initial Filing Fee	Final Fee
Up to \$75,000	\$750	\$800
>\$75,000 to \$150,000	\$1,750	\$1,250
>\$150,000 to \$300,000	\$2,650	\$2,000
>\$300,000 to \$500,000	\$4,000	\$3,500
>\$500,000 to \$1,000,000	\$5,000	\$6,200
>\$1,000,000 to \$10,000,000	\$7,000	\$7,700
>\$10,000,000	\$10,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$12,500
Undetermined Monetary Claims	\$7,000	\$7,700
Nonmonetary Claims	\$3,250	\$2,500
Deficient Filing Fee	\$500	
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. See below for additional details.	

**Flexible Fee Schedule**

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Up to \$75,000	Only available for claims above \$150,000		
>\$75,000 to \$150,000			
>\$150,000 to \$300,000	\$1,650	\$1,700	\$2,000
>\$300,000 to \$500,000	\$2,000	\$3,000	\$3,500
>\$500,000 to \$1,000,000	\$2,500	\$4,300	\$6,200
>\$1,000,000 to \$10,000,000	\$3,500	\$5,700	\$7,700
>\$10,000,000	\$5,000	\$9,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$12,500
Undetermined Monetary Claims	\$3,500	\$5,700	\$7,700
Nonmonetary Claims	\$2,000	\$2,250	\$2,500
Deficient Filing Fee	\$500		
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. See below for additional details.		



**Standard Fee Schedule (Cont.)**

- The **Initial Filing Fee** is payable in full by a filing party when a claim, counterclaim, or additional claim is filed.
- The **Final Fee** will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.
- **Fee Modifications:** Fees are subject to increase if the claim or counterclaim is increased after the initial filing date. Fees are subject to decrease if the claim or counterclaim decreases prior to the first hearing.
- **Cases with Three or More Arbitrators** are subject to a minimum Initial Filing Fee of \$4,000 and a Final Fee of \$3,500.

**Refunds—Standard Fee Schedule:**

**Initial Filing Fees:** Subject to a \$500 minimum non-refundable Initial Filing Fee for all cases, refunds of Initial Filing Fees for settled or withdrawn cases will be calculated from the date the AAA receives the demand for arbitration as follows:

- within 5 calendar days of filing—100%
- between 6 and 30 calendar days of filing—50%
- between 31 and 60 calendar days of filing—25%

However, no refunds will be made once:

- any arbitrator has been appointed (including one arbitrator on a three-arbitrator panel)
- an award has been rendered.

**Final Fees:** If a case is settled or withdrawn prior to the first hearing taking place, all Final Fees paid will be refunded. However, if the AAA is not notified of a cancellation at least 24 hours before a scheduled hearing date, the Final fee will remain due and will not be refunded.

**Flexible Fee Schedule (Cont.)**

- The **Initial Filing Fee** is payable in full by a filing party when a claim, counterclaim, or additional claim is filed.
- The **Proceed Fee** must be paid within 90 days of the filing of the demand for arbitration or a counterclaim before the AAA will proceed with the further administration of the arbitration, including the arbitrator appointment process.
  - If a Proceed Fee is not submitted within 90 days of the filing of the Claimant's Demand for Arbitration, the AAA will administratively close the file and notify all parties.
  - If the Flexible Fee Schedule is being used for the filing of a counterclaim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.
- The **Final Fee** will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.
- **Fee Modifications:** Fees are subject to increase if the claim or counterclaim is increased after the initial filing date. Fees are subject to decrease if the claim or counterclaim decreases prior to the first hearing.
- **Cases with Three or More Arbitrators** are subject to a minimum Initial Filing Fee of \$2,000, a \$3,000 Proceed Fee and a Final Fee of \$3,500.

**Refunds—Flexible Fee Schedule:**

Under the Flexible Fee Schedule, **Filing Fees** and **Proceed Fees** are **non-refundable** once incurred.

**Final Fees:** If a case is settled or withdrawn prior to the first hearing taking place, all Final Fees paid will be refunded. However, if the AAA is not notified of a cancellation at least 24 hours before a scheduled hearing date, the Final fee will remain due and will not be refunded.

**Additional Fees Applicable to the Standard Fee and Flexible Fee Schedules**

**Additional Party Fees:** Additional Party Fees will be charged as described above, and in addition:

- Additional Party Fees are payable by the party, whether a claimant or respondent, that names the additional parties to the arbitration.
- Such fees shall not exceed 50% of the base fees in the fee schedule, except that the AAA reserves the right to assess additional fees where there are more than 10 separately represented parties.



- An example of the Additional Party Fee is as follows: A single claimant represented by one attorney brings an arbitration against two separate respondents, however, both respondents are represented by the same attorney. No Additional Party Fees are due. However, if the respondents are represented by different attorneys, or if one of the respondents is self-represented and the other is represented by an attorney, an additional 10% of the Initial Filing fee is charged to the claimant. If the case moves to the Proceed Fee stage or the Final Fee stage, an additional 10% of those fees will also be charged to the claimant.

**Incomplete or Deficient Filings:** Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of all parties to have the arbitration administered by the AAA.

- Where the AAA is unable to obtain the parties' agreement to have the AAA administer the arbitration, the AAA will not proceed further and will administratively close the case. The AAA will also return the filing fees to the filing party, less the amount specified in the fee schedule above for deficient filings.
- Parties that file Demands for Arbitration that are incomplete or otherwise do not meet the filing requirements contained in the rules shall also be charged the amount specified above for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

**Arbitrations in Abeyance:** Cases held in abeyance by mutual agreement for one year will be assessed an annual abeyance fee of \$500, to be split equally among the parties. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the arbitration will be administratively closed. All filing requirements, including the payment of filing fees, must be met before a matter will be placed in abeyance.

**Fees for Additional Services:** The AAA reserves the right to assess additional administrative fees for services performed by the AAA that go beyond those provided for in the AAA's rules, but which are required as a result of the parties' agreement or stipulation.

**Hearing Room Rentals:** The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

### Mediation—Administrative Fee Schedules

A \$250 non-refundable deposit, which will be applied toward the cost of mediation, is required to initiate the AAA's administration of the mediation and appointment of the mediator.

The cost of mediation is based on the hourly or daily mediation rate published on the mediator's AAA profile. In addition, the parties will be assessed an administrative fee for the AAA's services of \$75 for each hour charged by the mediator. There is a four-hour or one-half day minimum charge for a mediation conference. Expenses referenced in Section M-17 of the Mediation Procedures may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the request to initiate mediation is filed but prior to the mediation conference, the cost is \$250 (to which the deposit will be applied), plus any mediator time and charges incurred. These costs shall be borne by the initiating party unless the parties agree otherwise.

*If you have questions about mediation costs or services, visit [www.adr.org](http://www.adr.org) or contact your local AAA office.*

## Supplementary Rules for Class Arbitrations

Rules Effective October 8, 2003

Fees Effective January 1, 2010

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### 1. Applicability

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

### 2. Class Arbitration Roster and Number of Arbitrators

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

### 3. Construction of the Arbitration Clause

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

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

### 4. Class Certification

#### (a) Prerequisites to a Class Arbitration

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

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

members.

(b) **Class Arbitrations Maintainable**

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

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

**5. Class Determination Award**

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

**6. Notice of Class Determination**

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

## **7. Final Award**

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

## **8. Settlement, Voluntary Dismissal, or Compromise**

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

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

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

## **9. Confidentiality; Class Arbitration Docket**

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

## **10. Form and Publication of Awards**

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

## **11. Administrative Fees and Suspension for Nonpayment**

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

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

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

## **12. Applications to Court and Exclusion of Liability**

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

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 15-CP-26-8921

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all others similarly situated, )  
 )  
Plaintiffs, )

vs. )

Jud Kuhn Chevrolet, )  
 )  
Defendant. )  
\_\_\_\_\_ )

**AFFIDAVIT OF L. SIDNEY CONNOR, IV**

**PERSONALLY APPEARED BEFORE ME, L. Sidney Connor, IV, who being duly sworn, deposes and states as follows:**

1. That he is over twenty-one (21) years of age and competent to give this Affidavit.
2. That those things stated herein are of his own personal knowledge unless otherwise stated.
3. That he is the attorney for the Plaintiff in the captioned action.
4. That the amount in controversy in this case concerns a fee charged by the dealer in the amount of \$399.00 described as an administrative fee, also known as a closing fee.
5. That the filing fee for this case filed in State Court in Horry County was \$150.00.
6. That the arbitration clause in the Purchase Agreement requires the application of the Commercial Arbitration Rules of the American Arbitration Association.
7. The American Arbitration Association also has consumer arbitration rules which are designed for consumers. The Plaintiff in this case is a consumer because he purchased a vehicle from a dealer for personal use.

8. The administrative Fee Schedule for Commercial Arbitration under the American Arbitration Association is attached hereto and incorporated herein by reference. According to this schedule, the initial filing fee for this case would be \$750.

9. That the Commercial Arbitration Fee Schedule provides that "Arbitrator compensation is not included in either schedule. Unless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award."

10. That the arbitration clause contained in the Purchase Agreement states that fees charged by the AAA will be split evenly between the parties. That I am personally familiar with the fees charged by arbitrators from the AAA and that these fees exceed \$300 an hour.

11. I am personally familiar with cases similar to the one in the present case and, based upon my learning an experience, if this case is arbitrated as a single case, I anticipate the case to take at least one day and possibly as much as two days. The arbitrator fees for a single case would range from \$2,400 to in excess of \$4,800.

12. That according to the Commercial Arbitration Fee Schedule and the arbitration clause contained in the Purchase Agreement, the arbitrator's fees for an individual claim that must be paid by Marcus Kevin Grant range from \$1,200 to in excess of \$2,400. With the filing fee of \$750, the costs for an individual claim would range from \$1,950 to \$3,150.

13. This matter has been filed as a class action. The AAA Supplementary Rules for Class Arbitrations are attached hereto and incorporated herein by reference.

14. The AAA's Supplementary Rules for Class Arbitrations requires an initial filing fee of \$3,350.

15. The rules further anticipate that the arbitrator's fees are paid in addition to the filing fees.

16. I have practiced law in the State of South Carolina for approximately thirty-five (35) years. I have been involved in numerous class actions in State Court. There is no charge for the Judge's services in State Court class actions.

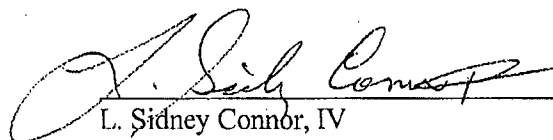
17. Based upon my experience in handling class actions, it is reasonable to expect that a single arbitrator or a panel of arbitrators for this particular class action would be at least \$10,000 and could exceed \$50,000.

18. The arbitration clause in the Purchase Agreement requires that the arbitration take place in Columbia, SC.

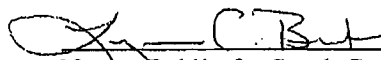
19. Both the Plaintiff and Defendant are located in or near Horry County, South Carolina and the transaction took place in Horry County, South Carolina.

20. This arbitration would involve several witnesses as a single case and numerous lay and expert witnesses as a class action, most all of whom would be located in Horry County, South Carolina. It would be unduly burdensome and expensive to pay these witnesses to travel from Horry County to Columbia, SC.

21. Further the Affiant sayeth not.

  
L. Sidney Connor, IV

SWORN TO before me this  
27 day of January, 2017

  
Notary Public for South Carolina  
My Commission Expires: 2-17-19



# COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES

## Administrative Fee Schedules

Amended and Effective July 1, 2016

For all cases determined to be international by the AAA-ICDR, the International Fee Schedule shall apply. An international case is generally defined as having either the place of arbitration or performance of the agreement outside the United States, or having an arbitration agreement between parties from different countries. To view the International Fee Schedule, visit [info.adr.org/internationalfeeschedule](http://info.adr.org/internationalfeeschedule).

The AAA offers parties two options for the payment of administrative fees.

For both schedules, administrative fees are based on the amount of the claim or counterclaim and are to be paid by the party bringing the claim or counterclaim at the time the demand or claim is filed with the AAA. *Arbitrator compensation is not included in either schedule.* Unless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award.

**Standard Fee Schedule:** A two-payment schedule that provides for somewhat higher initial filing fees but lower overall administrative fees for cases that proceed to a hearing.

**Flexible Fee Schedule:** A three-payment schedule that provides for lower initial filing fee and then spreads subsequent payments out over the course of the arbitration. Total administrative fees will be somewhat higher for cases that proceed to a hearing.

**Standard Fee Schedule**

Amount of Claim	Initial Filing Fee	Final Fee
Up to \$75,000	\$750	\$800
>\$75,000 to \$150,000	\$1,750	\$1,250
>\$150,000 to \$300,000	\$2,650	\$2,000
>\$300,000 to \$500,000	\$4,000	\$3,500
>\$500,000 to \$1,000,000	\$5,000	\$6,200
>\$1,000,000 to \$10,000,000	\$7,000	\$7,700
>\$10,000,000	\$10,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$12,500
Undetermined Monetary Claims	\$7,000	\$7,700
Nonmonetary Claims	\$3,250	\$2,500
Deficient Filing Fee	\$500	
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. See below for additional details.	

**Flexible Fee Schedule**

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Up to \$75,000	Only available for claims above \$150,000		
>\$75,000 to \$150,000	Only available for claims above \$150,000		
>\$150,000 to \$300,000	\$1,650	\$1,700	\$2,000
>\$300,000 to \$500,000	\$2,000	\$3,000	\$3,500
>\$500,000 to \$1,000,000	\$2,500	\$4,300	\$6,200
>\$1,000,000 to \$10,000,000	\$3,500	\$5,700	\$7,700
>\$10,000,000	\$5,000	\$9,000 plus .01% of the claim amount above \$10,000,000 up to \$65,000	\$12,500
Undetermined Monetary Claims	\$3,500	\$5,700	\$7,700
Nonmonetary Claims	\$2,000	\$2,250	\$2,500
Deficient Filing Fee	\$500		
Additional Party Fees	If there are more than two separately represented parties in the arbitration, an additional 10% of each fee contained in these fee schedules will be charged for each additional separately represented party. However, Additional Party Fees will not exceed 50% of the base fees contained in these fee schedules unless there are more than 10 separately represented parties. See below for additional details.		



**Standard Fee Schedule (Cont.)**

- The **Initial Filing Fee** is payable in full by a filing party when a claim, counterclaim, or additional claim is filed.
- The **Final Fee** will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.
- **Fee Modifications:** Fees are subject to increase if the claim or counterclaim is increased after the initial filing date. Fees are subject to decrease if the claim or counterclaim decreases prior to the first hearing.
- **Cases with Three or More Arbitrators** are subject to a minimum Initial Filing Fee of \$4,000 and a Final Fee of \$3,500.

**Refunds—Standard Fee Schedule:**

**Initial Filing Fees:** Subject to a \$500 minimum non-refundable Initial Filing Fee for all cases, refunds of Initial Filing Fees for settled or withdrawn cases will be calculated from the date the AAA receives the demand for arbitration as follows:

- within 5 calendar days of filing—100%
- between 6 and 30 calendar days of filing—50%
- between 31 and 60 calendar days of filing—25%

However, *no refunds will be made once:*

- any arbitrator has been appointed (including one arbitrator on a three-arbitrator panel).
- an award has been rendered.

**Final Fees:** If a case is settled or withdrawn prior to the first hearing taking place, all Final Fees paid will be refunded. However, if the AAA is not notified of a cancellation at least 24 hours before a scheduled hearing date, the Final fee will remain due and will not be refunded.

**Flexible Fee Schedule (Cont.)**

- The **Initial Filing Fee** is payable in full by a filing party when a claim, counterclaim, or additional claim is filed.
- The **Proceed Fee** must be paid within 90 days of the filing of the demand for arbitration or a counterclaim before the AAA will proceed with the further administration of the arbitration, including the arbitrator appointment process.
  - If a Proceed Fee is not submitted within 90 days of the filing of the Claimant's Demand for Arbitration, the AAA will administratively close the file and notify all parties.
  - If the Flexible Fee Schedule is being used for the filing of a counterclaim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.
- The **Final Fee** will be incurred for all cases that proceed to their first hearing and is payable in advance at the time the first hearing is scheduled.
- **Fee Modifications:** Fees are subject to increase if the claim or counterclaim is increased after the initial filing date. Fees are subject to decrease if the claim or counterclaim decreases prior to the first hearing.
- **Cases with Three or More Arbitrators** are subject to a minimum Initial Filing Fee of \$2,000, a \$3,000 Proceed Fee and a Final Fee of \$3,500.

**Refunds—Flexible Fee Schedule:**

Under the Flexible Fee Schedule, **Filing Fees** and **Proceed Fees** are non-refundable once incurred.

**Final Fees:** If a case is settled or withdrawn prior to the first hearing taking place, all Final Fees paid will be refunded. However, if the AAA is not notified of a cancellation at least 24 hours before a scheduled hearing date, the Final fee will remain due and will not be refunded.

**Additional Fees Applicable to the Standard Fee and Flexible Fee Schedules**

**Additional Party Fees:** Additional Party Fees will be charged as described above, and in addition:

- Additional Party Fees are payable by the party, whether a claimant or respondent, that names the additional parties to the arbitration.
- Such fees shall not exceed 50% of the base fees in the fee schedule, except that the AAA reserves the right to assess additional fees where there are more than 10 separately represented parties.



- An example of the Additional Party Fee is as follows: A single claimant represented by one attorney brings an arbitration against two separate respondents, however, both respondents are represented by the same attorney. No Additional Party Fees are due. However, if the respondents are represented by different attorneys, or if one of the respondents is self-represented and the other is represented by an attorney, an additional 10% of the Initial Filing fee is charged to the claimant. If the case moves to the Proceed Fee stage or the Final Fee stage, an additional 10% of those fees will also be charged to the claimant.

**Incomplete or Deficient Filings:** Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of all parties to have the arbitration administered by the AAA.

- Where the AAA is unable to obtain the parties' agreement to have the AAA administer the arbitration, the AAA will not proceed further and will administratively close the case. The AAA will also return the filing fees to the filing party, less the amount specified in the fee schedule above for deficient filings.
- Parties that file Demands for Arbitration that are incomplete or otherwise do not meet the filing requirements contained in the rules shall also be charged the amount specified above for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

**Arbitrations in Abeyance:** Cases held in abeyance by mutual agreement for one year will be assessed an annual abeyance fee of \$500, to be split equally among the parties. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the arbitration will be administratively closed. All filing requirements, including the payment of filing fees, must be met before a matter will be placed in abeyance.

**Fees for Additional Services:** The AAA reserves the right to assess additional administrative fees for services performed by the AAA that go beyond those provided for in the AAA's rules, but which are required as a result of the parties' agreement or stipulation.

**Hearing Room Rentals:** The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

### Mediation—Administrative Fee Schedules

A \$250 non-refundable deposit, which will be applied toward the cost of mediation, is required to initiate the AAA's administration of the mediation and appointment of the mediator.

The cost of mediation is based on the hourly or daily mediation rate published on the mediator's AAA profile. In addition, the parties will be assessed an administrative fee for the AAA's services of \$75 for each hour charged by the mediator. There is a four-hour or one-half day minimum charge for a mediation conference. Expenses referenced in Section M-17 of the Mediation Procedures may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the request to initiate mediation is filed but prior to the mediation conference, the cost is \$250 (to which the deposit will be applied), plus any mediator time and charges incurred. These costs shall be borne by the initiating party unless the parties agree otherwise.

*If you have questions about mediation costs or services, visit [www.adr.org](http://www.adr.org) or contact your local AAA office.*

## Supplementary Rules for Class Arbitrations

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

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### 1. Applicability

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

### 2. Class Arbitration Roster and Number of Arbitrators

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

### 3. Construction of the Arbitration Clause

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

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

### 4. Class Certification

#### (a) Prerequisites to a Class Arbitration

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

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

members.

