

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-40-4244

Melissa Anne York and
Olga Joanne Cristy,

v.

Dodgeland of Columbia, Inc. and
Jim Hudson Automotive Group,
and Jim Hudson Superstore,
a/k/a Jim Hudson Hyundai

Appellants,

Respondents.

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Melissa Anne York and Olga Joanne Cristy,

PLAINTIFFS,

v.

Dodgeland of Columbia, Inc. and Jim
Hudson Automotive Group, and Jim
Hudson Superstore, a/k/a Jim Hudson
Hyundai,

DEFENDANTS.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

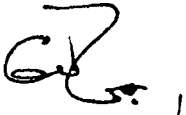
) Civil Action No.: 10-CP-40-4244

ORDER

RICHLAND COUNTY
FILED
2011 JUN 10 AM 11:30
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before the Court on March 10, 2011 and was further argued on May 18, 2011, upon motions by the defendants to dismiss the Amended Complaint, to compel arbitration, to sever, to strike, for a more definite pleading, and for a Protective Order pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), 12(b)(6), 12(b)(7), 12(e), 12(f), 18, 19, 20, 21, 23, and 26(c), SCRCP. Patrick E. Knie of Patrick E. Knie, P.A., and William A. McKinnon and Susan F. Campbell of McGowan, Hood, & Felder appeared on behalf of the plaintiffs. Steven W. Hamm and C. Jo Anne Wessinger Hill of Richardson, Plowden & Robinson, P.A., appeared on behalf of the defendants, Dodgeland of Columbia, Inc., Jim Hudson Automotive Group (who appears to be improperly named and who had no transaction with the Plaintiffs) and Jim Hudson Superstore a/k/a Jim Hudson Hyundai, whose true name is Jim Hudson Cars, LLC d/b/a Jim Hudson Hyundai (who also appears to be improperly named); J. Michael Montgomery of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of the defendant, Dodgeland of Columbia, Inc.

After considering the motions, supporting memoranda, arguments of counsel, and the materials



presented at the hearing, the Court grants the defendants' motion to dismiss and compel arbitration.

PROCEDURAL HISTORY AND FACTS

The plaintiffs, Melissa York and Olga Jones Cristy, filed this lawsuit challenging the charging of a "closing fee" by these two automobile dealerships, a type of fee which the South Carolina Legislature authorized by statute in 2000,¹ and which has been previously upheld by South Carolina appellate and trial courts.² The plaintiffs commenced this action against the defendants by filing the Summons and Complaint in the Court of Common Pleas in Richland County on June 25, 2010. An Amended Complaint was filed on August 5, 2010. Plaintiffs seek damages, individually and for the benefit of others, for the allegedly illegal charging of administrative fees (hereinafter referred to as "closing fees") by the defendants with respect to the sale of automobiles. These two plaintiffs brought actions against two defendant motor vehicle dealerships located in Richland County, and each plaintiff alleges she purchased a vehicle from a single dealership – either Defendant Dodgeland or Defendant Hyundai – but not the purchase of a vehicle by the respective plaintiffs from each of the individual defendants.

The plaintiffs' Amended Complaint sets forth various allegations with respect to the defendants' charging of closing fees. The Amended Complaint outlines general assertions with

¹ S.C. Code Ann. § 37-2-307 (2002).

² Other plaintiffs in previous cases have unsuccessfully challenged the legitimacy of closing fees in lawsuits brought before the enactment of the present statute in Section 37-2-307 authorizing the charging of closing fees. In two of those cases, the circuit court explicitly rejected the plaintiffs' claims that the closing fee constituted an unfair or deceptive act and also required the compliance with the South Carolina Rules of Civil Procedure, including Rule 23. See Fanning v. Fritz's Pontiac Cadillac Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) (finding that the charging of closing fees were permissible under the Consumer Protection Code); Fanning v. Fritz's Pontiac Cadillac Buick, Inc., C.A. No. 90-CP-40-3555 (Order of Hon. L. Henry McKellar, October 14, 1998) (granting defendant's motion for summary judgment on plaintiff's challenge to the manner in which the closing fees were disclosed); Ferguson v. Charleston Lincoln Mercury, Inc., C.A. No. 97-CP-10-2020 (Orders of Hon. R. Markley Dennis, Jr., January 11 and 15, 1999) (holding that the charging of the closing fee was not an unfair or deceptive act, and the defendant dealer had a reasonable basis for charging the fee).

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respect to the charging of closing fees in correlation with the advertised price of a vehicle. The plaintiffs acknowledge that in 2000, the South Carolina General Assembly enacted a statute, S.C. Code Ann. § 37-2-307, that allows a motor vehicle dealer to charge closing fees, provided the requirements of the statute are met. Section 37-2-307 is part of the Consumer Protection Code, and accordingly, the administration and construction of this statute is under the authority of the South Carolina Department of Consumer Affairs. See S.C. Code Ann. § 37-6-101, *et seq*; see also Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009) (noting that an agency's construction of a statute within its purview is entitled to respectful consideration and, absent compelling reasons, should not be rejected).

