THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2018-000171

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
Civil Action No. 2017-CP-10-02148
J. C. Nicholson, Jr., Circuit Court Judge

Cleo Sanders ..... Respondent

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer USA Holdings, Inc., Isiah S. White, Danny Anderson and Patrick Bachrodt, Jr..... Defendants

Of whom, Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White are the ..... Appellants

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INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court Err in Denying Appellants' Motion to Compel Arbitration When the Interpretation and Scope of the Arbitration Clause and the Arbitrability of a Claim were Expressly Designated in the Agreement as Matters for an Arbitrator to Decide?

II. Was the Circuit Court Without Jurisdiction to Issue its Second Order Granting Respondent's Motion to Compel Discovery Responses?

III. Did the Circuit Court Err in Issuing its Order Granting Respondent's Motion to Compel Discovery Wherein it Expressly Found that Appellant Waived its Right to Seek and/or Participate in Arbitration?

INTRODUCTION

This matter involves two Circuit Court Orders, each of which impermissibly run afoul against the presumption in favor of arbitration for various reasons. As such, the Circuit Court Orders should be reversed and deemed void as appropriate.

This case arises out of Respondent Cleo Sanders' purchase of a vehicle from Appellant Savannah Highway Automotive Co., d/b/a Rick Hendrick Dodge Chrysler Jeep Ram ("Rick Hendrick") in August 2012. At issue in this matter is the sales contract, and more specifically, a conspicuous Arbitration Clause contained therein. The Arbitration Clause is expansive in its language and scope. Four months after Respondent filed his lawsuit against other defendants and Appellants Rick Hendrick and Isiah White (collectively "Appellants"), Appellants moved for an Order staying and/or dismissing the action and compelling discovery pursuant to the Arbitration Clause. The Circuit Court ultimately denied the motion, finding that because Rick Hendrick assigned the sales contract to a financial institution, it did not have standing to seek arbitration under the contract. However, this was error, as the Arbitration Clause at issue is expansive and contemplates that even the interpretation and scope of the clause and arbitrability of the claim is to be decided by an arbitrator.

After Appellants filed their Notice of Appeal with respect to this order denying arbitration, the Circuit Court issued a second order, granting Respondent's motion to compel discovery responses, wherein it ordered Appellants to respond to discovery while simultaneously ordering that Rick Hendrick waived its right to seek or otherwise participate in arbitration by responding to discovery. This was error, as the Circuit Court did not have jurisdiction to issue the second order and the second order presents an error of law regarding the participation of discovery and waiver of the right to seek arbitration.

In its Orders, the Circuit Court erred in several ways, including invading the agreed upon terms of arbitration, ignoring the presumption of arbitration, issuing an Order which it had no power to issue, and revoking Rick Hendrick's right to seek or participate in arbitration in a discovery dispute. The Circuit Court's Orders should be reversed and voided.

STATEMENT OF THE CASE

The Respondent, Cleo Sanders, initiated this action on May 1, 2017 by filing a Summons and Complaint in the Court of Common Pleas against multiple defendants, including Appellants. On July 12, 2017, Appellants filed an Answer, asserting the defense of arbitration as one of its numerous defenses. Thereafter, on September 7, 2017, Appellants filed a Motion to Stay and/or Dismiss and Compel Arbitration pursuant to a conspicuous arbitration clause in the sales contract at issue. Sanders also filed a Motion to Compel Discovery against Appellants on October 11, 2017. The pending Motion to Compel Arbitration was heard by the Court on November 16, 2017. After hearing arguments and inviting and receiving supplemental memorandums from the parties, the Circuit Court denied Appellants' Motion to Compel Arbitration on January 10, 2018. (Order Denying Motion to Compel Arbitration).

On January 9, the Circuit Court heard Respondent's Motion to Compel Discovery. After hearing arguments, the Circuit Court granted the Motion to Compel Discovery on February 20, 2018. (Order Granting Motion to Compel Discovery).

Appellants timely filed Notices of Appeal on February 6, 2018, and March 21, 2018, respectively. (Notices of Appeal). The matters were joined into this consolidated appeal by Court Administration.

STATEMENT OF FACTS

A. *Facts Pleaded in the Complaint*

Respondent's claims purport to arise from his financed purchase of a 2012 Dodge Charger vehicle in August 2012. According to his Complaint, Respondent visited Hendrick on August 9, 2012, to purchase a 2012 Dodge Charger RT he discovered on the internet. (Compl. ¶18). The purchase price was listed as $29,999 on the internet. (Compl. ¶18). To facilitate the purchase, Sanders alleged he wanted to trade in his 2007 Chrysler because it had mechanical issues. (Compl. ¶19). Respondent alleged he met with Defendant Isaiah White and Defendant Danny Anderson at Hendrick. He claimed that although he informed Anderson he was on short-term disability for the next four months, Anderson used his paycheck stub on the credit application. Sanders traded in his 2007 Chrysler as part of the payment towards the Dodge Charger.