(b) **Class Arbitrations Maintainable**

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

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

**5. Class Determination Award**

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

**6. Notice of Class Determination**

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

## **7. Final Award**

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

## **8. Settlement, Voluntary Dismissal, or Compromise**

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

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

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

## **9. Confidentiality; Class Arbitration Docket**

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

## **10. Form and Publication of Awards**

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

## **11. Administrative Fees and Suspension for Nonpayment**

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

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

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

## **12. Applications to Court and Exclusion of Liability**

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

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Marcus Kevin Grant, Individually and in a representative capacity for all other similarly situated,

Plaintiff

v.

Jud Kuhn Chevrolet

Defendant.

IN THE COURT OF COMMON PLEAS **COPY**

CASE NO.

2015-CP-26-8921

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney: L. Sidney Connor, IV, Esq. Bar No.: 1363 Address: PO Drawer 14547, Surfside Beach, SC 29587 phone: 843-238-5648 fax: 843-238-5050 e-mail: <a href="mailto:sconnor@classactlaw.com">sconnor@classactlaw.com</a> other:	Defendant's Attorney: H. Clay Walker, Jr., Esq. Bar No. 5779 Address: PO Box 61140, Columbia, SC 29260 phone: 803-454-0955 fax: 803-454-0956 e-mail: <a href="mailto:cwalker@walkerreibold.net">cwalker@walkerreibold.net</a> other:
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MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and II)  
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**  
Nature of Motion: Amended Motion to Compel Arbitration  
Estimated Time Needed: 15 minutes Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**  
 Written motion attached  
 Form Motion/Order  
I hereby move for relief or action by the court as set forth in the attached proposed order.  
\_\_\_\_\_  
Signature of Attorney for  Plaintiff /  Defendants February 7, 2017  
Date submitted

**SECTION III: Motion Fee**  
 PAID - AMOUNT: \$25.00  
 EXEMPT:  Rule to Show Cause in Child or Spousal Support  
(check reason)  Domestic Abuse or Abuse and Neglect  
 Indigent Status  State Agency v. Indigent Party  
 Sexually Violent Predator Act  Post-Conviction Relief  
 Motion for Stay in Bankruptcy  
 Motion for Publication  Motion for Execution (Rule 69, SCRPC)  
 Proposed order submitted at request of the court; or,  
reduced to writing from motion made in open court per judge's instructions  
Name of Court Reporter:  
 Other:

**JUDGE'S SECTION**  
 Motion Fee to be paid upon filing of the attached order.  
 Other: \_\_\_\_\_  
\_\_\_\_\_  
JUDGE  
CODE: \_\_\_\_\_ Date: \_\_\_\_\_

**CLERK'S VERIFICATION**  
Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_  
 MOTION FEE COLLECTED: \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 Marcus Kevin Grant, individually )  
 and in a representative capacity for )  
 all other similarly situated, )  
 )  
*Plaintiff* )  
 )  
 v. )  
 )  
 Jud Kuhn Chevrolet, )  
 )  
*Defendant.* )

IN THE COURT OF COMMON PLEAS  
 Civil Action No. 2015-CP-26-8921

AMENDED  
 MOTION TO COMPEL ARBITRATION

2015 FEB -9 PM 12:17  
 RECEIVED  
 CLERK OF COURT  
 HORRY COUNTY, SC

TO: L. SIDNEY CONNER, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof or as soon thereafter as counsel may be heard, Defendant will, pursuant to Rule 12(b)(1), SCRPC, and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, move before the presiding judge of the Horry County Court of Common Pleas at the Horry County Courthouse for an order compelling Plaintiff Marcus Grant to individually arbitrate his claims, and staying this case pending the completion of arbitration. "Arbitration is a favored method of settling disputes in South Carolina." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).

As grounds for this motion, Defendant would show the Court the following:

1. Or about July of 2013, Plaintiff purchased a used a 2010 Chevrolet Camaro from the Defendant. The transaction involved interstate commerce. For example, the purchase was financed by GM Financial, located in Arlington, Texas. Plaintiff also enrolled in an on-star program. Finally, as part of the transaction, Plaintiff enrolled in a U.S. Key Replacement Plan administered by Brickell Financial Services-Motor Club, Inc., located in Miami, Florida.

2. The parties agreed to arbitrate all disputes in connection with the purchase. The contract to purchase the vehicle contained an arbitration clause, which reads:

**ARBITRATION REQUIRED BY THIS AGREEMENT.** The parties agree that instead of litigation in a court, any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order, including the validity or lack thereof of this contract, to any other document or agreement between the parties relating to sale of the motor vehicle, or to any other document or agreement between the parties relating to the motor vehicle, including the parties' retail installment contract, if any, shall be settled by binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules. Such arbitration shall be conducted in Columbia, SC. Each party will pay its own costs, and any filing fee charged by the American Arbitration Association shall be split evenly between the parties. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

(Purchase Order).

3. This arbitration clause is broad, and the claims asserted by Plaintiff fall within the scope of the arbitration clause. The Complaint alleges that in connection with the purchase of his automobile, Plaintiff was improperly charged a fee for the Defendant's work in closing the transaction, or, alternatively, that the fee charged for closing the transaction was in excess of what is permitted by law. This dispute is one "relating to the sale of the motor vehicle" or to the Purchase Order, which reflects the assessment of the closing fee. Any doubts as to whether the dispute falls within the scope of the arbitration clause should be resolved in favor of arbitration. *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323 (unless a court can say with positive assurance that an arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered). Because the parties agreed to arbitrate, and the claims asserted fall within the arbitration clause, arbitration must be ordered.

4. Defendant, however, cannot be required to arbitrate with Plaintiff if Plaintiff acts in a representative capacity. The United States Supreme Court has held that "a party may not be

compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 683 (2010) (emphasis in original). It explained that:

[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate. This is so because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.

*Id.* at 684. Accordingly, because the arbitration agreement does not affirmatively state that class actions are permitted, class actions are not permitted.

5. Defendant has offered to and committed to paying all administrative and/or filing fees which would be incurred for bilateral arbitration with the American Arbitration Association, the organization described by the arbitration agreement. As a result, there is no longer any material question as to whether arbitration filing and administrative fees will in any way prevent Plaintiff from seeking a remedy. *Large v. Conseco Fin. Servicing Corp.*, 292 F.3d 49, 56–57 (1st Cir.2002) (“Conseco's offer to pay the costs of arbitration ... mooted the issue of arbitration costs.”); *Nelson v. Insignia/Esg, Inc.*, 215 F.Supp.2d 143, 157 (D.D.C.2002) (“defendant's offer to pay all fees and expenses of arbitration effectively obviated any concerns the plaintiff may have raised regarding her ability to vindicate her claims”); *Rowe v. AT&T*, 2014 WL 172510 (D.S.C. 2014) (Anderson, G. Ross) (same); *Zuver v. Airtouch Communications, Inc.*, 103 P.3d 753 (Wash. 2004) (same).

6. Even if the offer to pay fees does not moot the issue of unconscionability due to cost, the AAA will most likely apply its Consumer Arbitration Rules. While the arbitration agreement refers to the Commercial Arbitration Rules, AAA Consumer Rules provide that the

AAA will apply Consumer Rules when the arbitration agreement is contained within a consumer agreement, as defined below, that specifies a particular set of rules other than the Consumer Arbitration Rules. (AAA Consumer Arbitration Rules, Rule 1). The AAA defines a consumer agreement as an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the goods or services purchased are for personal or household use. The AAA list an agreement to purchase an automobile as an example of such an agreement.

The Consumer Rules cap the filing fee at \$200 and require the business to absorb *all* remaining fees, including arbitrator compensation. Additionally, the arbitration agreement requires the Defendant to pay half of any filing fee incurred by Plaintiff. The net result is that it is more likely than not that Plaintiff will be assessed a total fee of \$100 to arbitrate his individual claim. This amount is less than the filing fee charged for a Circuit Court case, and would not act as a deterrent to the vindication of any remedy sought by Plaintiff.

7. If Plaintiff has entered into a contingency agreement with his counsel that requires or permits counsel to advance AAA filing and administrative fees, then he will not be denied a forum even if the AAA charges the fees which Plaintiff argues would be assessed.

8. Alternatively, if the Court were to find the arbitration clause unconscionable due to the cost of arbitration, Defendant requests that the Court order that Plaintiff proceed in court in an individual capacity only. Determinations of unconscionability based upon the cost of arbitration are made on a case by case basis. *Bradford v. Rockwell Semi-Conductor Sys., Inc.*, 238 F.3d 549 (4<sup>th</sup> Cir. 2001). Plaintiff has not submitted and cannot submit evidence that the cost of arbitration is prohibitively high for any individual he purports to represent, and Defendant insists upon its arbitration rights.

Therefore, Defendant asks this Court to enter an order compelling Plaintiff to arbitrate his dispute with Defendant in an *individual* capacity only and staying this case pending arbitration. This motion is based upon the pleadings, applicable law, the affidavit of Gregg Smith previously filed, and the affidavits of Judson Kuhn and Robert L. Reibold, filed herewith. Alternatively, if the Court were to deny Defendant's motion to compel arbitration based upon the cost of arbitration, Defendant requests that Court order this case to proceed in an individual capacity only.

I certify that consultation with opposing counsel concerning the subject matter of this motion would serve no useful purpose.

Respectfully submitted,



H. Clayton Walker, Jr.  
Robert L. Reibold  
Walker Reibold, LLC  
PO Box 61140  
Columbia, SC 29260  
(803) 454-0955  
(803) 454-0956/facsimile  
cwalker@walkerreibold.net  
rreibold@walkerreibold.net

February 7, 2017

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been served upon all Counsel by mailing a copy properly addressed and with sufficient postage affixed thereto this 7<sup>th</sup> day of Feb. 2017  
Cesare A. Walker  
Walker & Reibold, Attorneys at Law

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 Marcus Kevin Grant, individually )  
 and in a representative capacity for )  
 all other similarly situated, )  
 )  
*Plaintiff* )  
 )  
 v. )  
 )  
 Jud Kuhn Chevrolet, )  
 )  
*Defendant.* )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-8921

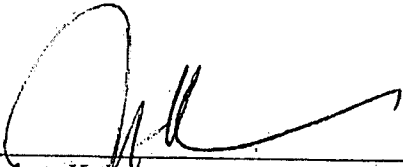
AFFIDAVIT OF JUDSON KUHN

2017 FEB -9 PM 12:17  
 COURT OF COMMON PLEAS  
 HORRY COUNTY, SC

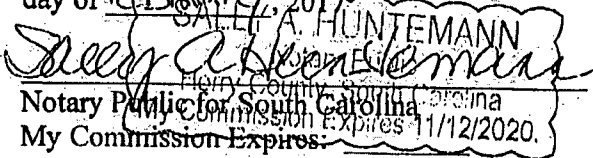
PERSONALLY APPEARED BEFORE ME the undersigned, who being duly sworn, deposes and says that:

1. I am over 18 years of age, am competent to testify, and have personal knowledge of the matters set forth herein. I am the majority owner and President of Jud Kuhn Chevrolet, the Defendant in the above-captioned case.
2. I have read the summons and complaint and am familiar with efforts to enforce the arbitration agreement in this case.
3. As President and majority owner of Jud Kuhn Chevrolet, I have the authority to commit the dealership to pay administrative and filing fees in connection with arbitration of this case with the American Arbitration Association (the "AAA").
4. With respect to the claim by Marcus Grant in this case, I do hereby authorize and commit the dealership to pay all administrative and filing fees which would ordinarily be incurred by Mr. Grant in bilateral arbitration with the AAA, should such arbitration be ordered by the Court.

I swear or affirm that the facts set forth in this affidavit are true and correct.

  
\_\_\_\_\_  
Judson Kuhn

SWORN TO before me this 1  
day of February, 2017.

  
Sally A. Huntemann  
Notary Public for South Carolina  
My Commission Expires 11/12/2020.

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all other similarly situated, )

*Plaintiff*

v. )

Jud Kuhn Chevrolet, )

*Defendant.*

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-8921

AFFIDAVIT OF  
ROBERT L. REIBOLD

CLERK OF COURT  
HORRY COUNTY, SC

2017 FEB -9 PM 12:17

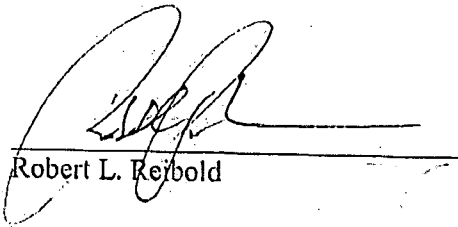
FILED  
MAR 10 2017

PERSONALLY APPEARED BEFORE ME the undersigned, who being duly sworn,  
deposes and says that:

1. I am over 18 years of age, am competent to testify, and have personal knowledge of the matters set forth herein. I am a member of Walker & Reibold, LLC, and have been involved in aspects of this case. I have also handled other matters involving arbitration of disputes between car dealerships and customers with the American Arbitration Association (the "AAA").
2. I have reviewed the arbitration agreement at issue in this case.
3. It is my opinion that the AAA will apply its Consumer Rules to this dispute despite the fact that the arbitration agreement specifies the application of commercial rules.
4. I am currently involved in another arbitration proceeding between a car dealership and a customer. A copy of the arbitration agreement in that case is attached hereto as Exhibit A. It specifies the application of commercial rules.
5. Nevertheless, the AAA has elected to apply the Consumer Rules. A copy of the email notification from the AAA is attached hereto as Exhibit B.

6. Also attached hereto are true and correct copies of the AAA Consumer Rules and Rule 53 of the AAA Commercial Arbitration Rules.

I swear or affirm that the facts set forth in this affidavit are true and correct.



Robert L. Reibold

SWORN TO before me this 6<sup>th</sup>  
day of February, 2017

Cesair Nicole Chase  
Notary Public for South Carolina  
My Commission Expires: 9/29/25

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF HORRY )  
 )  
 Marcus Kevin Grant, individually )  
 and in a representative capacity for )  
 all other similarly situated, )  
 )  
*Plaintiff* )  
 )  
 v. )  
 )  
 Jud Kuhn Chevrolet, )  
 )  
*Defendant.* )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-8921

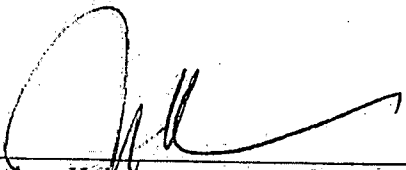
AFFIDAVIT OF JUDSON KUHN

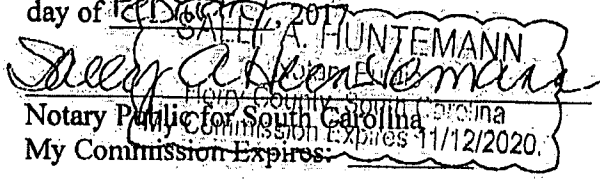
2017 FEB -9 PM 12:17  
 CLERK OF COURT  
 HORRY COUNTY, SC

PERSONALLY APPEARED BEFORE ME the undersigned, who being duly sworn, deposes and says that:

1. I am over 18 years of age, am competent to testify, and have personal knowledge of the matters set forth herein. I am the majority owner and President of Jud Kuhn Chevrolet, the Defendant in the above-captioned case.
2. I have read the summons and complaint and am familiar with efforts to enforce the arbitration agreement in this case.
3. As President and majority owner of Jud Kuhn Chevrolet, I have the authority to commit the dealership to pay administrative and filing fees in connection with arbitration of this case with the American Arbitration Association (the "AAA").
4. With respect to the claim by Marcus Grant in this case, I do hereby authorize and commit the dealership to pay all administrative and filing fees which would ordinarily be incurred by Mr. Grant in bilateral arbitration with the AAA, should such arbitration be ordered by the Court.

I swear or affirm that the facts set forth in this affidavit are true and correct.

  
\_\_\_\_\_  
Judson Kuhn

SWORN TO before me this 1  
day of February, 2017  
  
Sally A. Huntemann  
Notary Public for South Carolina  
My Commission Expires 11/12/2020

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 15-CP-26-8921

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all others similarly situated, )

Plaintiffs, )

vs. )

Jud Kuhn Chevrolet, )

Defendant. )  
\_\_\_\_\_ )

**PLAINTIFFS' MEMORANDUM IN  
OPPOSITION TO DEFENDANT'S AMENDED  
MOTION TO COMPEL ARBITRATION**

At the outset, the Court should dismiss the Defendant's Amended Motion to Compel Arbitration because the Defendant has demanded a Jury Trial under rule 38(b) SCRPC. When the Defendant filed its Answer dated February 19, 2016, it demanded a Jury Trial. See first page of Defendant's Answer, attached hereto. Nine months later, on November 30, 2016, the Defendant filed its initial Motion to Compel Arbitration. Rule 38(d) of the SCRPC provides, in pertinent part, "A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties..." The Plaintiff does not consent to the Defendant's withdrawal of its demand for jury trial. Therefore, the Defendant must try the case by jury and has waived any attempt to force arbitration in this case. The Defendant's Amended Motion to Compel Arbitration should be denied based on its demand for a Jury Trial.

The Defendant initially moved to compel arbitration and the Plaintiff responded. The Court heard arguments on these issues on Tuesday, January 31, 2017. The Court granted the Defendant ten (10) days to address the Plaintiff's argument of effective vindication.

The Defendant has now filed an Amended Motion. In that Amended Motion, the Defendant attempts to address the effective vindication argument by offering to "waive" the

unconscionable provisions of the arbitration clause. The Defendant argues that this attempted waiver “moots” the Plaintiff’s effective vindication argument. Neither logic nor the case law supports the Defendant’s position.

In the case of Gandee v. LDL Freedom Enterprises, Inc., 293 P.3d 1197 (Wash. 2013), the Supreme Court of Washington addressed a very similar issue on effective vindication dealing with an unconscionable arbitration clause. The Court found three unconscionable provisions relating to venue, fee shifting, and a shortened statute of limitations. The Court flatly rejected the Defendants attempted waiver of these unconscionable provisions, stating as follows:

[The Defendant] attempts to escape this result by offering to “waive” objectionable provisions, which it suggests, somehow moots [the Plaintiff’s] challenges. Contracts are generally interpreted as of the time of contracting, making any subsequent offer to waive unconscionable terms irrelevant. [Citations omitted]

Strong reasons exist for encouraging contracts to be conscionable at the time they are written and allowing, after the fact, waiver to moot unconscionability challenges is the exception, not the rule. Parties should not be able to load their arbitration agreements full of unconscionable terms and then, when challenged in court, offer a blanket waiver. This would encourage rather than discourage one sided agreements and would lead to increased litigation. Any other approach is inconsistent with the principal that contracts – especially the adhesion contracts common today – should be conscionable and fairly drafted. [293 P.3d at 1202.]

The Defendant has cited several cases for the proposition that an offer to pay the costs of arbitration moots the issue of effective vindication. The Defendant cited the case of Large v. Conseco Fin. Servicing Corp., 292 F.3d 49 (1st Cir. 2002). The Large case is distinguishable, however, for two reasons. First, the arbitration agreement in that case was silent with respect to costs and fees. The lower court found that, because the agreement was silent as to costs and fees, it would be “too speculative” to conclude that arbitration would deny the Plaintiffs an effective vindication of their rights. 292 F.3d at 56. Secondly, the lower court found that the Plaintiff had not met her burden of proving that the costs of arbitration would be prohibitively expensive.

Apparently, the Plaintiff filed no affidavits concerning the costs of arbitration. The Court of Appeals then mentioned that the Defendant had offered to cover the costs of arbitration. This offer, however, was not necessary to the holding. Therefore, the Court's reference to the offer is dicta.