The allegations with respect to the charging of closing fees are twofold: (1) the plaintiffs allege that defendants have not availed themselves of the statutory requirements of § 37-2-307; and (2) even if the defendants are charging closing fees in accordance with the Consumer Protection Code, the monetary amount of the closing fee improperly includes profit, as opposed to being limited for reimbursement for actual costs incurred by the defendants.³

Plaintiffs have alleged three causes of action: (1) violation of S.C. Code Ann. § 56-15-10 *et seq.*;⁴ (2) declaratory judgment interpreting § 37-2-307; and (3) unjust enrichment. The allegations in support of the Dealers Act claim only relate to the charging of closing fees and simply restate the contentions previously asserted with respect to § 37-2-307. Moreover, the plaintiffs identify one statutory provision of the Dealers Act, S.C. Code Ann. § 56-15-110, entitled "Suits for Damages," which provides for lawsuits to be brought on behalf of others and

³ With regard to the allegations that closing fees charged by the defendants wrongfully include profit, the plaintiffs quote from a lower trial court Order of the Honorable Doyet A. Early, III, in a case that is not final and such order remains appealable and not final at this time. At oral argument, counsel for the plaintiffs consented to defendants' motion to strike this reference from the Amended Complaint.

⁴ This Chapter is commonly referred to as the "Dealers Act."

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sets out specific relief that may be sought. However, § 56-15-110 does not identify any conduct or provide any independent right of action based on any specific alleged conduct of a defendant subject to the Dealers Act.

With regard to the transaction between plaintiff York and Dodgeland, the Buyers Orders executed between the parties both contain an arbitration clause. The Buyers Order has a notice of the arbitration provision at the top, in all caps and in bold, stating "**THIS BUYERS ORDER IS SUBJECT TO ARBITRATION PURSUANT TO SC CODE SECTION 15-48-10.**" The arbitration clause itself is found on the first page of the Buyers Order in all caps and in bold, directly above the signature line. The first sentence of the arbitration clause provides:

IN CONSIDERATION FOR SELLER AGREEING TO SELL TO PURCHASER THE ABOVE DESCRIBED VEHICLE, PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT.

Plaintiff York does not contest in her pleadings that she did not sign the Buyer's Order on the date her vehicle was purchased; however, she fails to reference the arbitration agreement.

With regard to Defendant Hyundai, Plaintiff Olga Cristy⁵ is based only upon a single transaction between her and Jim Hudson Hyundai. The Contract of Sale does include an arbitration agreement and as required by South Carolina law, notice of the arbitration provision as part of the negotiated agreement between the parties is provided in a statement at the top of the first page of the Contract in all caps, underlined, bold and larger type that states:

THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT, AND IF THE FEDERAL ARBITRATION

⁵ Ms. Cristy signed at least two separate agreements which each contain a separate Arbitration Agreement. These documents are the Contract of Sale between Jim Hudson Hyundai, Inc., d/b/a Jim Hudson Hyundai and the Retail Installment Contract and Security Agreement which provided the financing arrangements for Ms. Cristy's motor vehicle.



**ACT IS NOT APPLICABLE, THEN THIS CONTRACT IS SUBJECT TO
ARBITRATION PURSUANT OT THE SOUTH CAROLINA UNIFORM
ARBITRATION ACT.**

The arbitration clause itself is found on the second page of Contract of Sale but immediately above the signature line, there is further notice to Ms. Cristy related to the arbitration provision and other terms and conditions as well as an affirmation by her that she has read both sides of the contract:

SEE ADDITIONAL TERMS AND CONDITIONS ON OPPOSITE PAGE

CUSTOMER HAS READ BOTH SIDES OF THIS CONTRACT AND SCKNOWLEDGES REEIPT OF A COMPLETELY FILLED-IN COPY OF THIS CONTRACT.

Plaintiff Cristy does not contest in her pleadings that she did not sign the Contract of Sale for her vehicle on the date it was purchased; however, she fails also to reference the arbitration agreements or clauses found in the Contract of Sale and in the Retail Installment Contract and Security Agreement.⁶

The defendants have filed multiple motions, which include motions to dismiss the action for lack of jurisdiction over the subject matter, to compel arbitration, for lack of jurisdiction over the person, and for failure to state facts sufficient to constitute a cause of action, to sever, to strike, for a more definite statement, for a protective order, for costs and fee and other such relief. Because the Court grants the motion to dismiss the action and compel arbitration, the remaining issues raised by the defendants do not need to be addressed by this Court and may be raised in the arbitration process.

⁶ Ms. Cristy financed her vehicle purchase through the dealership, Jim Hudson Hyundai, and thus, Defendant Hyundai further claims that this arbitration provision applies in this instance to which the seller is asserting as well since it is another arbitration provision related to the sale of the vehicle between Ms. Cristy and seller Jim Hudson Hyundai.

LEGAL STANDARD

A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to "any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Doe, 373 S.C. at 395, 645 S.E.2d at 247-48 (quoting Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

A trial judge may dismiss a claim when the defendant demonstrates the plaintiff's "failure to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Rule 12(b)(6), SCRPC. A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987). When it is determined that a plaintiff does not have standing to prosecute, the court must dismiss the action. Brock v. Bennett, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994).

Pursuant to a motion to dismiss under Rules 12(b)(1) & (2), SCRPC, the Defendants challenge the power of the court over the subject matter or jurisdiction on one or more grounds, specifically due to the existence of arbitration agreements between the Plaintiffs and the respective Defendant upon when she purchased a motor vehicle, and therefore seek to compel arbitration. "The question of subject matter jurisdiction is a question of law for the court." Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104, 431 S.E.2d 631 (Ct.App.1993) (citing Bargesser v. Coleman Co., 230 S.C. 562, 96 S.E.2d 825 (1957)). The proper procedure for raising a lack of jurisdiction is for a party to file a motion to dismiss. Posey v. Proper Mold & Engineering, Inc.,

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378 S.C. 210, 217, 661 S.E.2d 395, 399 (S.C. App. 2008). In the present case, the plaintiffs' claims against the Defendants should be dismissed so that these claims may be presented and considered within the context of arbitration.