The Complaint contends that the defendants told Sanders some of the terms of the Retail Installment Sale Contract ("RISC"), but Sanders signed the contract without reading it in its entirety. (Compl. ¶40). The Complaint asserts Hendrick misrepresented Sanders' income to defendant Santander Consumer USA Holdings, Inc. ("Santander"), which Santander relied on in agreeing to purchase the contract from Hendrick. (Compl. ¶¶44-45). Respondent alleged that as a result of the defendants' fraud and negligence, he had a monthly payment that he could not afford and that the car was repossessed by Santander on January 30, 2017. (Compl. ¶¶47-52).

B. *The Contract*

Respondent executed a RISC in conjunction with the referenced vehicle purchase. The RISC contains a prominently-displayed arbitration clause, including all capitalized letters and bold-face type as to various provisions. (*See* RISC, Exhibit to Memorandum

in Support of Motion to Compel Arbitration and Supplemental Memorandum in Support of Motion to Compel Arbitration). As set forth in the Arbitration Clause, Sanders agreed to arbitrate each of the claims asserted in this action, utilizing the AAA or other agreed-upon suitable arbitration administration organization. The Arbitration Clause requires application of the Federal Arbitration Act (the "FAA"). The Arbitration Clause specifically states, in pertinent part, the following:

ARBITRATION CLAUSE

PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. Arbitration shall be conducted by the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York, 10019 (www.adr.org), or any other organization that you choose subject to our approval. You may get a copy

of the rules of these organizations by contracting the arbitration organization or visiting its website.

ARGUMENT

I. The Circuit Court erred in Denying Appellants' Motion to Compel Arbitration Because the Interpretation and Scope of the Arbitration Clause and the Arbitrability of a Claim were Expressly Designated in the Agreement as Matters for an Arbitrator to Decide.

A. Standard of Review

The question of arbitrability of a claim is an issue for judicial determination, *unless the parties provide otherwise*. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This determination is subject to de novo review. *Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320, 323 (2009). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

B. A Strong Presumption in Favor of Arbitration Exists.

"There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 274, 776 S.E.2d 91, 95 (Ct. App. 2015) (quoting *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013)). "Additionally, as our supreme court has noted, any doubt as to whether this claim is subject to arbitration must be resolved in favor of arbitration." *Id.* at 275, 776 S.E.2d at 96 (citing *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 210, 213 ("It is the policy of this state and federal law to favor arbitration and any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.") (citation and internal quotation marks omitted))). Therefore, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the

asserted dispute[,]" arbitration must generally be ordered. *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (citing *Am. Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 92 (4th Cir. 1996) (internal citations omitted)).

Under the FAA, a court must stay "any suit or proceeding" pending arbitration of "any issue referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. § 3. The Supreme Court of the United States has held that the FAA's substantive provisions are to be enforced in state courts as well as in federal courts. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (resolving conflict between state law and the FAA by enforcing the arbitration clause and holding that the state law violated the Supremacy Clause); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-72 (1995). According to the Supreme Court:

> Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Act.

Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983). The FAA requires that courts enforce arbitration agreements[1] and the Supreme Court has unambiguously held that courts must follow these provisions. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 220-21 (1985). Likewise, South Carolina courts have held that "[u]nless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v.*

[1] 9 U.S.C. §§ 2 and 3.

Green Tree Fin. Corp., 343 S.C. 531, 538 (2001). "Thus, an arbitration agreement that complies with the FAA and that exists within a contract to purchase or finance a vehicle preempts any state arbitration-specific law that would otherwise invalidate the arbitration agreement." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 79, 749 S.E.2d 139, 145 (Ct. App. 2013).

C. Pursuant to the Language of the Arbitration Clause at Issue, the Interpretation and Scope of the Arbitration Clause and the Arbitrability of a Claim, Including the Effect of an Assignment, is to be Decided by an Arbitrator.

South Carolina courts have never held that "standing" is one of the general contractual defenses that may invalidate an otherwise valid arbitration agreement. Thus, no South Carolina precedent suggests that an assertion of lack of standing can invalidate an arbitration agreement that complies with the FAA. Nevertheless, given South Carolina's, and the federal government's, policy favoring arbitration, this Court should find that the question of standing with respect to an arbitration agreement in the context of an assignment is within the scope of an expansive arbitration clause and is therefore subject to arbitration itself.