In the present case, the arbitration agreement is not silent as to costs and fees. It specifically calls for the arbitration to take place in Columbia, South Carolina, a good distance from where the transaction took place and it requires a sharing of the arbitration costs under the AAA's Commercial Rules of Arbitration. In addition, the Plaintiff in the present case has submitted an Affidavit showing that he cannot afford these exorbitant costs of arbitration either as an individual or as a class.

The Defendant also cites Nelson v. Insignia/ESG, Inc., 215 F.Supp.2d 143 (D.D.C. 2002). In that case, however, the Court stated "there is no evidence in this record that the fees associated with arbitration will potentially prohibit the Plaintiff from arbitrating her claims." 215 F.Supp.2d at 157. The Court's comment concerning the Defendant's offer to pay arbitration costs was nothing more than dicta.

Defendants also cite the case of Rowe v. AT&T, Inc. C/A No.: 6:13-cv-01206-GRA (D.S.C. 2014). In that case, however, the Plaintiff failed to submit any evidence on her ability to pay arbitration fees and costs. The Court's mention of the Defendant's offer to pay the Plaintiff's arbitration costs was unnecessary to the ruling and therefore it is only dicta.

The Defendant then cites Zuver v. Airtouch Communications, Inc., 103 P.3d 753 (Wash. 2004). Once again, that case specifically states that the Plaintiff failed to provide any evidence of arbitration costs or her ability to pay those costs. 103 P.3d at 763. Furthermore, Zuver was

distinguished and implicitly overruled on the issue of Defendant's offer to pay costs in Gandee v. LDL Freedom Enterprises, Inc., discussed above.

To allow the Defendant unilaterally to change the terms of the Arbitration Agreement and thus retroactively save the entire agreement is an absurd result. The Defendant's offer to "waive" the objectionable provisions of its unfairly drafted arbitration agreement is nothing more than an attempt to re-write the contract. Nearly all of the cases dealing with arbitration on a State and Federal level make some mention of the Court's desire to honor the contract entered into between the parties. The Courts will not allow either party unilaterally to re-write the arbitration agreement. The United States Supreme Court has repeatedly held that "Courts must 'rigorously enforce' arbitration agreements according to their terms." (Emphasis added.) Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985). If the Courts "rigorously enforce" arbitration agreements over the objection of the consumer Plaintiff who did not draft the agreement, then the Courts should even more "rigorously enforce" arbitration agreements over the objection of the corporate Defendant who drafted the agreement. "Rigorous enforcement" cuts both ways. For any Court to accept a Defendant's "offer" to re-write the contract and pay for arbitration costs would undermine the principles of contract law. To allow the drafter of the contract to change it after the fact would certainly put justice on its head.

It is no accident that the Defendant drafted its arbitration clause to apply the AAA's Commercial Rules rather than Consumer Rules. The Defendant desires to have a chilling effect on the bringing of any claims against it either in Court or in arbitration. To allow the Defendant to "offer" to pay costs on a case-by-case basis would effectively force all Plaintiffs to incur the costs of filing an action in State Court in order to force this offer. If, for example, the Plaintiff here had brought the action initially in the AAA, and not State Court, the Defendant would have

had no motivation to “offer” to pay the costs and fees of arbitration. The Defendant wants the Court to approve its selective enforcement of unconscionable provisions of the arbitration agreement.

The attorneys for the Defendant in this case have admitted their desire for selective enforcement by their own Affidavit. The Defendant has provided an email chain between the Defendant’s attorney and the AAA, concerning two other cases against auto dealers. (See Exhibit B, attached to Defendant’s Motion.) The Defendant’s attorneys attached this exhibit along with the Affidavit of Mr. Reibold to attempt to show the Court that the AAA may apply the Consumer Rules even where an Arbitration Agreement calls for the Commercial Rules. An arbitration agreement with a fee-splitting provision cannot be saved by the Defendant’s argument that the AAA might possibly disregard the fee-splitting provision. See, e.g., Slatten v. Jim Glover Chevrolet Lawton, LLC, Case No. CIV-15-1180-D (W.D. Ok. 2016) (Court denied arbitration where Plaintiff could not afford costs of arbitration, agreeing with the Plaintiff that she should not be “at the mercy of the arbitrator’s discretion as to whether to defer or reduce her share of the arbitration fees...”)

In his email to the AAA, Attorney Reibold does not offer to pay the Plaintiff’s costs in arbitration. He argues forcefully for the AAA to apply the Commercial Rules. He states, “the parties expressly called for the Application of *Commercial* Rules in the arbitration agreement, making Commercial Rules applicable. ... To the extent there is doubt, we believe the doubt should be resolved in accordance with the arbitration agreement, which specifies the application of the Commercial Rules.” This argument proves that the Defendants want the ability to selectively enforce arbitration agreements. In the “Allen v. Hoover” case mentioned in the email chain, it was in the dealer’s best interest to insist on the Commercial Rules. In the case at bar,


however, the Commercial Rules are not in the dealer's best interest because the cost-splitting provision of the Commercial Rules is the basis for the Plaintiffs effective vindication argument. In the "Allen v. Hoover" case cited in the email chain, the Plaintiff initiated the arbitration with the AAA and, therefore, made no argument on effective vindication. Therefore, there was no incentive for the dealership in that case to offer to pay the costs of arbitration.

Mr. Reibold's Affidavit and email chain show convincingly that Defendant dealers want to selectively enforce this Commercial Arbitration language to achieve a chilling effect on consumers. Dealers will argue for the Commercial Rules when it suits them and against the Commercial Rules when it works against them. The Defendant Dealer in this case should not be allowed to re-write the contract or selectively enforce unfair provisions of the contract.

#### CONCLUSION

For the reasons stated above, the Plaintiff requests the Court to deny the Defendant's Amended Motion to Compel Arbitration.

KELAHER, CONNELL & CONNOR, P.C.



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

February 11, 2017

## RULES OF CIVIL PROCEDURE

- 45. Subpoena.
- 46. Exceptions Unnecessary.
- 47. Jurors.
- 48. Juries of Less Than Twelve; Majority Verdict.
- 49. Special Verdicts and Interrogatories.
- 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.
- 51. Instructions to Jury: Objection.
- 52. Findings by the Court.
- 53. Masters and Special Referees.

### RULE 38. JURY TRIAL OF RIGHT

(a) **Right Preserved.** The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).

This Rule 38 is substantially the Federal Rule. The last sentence is added to Paragraph 38(a) to preserve the language of Code § 15-23-60. Paragraph 38(e) of the Federal Rule, referring to admiralty and maritime claims, is inapplicable to State practice.

#### Library References

Jury §§ 9, 12 to 24.5, 25, 27.  
Westlaw Topic No. 230.  
C.J.S. Bankruptcy § 310.  
C.J.S. Civil Rights § 660.  
C.J.S. Declaratory Judgments § 152.

C.J.S. Grand Juries § 16.  
C.J.S. Juries §§ 4 to 15, 19 to 21, 23 to 166, 169 to 209, 212, 215.  
C.J.S. Summary Proceedings § 8.

#### Law Review and Journal Commentaries

Annual survey of South Carolina law, practice and procedure. 40 S.C. L. Rev. 172 (Autumn 1988).

#### Notes of Decisions

Action for money damages 3  
Appeals 8  
Counterclaims 5  
Cross claims and third-party claims 6  
Demand for jury trial 2  
Findings of master 4  
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Right to jury trial, generally 1  
Waiver 7

connection with their counterclaim for fraud was timely, as owners' demanded jury trial in their answer to assignee's amended complaint when they asserted their fraud counterclaim for the first time, such that demand was made within 10 days of service of last pleading, as required by rule. Mortgage Electronic Systems, Inc. v. White (S.C.App. 2009) 384 S.C. 606, 682 S.E.2d 498. Jury § 25(6)

Purported wife was entitled to jury trial on widow's claim for conversion, in action brought by widow against purported wife alleging conversion and wrongful withholding of certain funds and personal property due the widow of deceased husband; purported wife properly en-

1. Right to jury trial, generally  
Mortgagors' demand for jury trial in foreclosure proceeding filed against them by assignee of mortgagee in

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF Horry )  
 )  
 Marcus Kevin Grant, individually )  
 and in a representative capacity for )  
 all other similarly situated, )  
 )  
*Plaintiff* )  
 )  
 v. )  
 )  
 Jud Kuhn Chevrolet, )  
 )  
*Defendant.* )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-8921

ANSWER

~~(Jury Trial Requested)~~

Defendant, answering the Complaint of the above-named Plaintiff, hereby alleges as follows:

**FIRST DEFENSE**

1. Each and every allegation of the Complaint which is not hereinafter specifically admitted or denied is denied.
2. Defendant lacks information sufficient to form a belief as to the truth or accuracy of the allegations of ¶ 1 of the Complaint and therefore denies the same.
3. Defendant admits ¶ 2 of the Complaint.
4. Paragraph 3 of the Complaint states a legal conclusion which Defendant is neither required to admit nor deny.
5. Defendant denies ¶ 5 of the Complaint.
6. Defendant admits so much of ¶ 5 of the Complaint as alleges that the Plaintiff agreed to pay a closing fee or administrative fee in the amount of \$399.00.
7. Answering ¶ 6 of the Complaint, Defendant states that S.C. Code Section 37-2-307 speaks for itself, and denies ¶ 6 of the Complaint to the extent inconsistent therewith.

8. Paragraph 7 of the Complaint states a legal conclusion which Defendant is neither required to admit nor deny.

9. Answering ¶ 8 of the Complaint, Defendant states that the Complaint speaks for itself.

10. Paragraphs 9 through 14 of the Complaint states pure conclusions of law unsupported by any facts which Defendant is neither required to admit nor deny. To the extent that ¶¶ 9 through 14 of the Complaint can be construed to allege the existence of any fact, Defendant denies ¶¶ 9 through 14 of the Complaint.

11. Answering ¶ 15 of the Complaint, Defendant incorporates by reference ¶¶ 1 through 10 of this Answer as if stated verbatim herein.

12. Defendant admits so much of ¶ 16 of the Complaint as can be construed to allege that it is a motor vehicle dealer as defined in the Dealers Act, S.C. Code Ann. § 56-15-10 et seq.

13. Defendant denies ¶¶ 17 through 19 of the Complaint.

14. Answering ¶ 20 of the Complaint, Defendant denies that Plaintiff is entitled to relief.

**SECOND DEFENSE**  
(Mandatory Arbitration)

15. Plaintiff's claims are subject to mandatory arbitration.

**THIRD DEFENSE**  
(Representative Capacity)

16. Pursuant to the arbitration clause in Plaintiff's contract, Plaintiff cannot serve as a class representative or assert claims in a representative capacity.

**FOURTH DEFENSE**  
(Voluntary Payment)

17. Plaintiff's claims is barred under the voluntary payment rule.

**FIFTH DEFENSE**

(Rule 12(b)(8))

18. Plaintiff's claim should be dismissed because another claim already exists between the same parties on the same claim. Plaintiff is a putative member of a class action filed against Defendant concerning closing fees in Aiken County, State of South Carolina.

**SIXTH DEFENSE**

(Standing/Capacity)

19. Because an action already exists filed by another who purports to represent the Plaintiff in this case, Plaintiff lacks standing and/or capacity to maintain this action.

**SEVENTH DEFENSE**

(Unconstitutional Statutory Provisions)

20. S.C. Code Ann. § 37-2-307, as construed by the South Carolina Supreme Court in *Freeman v JLH Investments*, is unconstitutionally vague.

**EIGHTH DEFENSE**

(Rule 12(b)(6))

21. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action for violation of the Dealer's Act, S.C. Code Ann. § 56-15-10 et seq.

**NINTH DEFENSE**

(Rule 23, SCRPC)

22. Upon information and belief, Plaintiff will not be able to plead and prove the prerequisites for maintaining a class action under Rule 23.

**TENTH DEFENSE**

(Exclusive Remedy)

23. The South Carolina Consumer Protection Code provides the exclusive remedy for alleged violations of Section 37-2-307. Moreover, upon information and belief, the Consumer Protection Code does not authorize a representative action in this case.

**ELEVENTH DEFENSE**

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

24. Closing fees charged in motor vehicle transactions are authorized by the closing fee statute and the accompanying administrative interpretation. At all relevant times, Defendant complied with these requirements, and/or the administrative interpretation, and therefore should be entitled to safe harbor protections of the Consumer Protection Code.

**TWELFTH DEFENSE**

(Section 37-5-202(7), Good Faith Error)

25. To the extent that any violation of the Consumer Protection Code occurred, which Defendant denies, such violation was unintentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

**THIRTEENTH DEFENSE**

(Filed Rate Doctrine)

26. Defendant has been required to and did at all relevant times file the maximum amount of its closing fee with the Department of Consumer Affairs. The Department of Consumer Affairs has accepted and approved the filed closing fee. Plaintiff's claims are therefore barred by the filed rate doctrine.

**FOURTEENTH DEFENSE**

(Injury Reasonably Avoidable)

27. Plaintiff's injury was reasonably avoidable. He was aware of the closing fee and had the option to walk away from the purchase. As a result, no violation of the Dealer's Act occurred.

**FIFTEENTH DEFENSE**

(Statutory and Punitive Damages Unconstitutional)

28. An award of statutory double damages or punitive damages in this case would violated the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution.

**SIXTEENTH DEFENSE**  
(Comparative Negligence)

29. Plaintiff is barred from relief in whole or in part by his comparative negligence.

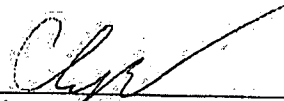
**SEVENTEENTH DEFENSE**  
(Mitigation of Damages)

30. Plaintiff is barred from relief to the extent that he failed to mitigate damages.

WHEREFORE, having answered the Complaint, Defendant prays that:

- a. the Complaint be dismissed with costs assessed against the Defendant; and
- b. for such other and further relief as the court deems just and proper.

Respectfully submitted,



H. Clayton Walker, Jr.  
Robert L. Reibold  
WALKER | REIBOLD  
Post Office Box 61140  
Columbia, SC 29260  
(803) 454-0955

ATTORNEYS FOR DEFENDANT

2/19, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document has been served upon all relatives by mailing a copy properly addressed and with sufficient postage affixed thereto this 19 day of February, 2016.

Robert L. Reibold  
Walker & Reibold, Attorneys at Law

STATE OF SOUTH CAROLINA )

COUNTY OF HORRY )

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all other similarly situated, )

*Plaintiff* )

v. )

Jud Kuhn Chevrolet, )

*Defendant.* )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-8921

AFFIDAVIT IN SUPPORT OF MOTION  
TO COMPEL ARBITRATION

PERSONALLY APPEARED BEFORE ME the undersigned, who being duly sworn,  
deposes and says that:

1. I am over 18 years of age, am competent to testify, and have personal knowledge  
of the matters set forth herein. I have read the Complaint filed in this action.

2. In July of 2013, I was the finance manager for the Defendant Jud Kuhn Chevrolet.

3. I was involved in the transaction involving Marcus Grant described in the  
Complaint.

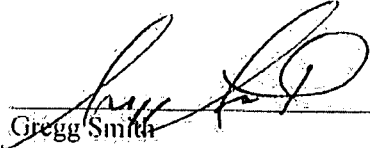
4. Attached hereto are true and accurate copies of the following documents  
which were executed in Plaintiff's transaction:

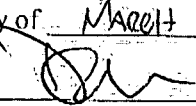
- a. Retail Buyer's Order
- b. On Star Subscription Confirmation
- c. US Key Replacement Plan; and

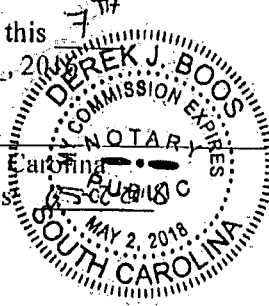


0093

d U.S. Treasury Check endorsed as partial payment.

  
\_\_\_\_\_  
Gregg Smith

SWORN TO before me this 7<sup>TH</sup>  
day of MARCH, 2014  
  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires MAY 2, 2018





**JUD KUH CHEVROLET**  
 PHONE: (843)399-4400  
 3740 HIGHWAY 8 EAST  
 LITTLE RIVER, SC 29566

**RETAIL BUYERS ORDER**

Salesman SUSAN K. ROEMER

Date Ordered 07/06/2013

Date of Delivery 070613

Driver's License # 008989537

E-Mail Address \_\_\_\_\_

CUST #: 51949  
 DEAL #: 53418

Purchaser(s) MARCUS KEVIN GRANT

Purchaser(s) \_\_\_\_\_

Home Phone # (843)250-5304

Address 1805 MERRIE LANE

Work Phone # (843)752-4810

City MULLINS SC

County HORRY Zip 29574

Enter my order for: Yr. 2010 Make CHEVROLET Model CAMARO Type 2DR COUPE LT Color RED JEWEL

Stock # E3315 Mileage 15612 Serial # 2511C1K99A9125266

DISCLAIMER OF WARRANTIES BY DEALER: The only express warranty, if any, applying to this motor vehicle will be that of the manufacturer. DEALER MAKES NO EXPRESS WARRANTIES OF THE MOTOR VEHICLE.

The dealer's name which is being sold "AS IS" and "WITH ALL FAULTS" and DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

DEALER NEITHER ASSURES NOR AUTHORIZES ANY OTHER PERSON TO ASSUME FOR DEALER ANY LIABILITY IN CONNECTION WITH THE SALE OF THIS VEHICLE. PURCHASER SHALL NOT BE ENTITLED TO RECOVERY FROM THE DEALER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS, OR INCOME, OR INCIDENTAL DAMAGES.

THE INFORMATION DISPLAYED ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISION IN THE CONTRACT OF SALE.

Lien Holder GM FINANCIAL  
 Address PO BOX 182673  
 City ARLINGTON  
 State TX Zip 76010-2673

IF TRADE-IN IS INVOLVED PLEASE SIGN AFFIDAVIT ON PAGE 2

Allowance \_\_\_\_\_  
 Payoff N/A Good Until \_\_\_\_\_  
 Payoff Quoted By \_\_\_\_\_  
 Balance Owed To \_\_\_\_\_  
 Street \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_  
 Account No. \_\_\_\_\_  
 Make Used Car \_\_\_\_\_ Year \_\_\_\_\_  
 Serial No. \_\_\_\_\_  
 Model \_\_\_\_\_  
 Mileage \_\_\_\_\_

PRICE	27900	00
ELECTRONIC TITLING	21	15
TOTAL PRICE	27921	15
TRADE IN ALLOWANCE / DISCOUNT		N/A
SUB TOTAL / TRADE DIFFERENCE	27921	15
ADMINISTRATIVE FEE	399	00
TOTAL (AMT. TO BE TAXED)	30320	15
SALES TAX 9.000 %	300	00
TAG & TITLE FEES	116	00
TOTAL CASH PRICE	28736	15
BALANCE OWED ON TRADE		N/A
REBATE		N/A
CASH DUE ON DELIVERY	2500	00
TOTAL CASH DOWN PAYMENT	2500	00
UNPAID BALANCE	26236	15
FOR CREDIT LIFE		N/A
FOR CREDIT DISABILITY		N/A
FOR SERVICE CONTRACT		N/A
FOR GAP		N/A
FOR GAP		N/A
TOTAL OTHER CHARGES AND FEES PAID TO OTHERS ON YOUR BEHALF		N/A
TOTAL UNPAID AMOUNT FINANCED	26236	15

PURCHASER MAY CHOOSE THE PERSON WHICH THE INSURANCE IS OBTAINED  
 USA  
 NAME OF INSURER \_\_\_\_\_  
 POLICY NUMBER \_\_\_\_\_

PURCHASER IS NOT REQUIRED TO OBTAIN CREDIT LIFE INSURANCE COVERAGE AND/OR A & H INSURANCE

ARBITRATION REQUIRED BY THIS AGREEMENT. The parties agree that in the event of a dispute, controversy or claim arising out of or relating to the sale of this motor vehicle or to this purchase order, including the validity or lack thereof of this contract, or to any other document or agreement between the parties relating to the sale of this motor vehicle, or to any other document or agreement between the parties relating to the motor vehicle, including the parties' retail installment contract, if any, shall be settled by binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules. Each arbitration shall be conducted in Columbia, SC. Each party will pay its own costs, and any filing fee charged by the American Arbitration Association shall be paid evenly between the parties. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

THIS PURCHASE ORDER IS FINAL WITH REGARD TO PRICE and shall not be affected by any marketing programs, including but not limited to coupons, special incentives, rebates or special financing programs.