DISCUSSION

I. Pursuant to the Federal Arbitration Act, Arbitration of Plaintiffs' Claims ~~against the Dealer from whom She Purchased a Vehicle~~ is Required.

Both of the plaintiffs entered into agreements with the defendant dealer from whom they purchased an automobile that contained arbitration clauses (hereinafter "Arbitration Agreement(s)"). Their respective and individual claims fall squarely within the scope of their own Arbitration Agreement. These Agreements are unremarkable and of the type that numerous courts have upheld time and again. Accordingly, pursuant to the Federal Arbitration Act and applicable federal and South Carolina law control in this dispute, the Court dismisses the plaintiffs' claims and compels arbitration.

a. The Federal Arbitration Act Applies in This Dispute

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., applies to "contract[s] evidencing a transaction involving commerce," 9 U.S.C. § 2. A contract to purchase a vehicle clearly is a contract evidencing a transaction involving commerce. Thornton v. Trident Med. Ctr., L.L.C., 592 S.E.2d 50, 52 (S.C. Ct. App. 2003); *see also* MS Dealer Service Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) (FAA applies to consumer's purchase of automobile); Stout v. Byrider, 50 F. Supp. 2d 733, 735 (N.D. Ohio 1999) (FAA governs in action by used car buyers against seller because "case concerns arbitration agreements involving transactions in interstate commerce"), *aff'd*, 228 F.3d 709 (6th Cir. 2000); Wolff Motor Co. v. White, 869 So.2d 1129, 1134 (Ala. 2003) ("[m]otor vehicles are 'the quintessential instrumentalities of modern interstate commerce'" and "a transaction involving the sale of an instrumentality of commerce

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... satisfies the FAA's 'involving commerce' test" (quoting United States v. Bishop, 66 F.3d 569, 588-90 (3d Cir. 1995))). Accordingly, the FAA governs the enforceability of the Arbitration Agreement and all questions concerning its scope.

The FAA embodies "the strong federal policy in favor of enforcing arbitration agreements." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985). Keeping with this "liberal federal policy favoring arbitration agreements," the Supreme Court has mandated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Indeed, "the parties' intentions 'are generously construed as to issues of arbitrability,' and any 'ambiguities as to the scope of the arbitration clause itself' must be 'resolved in favor of arbitration.'" Washington Square Secs., Inc. v. Aune, 385 F.3d 432, 436 (4th Cir. 2004) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985) and Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989)).⁷

b. The Court Is Authorized Under SCRCP Rule 12(b)(1) & (2) to Dismiss the Matter for Lack of Jurisdiction and Compel Arbitration

Rule 12(b)(1) of the South Carolina Rules of Civil Procedure permits the Court to dismiss a matter for lack of jurisdiction. Both Defendant Hudson and Defendant Dodgeland assert that the matter should be dismissed under SCRCP 12(b)(1) & (2) and that the matter should be compelled to arbitration based upon arbitration agreements governed by the FAA.⁸ The Court

⁷ Like the FAA, South Carolina law strongly favors arbitration, and "unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." Zabinski v. Bright Acres Assocs., 553 S.E.2d 110, 118 (S.C. 2001) (citing S.C. Pub. Serv. Auth. v. Great W. Coal, 437 S.E.2d 22, 25 (S.C. 1993)); see also South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.*

⁸ Defendant Dodgeland also raised the issue of an expired statute of limitations pursuant to South Carolina Code of Laws §37-15-530(2) that provides a three-year statute of limitations for an action upon a liability created by statute, which in this case would be §37-2-307. See also Tilley v. Pacesetter Corp.,

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will examine whether arbitration agreements exist. The existence of an arbitration agreement would require Court to compel arbitration as the Court could not maintain jurisdiction to proceed further. In fact during oral argument, the Plaintiffs specifically stated that they were not contesting whether there was prominent notice of an arbitration agreement between the Plaintiff and the Defendant dealer upon which she did business, but that the Plaintiffs did not specifically reference or mention the existence of such arbitration agreement in the Complaint or Amended Complaint. The Plaintiffs did acknowledge in response to the Court that the issue at hand is the "closing fee", "administrative fee", or "processing fee" which is found and separately itemized on the same documents presented by the Defendants (i.e., buyer's order or contract of sale) prominently disclosing and containing an arbitration clause governed by the FAA between the Plaintiff and the Defendant dealer with whom she negotiated and purchased a motor vehicle. Despite argument by the Plaintiffs that they have no obligation to acknowledge an arbitration clause in their pleadings and that they alone decide the content of their pleadings, the Plaintiffs did acknowledge to the Court an awareness of the arbitration provision and the signing by both plaintiffs of the retail installment sales contract, invoice, buyer's order or contract of sale to allege payment by the respective Plaintiffs of a "closing fee", "administrative fee", or "processing fee" of \$289.00 in preparing the Complaint or Amended Complaint. In examination of the pleadings, paragraphs 14, 15, 16, and 17 of the Plaintiffs' Amended Complaint specifically incorporate these documents and make reference thereto ("invoice") with multiple allegations

333 S.C. 33, 508 S.E.2d 16 (1998) (holding prior version of § 15-3-530 applied to statutory violation of Consumer Protection Code). Dodgeland has raised the issue that the applicable statute of limitations has run following Ms. York's purchase of two automobiles on September 4, 2006, and that the plaintiffs' claims against the defendant, Dodgeland, should be dismissed. While the court believes that Dodgeland raises a colorable claim that the three year statute of limitation prevents this case from proceeding further since the Plaintiff York transaction took place more than three years prior to the filing her lawsuit, that is a matter that should properly be addressed by the arbitrator selected to arbitrate this dispute.

including but not limited to claims related the location of "closing fee" or "administrative fee" with other such items "as taxes, tags and title."

c. Plaintiffs' Allegations Fall within the Scope of the Arbitration Agreement that She Signed.