In *Chicago Typographical Union Number 16 v. Chicago Sun-Times, Inc.*, 860 F.2d 1420, 1424 (7th Cir. 1988), the Seventh Circuit Court of Appeals answered this question directly, holding that "[q]uestions of 'procedural arbitrability' are matters for the arbitrator." *Id.* (citing and discussing *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964)).[2] *See also Int'l Union of Operating Eng'rs, Local 150 v. Flair Builders, Inc.*, 406

[2] In *John Wiley*, the United States Supreme Court held that whether a union had complied with the procedural steps necessary to preserve its right to arbitration was a question for the arbitrator, stating:

> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without

U.S. 487, 491-92, 32 L. Ed. 2d 248, 92 S. Ct. 1710 (1972); *Alabama Power Co. v. Local Union No. 391, Int'l Bhd. of Elec. Workers*, 612 F.2d 960, 963 (5th Cir. 1980) ("If the *subject matter* of the dispute is arguably arbitrable (resolving all doubts in favor of coverage), then it is for the arbitrator to decide whether or not the dispute may be arbitrated."). The *Chicago Typographical* Court stated: "Procedural issues, *including the standing of a party to the arbitration*, the *res judicata* effect of a prior arbitration award and the timeliness of filing a grievance, are for the arbitrator, so long as the *subject matter* of the dispute is within the arbitration clause." 860 F.2d at 1424 (first emphasis added).

Some courts have characterized the question as a question of scope. In *AT&T v. United Computer Systems*, No. 94-56755, No. 95-55015, 1996 U.S. App. LEXIS 28484, at *6-7 (9th Cir. Oct. 30, 1996), the Ninth Circuit Court of Appeals held the parties were required to submit to arbitration the issue of standing regarding an assignment of a contract containing an arbitration clause, stating:

> We reject AT&T's contention that the issue of [defendant's] standing to compel arbitration is not subject to arbitration. Paragraph 33 of the licensing agreement provides: "Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration[.]" This expansive language requires AT&T to submit to arbitration any dispute concerning the substantive provisions of the agreement, including a dispute regarding an assignment under Paragraph 13 of the agreement.
>
> AT&T argues that the issue on appeal is about who should decide whether the assignment was valid-- the courts or the arbitrators. However, the actual question here is not *who* decides the assignment issue, but whether the matter of assignment is within the scope of the arbitration agreement.

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consideration of the merits of the dispute which is presented for arbitration. . . . *Once it is determined*, as we have, *that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.*

Id. at 557-58 (emphasis added).

> As the Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1990) notes, when the question is whether the arbitration agreement includes a particular merits-related dispute, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 115 S. Ct. at 1924 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). Here Paragraph 33's broad and expansive language requires AT&T to submit the assignment issue to arbitration and the court did not err in remanding this issue to arbitration.

Id. See also CVD Equip. Corp. v. Dev. Specialists, Inc., Civil Action No. 11062-VCG, 2015 Del. Ch. LEXIS 193, at *5 (Ch. July 23, 2015) (holding that standing and jurisdictional questions are questions of scope, and that questions of scope, including whether the arbitration provision was drafted broadly enough to include disputes arising from the contract brought not by a signatory to that contract, but by an assignee of that signatory pursuant to an assignment for the benefit of creditors, are questions of substantive arbitrability which were agreed upon to be decided by the arbitrator).

The clear language of the Arbitration Clause at issue mandates that the question of standing, vis a vis an assignment, is a question to be arbitrated. As our Supreme Court has stated, "[t]he question of the arbitrability of a claim is an issue for judicial determination, *unless the parties provide otherwise*." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (emphasis added). The specific language of this Arbitration Clause requires the question of standing and assignment to be arbitrated.

The Supreme Court of Alabama also addressed this precise issue. In *Oakwood Acceptance Corp. v. Hobbs*, 789 So. 2d 847, 851-52 (Ala. 2001), the Alabama Supreme Court noted that "[j]ust as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, . . . so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed

about *that* matter." (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). In *Oakwood*, the plaintiffs contended that the defendant, the financer, did not have standing to compel arbitration because it did not present any evidence that it had been assigned the rights to the sales contract.

The *Oakwood* court noted that "when deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts" and that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *Id.* at 852 (citing *Kaplan*, 514 U.S. at 944); *see also AT&T Technologies, Inc. v. Commc'ns Workers of America*, 475 U.S. 643 (1986). The *Oakwood* court analyzed the arbitration agreements at issue[3] and stated:

> In each of the two cases now before us, the arbitration agreement clearly provides that 'any challenges to the validity or enforceability of this Agreement shall be determined by the arbitrator(s).' Therefore, whether Oakwood Acceptance has standing to enforce the arbitration agreement between Oakwood Homes and the plaintiffs is a question that must be decided by the arbitrator.