THIS AGREEMENT IS NOT BINDING UNTIL ACCEPTED BY DEALER'S AUTHORIZED REPRESENTATIVE. IF ACCEPTED, DEALER SHALL NOT BE OBLIGATED TO SELL THE MOTOR VEHICLE UNTIL COMMITMENT IS OBTAINED BY A BANK OR FINANCE COMPANY TO PURCHASE A RETAIL INSTALLMENT CONTRACT BETWEEN THE PARTIES HERETO BASED ON THE TERMS HEREOF AND THE PARTIES SIGN SUCH RETAIL INSTALLMENT CONTRACT OR UNTIL PURCHASER PAYS TO DEALER THE AMOUNT SHOWN ON PAGE 1 AS THE BALANCE DUE AFTER TRADE-IN OR DOWN PAYMENT. If accepted by dealer, Dealer does not agree to extend credit to Purchaser, and this Purchase Order shall not be construed as an agreement in writing with credit. However, Dealer reserves the right, as its sole option and discretion, to accept credit.

THE ADDITIONAL TERMS AND CONDITIONS ARE INCORPORATED BY REFERENCE, WHICH MEANS THAT THEY ARE PART OF THIS CONTRACT JUST AS IF THEY WERE PRINTED HERE. PURCHASER ACKNOWLEDGES RECEIPT OF A TRUE AND COMPLETED COPY OF THIS PURCHASE ORDER, AND AUTHORIZES INVESTIGATION OF PURCHASER'S CREDIT AND EMPLOYMENT HISTORY AND THE RELEASE OF INFORMATION CONCERNING SUCH CREDIT AND EMPLOYMENT HISTORY.

WITNESSE THE SIGNATURE OF THE PURCHASER OR CO-PURCHASER, IF ANY, this 06 day of JULY, 20 13  
 Signature Marcus K. Grant Co-Purchaser N/A  
 Accepted by Dealer MARCUS KEVIN GRANT

BY: \_\_\_\_\_  
 ADDITIONAL TERMS AND CONDITIONS ON PAGE 2  
 LIENHOLDER

## ADDITIONAL TERMS AND CONDITIONS

- 1. DEFINITIONS:** As used in this Purchase Order the terms (a) "Dealer" shall mean the Dealer which is named on page 1 hereof, which shall become a party to this agreement only when an authorized representative of the Dealer signs page 1; (b) "Purchaser" shall mean any party signing this Purchase Order as such on page 1 hereof, including the Co-Purchaser, if any; (c) "Program" means a motor vehicle which was originally sold by the manufacturer for rental purposes and later repurchased by the manufacturer and/or the Dealer; (d) "Factory Executive" means a motor vehicle owned and used by the manufacturer prior to sale to Dealer; (e) "Demo" means a motor vehicle used by the employees of the Dealer prior to sale.
- 2. WARRANTY OF PURCHASER:** Purchaser warrants to Dealer that Purchaser has good title to any listed trade-in vehicle and that trade-in vehicle is free from any encumbrance and all debts except those which are identified and specifically set forth on page 1. If additional amount is needed to clear title of all liens, Purchaser agrees to pay such amount to the Dealer immediately. Purchaser further agrees to pay to Dealer the cost of obtaining a duplicate title to the trade-in vehicle, if necessary. Purchaser assumes and agrees to pay, unless prohibited by law, and savings tax (sales or usage tax) imposed on or applicable to the transaction covered by this Purchase Order, regardless of which party may have primary tax liability therefor. Further, Purchaser warrants that Purchaser is 18 years of age or older and will execute all documents necessary to transfer title to trade-in vehicle to the Dealer.
- 3. DELIVERY AND DOCUMENTARY FEE:** The "Delivery and Documentary Fee" shown on page 1 may be charged by the Dealer for reimbursement of fees paid and for services rendered by the Dealer for the Purchaser which are not required by law to be performed or paid by Dealer, but which are customarily provided by motor vehicle dealers in the competitive marketplace. The amount of the fee does not necessarily represent the actual costs or expenses to Dealer but to an estimate based on Dealer experience. If the amount is less than Dealer's actual costs or expenses, then Dealer shall retain the difference as additional profit; if more, Dealer shall absorb the difference by reducing its profit. Examples of the fees paid or services rendered include, but are not limited to: cleaning the vehicle; preparing documents related to the sales contract; compiling, collecting and furnishing the motor vehicle registration out of state; preparing an odometer disclosure form, if needed; determining the amount of financed balance, if any, owed on any trade-in vehicle and obtaining a release of the lien on the vehicle from the appropriate financing institution; obtaining and obtaining license plates if required; securing physical damage insurance if requested; securing power of attorney authorization where required; verification of physical damage insurance; clerical necessities such as record keeping, costs of temporary tags, costs of forms (discriminator of warranty forms, key tags, buyers orders, etc.); sufficient amounts of gasoline for delivery; and possible fuel into charges that the Dealer incurs when work exceeds factory time schedule, e.g. water leaks, air leaks, squeaks, rattles, etc.
- 4. FAILURE TO OBTAIN FINANCING:** Dealer is not obligated to sell under this Purchase Order unless financing is approved by a lending institution satisfactory to Dealer at Dealer's sole discretion (or until Purchaser pays the balance due after trade-in or down payment to Dealer in cash), if approval of financing is not obtained or Purchaser does not pay the balance shown on page 1 to Dealer in cash within seven (7) days from the date of this agreement, the Purchaser shall return the vehicle delivered under this Purchase Order, less Dealer's expenses and/or damages, including but not limited to repair of any physical damage to the vehicle, \$1.00 per mile in excess of 25 miles per day or 150 miles, whichever is less, reasonable attorney fees and costs associated with enforcing this agreement, plus any other incidental and consequential damages Dealer suffers as a result of the failure to obtain approval of financing or payment shown on page 1. If the trade-in vehicle has been sold by Dealer, then Purchaser shall be entitled to reimbursement of the actual cash value of the trade-in vehicle, less the expenses and/or damages described above, regardless of the amount of any trade allowance and/or discount allowed by the Dealer. Purchaser agrees to indemnify and save Dealer from liability for any and all debts, obligations, damages, claims, demands, Order or Purchaser's possession of the motor vehicle, as well as from the costs, including reasonable attorney fees, of defending against them. Purchaser shall maintain in full force and effect insurance to cover damage to the motor vehicle and liability arising from the operation of the same.
- 5. INSPECTION AND ACCEPTANCE OF VEHICLE:** If the motor vehicle purchased is a new vehicle, it is possible that some minor scratches, dents, or damage may have occurred to the vehicle as a result of shipping. These will be inspected upon arrival at the dealership, and all of the minor damage except the slightest of flaws is covered in Dealer's shop using authorized factory personnel. Dealer agrees to inspect the vehicle with Purchaser at the time of delivery and discuss any of these items, should Purchaser request.
- If the motor vehicle being purchased is a used vehicle, Purchaser accepts it in its present condition. However the vehicle is used, it is possible that it has previous body, structural, or mechanical problems and has been repaired. Purchaser acknowledges the right was offered to obtain an independent inspection and evaluation of the vehicle to determine the nature or extent of any prior repairs. The used vehicle may also have previously been issued a rebuilt or salvaged title from a state licensing authority prior to the Dealer's purchase thereof.
- IN EITHER CASE, THE PURCHASER, BY EXECUTING THIS DOCUMENT, ACKNOWLEDGES THAT PURCHASER HAS INSPECTED THE VEHICLE ITSELF, AND ACCEPTS IT IN ITS PRESENT CONDITION, IN BOTH PHYSICAL APPEARANCE AND MECHANICAL OPERATION.**
- 6. MOTOR VEHICLE AIR CONDITIONING UNIT:** If the motor vehicle being purchased is a used vehicle, Purchaser understands that it may be equipped with an air conditioning unit which requires a refrigerant known as CFC-12, commonly known as Freon. Purchaser acknowledges that federal law prohibits (or will prohibit) the further production of Freon. If the air conditioning unit requires repair or major service, it may become necessary to convert to use a refrigerant other than Freon. Purchaser understands that the entire cost of such repair and/or conversion shall be borne by Purchaser and has no obligation relating to the air conditioning unit or its conversion at any time, now or in the future. Purchaser may obtain a detailed publication on this subject from the United States Environmental Protection Agency, The Office of Air and Radiation, Stratospheric Protection Division.
- 7. ADDITIONAL DOCUMENTS:** The Purchaser, before or at time of delivery of the motor vehicle covered by this Purchase Order, will execute such other forms of agreement or documents as may be required by the terms and conditions of this Purchase Order.
- 8. CONSEQUENTIAL DAMAGES: PURCHASER SHALL NOT BE ENTITLED TO RECOVER FROM DEALER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS, LOSS OF INCOME, OR ANY OTHER INCIDENTAL DAMAGES.**
- 9. FINALITY OF AGREEMENT:** Purchaser agrees that this Purchase Order including all of the terms and conditions on both pages hereof, and any other documents signed by Purchaser on this date (and any retail installment contract as described below) cancels and supersedes any prior agreement, and as of this date, the written documents comprise the complete and exclusive statement of the terms of the agreement relating to the subject matters covered hereby. This Purchase Order can be modified only by a writing signed by the parties hereto or the duly authorized representatives of the parties. Purchaser is not relying upon any opinion, promise, statement, or representation made by any sales person or other employee of the Dealer that is not set out in the written agreements. If any provision in these agreements is determined to be unenforceable, the remaining provisions shall remain in full force and effect. The validity, construction and enforceability of these agreements shall be governed by the laws of South Carolina except to the extent that such laws are superseded by federal law.

PURCHASER AGREES TO PAY ANY DIFFERENCE (SHORTAGE) BETWEEN THE BALANCE DUE ON TRADE-IN (SHOWN ABOVE), WHICH IS THE PAYOFF GIVEN TO DEALER BY PURCHASER'S LIENHOLDER AND THE AMOUNT OF THE ACTUAL PAY-OFF. PURCHASER ALSO AGREES TO PAY ANY DIFFERENCE (SHORTAGE) IN SALES OR USE TAX IMPOSED OR APPLICABLE TO THE TRANSACTION COVERED BY THIS PURCHASE ORDER AND ANY TAX LIENS ON THE TRADE-IN. ANY OVERAGES WILL BE REFUNDED BY DEALER TO PURCHASER.

### AFFIDAVIT TO BE USED WHEN TRADE-IN IS INVOLVED

Purchaser is the sole, true and lawful owner(s) of the trade-in vehicle described (with current year paid registration on page 1 of this Retail Buyers Order and Purchaser certifies that the Purchaser is of legal age and competent to make this contract. Purchaser hereby sells and transfers to Jud Kuhn Pre-Owned Advantage said vehicle and Purchaser warrants Purchaser has absolute title thereto and that said vehicle is free from any liens or encumbrances of any nature except as disclosed on page 1 hereof. Purchaser hereby represents, warranties, and guarantees that the trade-in vehicle has not been damaged beyond normal wear and tear and is not nor has it been subject to salvage title or to the operation of the laws of South Carolina or any other jurisdiction regarding salvage titles or vehicles. Purchaser makes the representations, warranties, and guarantees herein with full knowledge and understanding that the Seller herein is relying upon them and for the purpose of inducing the Seller to accept the trade-in for the value stated. Purchaser will transfer title and said trade-in vehicle upon execution of this contract or in the event it is not available at the time this contract is executed Purchaser hereby agrees that Seller is given a power of attorney to apply for a duplicate certificate of title to transfer to said vehicle on Purchaser's behalf.

"I HAVE READ AND AGREE TO ALL ABOVE TERMS AND CONDITIONS."

Signature W.A. Haines, Jr. X

LIENHOLDER

Date N/A

# OnStar Subscription Confirmation

(Please give a copy to your customer)

<b>VEHICLE INFORMATION</b>
MAKE: CHEVROLET
MODEL: Camaro
YEAR: 2010
VIN: 2G1FC1EV9A9125266
Activation Date: July 6, 2013



*OVD  
Dmn  
GO MINT*

MARCUS GRANT, WELCOME!

Follow the simple steps below to begin enjoying the safety and convenience of OnStar right away!

Start by pressing the blue OnStar button located on your rear view mirror or console to ensure your OnStar service activation is complete. The advisor will:

- Offer to enroll you in OnStar Vehicle Diagnostics at no additional charge as part of your OnStar subscription (e-mail address required).
- You may share your diagnostic information with your dealer by enrolling in Dealer Maintenance Notification. Ask your dealer about their participation in the program.
- Offer you Hands-Free Calling minutes at a special promotional price.
- Answer any questions you may have about the OnStar Service that comes with your vehicle.

### 3 MONTHS ON US

Vehicle purchase includes 3 Months of the OnStar Directions & Connections Plan. This Plan includes:

- |  |                       |   |
|--|-----------------------|---|
| • Access to OnStar Hands-Free Calling  | • Remote Door Unlock  | • Stolen Vehicle Location Assistance    |
| • OnStar Vehicle Diagnostics           | • Roadside Assistance | • Turn-by-Turn Navigation (If equipped) |
| • Automatic Airbag Deployment Response | • Crisis Assist       | • Emergency Services                    |

Visit [onstar.com](http://onstar.com) for coverage maps, details and system limitations. Services vary by model and conditions.

### ACTIVE ONSTAR SUBSCRIBER DISCOUNT



Some insurance companies offer a discount for vehicles equipped with OnStar. Take this coupon to your insurance provider to see if you are eligible.

<b>VEHICLE INFORMATION</b>
VIN:2G1FC1EV9A9125266
Customer Name: marcus grant
Activation Date: July 6, 2013



United States Treasury <sup>16-51</sup> 000 K 881,208,750



Check No.



07 01 13 24 KANSAS CITY, MO  
3091 19557920 36000201 V3 C619 01A2

3091 19557920

Pay to  
the order of

MARCUS KEVIN GRANT  
1805 MERRIE LN  
MULLINS SC 29574

20 00 VA 19 01  
COMP

\$\$\$15932\*00

VOID AFTER ONE YEAR

PERSONAL FINANCING OFFICER



691026

⑈ 30910 ⑈ ⑆000000518⑆ 195579208⑈ 190713

6400010023 07-05-2013 <053206741>

*Marcus Kevin Grant*

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 15-CP-26-8921

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all others similarly situated, )

Plaintiffs, )

vs. )

Jud Kuhn Chevrolet, )

Defendant. )

**PLAINTIFFS' SUPPLEMENTAL  
MEMORANDUM REGARDING  
CLASS WIDE ARBITRATION**

The Defendant moved to compel Bilateral (Non-Class) Arbitration. On July 31, 2107 the Court ruled from the Bench that the case would go to arbitration but reserved judgment on whether the arbitration could proceed bilaterally only or as a Class. This Supplemental Memorandum is in support of the Plaintiff's position for the Plaintiff to be allowed to proceed in arbitration as a class action.

The present case has been styled as a Class Action under the Dealers Act. The Dealers Act specifically provides for class actions. S.C. Code Ann. §56-15-110(2) provides "When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief."

The South Carolina Supreme Court addressed class actions under the Dealers Act in the case of Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I). The Court found that an Arbitration Agreement which prohibited class actions in direct contravention of the Dealers Act is against public policy. The Court noted that in addition to specifically providing for class actions, the Dealers Act also provides that "Any contract or part thereof or practice

thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.” S.C. Code §56-15-130. The Court went on to hold, “Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State’s public policy and is void and unenforceable.” (Emphasis added.) The Court affirmed the Trial Court’s Order in result, denying the Motion to Compel Arbitration.

Shortly after the opinion in Herron I was issued, The United States Supreme Court published its opinion in the case of AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011). In Concepcion, The United States Supreme Court overturned a decision of the California Courts which invalidated a class action waiver in an arbitration provision based upon the preemption of the FAA. The United States Supreme Court then accepted certiorari on the Herron I case and remanded the Herron I case with instructions for the South Carolina Supreme Court to reconsider its opinion in Herron I in light of the Concepcion case. The South Carolina Supreme Court affirmed Herron I because the issue of preemption had not been preserved for review in the South Carolina proceedings. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). (Herron II).

The arbitration agreement in Herron I contained a class action waiver. The Court struck the waiver on public policy grounds but implied that the waiver was severable and the arbitration clause could be saved. The Court struck the entire arbitration clause at the Defendant’s request. The Arbitration Agreement in the present case DOES NOT have a class action waiver. Therefore, the present case is EVEN STRONGER than Herron I and this Court has even more reason to deny the Respondent’s request for bilateral arbitration.

In 2015, the United States Supreme Court once again overturned a California decision denying arbitration. In DirecTV v. Imburgia, 577 U.S. \_\_\_\_ (2015), the Court addressed an arbitration clause which contained a class action waiver with a self-defeating clause. The waiver specified that the entire arbitration provision was unenforceable if the “law of your state” made class-action waivers unenforceable. The lower court reasoned that since the law of California did not allow class action waivers, and since that rule was the “law of your state” the entire arbitration agreement was unenforceable by its own self-defeating terms. The Supreme Court disagreed, reasoning that the lower court had asked the wrong question. The court stated, “Thus the underlying question of contract law at the time [the lower court] made its decision was whether the ‘law of your state’ included invalid California law. We must now decide whether answering that question in the affirmative is consistent with the [FAA].” (Emphasis in original.) Id. at \_\_\_\_.

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

The facts of the present case, however, are very different from the facts of DirecTV. The first and foremost distinction is that DirecTV and prior cases concerned the States’ attempts to defeat arbitration altogether, which would frustrate the liberal Federal Policy in favor of

arbitration as set forth in the FAA. In the present case, however, the Court has already ruled in favor of arbitration. Therefore, the issue of class treatment is separate from the enforceability of the arbitration clause.

The second distinction is that the arbitration clauses in the present case contains no class action waiver. Therefore, there is no conflict between the state's public policy of allowing class actions under the Dealers Act and the FAA's liberal policy favoring arbitration. Both of these interests can be served.

The Third distinction is that the class action provision of the Dealers Act applies to all situations which arise under the Act. It does not target arbitration as the California law did in DirecTV. The class action provision of The Dealers Act allows for a class action in any contract to purchase a vehicle, with or without an arbitration clause. The Dealers Act was adopted in 1962, long before arbitration became popular. In 1962, the South Carolina legislature could not possibly have intended to target arbitration clauses. There is no evidence in the record to suggest that arbitration clauses were used in Automobile purchase Agreements in 1962. The purpose of providing for class actions under the Dealers Act was most certainly to provide a practical economical remedy for a large group of car buyers who have suffered the same type harm. The purpose was not to defeat arbitration clauses, or to frustrate the purposes of the FAA.