"To decide whether an arbitration agreement covers a particular dispute, the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement, irrespective of the label given to the cause of action." Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc., 588 S.E.2d 136, 207 (S.C. Ct. App. 2003) (citing Zabinski, 553 S.E.2d at 597). Applying these principles, each of the plaintiffs' individual claims fall within the scope of the Arbitration Agreement that she signed.

Both plaintiffs allege in the Amended Complaint that the dealer she did business with engaged in a "common practice of presenting/advertising car prices in a misleading manner" because it allegedly "fails to include and/or adequately disclose 'administrative fee' in the advertised price of the car" and misleads buyers "that the set fee is mandatory fee, such as taxes and license fees." The plaintiffs acknowledge that such fees are specifically authorized by S.C. Code Ann. § 37-2-307, but each plaintiff alleges that the defendants did not comply with the statute, although each plaintiff does not specify in their pleading the statutory basis of the alleged non compliance with the closing fee statute.

Each of these allegations clearly falls under the claims that Ms. Cristy and Jim Hudson Hyundai and that Ms. York and Dodgeland respectively and individually agreed to arbitrate. The Arbitration Agreements provide that "any and all disputes" between the dealer and purchaser relating to the vehicle are covered under the Agreement. Each Agreement expressly encompasses all subjects relating to its respective plaintiffs' claims.

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d. **The Arbitration Clauses are Unremarkable and Are Subject to Enforcement.**

The Arbitration Agreement signed by these Plaintiffs and their particular dealer that they did business with is unremarkable and of a type countless courts have upheld. Moreover, each respective agreement authorizes the arbitrator to determine the validity of the agreement⁹ or to decide all issues of arbitrability. Each ~~arbitration agreement contains~~ a statement in bold, all caps that the transaction between the Plaintiff and the Defendant dealer was subject to arbitration. The Plaintiffs do not contest signing the document or claim a lack of conspicuousness or otherwise than that the Defendants' motions to compel arbitration are premature. The Defendants each made their respective motions pursuant to SCRCP 12(b)(1), (2), and (6) due to the lack of jurisdiction. It is not premature for the Court to resolve the issue of jurisdiction over the matter, and thus compel arbitration of the dispute. Accordingly, these Agreements are not unconscionable or unenforceable, and arbitration is proper.

With regard to Defendant Dodgeland, Plaintiff Cristy claims that the arbitration agreement lacks material terms suggesting the method or forum of arbitration to be used and therefore, the matter should not be compelled to arbitration. The Court notes that the FAA provides a mechanism or method of selecting an arbitrator. The Section 5 of the FAA provides that:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; **but if no method be provided therein**, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or

⁹ The Dodgeland Arbitration Agreement signed by Ms. York provides that the "...arbitrator shall decide all issues of arbitrability." Whereas, the Agreement signed by Ms. Cristy in her transaction with Jim Hudson Hyundai provides that "... the validity of this arbitration clause ... shall be resolved by the binding arbitration by one arbitrator."

umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C.A. §5 (2010) (emphasis added). There is no question by Plaintiff Cristy that the arbitration agreement between her and Defendant Dodgeland is governed by the FAA. The FAA provides for the resolution of such procedural matter. In Hooters of America, Inc. v. Phillips, 39 F.Supp.2d 582 (D.C.S.C. 1998), Judge Currie examined a similar issue where there was no dispute on the existence of a written arbitration agreement, but the issue was whether or not such terms are essential to the agreement. The Court opined that “[i]n the orthodox situation the content of arbitration rules would not constitute a material term of the agreement because such rules would address merely procedural matters of the forum.” *Id.* at 606-607. In the instance case, there is no absence of such rules to provide for the manner and selection of the arbitrator as such would be governed by Section 5 of the FAA.

The plaintiffs’ reliance on Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) certiorari granted, judgment vacated by Sonic Automotive, Inc. v. Watts, ___ S.Ct. ___, 2011 WL 1631040 (U.S.S.C. May 2, 2011) (No. 10-315),¹⁰ and Simpson v. MSA of Myrtle

¹⁰ On May 2, 2011, the United States Supreme Court granted the Petition for Writ of Certiorari filed by the Century BMW on August 31, 2010, vacated the judgment and decision of the South Carolina Supreme Court in Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010), and remanded the case for further consideration in light of the AT&T Mobility LLC v. Concepcion, 593 U.S. ___ (April 27, 2011).

The AT&T Mobility LLC v. Concepcion case holds that the terms of a valid arbitration agreement governed by the FAA between parties can properly exclude or prohibit participation in an a class or group action by holding that the FAA preempts any state-law rule that “stand(s) as an obstacle to the accomplishment of the FAA’s objectives.” Slip op. 9.

Sonic Automotive, Inc., also known as Century BMW, only sought a petition for certiorari on the question pertaining the South Carolina Supreme Court’s holding that the state law prohibited the use of class action waiver in the arbitration contract of Century BMW. The arbitration agreement used by Century BMW was otherwise found to be enforceable and the anti-class provision was found unconscionable under state law. Since Century BMW waived application of the severability clause in oral argument if the South Carolina Supreme Court found the anti-class language in the agreement to be

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Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) does not preclude this Court from holding that the Arbitration Agreements are valid. Both of these cases involved arbitration clauses in automobile sales contracts. The Simpson court upheld the trial court's ruling that the arbitration clause in that case was unconscionable, whereas the Herron court reversed the trial court's ruling that the arbitration clause in that case was unconscionable. The Arbitration Agreements in the present case are more akin to the arbitration clause in Herron and are therefore enforceable.¹¹ For example, both documents are clearly labeled at the top in bold type and capital letters to alert the plaintiffs that the agreements are subject to arbitration. In addition, the court notes that the South Carolina Supreme Court has previously ruled that the Federal Arbitration Act preempts the South Carolina Arbitration Act in the event of a conflict between state and federal provisions. Rich v. Walsh, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000).

invalid under South Carolina contract law, the matter was not compelled to arbitration by the South Carolina Supreme Court.