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[3] The arbitration agreements in *Oakwood* stated, in part:

> All claims, disputes and controversies arising out of or relating in any way to the sale, purchase, or occupancy of the Home or of any goods or insurance products offered or sold in connection with the contract, or arising out of the financing of the Home, including but not limited to any negotiations between the parties, the design, construction, performance, delivery, condition, installation, financing, repair or servicing of the Home, including claims for equitable relief or claims based on contract, tort, statute, warranty, or any alleged breach, default, negligence, wantonness, fraud, misrepresentation, suppression of fact, or inducement, will to the fullest extent permitted by Federal law be resolved by binding arbitration administered by the American Arbitration Association ('AAA') under its Commercial Arbitration Rules. Notwithstanding the above, no act to take or dispose of collateral securing payments under the Contract, (including without limitation the exercise of any rights under a mortgage, deed of trust or security interest, with or without judicial process, or obtaining a writ of attachment or sequestration), shall be subject to this Arbitration Agreement. Any challenges to the validity or enforceability of this Agreement shall be determined by the arbitrator(s).

Oakwood Acceptance, 789 So. 2d at 849-50.

Id. at 852.

Here, just as in *Oakwood*, the parties clearly agreed to arbitrate arbitrability. The agreement states:

> Any claim or dispute, whether in contract, tort, statute or otherwise (*including the interpretation and scope of this Arbitration Clause, and the arbitrability of this claim or dispute*) between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

(emphasis added). Thus, the arbitrability of this action, including the issues related to Appellant's standing and arbitrability, is a decision to be decided in arbitration, by an arbitrator, pursuant to the valid Arbitration Clause.[4]

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[4] Moreover, though not specifically before the Court, under the FAA, "[a] party aggrieved by the alleged failure . . . or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Courts have held that when a plaintiff sues under a contract but then attempts to avoid the arbitration clause within the contract, an aggrieved party may compel arbitration. *Stations W., Ltd. Liab. Co. v. Pinnacle Bank of Or.*, No. 06-1419-KI, 2007 U.S. Dist. LEXIS 30666, at *8-9 (D. Or. Apr. 23, 2007) ("Since plaintiff alleges a claim against Pinnacle for breach of contract while at the same time disclaiming the arbitration provision in that very contract, Pinnacle qualifies as "[a] party aggrieved" and may compel arbitration."). *See e.g. Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration Int'l., Inc.*, 198 F.3d 88 (2nd Cir. 1999) (court implies that assignor could compel arbitration); *Vainqueur Corp. v. Lamborn & Co.*, 305 F. Supp. 1007 (D.N.Y. 1969) ("When there is a specific written agreement to arbitrate any dispute that may arise out of an agreement, and one of the parties to that agreement fails to comply with its terms, the other party is entitled to an order compelling arbitration even if that party has irrevocably assigned its rights under the agreement."); *Lachmar v. Trunkline LNG Co.*, 753 F.2d 8 (2d Cir. 1985) (accepts, without deciding, that assignor may participate in arbitration); *Tenneco Resins, Inc. v. Davy Int'l, A.G.*, 770 F.2d 416, 417, 422 (5th Cir. 1985) (same).

Indeed, in *Nolde Brothers, Inc. v. Bakery Workers*, 430 U.S. 243, 97 S. Ct. 1067, 51 L. Ed. 2d 300 (1977), the United States Supreme Court addressed an expired agreement to arbitrate and focused on whether the parties intend to terminate the right to arbitrate upon expiration of the contract. *Nolde Brothers* established a presumption in favor of post-expiration arbitration of matters unless "negated expressly or by clear implication." as long as the arbitration was "of matters and disputes arising out of the relation governed by contract." *Id.* The point of *Nolde Brothers* is that even when parties intentionally cause a contractual relationship to end, there are strong reasons to believe that the parties intend to retain arbitration duties for disputes arising under the contract. A contrary rule "would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration

Respectfully, the cases cited by the Circuit Court in its Order[5] invade the province of the arbitrator and impermissibly limit the scope of an unquestionably broad arbitration agreement. The cases cited by the Circuit Court in its Order do the very things that are expressly reserved for arbitration—determine the interpretation and scope of the clause and arbitrability of the claim. Moreover, the *In re Wholesale Grocery* case cited by the Circuit Court decides the questions of scope and arbitrability in a perfunctory manner without inclusion or citation to the actual language of the arbitration clauses at issue. 97 F.Supp.3d 1101 (D. Minn. 2015). In the *Highlands Ranch* case, the arbitration agreement required arbitration of "all disputes, controversies or claims arising out of or relating to [the] [a]greement." 590 F. Supp. 2d 677, 680 (D.N.J. 2008). While this language is broad and sufficient to require the effect of an assignment on the right to arbitrate be decided in arbitration, the language at issue in the RISC goes much further. Indeed, it specifically accounts for the very issue the Circuit Court resolved be decided by arbitration:

> Any claim or dispute, whether in contract, tort, statute or otherwise *(including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute)*. . . .