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

The entire agreement between the dealer and the purchaser is subject to the provisions of the South Carolina Manufacturers, Distributors and Dealers Act (Dealers Act). The Dealers Act is very specific in terms of the rights of consumers to band together in a class action. S.C. Code Ann. §56-15-110(2) provides "When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief." This is a specific consumer remedy recognizing that some losses suffered by consumers may be so small that the loss would not warrant the filing of a single action. The Dealers Act recognizes that consumers are particularly vulnerable to abusive fees charged by dealers and therefore specifically provides for consumers to band together to seek justice against these unscrupulous charges and activities.

The arbitration clauses contained in the purchase agreement in this case cannot be read separately from the requirements and the protections provided by the Dealers Act. These protections are presumed to be a part of any contract and therefore the arbitration clauses are not silent as to whether a class action can be brought in arbitration. The provisions of the Dealers Act are required in every Contract of Sale. As stated by the South Carolina Supreme Court in Herron I, the class action provision is non-waivable.

The contract was entered in Horry County, South Carolina. Both parties are residents of South Carolina. The Defendant has a South Carolina Dealer's license. The Defendant is subject to the Dealers Act and is charged with knowledge of the Class Action provisions of the Act. All parties to the transaction are aware of the application of the Dealers Act. Therefore, the Contract of Sale is NOT SILENT as to class actions. The Arbitration Clause requires arbitration before the American Arbitration Association (AAA), which has developed an entire set of rules for

for Class Actions. (See discussion in Plaintiff's Memorandum.) The Defendant is fully aware of the AAA's rules on Class Actions. Therefore, the contract is NOT SILENT as to Class treatment.

**CONCLUSION**

The Plaintiff requests the Court to order that the arbitration may treat this matter as a class action.

s/L. Sidney Connor, IV  
S.C. Bar No.: 1363  
Attorney for the Plaintiff  
KELAHER, CONNELL & CONNOR, P.C.  
Post Office Drawer 14547  
Surfside Beach, SC 29587  
T (843) 238-5648  
sconnor@classactlaw.net

August 1, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	Civil Action No. 2015-CP-26-8921
	)	
Marcus Kevin Grant, individually	)	
and in a representative capacity for	)	
all other similarly situated,	)	DEFENDANT JUD KUHN CHEVROLET'S
	)	RESPONSE TO PLAINTIFF'S
<i>Plaintiff</i>	)	SUPPLEMENTAL MEMORANDUM ON
	)	CLASS WIDE ARBITRATION
v.	)	
	)	
Jud Kuhn Chevrolet,	)	
	)	
<i>Defendant.</i>	)	
	)	

Arbitration in this case must be bilateral. Plaintiff's argument for class arbitration, while creative, relies on outdated South Carolina cases which cannot overcome controlling federal law.

**I. The FAA Preempts the Holding of *Herron I*.**

Plaintiff rests his argument on the fact that the South Carolina Supreme Court once stated that the Dealers Act contains a non-waivable right to bring a class action. *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 392 (2010) ("*Herron I*"). According to Plaintiff, this holding requires class arbitration of its own force or because it was somehow incorporated into the arbitration agreement in this case.

Plaintiff's argument ignores the fact that the holding on which he relies is preempted where, as here, the Federal Arbitration Act ("FAA") controls. Our Supreme Court in *Herron I* ruled that the Dealers Act creates a non-waivable right to class arbitration, and invalidated an arbitration clause because it contained a waiver of class action rights. This holding was vacated by the United States Supreme Court in *Sonic Automotive, Inc. v. Watts*, 563 U.S. 971 (2011).

The South Carolina decision conflicted directly with the United States Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011). In *Concepcion*, the Court

stated that “[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 344 (emphasis added). This language is a wall Plaintiff cannot breach. Contrary to Plaintiff’s argument, class arbitration cannot be required by statute in every case involving a car dealer - even where an arbitration agreement is silent on class arbitration -- because statutorily mandated class wide arbitration creates a scheme inconsistent with the FAA. The FAA preempts the holding on which Plaintiff relies.

Plaintiff correctly notes that *Herron I* was later reinstated because the issue of preemption had not been preserved for appellate review. *Herron v Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (“*Herron II*”). However, reinstatement because preemption was not raised implicitly conveys that, where preemption is raised, the opinion is invalid. As our Court of Appeals stated when discussing the same class action provision of the Dealers Act at issue here:

[a]lthough our supreme court technically “reinstated” its *Herron I* opinion, in light of (1) that case’s profound preservation deficiencies; (2) the opinion of the Supreme Court of the United States vacating *Herron*; and (3) the applicable holdings within *Concepcion*, the *Herron I* reinstatement *did not* signify a post-*Concepcion* position that the Dealers Act provision is immune to FAA preemption.

*York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 93, 749 S.E.2d 139, 152 (Ct.App. 2013) (emphasis added).

*Herron I*’s holding that the Dealers Act requires class arbitration is preempted by the FAA. Because the FAA controls here, Plaintiff cannot rely on *Herron I* to require class arbitration either directly or because it was somehow incorporated by reference into the arbitration agreement.

## II. Even if the Holding of *Herron I* Remained Valid in FAA Cases, *Stolt-Nielsen* Would Still Require Bilateral Arbitration.

Even if Plaintiff could rely on *Herron I*, he cannot overcome *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010). The United States Supreme Court’s

decision in *Stolt-Nielsen* held that that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Id.* at 684. (emphasis in original). Here, there is no contractual basis for concluding that the parties’ agreed or that the dealership consented to class arbitration. The arbitration agreement here provides that:

**ARBITRATION REQUIRED BY THIS AGREEMENT.** The parties agree that instead of litigation in a court, any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order, including the validity or lack thereof of this contract, to any other document or agreement between the parties relating to sale of the motor vehicle, or to any other document or agreement between the parties relating to the motor vehicle, including the parties’ retail installment contract, if any, shall be settled by binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules. Such arbitration shall be conducted in Columbia, SC. Each party will pay its own costs, and any filing fee charged by the American Arbitration Association shall be split evenly between the parties. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

(Ex. 1, Smith Aff.). As this excerpt reveals, the arbitration clause does not refer in any way to class wide arbitration.

Plaintiff does not actually argue that the contract language suggests that either party contemplated class wide arbitration. Instead, Plaintiff argues that the preempted class action provision of the Dealers Act is somehow incorporated by reference into the arbitration agreement. The mere fact that Plaintiff was forced to go outside the four corners of the contract to the Dealers Act to try to fit this case under the umbrella of *Stolt-Nielsen* is a tacit admission that the contract itself contains no evidence of consent to class arbitration. An external statute cannot be considered a “contractual basis” for consent or agreement to class arbitration. As the United States Court of Appeals for the Sixth Circuit explained, the principal reason to conclude that an arbitration clause

does not authorize class wide arbitration “is that the clause nowhere mentions it.” *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6<sup>th</sup> Cir. 2013).

Even if the Dealers Act class action provision could be considered, it would not allow Plaintiff to escape *Stolt-Nielsen*. What the Supreme Court emphasized in *Stolt-Nielsen* was the importance of consent and mutual intent to submit to arbitration in general and class arbitration in particular because of its potential for significant rulings with very little judicial review. *Stolt-Nielsen*, 599 U.S. at 684-85. The parties’ *agreement* is the controlling factor under the FAA. The Dealers Act provision does not speak to agreement. There is no evidence in the contract, by affidavit, or otherwise, that parties were aware of the statute, the *Herron I* decision, or relied upon the statute or decision in agreeing to arbitration. In the absence of a contractual basis to establish that the parties both agreed to class arbitration, *Stolt-Nielsen* prohibits class arbitration.

### III. *Herron I* Is Outdated and No Longer Controlling.

Plaintiff’s supplemental memorandum also relies on *Herron I* for the proposition that South Carolina public policy favors class action proceedings in cases under the Dealers Act. However, this position has subsequently been rejected by the Legislature, and the class action procedure in the Dealers Act is no longer available to the Plaintiff in this case.

Plaintiff seeks redress for the allegedly improper charging of a “closing fee.” (Complaint at ¶¶ 3-17). After the decision in *Herron II*, the South Carolina General Assembly amended S.C. Code § 37-2-307, a provision of the Consumer Protection Code entitled “Motor vehicle sales contracts closing fees.” This amendment became effective on June 3, 2016, and significantly changed the law regarding car dealer closing fees.

One such change is that closing fees are no longer actionable under the Dealers Act. Instead, a customer alleging that a closing fee in a car contract is improper must pursue relief, if any, under the Consumer Protection Code. Section 37-2-307 now provides in pertinent part that:

Notwithstanding another provision of law, a motor vehicle dealer who complies with this section [S.C. Code 37-2-307] and any regulation promulgated under it and who charges a closing fee *is not* engaging in any action which is arbitrary, in bad faith, unconscionable, an unfair or deceptive practice, or an unfair method of competition for purposes of Section 56-15-30 and 56-15-40 [the Dealer's Act] with regard to the charging of a closing fee and may lawfully charge a closing fee.

S.C. Code Ann. § 37-2-307(D)(1) (emphasis added). The amendment removes the subject matter of closing fees from the purview of the Department of Motor Vehicles, which administers Title 56, and cedes control to the Department of Consumer Affairs. *Id.* at § (E)(1) (“The Department of Consumer Affairs shall administer and enforce the subject matter of closing fees including, but not limited to, this section.”). The amendment also provides a specific remedy for alleged closing fee violations. *Id.* at § (D)(3) (a consumer injured by an improper closing fee may assert remedies available under the Consumer Protection Code).

That closing fees are no longer actionable under the Dealers Act affects Plaintiff's argument in two ways. First, in asking the Court to order class arbitration of a Dealers Act claim involving closing fees, Plaintiff is urging the Court to adopt a public policy which has been rejected by the General Assembly. Second, the procedural and remedial aspects of the amendment, including access to a class action mechanism, are retroactive. Plaintiff cannot make use of the Dealers Act class action provision to challenge closing fees even if that provision is not preempted by the FAA.

Statutes are ordinarily construed prospectively rather than retroactively -- unless the statute is remedial or procedural in nature. *S.C. Dept. of Revenue v. Rosemary Coin Machs, Inc.*, 339 S.C. 25, 28, 528 S.E.2d 416, 418 (2000). A statute is remedial and applies retroactively when it creates

new remedies for existing rights. *Hercules, Inc. v. South Carolina Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) (statutes affecting the remedy, not the right, are generally retrospective); *see also City of Florence v. Jordan*, 362 S.C. 227, 233 n.1, 607 S.E.2d 86, 89 n.1 (2004) (finding an amendment concerning the exclusion of evidence results for failure to comply with a statute was remedial).

The amendment to the closing fee statute created a new remedy for an existing right. Closing fee disputes were not previously actionable under the Consumer Protection Code. *Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 373, 778 S.E.2d 902, 908 (2015) (closing fee plaintiff had “no means of recovery” under the Consumer Protection Code). The amendment provides an express remedy under the Consumer Protection Code, and therefore applies retroactively. Given the statutory scheme, the new remedy is exclusive, and Plaintiff cannot rely on a statutory provision which is no longer available to him under South Carolina law.

**IV. Conclusion**

Arbitration in this case must be bilateral. The arbitration agreement does not refer to class arbitration and there is no other contractual basis on which to conclude that the parties’ agreed to class arbitration. *Stolt-Nielsen* applies and prohibits class arbitration. Additionally, and in any event, the FAA preempts the outdated South Carolina case on which Plaintiff relies.

Respectfully submitted,

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August 10, 2017

ATTORNEYS FOR DEFENDANT

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NO.: 15-CP-26-8921

Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all others similarly situated, )  
 )  
Plaintiffs, )

vs. )

**PLAINTIFFS' REPLY MEMORANDUM**

Jud Kuhn Chevrolet, )  
 )  
Defendant. )  
\_\_\_\_\_ )

The Defendant has provided a Memorandum regarding Class Wide Arbitration, which raises new arguments. This Reply addresses those new arguments.

**I. United States Supreme Court allows class actions in arbitration.**

The Defendant has argued that there is no contractual basis for class wide arbitration. This statement is incorrect as demonstrated in a U.S. Supreme Court case decided in 2013, after Stolt-Nielsen (2010).

In the case of Oxford Health Plans, LLC v. Sutter, 569 U.S. \_\_\_\_\_ (2013), the United States Supreme Court, in a unanimous decision, affirmed an arbitrator's decision to allow a class action to proceed in arbitration based upon the arbitrator's interpretation of the contract. The arbitration clause at issue states as follows:

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one Arbitrator. [Id.]

Obviously, this particular arbitration clause says nothing about class actions. Therefore, the agreement between the parties was arguably "silent" as to class actions. Nonetheless, the

arbitrator found that the intent of the arbitration clause was “to vest in the arbitration process everything that is prohibited from the Court process.” Id. The Supreme Court went on to state the Arbitrator’s reasoning as follows: “And a class action, the arbitrator continued, ‘is plainly one of the possible forms of civil action that could be brought in a Court’ absent the agreement.” Id. Accordingly, he concluded that ‘on its face, the arbitration clause... expresses the parties’ intent that class arbitration can be maintained’” Id.

The United States Supreme Court ruled that the arbitrator’s decision to allow this interpretation of the contract would not be overturned under the appeal parameters of the Federal Arbitration Act. The Court went on to distinguish its Stolt-Nielsen decision by noting as follows:

“The parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on Class Arbitration.” Id. (emphasis added).

In the present case there is no such unusual stipulation. On the contrary, the arbitration clause in the present case anticipates that all matters which could be brought forth in a Court system could also be brought forth in arbitration, which would include class actions. The facts of the present case are much more compelling than the facts surrounding the arbitration clause in the Sutter case. The arbitration clause in the Sutter case said nothing about class actions. In the present case there is the added indicator that class actions are specifically provided for under the Dealers Act which has been declared to be the public policy of this state by our Courts in Heron I and Heron II.

If the Federal Arbitration Act unequivocally prevented class actions in arbitration, the United States Supreme Court certainly would have overturned the arbitrator’s decision in the Sutter case. The Sutter case makes it clear that it is the Court’s responsibility to examine the

arbitration clause in light of all circumstances which in our case would include a specific provision for class actions in the Dealers Act.

**II. Appeals Court Decision**

The Defendant cites York v. Dodgeland of Columbia, Inc. 406 S.C. 67, 749 S.E.2 139 (Ct.App. 2013) for the proposition that Herron I and Herron II are no longer good law. The arbitration clause in the York case, however, did in fact contain a class action waiver clause. There is no such class action waiver clause in the present case. Therefore, the York case is inapplicable to the facts of this case. In addition, the York case was heard on June 12, 2013, just 2 days after the Supreme Court's opinion came out in Sutter. York does not mention Sutter. Presumably, the Appeals Court did not have the benefit of considering the Sutter decision.

**III. The 2016 amendment to the closing fee statute.**

The Defendant argues that the 2016 amendment to the closing fee statute implies that "closing fees are no long actionable under the Dealers Act." The Defendant has misinterpreted and/or misconstrued this amendment in a number of ways.

First of all, the Defendant states that "the amendment removes the subject matter of closing fees from the purview of the Department of Motor Vehicles." Defendant's Brief at Page 5. This statement makes no sense because the DMV was never vested with any regulatory authority over closing fees. The legislature of South Carolina adopted the first closing fee statute in the year 2000 in response to the automobile dealers' desire to legalize closing fees. The original closing fee statute found at §37-2-307 is entitled "Notice of Closing Fees on Motor Vehicle Sales Contracts; Registration Fees." It states as follows:

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of Ten Dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and

displayed in a conspicuous location in the motor vehicle dealership. (Emphasis added.)

These two simple sentences are all that comprise the initial closing fee statute of 2000. Notably, it is contained in the Consumer Protection Code (SCCPC). Furthermore, the one-time registration fee must be paid to the Department of Consumer Affairs. There is no reference in this statute to the Department of Motor Vehicles. The Defendant would argue that the 2016 Amendment somehow switches regulatory authority from the DMV to the DCA. Such is not the case. The 2000 version of the Closing Fee Statute makes it clear that the regulatory authority has always been with the DCA not the DMV. The section is still entitled §37-2-307 and it still appears in the Consumer Protection Code. Nothing has changed about the jurisdiction of closing fees. Attached to this Reply Memorandum is the complete 2016 Amendment, as passed. Notably, there is nothing in the Amendment that discusses or changes any provision of the Dealers Act. There is nothing in the Amendment that modifies or changes the availability of class actions under the Dealers Act. The class action provision for suits brought under the Dealers Act is found at §56-15-110(2) and remains intact. It is interesting to note that one of the first drafts of this bill contained a provision to delete the class action provision from the Dealers Act. See January 12, 2016 draft, attached. This proposal was rejected by the Legislature and class actions remain viable under the Dealers Act.

Secondly, the 2016 Amendment does not change the disclosure requirements for dealers regarding closing fees. §37-2-307(A)(2) under the Amendment states, “The closing fee must (emphasis added) be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.” This is the exact language as in the second sentence of the original §37-2-307 act from the year 2000. Nothing has changed about disclosure requirements.

The Plaintiff's Complaint alleges that the Defendant negligently violated the Dealers Act in several particulars, including the following:

- b. In failing to include the closing fee in the advertised price of the motor vehicles which includes the window sticker of the vehicle;
- c. In failing to display the closing fee in a conspicuous location in the motor vehicle dealership....

These two allegations of negligence are identical for the original statute as well as the 2016 Amendment. None of the changes in the 2016 Amendment relates to the all-important issue of disclosure.

The Defendant states that "closing fees are no longer actionable under the Dealers Act." Defendant quotes §(D)(1) for the proposition that closing fees are lawful and the dealer who charges closing fees is not engaging in an action which is arbitrary or in bad faith. The Defendant, however, has completely neglected the first part of this section which states "A motor vehicle dealer who complies with this section and any regulation promulgated under it...." In other words, compliance with the disclosure requirements has not changed. A dealer who does not comply with these disclosure requirements continues to be subject to an action under the Dealers Act because he is not in compliance with disclosure. The Complaint has alleged that this particular dealer did not disclose the closing fee in the advertised price of the vehicle and did not display the closing fee in a conspicuous location in the motor vehicle dealership. The gravamen of the Plaintiff's Complaint is a failure to disclose. A failure to disclose means that there is no compliance with the closing fee statute and the dealer can be liable under the Dealers Act for failure to disclose. There is nothing in the SCCPC or in the Amendment to the Closing Fee Statute which states that the consumer no longer has an action under the Dealers Act if in fact the dealer fails to disclose.

Third, the 2016 Amendment to the Closing Fee Statute is not retroactive. A brief review of the legislative history reveals that the legislature flatly rejected a retroactive provision written into the early draft. Section 5 of the January 12, 2016 proposed draft of the 2016 amendment states as follows:

SECTION 5. This act takes effect upon approval by the Governor, and shall apply to any and all causes of action, including appeals, pending on January 12, 2016, which have not been reduced to final judgment, and this act shall apply to any matter pending and unresolved on the effective date of this act.

This retroactivity provision was flatly rejected by the Legislature and does not appear in any later versions of the bill. It is certainly not in the final version of the bill as passed. The Defendant is well aware of the negotiations over this failed retroactivity provision. The Defendant's argument for retroactivity is proved incorrect by the legislative history.

The legislature did not include a retroactivity clause, specifically because there were numerous class actions pending against dealers across the state for failing to disclose. See, for example, Freeman v. J. L. H. Investments, 414 S.C. 362, 778 S.E.2 902 (2015). The final statutory language directly contradicts the Defendant's assertion. Section 2 of the Amendment specifically states "This Act takes effect upon approval by the Governor; provided, however, a motor vehicle dealer must be allowed an additional period of 30 days from the effective date to comply with §37-2-307(C)." Section 2 would have been a perfect opportunity for the legislature to state its retroactive effect if in fact that was intended by the legislature. As a matter of fact, it was not intended as is evidenced by the legislative history.