The Petition for Writ of Certiorari presented by Century BMW argued that the state-law rule preempted in AT&T Mobility is materially indistinguishable from the state-law rule in Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010), and that such state-law rule invalidates a prohibition on class or group arbitration contained in an arbitration agreement on the ground that the class action waiver itself is unconscionable or unenforceable as against public policy. While state-law rule in AT&T Mobility, like the South Carolina state law rule in Herron v. Century BMW, does not require class action arbitration, the state-law rule contravenes the overarching purpose of the FAA "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." AT&T Mobility at 9.

¹¹ Even if specific portions of the Arbitration Agreements were unenforceable, the unenforceable provisions may be severed from the remaining provisions. Although the court in Herron upheld the denial of the defendant's motion to compel arbitration, the Herron court acknowledged that the defendant waived its right of severability. Regardless, the issue of severability may be raised in arbitration as contemplated in the Arbitration Agreements.

Finally, plaintiffs' argument that discovery is necessary before determining whether the arbitration clauses are valid is unavailing. To allow these cases to proceed in discovery when the existence of enforceable arbitration clauses are clear from the face of the sales documents would completely defeat the purpose of the arbitration clause, which is to avoid litigation in state or federal court in order to resolve any pending individual disputes. Again, plaintiffs may raise these and other issues in arbitration, as each of the Arbitration Agreements provides for the arbitrator to determine issues related to the validity of specific provisions of the arbitration clause. The issue before this Court is whether the agreement to arbitrate is initially enforceable. It is clear to the Court from a review of the Arbitration Agreements that the parties agreed to arbitrate. Unlike Simpson, there is no question that an arbitration agreement existed between the parties in the respective transactions in the present case.

e. Allegations Against Other Defendants Do Not Prevent Arbitration.

A plaintiff cannot avoid arbitration by naming other dealerships, with which she has no connection, as a defendant. Even if a plaintiff had standing against the other defendant that she did not do business, Ms. Cristy must arbitrate her dispute with Jim Hudson Hyundai pursuant to the Arbitration Agreement between them and Ms. York must arbitrate her dispute with Dodgeland.¹² See S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 437 S.E.2d 22, 24 (1993) (“[A] party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would nullify the rule requiring arbitration.”).

¹² Although Dodgeland has moved to dismiss on the grounds that York's claims are barred by the applicable statute of limitations, this Court, in compelling arbitration, does not need to rule on this issue. Dodgeland may raise this issue in arbitration, and this Court's Order compelling arbitration shall not be construed as a decision on the statute of limitations issue or any other issue raised by the parties.



f. **All Judicial Proceedings against the Defendants shall be Dismissed while Arbitration Proceeds.**

Pursuant to Section 3 of the FAA, any court of the United States must, at a minimum, stay judicial proceedings involving claims, like those here, that fall within the arbitration provisions of written agreements. *See* 9 U.S.C. § 3; *see also* Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 26 (“[S]tate courts, as much as federal courts, are ~~obliged to~~ grant stays of litigation under § 3 of the Arbitration Act.”). “Notwithstanding the terms of § 3, however, dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.” Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, 252 F.3d 707, 709-710 (4th Cir. 2001); *see also* Alford v. Dean Witter Reynolds, 975 F.2d 1161, 1164 (5th Cir. 1992) (“The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.”); Payton v. Nordstrom, Inc., 462 F.Supp.2d 706, 708 (M.D.N.C. 2006) (“[T]he Fourth Circuit has held that, despite the language of the FAA regarding a stay of arbitration, when all of the claims in a lawsuit are required to be arbitrated, dismissal, rather than a stay, is a proper remedy.”). Because all of plaintiffs’ claims against the dealership from whom she purchased a car must be resolved through arbitration, the Court hereby dismisses their actions against Jim Hudson Hyundai and against Dodgeland in this Court and grants defendants’ Motion to Compel individual Arbitration of the disputes against each dealership.

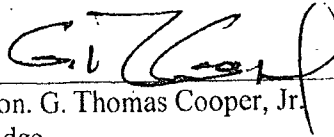
CONCLUSION

The court has determined that the claims raised by plaintiffs in the present suit are subject to arbitration, as the Arbitration Agreements between the parties are valid and enforceable as to the initial question of whether an arbitration agreement existed between the parties. Having determined that arbitration is required, the Court declines to rule on other issues that were raised

Griffith

by any party, as these issues may be addressed in arbitration. Accordingly, the defendants' motion to dismiss and to compel arbitration is GRANTED.

AND IT IS SO ORDERED.



Hon. G. Thomas Cooper, Jr.

Judge
Fifth Judicial Circuit

JUNE 10, 2011.

Columbia, South Carolina.

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO: 2010CP4004244

IN THE COURT OF COMMON PLEAS

Melissa Anne York

vs.