As such, the Circuit Court erred in declining to send the issues of scope and interpretation and arbitrability to the appropriate forum—arbitration.

In any event, Respondent's argument regarding the assignment and the Circuit Court's citation of the two cases referenced above creates, *at most*, a difference of opinion or an ambiguity in the clause. Federal law is clear that in applying general South Carolina rules of contract interpretation to the language of an arbitration agreement

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proceedings had not begun before termination." 430 U.S. at 251. Nevertheless, these are matters, pursuant to the Arbitration Clause in the Contract, for the arbitrator, not the Court, to decide.

[5] *In re Wholesale Grocery Prods. Antitrust Litig.*, 97 F. Supp. 3d 1101 (D. Minn. 2015); *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys.*, 590 F. Supp. 2d 677 (D.N.J. 2008).

subject to the FAA, this Court must, in accordance with the federal substantive law on arbitration, resolve any ambiguities as to the scope of the arbitration agreement in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (section 2 of the FAA "creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act" and "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (in construing an arbitration agreement within the coverage of the FAA, "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability"); *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989) (finding that "in applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act, due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration" (citation omitted)).

Thus, South Carolina and federal policy favoring arbitration mandates that to the extent the Arbitration Clause is susceptible to multiple interpretations, it should be construed in favor of arbitration, including the determination of the scope of the clause and arbitrability of the claims.

The standard of review compels this Court to reverse where the evidence does not support the ruling or the ruling is controlled by an error of law. The Circuit Court erred in denying the motion to compel arbitration based upon the assignment in light of the

public policy and presumptions favoring arbitration and the expansive language of the Arbitration Clause. As such, this Court should reverse.

II. The Circuit Court was Without Jurisdiction to Issue its Second Order Granting Respondent's Motion to Compel Discovery Responses.

The Circuit Court granted Respondent's Motion to Compel Discovery Requests in its February 20, 2018 Order. This Order was filed nearly two weeks after Appellants' February 6, 2018 Notice of Appeal was filed with respect to the Circuit Court's January 10, 2018 Order denying Appellants' Motion to Compel Arbitration. Pursuant to the South Carolina Appellate Court Rules, the Circuit Court was without subject matter jurisdiction to issue the Order and this Court should find the Order void for lack of jurisdiction.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 93, 668 S.E.2d 795, 796 (2008) (citations omitted). The issue of subject matter jurisdiction may be raised at any time including when raised for the first time on appeal to this Court. *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002) (citing *Brown v. State*, 343 S.C. 342, 346, 540 S.E.2d 846, 848-49 (2001)).

Upon Appellants' filing of the Notice of Appeal regarding the Order denying arbitration, all matters affected by that appeal, including issues related in any way to arbitration, were automatically stayed and the Circuit Court did not have jurisdiction over matters affected by the appeal. Indeed, Rule 205 of the South Carolina Appellate Court Rules provides the appellate court with exclusive jurisdiction over matters on appeal. Generally, serving notice of appeal divests the lower court of jurisdiction over the order

appealed, except for matters not affected by the appeal. *Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997). Rule 241(a), SCACR, in governing matters which are stayed while on appeal, provides:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the trial judge, appellate court, or judge or justice thereof. The lower court retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Under Rule 205 and the last sentence of the above-quoted portion of Rule 241, the lower court may not act or issue orders that affect an issue on appeal. *Arnal v. Fraser*, 371 S.C. 512, 518-19, 641 S.E.2d 419, 422 (2007).

Here, even assuming the Circuit Court's Order did not expressly find a waiver of Rick Hendrick's right to arbitrate, the Circuit Court was still without subject matter jurisdiction to issue an order compelling discovery responses when a Notice of Appeal regarding a Motion to Compel Arbitration was filed. The development and exchange information and "discovery" in an arbitration is vastly different from formal discovery in a South Carolina court of common pleas. For example, the Consumer Rules of the American Arbitration Association ("AAA"), the specified arbitration organization in the Arbitration Clause, do not have discovery rules similar to a court of common pleas; rather, it discusses Exchange of Information Between Parties. Indeed, R-22 governs the exchange and states:

> (a) If any party asks or if the arbitrator decides on his or her own, keeping in mind that arbitration must remain a fast and economical process, the arbitrator may direct
>
> i. specific documents and other information to be shared between the consumer and business, and

ii. that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing.