This argument of retroactive application is meaningless, however, because the requirements relating to disclosure were not changed in the least. Therefore, even if the statute were retroactive and dealers were presumptively allowed a \$225.00 closing fee prior to 2016, it still remains that the dealer has an obligation to disclose this fee to its customers. The remedy

for this failure of disclosure is found under the Dealers Act. That remedy has not changed in the least and therefore the Defendant's arguments for retroactivity are irrelevant.

**IV. Not the Exclusive remedy.**

The Defendant argues that the 2016 Amendment to the Closing Fee Statute provides the exclusive remedy for consumers who might suffer an injury because of a violation of the Closing Fee Statute. This argument is incorrect. Subsection (D)(3) of the 2016 Amendment states "A purchaser injured or damaged by an action of a motor vehicle dealer in violation of this section or any regulation promulgated thereunder, may (emphasis added) assert the remedies available pursuant to the provisions of this title." This section does not state nor imply that the SCCPC is the exclusive remedy for the consumer. Rather, the amendment states that a consumer "may" assert remedies available under Title 37.

The Supreme Court of South Carolina dealt with this issue extensively in the case of Freeman v. J. L. H. Investments, LP 414 S.C. 362, 778 S.E.2 902 (2015). The Supreme Court found that the Plaintiff in the Freeman case "pursued the proper course of action in seeking recovery for a closing fee violation under the Dealers Act." 414 S.C. at \_\_\_\_\_. The Court went on to state as follows:

Despite the well-defined purpose to protect against unfair practices involving consumer practices involving consumer credit transactions, {the Defendant} identifies several provisions in the SCCPC as potential avenues for recovery. However, none of these are applicable to the type of claim brought by Freeman. A review of these Code Sections reveals that the remedies are directed at recovery for specifically identified acts involving lending transactions between creditors and debtors. Here, Freeman did not allege any unfair practice regarding the financing of her vehicle purchased. Rather, she claimed she that she was unfairly charged a "closing fee" that bore no relation to the actual expenses incurred by Hendrick. Given this claim did not involve an unfair consumer credit transaction between a creditor and a debtor, Freeman had no means of recovery under the SCCPC. Instead, Freeman's claim fell within the purview of the Dealer Act... (414 S.C. at \_\_\_\_.)

It would certainly appear that the 2016 Amendment to the Closing Fee Statutes was enacted partly as a response to the Freeman case. But, it is significant that the 2016 Amendment did not provide any additional “remedy.” Section (D)(3) states that the consumer “may assert the remedies available pursuant to the provisions of this title,” but nothing about the “title” (SCCPC) was actually added or modified. In other words, the holding in Freeman as to no available remedy in the SCCPC has not changed. Although the 2016 Amendment makes passing reference to a “remedy” it is actually illusory. The remedies provided by the SCCPC relate to consumer credit, not to a failure to disclose closing fees. The only remedy available for the Plaintiffs in this case is found under the Dealers Act for failure to disclose the charging of closing fees. The present case has nothing to do with credit and, therefore, there is no remedy provided under the SCCPC as alleged by the Defendant.

The Freeman court went on to state,

Furthermore, because the legislature enacted the SCCPC and the Dealers Act both for the purpose of consumer protection, the statutes cannot be read in isolation. (Citations omitted) Considering this common purpose, we believe the legislature intended for the statutes to be construed together as it expressly provided for the SCCPC to supplement remedies afforded to consumers in law and equity which would necessarily include those provided in the Dealers Act.

The provision of the SCCPC which provides for supplemental remedies is S.C. Code Ann. §37-1-103(2015) which states “Unless displaced by the particular provisions of this title, the Uniform Commercial Code and the principals of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions.” The remedies provided in the Dealers Act certainly have not been displaced by the vague ineffective language of Section (D)(3) in the 2016 Amendment to the Closing Fee Statute. If this were the

case, then the consumer would in fact have no remedy for a dealer's failure to disclose its closing fees as required by statute.

The Supreme Court concluded in Freeman, "Consequently, in reconciling the two statutes, we find that the "closing fee" statute sets forth the procedural requirements that a dealer must satisfy before charging a closing fee whereas the Dealers Act sets forth the remedy for an alleged "closing fee" violation." 414 S.C. at \_\_\_\_\_.

The 2016 Amendment did nothing to alter the holding in the Freeman case. The Dealers Act continues to provide a supplemental remedy (if not the only remedy) for consumers against dealers who fail to comply with the disclosure requirements of the Closing Fee Statute.

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August 11, 2017

# Closing Fee Statute Amendment - Final Version

## South Carolina Legislature

ELECTRONICALLY FILED - 2017 Aug 11 3:52 PM - HORRY - COMMON PLEAS - CASE#2015CP2608921

4548 found 2 times.

### H\*4548

Session 121 (2015-2016)

**H\*4548**(Rat #0265, Act #0231 of 2016) General Bill, By Sandifer, Forrester, Toole, Bales, Chumley, Burns, Hardee, Allison, Tallon, Henderson, Clemmons, Sottile, Crosby, V.S. Moss, Jefferson, Yow, Duckworth, H.A. Crawford, Jordan, Fry, Herbkersman, Lowe, Goldfinch, Hixon, Norman, Hiott, Taylor, McCoy, D.C. Moss, Collins, Rutherford, Anderson, Kirby, Pitts, Corley, Ballentine, Hamilton, Finlay, Huggins, Ott, Govan, Riley, Willis, Thayer, Felder, Hicks, Simrill, G.A. Brown, Bedingfield, Stringer, Ryhal, King, Loftis, Hayes, Mack, Rivers, Ridgeway, Clary, Brannon, Atwater, Daning, Bannister, Anthony, McEachern, Mitchell, Erickson, Weeks, Knight, Cole, George, Horne, G.R. Smith, G.M. Smith, Williams, Limehouse, Pope, Gambrell, Alexander, Stavrinakis, Newton, White, Spires, R.L. Brown, Gilliard, Dillard and Gagnon

AN ACT TO AMEND SECTION 37-2-307, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO CLOSING FEES ASSESSED ON MOTOR VEHICLE SALES CONTRACTS, SO AS TO REQUIRE A MOTOR VEHICLE DEALER WHO CHARGES A CLOSING FEE TO PAY A REGISTRATION FEE AND THE FEE MUST BE INCLUDED IN THE ADVERTISED PRICE OF THE MOTOR VEHICLE; TO DEFINE THE TERM CLOSING FEE; TO ESTABLISH THE PROCEDURES A DEALER SHALL UNDERTAKE BEFORE CHARGING A CLOSING FEE AND TO AUTHORIZE THE DEPARTMENT OF CONSUMER AFFAIRS TO DETERMINE WHETHER A CLOSING FEE IS REASONABLE; TO PROVIDE THAT A DEALER WHO COMPLIES WITH CERTAIN STATUTORY REQUIREMENTS MAY LAWFULLY CHARGE A CLOSING FEE, TO ALLOW A MOTOR VEHICLE DEALER TO ASSERT ANY DEFENSES PROVIDED TO A CREDITOR PURSUANT TO TITLE 37, AND TO ALLOW A PURCHASER INJURED OR DAMAGED BY THE ACTION OF A MOTOR VEHICLE DEALER IN VIOLATION OF CERTAIN STATUTORY REQUIREMENTS MAY ASSERT THE REMEDIES AVAILABLE PURSUANT TO TITLE 37; TO AUTHORIZE THE DEPARTMENT OF CONSUMER AFFAIRS TO ADMINISTER AND ENFORCE MOTOR VEHICLE DEALER CLOSING FEES; AND TO EXPRESS THE INTENT OF THE GENERAL ASSEMBLY. - ratified title

- 12/10/15 House Prefiled
- 12/10/15 House Referred to Committee on Labor, Commerce and Industry
- 01/12/16 House Introduced and read first time (House Journal-page 102)
- 01/12/16 House Referred to Committee on Labor, Commerce and Industry (House Journal-page 102)
- 01/13/16 House Member(s) request name added as sponsor: Clemmons, Sottile, Crosby, V.S.Moss, Jefferson, Yow, Duckworth, H.A.Crawford, Jordan, Fry, Herbkersman, Lowe, Goldfinch, Hixon, Norman, Hiott, Taylor, McCoy, D.C.Moss, Collins, Rutherford, Anderson, Kirby
- 01/20/16 House Member(s) request name added as sponsor: Pitts
- 01/21/16 House Member(s) request name added as sponsor: Corley
- 01/26/16 House Member(s) request name added as sponsor: Ballentine, Hamilton, Finlay, Huggins
- 01/28/16 House Member(s) request name added as sponsor: Ott, Govan, Riley, Willis, Thayer, Felder, Hicks
- 02/02/16 House Member(s) request name added as sponsor: Simrill, G.A.Brown, Bedingfield, Stringer, Ryhal
- 02/03/16 House Member(s) request name added as sponsor: King, Loftis
- 02/04/16 House Member(s) request name added as sponsor: Hayes, Mack, Rivers, Ridgeway, Clary, Brannon, Atwater,

Daning, Bannister, Anthony, McEachern, Mitchell, Erickson

02/09/16 House Member(s) request name added as sponsor: Weeks, Knight, Cole, George, Horne, G.R.Smith, G.M.Smith, Williams, Limehouse, Pope, Gambrell

02/10/16 House Committee report: Favorable with amendment Labor, Commerce and Industry (House Journal-page 5)

02/10/16 House Member(s) request name added as sponsor: Alexander, Stavrinakis, Newton

02/11/16 House Member(s) request name added as sponsor: White, Spires, R.L.Brown, Gilliard, Dillard

02/11/16 House Requests for debate-Rep(s). Ott, Mack, Whipper, Cobb-Hunter, Williams, Sandifer, Forrester, McKnight, Kennedy, JE Smith, King, Bernstein, Whitmire, Erickson, Anderson, Kirby, McCoy, MS McLeod, (House Journal-page 67)

02/23/16 House Member(s) request name added as sponsor: Gagnon

02/23/16 House Amended (House Journal-page 50)

02/23/16 House Read second time (House Journal-page 50)

02/23/16 House Roll call Yeas-98 Nays-7 (House Journal-page 50)

02/24/16 Scrivener's error corrected

02/25/16 House Read third time and sent to Senate (House Journal-page 40)

02/25/16 Senate Introduced and read first time (Senate Journal-page 7)

02/25/16 Senate Referred to Committee on Judiciary (Senate Journal-page 7)

03/02/16 Senate Committee report: Majority favorable, minority unfavorable Judiciary (Senate Journal-page 8)

03/03/16 Scrivener's error corrected

04/12/16 Senate Amended (Senate Journal-page 17)

04/13/16 Scrivener's error corrected

04/13/16 Senate Amended (Senate Journal-page 33)

05/11/16 Senate Special order, set for May 11, 2016 (Senate Journal-page 76)

05/17/16 Senate Amended (Senate Journal-page 44)

05/17/16 Senate Read second time (Senate Journal-page 44)

05/17/16 Senate Roll call Ayes-42 Nays-0 (Senate Journal-page 44)

05/19/16 Senate Read third time and returned to House with amendments (Senate Journal-page 55)

05/26/16 House Concurred in Senate amendment and enrolled (House Journal-page 41)

05/26/16 House Roll call Yeas-99 Nays-0 (House Journal-page 41)

06/02/16 Ratified R 265

06/03/16 Signed By Governor

06/09/16 Effective date See Act for Effective Date

06/09/16 Act No. 231

VERSIONS OF THIS BILL

12/10/2015  
 2/10/2016  
 2/23/2016  
 2/24/2016  
 3/2/2016  
 3/3/2016  
 4/12/2016  
 4/13/2016

4/13/2016-A  
5/17/2016

H. 4548

(A231, R265, H4548)

AN ACT TO AMEND SECTION 37-2-307, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO CLOSING FEES ASSESSED ON MOTOR VEHICLE SALES CONTRACTS, SO AS TO REQUIRE A MOTOR VEHICLE DEALER WHO CHARGES A CLOSING FEE TO PAY A REGISTRATION FEE AND THE FEE MUST BE INCLUDED IN THE ADVERTISED PRICE OF THE MOTOR VEHICLE; TO DEFINE THE TERM CLOSING FEE; TO ESTABLISH THE PROCEDURES A DEALER SHALL UNDERTAKE BEFORE CHARGING A CLOSING FEE AND TO AUTHORIZE THE DEPARTMENT OF CONSUMER AFFAIRS TO DETERMINE WHETHER A CLOSING FEE IS REASONABLE; TO PROVIDE THAT A DEALER WHO COMPLIES WITH CERTAIN STATUTORY REQUIREMENTS MAY LAWFULLY CHARGE A CLOSING FEE, TO ALLOW A MOTOR VEHICLE DEALER TO ASSERT ANY DEFENSES PROVIDED TO A CREDITOR PURSUANT TO TITLE 37, AND TO ALLOW A PURCHASER INJURED OR DAMAGED BY THE ACTION OF A MOTOR VEHICLE DEALER IN VIOLATION OF CERTAIN STATUTORY REQUIREMENTS MAY ASSERT THE REMEDIES AVAILABLE PURSUANT TO TITLE 37 TO AUTHORIZE THE DEPARTMENT OF CONSUMER AFFAIRS TO ADMINISTER AND ENFORCE MOTOR VEHICLE DEALER CLOSING FEES; AND TO EXPRESS THE INTENT OF THE GENERAL ASSEMBLY.

Be it enacted by the General Assembly of the State of South Carolina:

**Closing fees on motor vehicle sales contracts authorized and requirements for the fee**

SECTION 1. Section 37-2-307 of the 1976 Code is amended to read:

"Section 37-2-307. (A)(1) Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year before January thirty-first to the Department of Consumer Affairs. The department shall set the fee annually in an amount not to exceed twenty-five dollars.

(2) The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

(B) A closing fee is defined as a fee charged for all administrative and financial work needed to transfer the motor vehicle to the consumer, person, or entity including, but not limited to, compliance with all state, federal, and lender requirements, preparation and retrieval of documents, protection of the private personal information of the consumer, records retention, and storage costs.

(C)(1) Prior to charging a closing fee, a motor vehicle dealer shall provide written notice to the Department of Consumer Affairs of the maximum amount of a closing fee the dealer intends to charge on an annual basis. The department may review the amount of the closing fee for reasonableness using the criteria in item (3) if the maximum amount of the closing fee intended to be charged by a dealer in a vehicle transaction exceeds two hundred twenty-five dollars per vehicle. The department shall not conduct a review of the amount of the closing fee for reasonableness when the maximum amount the dealer intends to charge in a vehicle transaction is not more than two hundred twenty-five dollars per vehicle. If the department intends to conduct a formal review of a proposed closing fee, the department shall provide written notice to the motor vehicle dealer of the department's intention to review the proposed closing fee within thirty days of receiving the proposed closing fee notice. If the department does not provide a motor vehicle dealer with written notice of the department's intention to review the proposed closing fee within thirty days, the motor vehicle dealer is authorized to charge the proposed closing fee. If the department determines that a proposed closing fee is not reasonable, the department shall issue a written order detailing the department's findings. The department may require the fee to be reduced or require the motor vehicle dealer to submit a new fee for review. The dealer is at all times authorized to submit a new closing fee that is equal to or less than two hundred twenty-five dollars per vehicle which is not subject to review.

During the pendency of the review period, a motor vehicle dealer is authorized to charge a closing fee at an amount not to exceed the amount most recently on file and permitted to be charged by the department. If the department finds that a closing fee is not reasonable, the motor vehicle dealer may request a hearing in accordance with the Administrative Procedures Act.

(2) If the maximum amount of the closing fee that the dealer intends to charge is not more than two hundred twenty-five dollars per vehicle, the closing fee is deemed approved by the department and the dealer does meet and fulfill all reasonableness requirements and criteria in compliance with the law and this section.

(3) In determining the reasonableness of a closing fee, the department shall allow the following items to be included in a reasonable closing fee:

(a) all administrative expenses, costs, staff, supplies, materials, and financial work needed to transfer the motor vehicle to the consumer and to procure the closing of the motor vehicle transaction;

(b) all costs for administrative expenses, costs, staff, supplies, and materials necessary by the dealer to comply with all state, federal, and lender requirements;

(c) all costs for administrative costs, staff, and materials needed for the preparation and retrieval of documents;

(d) all costs for administrative costs, staff, supplies, and materials necessary for the protection of the private personal information of the consumer; and

(e) all costs for administrative costs, staff, supplies, and materials necessary for records retention and storage costs of such records.

(D) Whether the vehicle transaction is a credit sale, consumer lease, or cash transaction:

(1) notwithstanding another provision of law, a motor vehicle dealer who complies with this section and any regulation promulgated under it and who charges a closing fee is not engaging in any action which is arbitrary, in bad faith, unconscionable, an unfair or deceptive practice, or an unfair method of competition for purposes of Sections 56-15-30 and 56-15-40 with regard to the charging of a closing fee and may lawfully charge a closing fee;

(2) a motor vehicle dealer may assert any defenses provided to a creditor pursuant to the provisions of this title; and

(3) a purchaser injured or damaged by an action of a motor vehicle dealer in violation of this section or any regulation promulgated thereunder, may assert the remedies available pursuant to the provisions of this title.

(E)(1) The Department of Consumer Affairs shall administer and enforce the subject of motor vehicle dealer closing fees including, but not limited to, this section. The department shall make and promulgate such rules and regulations relating to motor vehicle dealer closing fees to administer and enforce this section. The department shall have access to a motor vehicle dealer's books, accounts, and records to determine if the dealer is complying with the provisions of this section, and this financial information must be kept confidential and privileged from disclosure, except as provided by law.

(2) If the department determines that a closing fee is not reasonable, the department shall issue a written order detailing the department's findings. The department may require the fee to be reduced or require the motor vehicle dealer to submit a new fee for review. If the department finds that a closing fee is not reasonable, the motor vehicle dealer may request a hearing in accordance with the Administrative Procedures Act.

(F) It is the intent of the General Assembly to authorize a motor vehicle dealer to charge a closing fee in compliance with this section and to protect a motor vehicle dealer from civil liability for charging a closing fee if the fee is charged in compliance with this title and any Department of Consumer Affairs regulation or

administrative interpretation. It is further the intent to protect consumers by the disclosure and notice provisions established in this section and with the remedies provided by this title."

**Time effective**

SECTION 2. This act takes effect upon approval by the Governor; provided, however, a motor vehicle dealer must be allowed an additional period of thirty days from the effective date to comply with Section 37-2-307(C).

Ratified the 2nd day of June, 2016.

Approved the 3rd day of June, 2016.