Dodgeland Of Columbia Inc

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been heard or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCPP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

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

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

IT IS ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 10 June 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Susan F Campbell
William A McKinnonJ Michael Montgomery
Steven Hamm
Rebecca Laffitte

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCPP APP-24/FORM 4

Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Melissa Anne York and Olga Joanne Cristy,)
)
Plaintiff(s),)
)
v.)
)
Dodgeland of Columbia, Inc., Jim Hudson)
Automotive Group, and Jim Hudson)
Superstore, Inc., a/k/a Jim Hudson Hyundai,)
)
Defendant(s).)
_____)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
C/A No.: 2010-CP-40-4244

**ORDER DENYING MOTION TO
RECONSIDER, ALTER, OR AMEND**

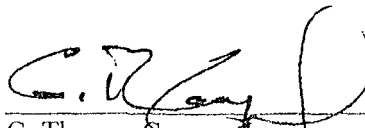
RICHLAND COUNTY
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2011 AUG 10 PM 1:51
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court by way of Plaintiff(s) Melissa Anne York and Olga Joanne Cristy's Motion to Reconsider pursuant to Rules 59 and 60 SCRPC. Specifically, Plaintiff(s) ask this Court to reconsider its Order of June 10, 2011 compelling arbitration.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered.¹ Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rules 59(e) and 60(b) SCRPC to reconsider this Court's Order filed June 10, 2011. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

August 10, 2011
Columbia, South Carolina


G. Thomas Cooper, Jr.
Judge, Fifth Judicial Circuit

¹ Although not the basis for this Court's decision, the Court also notes that a copy of the Defendant's Motion to Reconsider was not provided to the Court and thus does not comply with Rule 59(g) SCRPC.

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO: 2010CP4004244

IN THE COURT OF COMMON PLEAS

Melissa Anne York

vs.

Dodgeland Of Columbia Inc

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: _____
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
- ☐ Other: _____

JEANETTE W. McBRIDE
C.C.P. & G.S.
2011 AUG 10 PM 1:52
RICHLAND COUNTY
FILED

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

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

IT IS ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2011.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2011, and a copy mailed first class this 10 August 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Susan F Campbell
William A McKinnonJ Michael Montgomery
Steven Hamm
Rebecca Laffitte

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)



Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Melissa Anne York and Olga Joanne Cristy

Plaintiff(s)

vs.

Dodgeland of Columbia, Inc. and Jim Hudson
Automotive Group, and Jim Hudson Superstore,
Inc., a/k/a Jim Hudson Hyundai,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2010-CP - 40-

4244

(Please Print)

Submitted By: Susan F. Campbell, Esquire

Address: 1414 Lady Street, Columbia, SC 29201

SC Bar #: 70545

Telephone #: (803) 256-6132

Fax #: (803) 256-6155

Other:

E-mail: scampbell@mbhclaw.com

NOTE: The cover sheet 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 cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

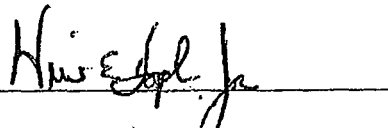
*If Action is Judgment/Settlement do not complete

- ☒ 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)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20____-CP-____-	☐ Products Liability (340)	☐ Partition (440)
☒ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Other (399)	☐ Other (399)
-
Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture-Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899)	☐ Worker's Comp (960)
	☐ Other (799)		☐ Zoning Board (970)
-
Special/Complex /Other			
☐ Environmental (600)	☐ Pharmaceuticals (630)		☐ Administrative Law Judge (980)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)		☐ Public Service Commission (990)
☐ Medical (620)	☐ Out-of State Depositions (650)		☐ Employment Security Comm (991)
☐ Other (699)	☐ Sexual Predator (510)		☐ Other (999)

Submitting Party Signature:



Date:

6/23/10

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

22

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville,
Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), and Richland

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 210th 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 RICHLAND

Melissa Anne York and Olga Joanne Cristy,

Plaintiffs,

vs.

Dodgeland of Columbia, Inc. and Jim Hudson
Automotive Group, and Jim Hudson
Superstore, Inc., a/k/a Jim Hudson Hyundai,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

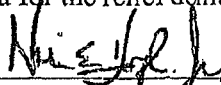
) C/A No.: 2010-CP-40-

) **SUMMONS**

RICHLAND COUNTY
FILED
2010 JUN 25 PM 12:06
JEANETTE W. MORRIS
C.C.P. & G.S.

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at their offices, 1414 Lady Street (29201), Post Office Box 11316, Columbia, South Carolina, 29211, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.


William E. Hopkins, Jr.

Susan F. Campbell

McCutchen Blanton Hopkins & Campbell, LLP

Post Office Drawer 11316

Columbia, South Carolina 29211-1316

Phone: (803) 256-6152; Fax: (803) 256-6155

Email: scampbell@mbhclaw.com

Patrick E. Knie (#2370)

Patrick E. Knie, PA

Post Office Box 5159

Spartanburg, South Carolina 29304-5159

Phone: (864) 582-5118; Fax: (864) 585-1615

Email: pknie@knielaw.com

ATTORNEYS FOR THE PLAINTIFFS

Columbia, South Carolina

June 23, 2010

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No.: 2010-CP-40-

COMPL INT

(JURY TRIAL DEMANDED)

Dodgeland of Columbia, Inc. and Jim Hudson Automotive Group, and Jim Hudson Superstore, Inc., a/k/a Jim Hudson Hyundai,

Defendants.

Plaintiffs above-named, individually and for the benefit of all others who paid illegal administration fees to Defendants above-named, hereby complaining of Defendants, would respectfully show that:

1. Plaintiff Melissa Anne York is a citizen and resident of Lexington County, South Carolina. Plaintiff Melissa Anne York purchased a motor vehicle from Defendant Dodgeland of Columbia, Inc., and was charged an illegal administrative fee (often referred to as an "administrative fee," a "recording and processing fee," "closing fee," "dealer documentation and closing fee" (hereinafter collectively referred to as "administrative fees").