(b) Any exhibits the parties plan to submit at the hearing need to be shared between the parties at least five business days before the hearing, unless the arbitrator sets a different exchange date.

(c) No other exchange of information beyond what is provided for in section (a) above is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process.

(d) The arbitrator has authority to resolve any disputes between the parties about exchanging information.

American Arbitration Association, *Consumer Arbitration Rules*, (2014), https://www.adr.org/sites/default/files/Consumer_Rules_Web.pdf (last accessed May 30, 2018).

Furthermore, "following the legal rules of evidence shall not be necessary" in an AAA arbitration. *See* R-34, Evidence, *Consumer Arbitration Rules*.

These rules, and many other differences in the exchange and use of documents and information, necessarily affirm that an order compelling discovery is a matter "affected by the appeal" of a Motion to Compel Arbitration. As such, the Circuit Court was without jurisdiction to file the February 20, 2018 Order once the Notice of Appeal regarding the Motion to Compel Arbitration was filed on February 6, 2018.

Even beyond the Notice of Appeal's effect on a general discovery order, the Circuit Court removed any potential doubt regarding its lack of subject matter jurisdiction when it ordered Appellants to respond to discovery requests while it expressly stated that Rick Hendrick waived its right to pursue or participate in arbitration by so responding. As the cases cited in the previous sections and sections below make clear, the FAA requires courts to resolve any doubts concerning arbitration in favor of arbitration, including whether a party has waived its right to arbitration. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 387-88, 759 S.E.2d 727, 736 (2014) (citing *Rhodes v.*

Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 125, 647 S.E.2d 249, 251 (Ct. App. 2007)).

The Circuit Court's Order revoked Rick Hendrick's ability to seek arbitration after a Notice of Appeal was filed on the issue of compelling arbitration. Pursuant to Rules 205 and 241, SCACR, the Circuit Court did not have the power to issue the Order intruding on the very issue on appeal—Appellant's right to seek or participate in arbitration. This cannot stand. *See Wingate v. Wingate*, 289 S.C. 574, 347 S.E.2d 878 (1986) (because alimony was an issue on appeal from the divorce decree, our supreme court had exclusive jurisdiction over the alimony issue, and the family court was without jurisdiction to change the amount of alimony during the pending appeal).

In light of the Circuit Court's lack of subject matter jurisdiction, this Court should find that the Order Granting Respondent's Motion to Compel Discovery void.

III. The Circuit Court Erred in Issuing its Order Granting Respondent's Motion to Compel Discovery, Wherein it Expressly Found that Appellant Waived its Right to Seek and/or Participate in Arbitration by Responding to Discovery.

A. Standard of Review

"A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Id.*

B. The Circuit Court's Order Granting Respondent's Motion to Compel Discovery, Wherein it Expressly Found that Appellant Waived its Right to Seek and/or Participate in Arbitration, is Controlled by an Error of Law.

Even assuming the Circuit Court had the power to issue its second order in this matter after Appellants filed the Notice of Appeal, the Order granting Respondent's Motion to Compel Discovery is still controlled by an error of law and should be reversed. While seemingly a generic order regarding discovery, the Order notably and improperly erred in its Order regarding the discovery's effect on arbitration, holding that Hendrick waived its position regarding its right to compel and/or participate in arbitration by responding to discovery. In so doing, the Circuit Court compelled initial discovery responses while simultaneously penalizing the party for responding to said discovery—this cannot stand in light of the presumption in favor of arbitration and the case law regarding waiver of the right to seek the same.

Notably, Respondent did not argue Appellant should be found to have waived its right to arbitrate if it responds to discovery requests. For clarity, the waiver argument was first addressed in briefing and at the November 2017 hearing by the parties on Appellants' Motion to Compel Arbitration. However, given that the Circuit Court indicated after the November hearing but prior to the January 9, 2018 hearing on Respondent's Motion to Compel Discovery, that the Motion to Compel Arbitration would be denied based upon the assignment issue, Respondent did not address the waiver issue at the January 9th hearing. However, given that no Order had been received regarding the Motion to Compel Arbitration, counsel for Appellant specifically addressed the issue of participation in discovery and sought clarification that doing so would not act as a waiver with respect to its right to compel arbitration at a later date under any and all available documents. At the hearing, the Court specifically stated "[p]ut in the order that you are not waiving your argument for – any arguments that you may have for arbitration, okay." (Transcript of January 9, 2018 hearing, p. 5).