Legislative Services Agency  
<http://www.scstatehouse.gov>

ELECTRONICALLY FILED - 2017 Aug 11 3:52 PM - HÖRRY - COMMON PLEAS - CASE#2015CP2608921

*Closing Fee Statute Amendment - January, 2016 Draft*  
South Carolina General Assembly  
121st Session, 2015-2016  
*(not passed)*

ELECTRONICALLY FILED - 2017 Aug 11 3:52 PM - HORRY - COMMON PLEAS - CASE#2015CP2608921

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~~Indicates Matter Stricken~~

Indicates New Matter

S. 911

**STATUS INFORMATION**

General Bill

Sponsors: Senators L. Martin, Campsen, Massey, Hayes, Alexander, Bennett, Bright, Bryant, Campbell, Corbin, Gregory, Hembree, S. Martin, O'Dell, Peeler, Shealy, Turner, Johnson, Grooms, Williams, Davis, Verdin, Fair, Reese, Nicholson, Cleary and Lourie  
Document Path: I:\s-jud\billsl. martin\jud0078.jh.docx

Introduced in the Senate on January 13, 2016  
Currently residing in the Senate Committee on **Judiciary**

Summary: Closing fees on motor vehicle sales contracts

**HISTORY OF LEGISLATIVE ACTIONS**

Date	Body	Action Description with journal page number
12/2/2015	Senate	Prefiled
12/2/2015	Senate	Referred to Committee on <b>Judiciary</b>
12/3/2015	Senate	Referred to Subcommittee: L.Martin (ch), Hutto, Massey
1/13/2016	Senate	Introduced and read first time ( <u>Senate Journal-page 28</u> )
1/13/2016	Senate	Referred to Committee on <b>Judiciary</b> ( <u>Senate Journal-page 28</u> )
1/20/2016	Senate	Committee report: Majority favorable, minority unfavorable <b>Judiciary</b> ( <u>Senate Journal-page 10</u> )
1/21/2016		Scrivener's error corrected
5/31/2016	Senate	Recommitted to Committee on <b>Judiciary</b>

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**VERSIONS OF THIS BILL**

- [12/2/2015](#)
- [1/20/2016](#)
- [1/21/2016](#)

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

~~Indicates Matter Stricken~~

Indicates New Matter

**COMMITTEE REPORT**

January 20, 2016

**S. 911**

Introduced by Senators L. Martin, Campsen, Massey, Hayes, Alexander, Bennett, Bright, Bryant, Campbell, Corbin, Gregory, Hembree, S. Martin, O'Dell, Peeler, Shealy, Turner, Johnson, Grooms, Williams, Davis, Verdin, Fair, Reese, Nicholson, Cleary and Lourie

S. Printed 1/20/16--S. [SEC 1/21/16 12:57 PM]

Read the first time January 13, 2016.

**THE COMMITTEE ON JUDICIARY**

To whom was referred a Bill (S. 911) to amend the Code of Laws of South Carolina, 1976, relating to closing fees on motor vehicle sales contracts, so as to establish a definition of a closing fee that, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass:

Majority favorable. Minority unfavorable.

LARRY A. MARTIN BRAD HUTTO

For Majority. For Minority.

**A BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO CLOSING FEES ON MOTOR VEHICLE SALES CONTRACTS, SO AS TO ESTABLISH A DEFINITION OF A CLOSING FEE THAT A MOTOR VEHICLE DEALER MAY CHARGE BY AMENDING SECTION 37-2-307 OF THE CODE AND TO PROVIDE AN AFFIRMATIVE DEFENSE FOR A MOTOR VEHICLE DEALER WHO COMPLIES WITH THE REQUIREMENTS OF THE CODE IS IN COMPLIANCE WITH STATE LAW; RELATING TO THE DEALERS' ACT TO CLARIFY THE PROCEDURAL PROCESS FOR BRINGING A CLAIM SO AS TO REPEAL SECTION 56-15-110(2) AND TO AMEND THE PROCEDURAL PROCESS FOR A PERSON TO BRING A CLAIM IN AN INDIVIDUAL CAPACITY UNDER THE DEALER'S ACT IN SECTION 56-15-110 (1); AND TO CLARIFY THE CURRENT PROCEDURAL PROCESS IN STATE LAW FOR A MOTOR VEHICLE TO BRING ACTION OR CLAIM FOR DAMAGE AND HARM TO ITS BUSINESS OR PROPERTY BY THE MANUFACTURER, DISTRIBUTOR, OR OTHER PERSON BY AMENDING SECTION 56-15-30.

Whereas, the South Carolina Supreme Court held in the matter of Freeman v. J.L.H. Investments, L.P., a/k/a Hendrick Honda of Easley issued on November 4, 2015, that a closing fee charged by a

motor vehicle dealer pursuant to Section 37-2-307 of the South Carolina Code must bear some relation to the actual expenses incurred for the closing and the majority; and

Whereas, the General Assembly enacted Section 37-2-307 of the South Carolina Code in 2000 and placed the closing fee statute in the disclosure chapter of the South Carolina Consumer Protection Code as a disclosure provision if a motor vehicle dealer intends to collect or charge a closing fee; and

Whereas, the South Carolina Supreme Court's Opinion, directly and adversely threatens the economic stability and ongoing viability of owners and operators of motor vehicle dealerships, their employees, vendors, customers, and communities; and

Whereas, there are approximately 282 franchised automotive dealerships employing 22,568 citizens in jobs throughout the State of South Carolina and their economic interests are important to their communities and to the State; and

Whereas, the majority expressly invited the General Assembly to address and correct this interpretation if it disagreed with the aforementioned Opinion; and

Whereas, the General Assembly enacted Section 56-15-110(2) of the Dealer's Act (Chapter 15 of Title 56) to allow motor vehicle dealers who are aggrieved and damaged as a result of the manufacturer and/or distributor to have the ability to join together in seeking remedy and action against the manufacturer and/or distributor; and

Whereas, the General Assembly finds that the court's dissenting opinion accurately reflects the intent of the General Assembly when it enacted the Closing Fee Statute as part of the Consumer Protection Code and placed the enforcement authority with the Department of Consumer Affairs to ensure compliance with the statute and to encourage reliance on the construction of the code by the department thereby protecting consumers and providing due regard for the interests of legitimate businesses seeking to comply with applicable requirements established by the department. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 37-2-307 of the 1976 Code is amended to read:

"Section 37-2-307. (a) Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

(b) A motor vehicle dealer who complies with subsection (a) above is deemed to be in compliance with the provisions of this section and may lawfully charge a closing fee. A motor vehicle dealer may assert any defenses provided to a creditor under the provision of Title 37 of the South Carolina Code of Laws whether the vehicle transaction is a credit sale or cash transaction.

(c) The Department of Consumer Affairs shall administer this section and shall exclusively enforce the subject of motor vehicle dealer closing fees, including, but not limited to, this section.

SECTION 2. Section 56-15-110(1) of Article 1, Chapter 15, Title 56 of the 1976 Code is amended to read:

"Section 56-15-110. (1) In addition to temporary or permanent injunctive relief as provided in Section 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas individually, but not in a representative or group capacity, nor acting as a private attorneys general, and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee and costs."

SECTION 3. Section 56-15-110(2) of the 1976 Code is repealed.

SECTION 4. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this Act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

SECTION 5. This act takes effect upon approval by the Governor, and shall apply to any and all causes of action, including appeals, pending on January 12, 2016, which have not been reduced to final judgment, and this act shall apply to any matter pending and unresolved on the effective date of this act.

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This web page was last updated on June 24, 2016 at 12:01 PM

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF HORRY )  
 )  
Marcus Kevin Grant, individually )  
and in a representative capacity for )  
all other similarly situated, )  
 )  
Plaintiff )  
 )  
v. )  
 )  
Jud Kuhn Chevrolet, )  
 )  
Defendant. )  
 )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2015-CP-26-8921

DEFENDANT JUD KUHN CHEVROLET'S  
BRIEF IN OPPOSITION TO PLAINTIFF'S  
PROPOSED ORDER ON ARBITRATION

Plaintiff submitted a proposed order regarding Defendant's motion to compel arbitration. And served Defendant with a copy of the proposed order. Defendant does not object to the portion of the proposed order addressing whether the case is subject to arbitration. However, the portion of the order addressing class arbitration is flawed in certain respects. It fails to address certain arguments, contains arguments which have not previously been raised to the trial court, and draws flawed legal conclusions. Defendant submits this brief to inform the Court of its concerns with the proposed order.

**I. The Proposed Order Ignores and/or Contains No Ruling on Defendant's Argument that the Language of the Arbitration Agreement Does Not Evidence the Parties' Intent or Agreement for Class Arbitration.**

Defendant argued at the original hearing and in a supplemental brief that the arbitration clause does not evidence an intent or agreement for class arbitration. Plaintiff agrees that the clause itself does not expressly mention class arbitration. This silence is the first and most basic reason to conclude that the parties did not contemplate class arbitration. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6<sup>th</sup> Cir. 2013) (the principal reason to conclude

that an arbitration clause does not authorize class wide arbitration “is that the clause nowhere mentions it”).<sup>1</sup>

Moreover, the language of the arbitration agreement itself suggests that arbitration should be bilateral. The arbitration agreement states that all claims arising out of “the sale of *the* motor vehicle” or related “to *this* Purchase Order” are subject to arbitration. (Arbitration Agreement) (emphasis added). The italicized portions of the clause indicate that claims involving a single vehicle or contract are subject to arbitration – they do not support an interpretation that claims involving other vehicles or other purchase orders are arbitrable by the Plaintiff. The Honorable Steven John recently granted a motion limiting arbitration to *bilateral* arbitration because the arbitration agreement contained just such language. A copy of this decision, which is currently before the South Carolina Court of Appeals, is attached hereto as Exhibit A.

The proposed order fails to rule on these arguments.

## II. The Proposed Order Improperly Relies Upon the Dealers’ Act to Infer The Parties Intent or Agreement to Class Arbitration.

<sup>1</sup> The Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have all held that “‘silence’ in an agreement regarding class arbitration generally indicates that it is not authorized by the agreement.” *Opalinski v. Robert Half Int’l*, 677 Fed.Appx. 738, 741 (3d Cir. 2017) (citing *Eshagh v. Terminix Int’l Co.*, 588 Fed.Appx. 703, 704 (9th Cir. 2014)) (affirming the district court’s grant of a motion to strike class allegations, where the arbitration agreement did not mention class arbitration); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (“The principal reason to conclude that this arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it.”); *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 643–44 (5th Cir. 2012) (finding that silence in an agreement does not “constitute[ ] consent to class arbitration” (internal quotation marks omitted)), *abrogated on other grounds by Oxford Health Plans LLC v. Sutter*, — U.S. —, 133 S. Ct. 2064, 186 L.Ed.2d 113 (2013); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728–29 (8th Cir. 2001) (holding that the district court did not err by compelling individual, rather than class, arbitration because the relevant agreements were silent as to class arbitration); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995) (stating “the FAA forbids federal judges from ordering class arbitration where the parties’ arbitration agreement is silent on the matter”). While the Fourth Circuit has not yet addressed this precise issue, district courts in the Fourth Circuit, including the District of South Carolina, have agreed class arbitration cannot be compelled where the arbitration agreement is silent. *E.g., Del Webb Communities, Inc. v. Carlson*, 2107 WL 1050139 (D.S.C. Feb. 1, 2017) (Duffy, Patrick J.); *NCR Corporation v. Jones*, 157 F.Supp.2d 460 (W.D.N.C. 2016).

The proposed order states that the arbitration clause cannot be read separately from the requirements of the Dealers Act, which according to *Herron I* contains a non-waivable class action provision. The proposed order, however, contains no ruling on Defendant's argument that *Herron I* is preempted by the FAA. This argument was implicitly approved by our Court of Appeals in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct.App. 2013), which stated that our Supreme Court's reinstatement of the *Herron I* opinion did not signify a post-*Concepcion* position that the Dealers Act is immune to FAA preemption. *Id.* at 93, 749 S.E.2d at 152.

Additionally, and in any event, the argument that the Dealers Act, an external statute, can be used to infer the parties' agreement or intent to proceed with class arbitration because existing law is considered part of the contract makes no sense. Other statutes existed at the time the contract was executed which also governed the relationship between the Plaintiff and Defendant, including the Unfair Trade Practices Act and the Consumer Protection Code. In contrast to the Dealers Act, these statutes *prohibit* class actions. *E.g.*, S.C. Code Ann. § 39-5-140(a) (an injured party may "bring an action individually, but not in a representative capacity"); S.C. Code Ann. § 37-5-202(1) (a consumer has a right "other than in a class action" to recover a penalty). It is not possible to infer the parties' agreement or intent to use class arbitration from an external statute because external statutes are inconsistent. Inquiry should be confined to the text of the arbitration agreement.

**III. The Proposed Order Improperly Relies upon the AAA Rules to Infer the Parties' Agreement or Intent to Use Class Arbitration.**

The proposed order states that the Arbitration Agreement's reference to American Arbitration Association ("AAA") arbitration is evidence of intent to utilize class arbitration because the AAA rules contain a set of rules entitled "Supplementary Rules for Class Arbitration." This argument should not be included in the proposed order. First, it is a new argument, and has

not previously been submitted to the Court. Neither the AAA Consumer Arbitration Rules nor the Supplementary Rules for Class Arbitration are in the record.

Second, courts have rejected this argument. A reference to the AAA rules in an arbitration provision—without any additional language regarding class procedures—is not enough to find that the agreement contemplates class arbitration. *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3rd Cir. 2016); *Reed Elsevier Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599-600 (6<sup>th</sup> Cir. 2013).

Third, the argument ignores the express language of the Supplementary Rules themselves. They provide that in construing an arbitration, the very task the Court is engaged in, “the existence of these Supplementary Rules, or any other AAA rules, [should not be considered] to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.” Rule 3 of the Supplementary Rules for Class Arbitration (Construction of Arbitration Clause). In other words, the Supplementary Rules themselves prohibit the Court from relying upon their existence as a factor in determining whether arbitration should proceed bilaterally or on a class basis.

#### **IV. The Proposed Order Improperly Relies on *Oxford Health Plans, LLC v. Sutter*.**

The *Oxford* decision was not cited by Plaintiff until Plaintiff replied to Defendant’s reply to Plaintiff’s *supplemental* memorandum of law on the arbitration issue – Plaintiff’s third brief and one to which Defendant had no opportunity to reply. Plaintiff characterizes the decision as one by the United States Supreme Court blessing the decision of an arbitrator who concluded that class arbitration was available when an arbitration clause was silent. This is a mischaracterization. As the Supreme Court itself stated in that case:

[n]othing we say in this opinion should be taken to reflect any agreement with the arbitrator’s contract interpretation, or any quarrel with Oxford’s contrary reading. All we say is that convincing a court of an arbitrator’s error—even his grave error—is not enough. So long as the arbitrator was “arguably construing” the contract—which

this one was—a court may not correct his mistakes under § 10(a)(4).

*Oxford Health Plans, LLC v. Sutter*, 113 S.Ct. 2064, 2070 (June 10, 2013). A concurrence by Justice Samuel Alito even noted that, if the Court were reviewing the arbitrator's decision de novo, it “would have little trouble concluding that [the arbitrator] improperly inferred ‘[a]n implicit agreement to authorize class-action arbitration ... from the fact of the parties' agreement to arbitrate.’ ” *Oxford Health*, 133 S.Ct. at 2071 (Alito, J., concurring) (alterations in original) (quoting *Stolt-Nielsen*, 559 U.S. at 685, 130 S.Ct. 1758).

Responding to this language, federal courts have rejected the suggestion Plaintiff asks the Court to adopt in the proposed order. The United States District Court for the Northern District of West Virginia has stated, for example that:

[t]he plaintiffs argue that because the Supreme Court concluded that the arbitrator [in *Oxford*] did not exceed his powers in authorizing class arbitration, the Court established a rule of law that express reference to class arbitration is not necessary for the parties to consent to it. However, the key to the *Oxford Health Plans* decision is its procedural posture. The Court was facing a motion to vacate the arbitral award, and the parties did not contest that the availability of class arbitration was arbitrable. The Court considered the narrow question of whether § 10(a)(4) of the FAA allows a court to vacate an arbitral award based on the arbitrator's determination that the parties consented to class arbitration. Section 10(a)(4) allows a court to vacate an arbitral award “where the arbitrator[ ] exceeded [his] powers,” but not when the arbitrator commits even serious error. The Court concluded that the arbitrator did not abuse his power in “( ... arguably) interpreting the parties' contract.” Thus, *Oxford Health Plans* reinforces the high burden a party has in seeking to vacate an award, but says nothing about how a court should interpret an arbitration clause.

*Bird v. Turner*, 2015 WL 5168575 at \* 9 (N.D.W.Va. Sept. 1, 2015) (emphasis added) (internal citations omitted).

In fact, the *Oxford* decision arguably supports Defendant's position. As the United States District Court for the Southern District of Ohio explained when discussing *Oxford*:

[Plaintiff] argues that if *Stolt-Nielsen* held that silence alone prohibited class arbitration, the Supreme Court in *Oxford Health* would have been required to vacate the arbitrator's ruling in that case. However, Smith misreads and misapplies *Oxford Health*. In *Oxford Health*, the Supreme Court strongly implied that the arbitrator may

have been incorrect in his analysis, but that the Court could not overturn the arbitrator's decision based upon a very limited scope of review.

*Smith v. BT Conferencing, Inc.*, 2013 WL 5937313 at \* 9 (S.D.Ohio Nov. 5, 2013).

**V. The Order Should Make Clear that the Court Is Not Expressing an Opinion on Whether Class Treatment Is Appropriate in Arbitration, but Only that Class Treatment Is Possible in Arbitration.**

Assuming the Court denies Defendant's motion to compel bilateral arbitration, there is a difference between a ruling that class arbitration is permitted by the parties' agreement and determining that class arbitration is appropriate. Decisions regarding the number of people in the class, common issues of fact or law, and differences in individual claims, all of which might argue for or against class treatment have not been made at this time. Defendant would request that the Court's order reflect that no decision about the *propriety* of class treatment has been made.

Respectfully submitted,

/s/H. CLAYTON WALKER, JR.  
H. Clayton Walker, Jr.  
WALKER | REIBOLD  
Post Office Box 61140  
Columbia, SC 29260  
(803) 454-0955

August 24, 2017

ATTORNEYS FOR DEFENDANT

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF Horry ) 2015-CP-26-08921

Marcus Kevin Grant, individually )  
and in a representative capacity )  
for all others similarly situated, )  
 )  
Plaintiff, ) Transcript of Record  
 )  
versus ) July 31, 2017  
 )  
Jud Kuhn Chevrolet, )  
 )  
Defendant. )

B E F O R E:

Honorable Benjamin H. Culbertson  
Horry County Courthouse  
Conway, South Carolina

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

Lawrence Sidney Connor, IV, Esquire  
Attorney for Plaintiff

Harry Clayton Walker, Jr., Esquire  
Attorney for Defendant

Grace L. Hurley, CVR-CM-M  
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)

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1 (On the record, July 31, 2017.)

2 THE COURT: Marcus Kevin Grant, individually and in a  
3 representative capacity for all others similarly situated  
4 versus Jud Kuhn Chevrolet. According to my roster, the matter  
5 is before the Court on a -- an amended motion to compel  
6 arbitration and a motion to compel responses to discovery.  
7 Please give the court reporter your name and who you  
8 represent.

9 MR. WALKER: Clay Walker here for Jud Kuhn Chevrolet.

10 THE COURT: All right.

11 MR. CONNOR: Sid Connor for the Plaintiff class.

12 THE COURT: All right. We've got two motions. Does it  
13 matter what order we take them in?

14 MR. WALKER: Well, Your Honor, I -- one's a discovery  
15 motion, and I can't, I can't answer discovery without waiving  
16 my arbitration rights.

17 MR. CONNOR: He's correct.

18 THE COURT: I see.

19 MR. CONNOR: That, that needs to be second.

20 THE COURT: All right. Well, let's hear then the  
21 Defendant's motion to compel arbitration.

22 MR. WALKER: Your Honor, I represent Jud Kuhn Chevrolet.  
23 His place is down in Little River. The Plaintiff bought a car  
24 from us. The Plaintiff now claims that a fee that he  
25 voluntarily paid when he bought the car was improper, and he's

1 brought this as a class case, and I've brought this motion to  
2 enforce the arbitration agreement that got signed when he  
3 bought the car, and under the terms of that agreement, Jud  
4 Kuhn and Mr. Grant need to go arbitrate their dispute as a  
5 bilateral dispute, just the two of them. The real fistfight  
6 here is can I enforce the arbitration agreement, and there's a  
7 memorandum filed by the Plaintiff saying that essentially it's  
8 going to cost too much money the way this agreement's set up  
9 to make him arbitrate, and there's some federal cases that say  
10 if it's so expensive he can't vindicate his rights, you can't  
11 make him arbitrate, but in this case it's going to cost him a  
12 hundred bucks, worst case, and my client's agreed to pay that  
13 anyway. So we've mooted the whole issue.