2. Plaintiff Olga Joanne Cristy is a citizen and resident of Lexington County, South Carolina. Plaintiff Olga Joanne Cristy purchased a motor vehicle from Defendant Jim Hudson Superstore, Inc., a/k/a Jim Hudson Hyundai and was charged an illegal administrative fee.

3. Pursuant to S.C. Code Ann §56-5-110, the Plaintiffs bring this action for the benefit of all others who paid illegal administration fees to Defendants above-named

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2010 JUN 25 PM 12:06
JEANETTE W. MCBRIDE
D.P. & G.S.

4. Defendant Dodgeland of Columbia, Inc. is a licensed motor vehicle dealer and a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina.

5. Defendant Jim Hudson Automotive Group is a licensed motor vehicle dealer and a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina.

6. Defendant Jim Hudson Superstore, Inc., a/k/a Jim Hudson Hyundai is a licensed motor vehicle dealer and a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina

VENUE

7. Venue is proper in Richland County because both Defendants maintain an office and agent for the transaction of business in Richland County, and the alleged wrongdoing occurred in this county.

FACTS

8. Defendants conspired together and with others in a common scheme designed to deceive all car buyers (the term "car" as used herein includes new and used cars, trucks, sport utility vehicles, and automobiles of all kinds). These actions amount to concerted consumer fraud.

9. Each individual Defendant's conduct vis-a-vis' all consumers was the product of unfair, misleading, and/or unconscionable business practices.

10. Defendants engaged in a common practice of presenting/advertising car prices in a misleading manner.

11. Defendants set and advertise the illegal sticker price for cars, and then upon closing illegally collected illegal administrative fees.

12. Defendants present and advertise the illegal ""administrative fees" in a misleading manner and/or in an effort to mislead car buyers. This practice is a deceptive way to secretly and artificially raise the sticker price.

13. Defendants conduct is not unlike that found to be an unfair trade practice by an Ohio Court in *Motzer Dodge Jeep Eagle, Inc. v. Ohio Attorney General*, 642 N.E.2d 20 (Oh. Ct. App. 1994).

14. Defendants' advertising is misleading because it fails to include and/or adequately disclose "administrative fee" in the advertised price of the car.

15. The illegal "administrative fees" are deceptive add-ons.

16. The illegal "administrative fees" are presented to car buyers in a misleading manner because car buyers are led to believe that the illegal "administrative fees" are mandatory fees, such as taxes and license fees.

17. The illegal "administrative fees" are charged in addition to advertised and/or list prices for cars.

18. The illegal "administrative fees" are deliberately placed as separate line items on Defendants' invoices along with mandatory fees such as taxes, tags, and title.

19. This implies that the illegal "administrative fees" like the payment of taxes, fees for tags and fees for obtaining title are separate set fees and that there is no option but to pay this fee with every car purchase.

20. Consequently, car buyers purchase cars based on the total sticker price and are misled into believing that any discount received is off the sticker price and that additional illegal "administrative fees" are a special, mandatory fee.

21. In 2000, the General Assembly enacted a very narrow exception for charging "administrative fees."

22. S.C. Code Ann. §37-2-307 allows a dealership to do what would otherwise be illegal, charge "administrative fees," only if the dealership follows strict rules.

23. S.C. Code Ann. §37-2-307 requires that "administrative fees" be included in the advertised price, disclosed on the sales contract, and conspicuously displayed at the dealership.

24. S.C. Code Ann. §37-2-307 also requires that Defendants annually register to charge "administrative fees" with the Department of Consumer Affairs.

25. Also, Defendants may only charge the "administrative fees" for reimbursement of actual cost and may not charge administrative fees for profit.

26. Upon information and belief, Defendants have not availed themselves of the limited exception in S.C. Code Ann. §37-2-307.

27. Defendants falsely claim that they are charging "administrative fees" for reimbursement of actual costs, but are actually charging illegal "administrative fees" for a profit.

28. Upon information and belief, for one or more of the relevant years, every Defendant did one or more of the following illegal acts:

- a. failed to individually register annually with the Department of Consumer Affairs;
- b. charged illegal "administrative fees" in excess of the amount for which it registered;
- c. failed to disclose the illegal "administrative fees" on sales contracts;

- d. charged illegal "administrative fees" in excess of their costs;
- e. failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;
- f. advertised deceptively and illegally in order to mislead purchasers;
- g. failing to include the "administrative fee" in the advertised price; and
- h. created a closing procedure to add illegally "administrative fees."

FOR A FIRST CAUSE OF ACTION

(Violations of S.C. Code Ann. §56-15-10 *et. seq.*)

29. The allegations set forth in the paragraphs above are incorporated herein as if set forth verbatim.

30. Defendants are motor vehicle dealers subject to Title 56 of the S.C. Code.

31. Defendants' deceptive use of illegal "administrative fees" is arbitrary, in bad faith and unconscionable.

32. Defendants' use and presentation of the illegal administrative fees is designed to deceive and/or mislead car buyers and thus is arbitrary, in bad faith, and unconscionable and in violation of the statute.

33. Upon information and belief, Defendants violated S.C. Code Ann. §56-15-10 *et. seq.* by, *inter alia*,

- a. failing to individually register annually with the Department of Consumer Affairs;
- b. charging illegal "administrative fees" in excess of the amount for which it registered;
- c. failing to disclose the illegal "administrative fees" on sales contracts;
- d. charging illegal "administrative fees" in excess of their costs;
- e. failing to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;

- f. advertising deceptively and illegally in order to mislead purchasers;
- g. failing to include the "administrative fee" in the advertised price; and
- h. creating a closing procedure to illegally add "administrative fees."