Despite this oral ruling, Respondent's counsel failed to put the directive by the Court in its proposed order. Appellant's counsel then submitted a proposed order to effectuate the Court's directive. However, the Order which was filed erroneously, in contradiction to the Court's oral instructions and well-established law, stated "Defendants, except Rick Hendrick, shall not waive its position regarding the right to compel and/or participate in discovery by responding to said discovery." (Order Granting Motion to Compel Discovery, p. 2). This was error. The Circuit Court's Order compelling discovery responses, while also indicating Rick Hendrick waives its position regarding the right to compel arbitration by responding to said discovery not only places Hendrick in a proverbial "Catch-22," but also is contrary to the case law cited below.

Certainly, parties may waive their right to enforce an arbitration clause. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 387-88, 759 S.E.2d 727, 736 (2014) (citing *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 251 (Ct. App. 2007)). However, the FAA requires courts to resolve "'any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or *an allegation of waiver, delay,* or a like defense to arbitrability.'" *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)) (emphasis in original). Thus, there is a presumption against finding a party has waived its right to compel arbitration. *Id.* (citing *E. Dredging & Constr., Inc. v. Parliament House, L.L.C.*, 698 So. 2d 102, 103 (Ala. 1997)). Moreover, the party opposing arbitration "bears the heavy burden of proving waiver." *In re Mercury Constr. Co.*, 656 F.2d 933, 939 (4th Cir. 1981).

A party may waive its right to insist on arbitration if the party "so substantially utilizes the litigation machinery that to subsequently permit arbitration would prejudice

the party opposing the stay." *Fraser v. Merrill Lynch Pierce, Femner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987). But even in cases when the party seeking arbitration has invoked the "litigation machinery" to some degree, "the dispositive question is whether the party objecting to arbitration has suffered actual prejudice." *Id.* "Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration." *Id.* (citation omitted).

Appellants' invocation of the arbitration clause was neither untimely nor done with delay. Nor did Appellant waive its right to seek arbitration by filing an Answer in this matter, and in fact, the arbitration clause was enumerated as a specific defense to the Action by Appellants. Moreover, nothing in the record suggests that Plaintiff has suffered actual prejudice sufficient to constitute a waiver of Appellant's right to arbitration.

See In re Mercury Constr. Co., 656 F.2d at 939 ("It is only when . . . delay results in actual prejudice that it may amount to 'default' within the [FAA]"); *see also MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249-50 (4th Cir. 2001) (noting that when the time between filing of action and arbitration was less than six months, there was no waiver). As such, the delay, if any, on the part of Defendants is not sufficient to support a finding of waiver.

In *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127, 647 S.E.2d 249, 251-52 (Ct. App. 2007), this Court addressed the factors to be considered to determine if a party has waived its right to compel arbitration: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-

moving party was prejudiced by the delay in seeking arbitration." The court then stated

> [A] party may waive its right to compel arbitration if a substantial length of time transpires between the commencement of the action and the commencement of the motion to compel arbitration. What is "a substantial length of time" varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration.

Id. at 126, 647 S.E.2d at 251.

To establish the prejudice factor, "the non-moving party must show something more than 'mere inconvenience.'" *Rhodes*, 374 S.C. at 127, 647 S.E.2d at 251-52 (citing *Evans v. Accent Manufactured Homes*, 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (Ct. App. 2003)). To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took "advantage of the judicial system by engaging in discovery." *Id.* This inquiry, however, is just part of a broader, common sense approach South Carolina courts take to determine whether a motion to compel arbitration should be granted or denied:

> [On the one hand,] if the parties conduct little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," prejudice will likely not exist, and the law would favor arbitration; [on the other hand,] if the parties, conduct significant discovery, then the party seeking arbitration has taken "advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration.

Id.

A litany of South Carolina cases addressing this issue mandate that the Court find the Circuit Court's Order was in error and contrary to South Carolina law.

For example, in *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004), the Court of Appeals found that a five-and-a-half year period where the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" demonstrated waiver of the right to compel

arbitration. In *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003), this Court found that a nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver. *Id.* at 548, 575 S.E.2d at 75-76. In *Liberty Builders*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999), the Court found that a two-and-a-half year period when the parties sought assistance from the court on approximately forty occasions demonstrated waiver. *Id.* at 666, 521 S.E.2d at 753-54. Finally, the *Rhodes* court held that although the motion to compel arbitration was made less than a year after the filing of the suit, the party had waived its right to arbitration when discovery was complete (including five depositions) and the case had been placed on the trial roster. 374 S.C. at 128, 647 S.E.2d at 252.