14 Now, the agreement says we're going to arbitrate under  
15 the commercial rules of the federal arbitration, excuse me,  
16 the AAA, American Arbitration Association. The problem is if  
17 you try to do that they're like the government, they say this  
18 is a consumer contract, it's an agreement to buy a car, and  
19 those are considered by the AAA to be consumer contracts, and  
20 they are subject to the consumer rules, and the consumer rules  
21 say the parties shall have made the consumer rules part of  
22 their agreement if it's a consumer contract, and those include  
23 automobile and manufactured home purchase contracts. So these  
24 are the rules that are going to govern, and under this, all  
25 the consumer pays is a \$200 filing fee. The arbitration

1 agreement says we have to pay half of everything anyway. So  
2 it's going to cost him a hundred bucks, less than it costs to  
3 file this case. In any event, Your Honor, we filed an  
4 affidavit with the motion from Jud Kuhn saying he'll pay all  
5 of it anyway, and while it may sound kind of odd, the federal  
6 courts recognize that moots this whole issue. As long as it  
7 is filed before the Court's ruled on the motion, this is all  
8 moot. There is one other issue that's raised. This  
9 agreement, for reasons I don't know because I didn't draft it,  
10 says we're going to arbitrate in Columbia, and Mr. Grant's  
11 filed an affidavit saying that's not the most convenient place  
12 for him, he has to drive up the road, and that's not  
13 convenient, and I absolutely agree it's not convenient, but  
14 that's not enough to say he can't vindicate his rights. He's  
15 obviously got a car. He bought one from us. He can ride to  
16 Columbia with his lawyer. So while it may be inconvenient, I  
17 can't explain why it's there because I didn't draft this  
18 agreement, and I realized this weekend I haven't tried to find  
19 out who did. So I can't really offer any explanation to the  
20 Court about why it's there, but to defeat my motion, the cases  
21 say he has a substantial burden of showing that it's -- he  
22 can't vindicate his rights, he can't pursue this claim, and  
23 right now there's an affidavit from my client saying he'll pay  
24 all the fees anyway. There's also an affidavit from my  
25 partner who's got another case, different parties, different

1 jurisdiction, different everything, different lawyers where he  
2 wrote the AAA trying to say use the commercial rules, that's  
3 what the agreement says, and there's all the feedback and  
4 pushback and ruling from the AAA saying the consumer rules  
5 apply, the consumer fees apply because it's a consumer  
6 contract. So in this instance, there's no real burden to  
7 prevent the Plaintiff from coming into arbitration, worst case  
8 he pays a hundred dollars, which is his half of the fee  
9 because the agreement says we split the fees. So our position  
10 is we haven't unduly burdened him. If he thinks he is, we  
11 filed an affidavit saying we'll pay it anyway, and there are  
12 Fourth Circuit cases that say that moots the issue. Judge  
13 Ross Anderson, who my -- I used to practice in Greenville, he  
14 ruled in a case as long as you promise to do it before the  
15 Court's ruled it moots the issue. So I've got a lot of good  
16 authority. All that's resolved. We're down to having to  
17 drive to Columbia, and while I can't explain why it says that,  
18 that's not going to prevent them from pursuing this case.

19 THE COURT: All right. Thank you. Mr. Connor.

20 MR. CONNOR: Your Honor, this, this -- the case has a lot  
21 of layers to it, as you might imagine that I would -- there's  
22 been a -- there's a volume of briefs. I apologize for that,  
23 but I think they're important. I would encourage the Court to  
24 go through those before making your ruling. Obviously, I  
25 mean, either way this goes I think what's going to happen is

1 pretty obvious. I've got about six or seven of these class  
2 actions at this time. They all involve this or a similar  
3 issue to it. This particular issue, the effective vindication  
4 of rights is just the first layer of this case. The federal  
5 courts have recognized at Federal Arbitration Act, even though  
6 it requires arbitration still gives you -- has a savings  
7 clause that says if the contract is not valid under state law  
8 for other reasons then the contract is void and you don't have  
9 to arbitrate. One of those reasons that's been recognized is  
10 called the effective vindication because you have to provide a  
11 forum where the Plaintiff can actually effectively vindicate  
12 his rights. You can't give him a forum that's going to be  
13 stacked against him, and one of the ways this has been -- that  
14 that has been recognized is the cost of the arbitration, and  
15 this fight has gone on throughout the country. This is, this  
16 is not the first two lawyers to argue this effective  
17 vindication. In essence, only one-half of it's been argued,  
18 and that is what happens if there is a consumer agreement and  
19 it's, and it's litigated in the consumer AAA rules normally  
20 that's a \$200 filing fee for me. Even at that, they're,  
21 they're claiming, "Well, we'll pay that or at least half of  
22 that, normally would cost you a hundred dollars," and then  
23 there's the cases back and forth that say, you know, what  
24 happens if they waive that, and my argument is the same  
25 argument that was made by the, by the court in the case of

1. Gandee versus LDL Freedom Enterprises out of the State of  
2 Washington, and that's in my second brief and, and basically  
3 the court says there the Defendant attempts to escape this  
4 result by offering to quote, waive objectionable provisions,  
5 which it suggests somehow moots the Plaintiff's challenges.  
6 Contracts are generally interpreted as of the time of  
7 contracting making any subsequent offer to waive  
8 unconscionable terms irrelevant, and that's our argument here,  
9 that their attempted waiver makes the -- it still is  
10 irrelevant to the validity of the contract. The court goes on  
11 to state this, strong reasons exist for encouraging contracts  
12 to be conscionable at the time they're written and allowing  
13 after the fact waiver to moot unconscionability, challenges  
14 the exception -- is the exception not the rule. Parties  
15 should not be able to load their arbitration agreements full  
16 of unconscionable terms and then when challenged in court  
17 offer a blanket waiver. This would encourage rather than  
18 discourage one-sided agreements and would lead to increased  
19 litigation. Any other approach is inconsistent with the  
20 principal that contracts, especially the adhesion contracts  
21 common today, should be conscionable and fairly drafted. So  
22 what we would say is the attempted waiver should not be  
23 considered at all by the Court. You should take the contract  
24 as it was written and consider that as of this time, and  
25 there's, there's some support for that in this state. Simpson

1 versus MSA was the first case in this state which recognized  
2 that you could overturn an arbitration agreement through the  
3 merits of the agreement. Basically in that case the  
4 arbitration agreement with the auto dealer said you couldn't  
5 have certain consumer rights, couldn't get treble damages,  
6 etcetera, and our Supreme Court said you can't do that, and  
7 five to nothing they ruled that was an invalid agreement.  
8 Now, there was no attempted waiver in that case, but I would  
9 suppose if there were an attempted waiver, the court would  
10 have said, "No. You can't do that. We're going to take the  
11 contract just as it is. We're going to read it just like it  
12 is and go from there." So I think there's some support,  
13 although be it indirect.

14 The, the really the underlying argument here is whether  
15 or not we get to litigate this as a class action or what we  
16 call bilaterally, which is just between the two parties, and  
17 that involves a long line of United States Supreme Court  
18 decisions interpreting Federal Arbitration Act as you I'm sure  
19 are familiar with, and the most recent case that deals with  
20 this particular issue is called Stolt-Nielsen. The Stolt-  
21 Nielsen case basically stands for the proposition that if the  
22 arbitration agreement doesn't specifically say that you can  
23 arbitrate as a class, then the Supreme Court says the, the  
24 assumption is you can't, that the parties didn't do that, and  
25 ordinarily that would carry the day, and we would not get to

1 litigate as a class. It does not carry the day under the  
2 Dealers Act, however. I've, I've brought one cause of action  
3 in this case. It's only the Dealers Act. The Dealers Act,  
4 oddly enough, has a specific class action provision built into  
5 it apart from Rule 23, and I believe the Dealers Act was  
6 enacted before Rule 23 became a procedural rule for the State  
7 of South Carolina, although we did recognize common law class  
8 actions even before that, but it's a specific remedy against  
9 dealers by consumers. It's very odd in South Carolina law.  
10 It doesn't -- I don't know of any other place that it exists,  
11 but it's there, and it says in a, in a dealership case by  
12 consumers the consumers can bring a class action. It's a  
13 specific provision for it. I think that that trumps the  
14 Stolt-Nielsen case because you have a specific statute that  
15 says you get to do this. The other Supreme Court cases  
16 basically say, "Look, you can't single out arbitration  
17 agreements," because the State of California and the Supreme  
18 Court have been going -- have had an ongoing battle about  
19 arbitration agreements. The State of California tried to  
20 outlaw them in some cases completely, and the Supreme Court  
21 addressed those in several cases and said, "California, you  
22 can't do that. You can't just outlaw arbitration. You can't  
23 target an arbitration agreement," but if you have a state  
24 statute that's neutral to arbitration it just applies to all  
25 contracts then you can do that and the -- its arbitration

1 agreement just happens to be in violation of that. That's  
2 what we have here. We have a state statute that was enacted,  
3 I believe in the seventies, the Dealers Act that says you get  
4 a class action in a, in a, in a case against a dealer. It's  
5 not targeted to arbitration. It's targeted to general  
6 contracts in general. It -- in fact, in the seventies, you  
7 know, I doubt there was any talk of any arbitration  
8 agreements. I didn't really -- you didn't really see them in  
9 dealers contracts till the late nineties and into the 2000s.  
10 So it wasn't an issue back then. It's not targeted. So the  
11 -- and there's a specific case law and it's called Herron,  
12 Herron I and Herron II, and these are all in the briefs, and  
13 the South Carolina Supreme Court has said that the statute  
14 says it's the public policy for the State of South Carolina to  
15 allow a class action in a Dealers Act case, and in that  
16 particular case it rejected the Defendant dealer's argument to  
17 put it in arbitration, went up to the United States Supreme  
18 Court. The United States Supreme Court sent it back and said,  
19 "Look, take a new look at this based on our Concepcion ruling,  
20 Concepcion versus AT&T, where we say the FAA trumps this and  
21 you should reconsider." Came back to our South Carolina  
22 Supreme Court. At that point the South Carolina Supreme Court  
23 said, "Well, you didn't raise the FAA preemption issue in the  
24 court below. So we're going to stick with our prior ruling."  
25 So that's a little bit out there without -- with an unanswered

1 question, but the, the fact remains that Heron I said it's the  
2 public policy of this state to allow a class action against a  
3 dealer. In this particular case, the key point here, most  
4 dealers have now through Mr. Walker's wise counsel have put in  
5 clauses, no arbitration clauses and class action waivers.  
6 This dealer did not have a class action waiver. It simply has  
7 an arbitration clause but no class action waiver. So, they're  
8 trying to argue from the, from the fact that there's nothing  
9 in the arbitration clause at all implies that we didn't agree  
10 to a class action in arbitration, but the fact remains they  
11 don't have to because Heron I says you get to anyway. So the  
12 bottom line is, number one, we believe that the motion should  
13 be denied and we should stay in state court. If the Court  
14 rules that we go to arbitration, we believe that the Court  
15 should say Heron I controls and we get to arbitrate as a class  
16 action if that's what the arbitrator deems appropriate and  
17 we'll go through the normal class action maneuvers, how many  
18 people are in the class, how much money is involved, those  
19 types of things. That will be for the arbitrator.

20       There's one other point I should mention, and that's the  
21 first point I bring up in my second brief which may simplify  
22 the whole matter and, and that is that the rules of civil  
23 procedure state that if you demand a jury trial in your answer  
24 then you can't later waive the jury trial or demand -- it  
25 doesn't say specific to arbitration, but it says Rule 38(D)

1 provides in part a demand for trial by jury made as herein  
2 provided may not be withdrawn without the consent of the  
3 parties. Well, we don't consent to their withdrawal of the  
4 demand for jury trial. When they answered the case and I  
5 attached the answer to the memorandum, they clearly state jury  
6 trial demanded. They didn't make a motion for arbitration  
7 until nine months later. The case was nine months old before  
8 we got a motion to compel arbitration, and in the meantime,  
9 we, we've, we've lost nine months because of that. We heard  
10 this argument first in January before Judge John, and Judge  
11 John granted a continuance for them to deal with these -- with  
12 what was deemed to be new arguments. So we're here before you  
13 on the effective vindication argument, but it is a -- does  
14 have a lot of layers. I apologize for that. It's a very  
15 interesting -- some very interesting issues, and we would urge  
16 the Court to deny the motion for arbitration because of those  
17 reasons, but if you grant the motion we would urge the Court  
18 to allow us to proceed as a class action.

19 THE COURT: All right. But now what does Rule 38 say  
20 again?

21 MR. CONNOR: Rule 38(D) says, "A demand for trial by jury  
22 made as herein provided may not be withdrawn without the  
23 consent of the parties."

24 THE COURT: Okay.

25 MR. CONNOR: Black and white.

1 THE COURT: All right. Anything in reply?

2 MR. WALKER: Your Honor, very briefly, in black and white  
3 in the answer second defense I preserved my arbitration  
4 rights, that it'll end up in arbitration, I'm not walking away  
5 from my jury. As to whether this should be bilateral  
6 arbitration or class arbitration, as I presented it to the  
7 Court the big fistfight is is arbitration enforceable. Mr.  
8 Connor from his own mouth says the Stolt case, the U.S.  
9 Supreme Court has said if the parties don't agree to it in the  
10 arbitration agreement, you can't do it. Your Honor, there's a  
11 prior case brought by Mr. Connor in this courthouse, the  
12 Defendant is, I think, the Mitsubishi Store. They have a  
13 funny name, Fagg [spelled phonetically], Inc. This issue was  
14 decided in that case adverse to Mr. Connor's client. So  
15 there's already one case in South Carolina that says the U.S.  
16 Supreme Court when it ruled in Stolt knew what it was doing.  
17 So the U.S. Supreme Court has made it very clear if we go into  
18 arbitration we're going to go in bilaterally, and Mr. Grant  
19 and Jud Kuhn are going to try their case and resolve it before  
20 an arbitrator, but you can't take it in as a class because the  
21 U.S. Supreme Court has said absent an agreement between the  
22 parties it's not permissible, and there is no agreement  
23 between the parties in this case to arbitrate a class. So,  
24 number one, this agreement is arbitrable. No one said the  
25 consumer rules aren't going to apply, and his client only has

1 to pay \$100.

2 THE COURT: But what was -- why did you delay? Why did  
3 you file an answer demanding a jury trial and then have a  
4 nine-month delay before you filed a motion to compel  
5 arbitration?

6 MR. WALKER: Your Honor, miscommunication between me and  
7 a younger lawyer in my office. I thought it was done, and I  
8 was -- I didn't audit the file closely enough. That's my  
9 fault. That's not for advantage, Your Honor.

10 THE COURT: So how, how do you get around Rule 38(D)?

11 MR. WALKER: Your Honor, I'm not trying to say I -- I'm  
12 backing off my jury trial. If it's in arbitration and our  
13 arbitration agreement's enforceable, that's the forum where I  
14 have to take my case.

15 THE COURT: So a jury trial and arbitration --

16 MR. WALKER: And Your Honor, it would -- no, Your Honor.

17 THE COURT: This says a demand for a trial by a jury --

18 MR. WALKER: Yes, sir.

19 THE COURT: -- made may not be withdrawn without consent  
20 of the parties.

21 MR. WALKER: I'm, I'm not withdrawing it. If, if there's  
22 no arbitration we're going to try it in this forum. Your  
23 Honor, they -- it couldn't have been intended that if I get  
24 sued my choices are -- and I have -- and I want to enforce my  
25 arbitration agreement I can't ask for a jury trial. That's

1 what he's saying.

2 THE COURT: Oh, okay. I see what you're saying.

3 MR. WALKER: That can't have been the intent. If you, if  
4 you follow what he's saying I couldn't have asked for a jury  
5 trial.

6 THE COURT: Okay.

7 MR. WALKER: You can't force me to waive my right. I got  
8 a constitutional right to that, and if you do what he says, I  
9 can't, I can't ever enforce my arbitration agreement without  
10 losing my right to a jury trial.

11 THE COURT: So you're saying if it's not arbitrated then  
12 it goes for a jury trial?

13 MR. WALKER: Yes, sir.

14 THE COURT: Or if I deny this motion then it's a jury  
15 trial?

16 MR. WALKER: Correct.

17 THE COURT: All right.

18 MR. WALKER: I'm not backing off that one bit.

19 THE COURT: I see.

20 MR. WALKER: So that's my response to those three points.

21 MR. CONNOR: Your Honor, I forgot to hand up a case. May  
22 I do that?

23 THE COURT: Yes.

24 MR. WALKER: And Your Honor, I thought I had a copy of  
25 the order granting bilateral arbitration in the Fagg [spelled

1 phonetically] case but I can't find it and I apologize.

2 THE COURT: That's all right. I'm going to -- hold for  
3 one second. All right. Because he did put a second defense  
4 for mandatory arbitration and there is an arbitration  
5 agreement, I am going to grant the motion to compel  
6 arbitration. I don't know the answer on the class action  
7 issue. I'm going to let the arbiter decide that because I  
8 don't know what, what the answer is on that. So I'm going to  
9 let the --

10 MR. CONNOR: Your Honor, I -- we've, we've argued that,  
11 that before as to who decides that, and the Fourth Circuit is  
12 pretty clear that this Court decides it.

13 THE COURT: Okay. So I decide whether or not they can  
14 maintain --

15 MR. CONNOR: Yeah. You're -- yeah. You're the, you're  
16 the --

17 THE COURT: -- the class action?

18 MR. CONNOR: -- gatekeeper.

19 MR. WALKER: That's correct. And Your Honor --

20 MR. CONNOR: I hate to put that on you.

21 MR. WALKER: And I'm sure what they're anticipating is it  
22 -- anyway, it's the law.

23 MR. CONNOR: And that's really what I would encourage the  
24 Court to take a real hard look at because, because of the  
25 reasons I've stated. I really don't mind arbitrating it as a

1 class. I don't want to do that.

2 THE COURT: Well, let's do this. All right. I'm going  
3 to grant the motion to compel arbitration. As to whether or  
4 not you can maintain a class action, I want both of you to  
5 submit briefs within ten days, you why you can maintain it,  
6 you why you can't maintain it, and then I'll make a decision.  
7 I'll hold that issue in abeyance.

8 MR. WALKER: Thank you, Judge.

9 THE COURT: All right.

10 MR. CONNOR: I would offer to you that that's probably 90  
11 percent of my brief right now.

12 THE COURT: Well, if you want to rely on what you've  
13 submitted thus far.

14 MR. CONNOR: I'll take, I'll take a look at it, but I  
15 don't think there's any more to add to it and from, from my  
16 viewpoint.

17 THE COURT: All right. If you want, if you want to rely  
18 on what you've submitted thus far, that'll be fine, and but  
19 submit briefs within ten days and I'll make a decision.

20 MR. CONNOR: Yes, Your Honor. Thank you.

21 MR. WALKER: Thanks, Judge.

22 THE COURT: All right. Thank you.

23 So the motion to compel that would now be moot; right?

24 MR. CONNOR: Well, it would be held in abeyance, I would  
25 think. Well, moot, yes, because of the arbitration.

1 MR. WALKER: Thanks, Judge.

2 THE COURT: Thank you.

3 (Adjourned.)

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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of Marcus Kevin Grant, individually and in a representative capacity for all others similarly situated versus Jud Kuhn Chevrolet, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on July 31, 2017.

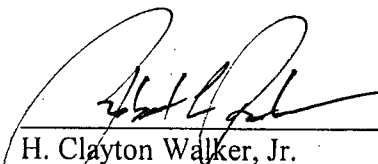
I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

---

Grace L. Hurley, CVR-CM-M  
Official Reporter

December 19, 2017.

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



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