However, in *Toler's Cove Homeowners Association, Inc. v. Trident Construction. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003), the Supreme Court found a thirteen month period did not demonstrate waiver of the right to seek arbitration when discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions." *Id.* at 612, 586 S.E.2d at 585. Likewise, in *Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003, this Court held that a thirteen month period did not demonstrate waiver when "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes. *Id.* at 67, 590 S.E.2d at 507. Finally, in *General Equipment & Supply Co. v. Keller Rigging & Construction, Inc.*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001), the Court held that a period of less than eight months did not establish waiver where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories." *Id.* at 556, 544

S.E.2d at 645.

In the case *sub judice*, Appellant filed its motion to compel arbitration only four months after Respondent filed the lawsuit. Furthermore, Appellant did not engage in discovery prior to filing its motion to compel arbitration. In fact, Appellant made a strategic decision prior to filing its motion to compel arbitration to not engage in discovery so as to avoid even the appearance of taking advantage of the judicial system and/or waiving its right to arbitrate. There was no prejudice suffered by Respondent in any form. When compared to the circumstances in the *Toler's Cove*, *Rich*, and *General Equipment* cases wherein no waiver was found, it is clear that Appellant has not waived its right to arbitration when no substantial amount of time passed before Appellant properly sought arbitration and no prejudice was suffered by Respondent because Appellant did not take advantage of the judicial system in any way.

A court order compelling discovery responses, while simultaneously penalizing a party for responding to discovery, defies logic and places Appellant in an impossible situation. In light of this, the Circuit Court's Order expressly finding that Appellant waived its right to seek and/or participate in arbitration cannot stand in the face of the case law cited above. As such, this Court should reverse the Circuit Court's Order insofar as it expressly found Appellant waived its right to seek and/or participate in arbitration.

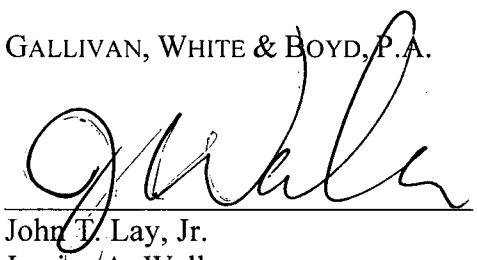
CONCLUSION

The Circuit Court erred in denying Appellants' Motion to Compel Arbitration in light of the expansive language of the specific Arbitration Clause at issue and the presumption in favor of arbitration. Furthermore, the Circuit Court was without subject matter jurisdiction to issue its Order compelling discovery responses after Appellants

filed the Notice of Appeal. Finally, the Circuit Court's Order granting Respondent's Motion to Compel Discovery was based on an error of law when it ordered Appellants to respond to discovery but simultaneously ordered that such responding resulted in waiver of its right to seek or participate in arbitration. As such, Appellants respectfully request this Court reverse the Circuit Court's first order and compel arbitration and void or reverse the Circuit Court's second order regarding discovery.

Respectfully submitted,

GALLIVAN, WHITE & BOYD, P.A.

By: 

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June 4, 2018

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Case Tracking No. 2018-000171

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
Civil Action No. 2017-CP-10-2148
J. C. Nicholson, Jr., Circuit Court Judge

Cleo Sanders ..... Respondent

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer USA Holdings, Inc., Isiah S. White, Danny Anderson and Patrick Bachrodt, Jr. ..... Defendants

Of whom, Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White are the ..... Appellants

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PROOF OF SERVICE

I, the undersigned employee of Gallivan, White & Boyd, P.A., do hereby certify that I have caused the below referenced to be served via U.S. Mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the address(es) shown below.

1. Appellants' Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White's Initial Brief;

C. Steven Moskos, Esquire
C. Steven Moskos, P. A.
4000 Faber Place Drive
Suite 300
Charleston, South Carolina 29405

Amber M. Miller
Amber M. Miller, Legal Assistant

Date: June 4, 2018

GWB
GALLIVAN WHITE BOYD
Complex experience for complex matters

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jwaller@GWBlawfirm.com

June 4, 2018

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: *Cleo Sanders v. Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer USA Holdings, Inc., Isiah S. White, Danny Anderson and Patrick Bachrodt, Jr.*
Charleston County Case No. 2017-CP-10-02148
Court of Appeal Case No.: 2018-000171
GWB File No.: 8493-6

Dear Ms. Kitchings:

Enclosed for filing with your office are the following:

1. Appellants' Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White's Initial Brief;
2. Appellants' Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White's Designation of Matter to be Included in Record of Appeal;
3. Appellants' Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White's Certificate of Compliance; and
4. Proofs of Service.

I would appreciate you filing the original and returning a clocked copy to me by the awaiting individual from my office.

With kind regards, I am

Sincerely,

GALLIVAN, WHITE & BOYD, P.A.

Jessica A. Waller

JAW:amm
Enclosures
cc: C. Steven Moskos, Esquire