34. Defendants conspired together and with others to all charge similar illegal "administrative fees" in an effort to cause damage to South Carolina car buyers. This conspiracy in and of itself is a violation of statute.

35. This suit is brought pursuant to S.C. Code Ann. §56-15-110(2) for the benefit of the whole because the action is one of common or general interest to many persons and the parties are numerous and it is impracticable to bring them all before the Court.

36. Accordingly, Plaintiffs are suing for the benefit of all South Carolina car buyers who paid administrative fees to Defendants and against all motor vehicle dealers owned or controlled by Defendants as defined in S.C. Code Ann. §56-15-10(h).

37. Plaintiffs and all South Carolina car buyers who paid illegal administrative fees to Defendants in the past have been injured by Defendants' deceptive acts as described above.

38. As a result of the aforementioned conduct of Defendants, Plaintiffs are entitled to double actual damages, the cost of the suit and a reasonable attorneys' fee pursuant to S.C. Code Ann. §56-15-110(1).

39. Furthermore, the aforementioned conduct of Defendants was malicious. Thus, Plaintiffs are entitled to punitive damages pursuant to S.C. Code Ann. §56-15-110(3).

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)

40. The allegations set forth in the paragraphs above are incorporated herein as if set forth verbatim.

41. This cause of action seeks a declaratory judgment for the purposes of determining a question of actual controversy between all parties.

42. Plaintiffs seek a determination of their rights and legal relations with the Defendants.

43. The issues raised by Defendants' common practice of charging illegal "administrative fees" are of such wide concern and public interest that this declaratory judgment action should be decided for future guidance to insure that the public is protected.

44. Plaintiffs seek a determination of the following question:

- a. Is the charging of illegal "administrative fees," and further acts by Defendants as described above illegal?

45. Plaintiffs seek a declaratory judgment from this Court that:

- a. A permanent injunction issue preventing Defendants from charging future customers with illegal administrative fees;
- b. Defendants be ordered to disgorge all illegal administrative fees collected from Plaintiffs and all car buyers who paid illegal "administrative fees" to Defendants.

FOR A THIRD CAUSE OF ACTION
(Unjust Enrichment)

46. The allegations of the preceding paragraphs above are repeated to the extent they are not inconsistent with this cause of action.

Patrick E. Knie
Patrick E. Knie, PA
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Columbia, South Carolina

June 23, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Melissa Anne York and Olga Joanne Cristy,

Plaintiffs,

vs.

Dodgeland of Columbia, Inc. and Jim Hudson
Automotive Group, and Jim Hudson
Superstore, Inc., a/k/a Jim Hudson Hyundai,

Defendants.

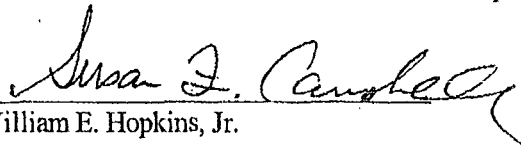
) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
)

) C/A No.: 2010-CP-40-4244
)

) **AMENDED SUMMONS**
)
)

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the **First Amended Complaint** in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said First Amended Complaint pursuant to SCRCP, Rule 15 (a) on the subscriber at their offices, 1414 Lady Street (29201), Post Office Box 11316, Columbia, South Carolina, 29211, within the time remaining for response to the original pleadings which is **September 3, 2010**; and if you fail to answer the First Amended Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the First Amended Complaint.



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Columbia, South Carolina

August 5, 2010

ATTORNEYS FOR THE PLAINTIFFS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A No.: 2010-CP-40-4244
Melissa Anne York and Olga Joanne Cristy,	)	
	)	
Plaintiffs,	)	FIRST AMENDED COMPLAINT
vs.	)	(JURY TRIAL DEMANDED)
	)	
Dodgeland of Columbia, Inc. and Jim Hudson	)	
Automotive Group, and Jim Hudson	)	
Superstore, Inc., a/k/a Jim Hudson Hyundai,	)	
	)	
Defendants.	)	
	)	

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C.P. & G.S.

Plaintiffs above-named, individually and for the benefit of all others who paid illegal closing fees to Defendants above-named, hereby complaining of Defendants, would respectfully show that:

1. Plaintiff Melissa Anne York is a citizen and resident of Lexington County, South Carolina. Plaintiff Melissa Anne York purchased a motor vehicle from Defendant Dodgeland of Columbia, Inc., and was charged an illegal administrative fee (often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or a "dealer documentation and closing fee" (hereinafter collectively referred to as "administrative fees").
2. Plaintiff Olga Joanne Cristy is a citizen and resident of Lexington County, South Carolina. Plaintiff Olga Joanne Cristy purchased a motor vehicle from Defendant Jim Hudson Superstore, Inc., a/k/a Jim Hudson Hyundai and was charged an illegal "administrative fee."
3. Pursuant to S.C. Code Ann §56-15-110, the Plaintiffs bring this action for the benefit of all others who paid illegal "administrative fees" to Defendants above-named.

4. Defendant Dodgeland of Columbia, Inc. is a licensed motor vehicle dealer and a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina.

5. Defendant Jim Hudson Automotive Group is a licensed motor vehicle dealer and a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina.

6. Defendant Jim Hudson Superstore, Inc., a/k/a Jim Hudson Hyundai is a licensed motor vehicle dealer and a corporation organized and existing under the laws of the State of South Carolina with its principal place of business in Richland County, South Carolina

VENUE

7. Venue is proper in Richland County because both Defendants maintain an office and agent for the transaction of business in Richland County, and the alleged wrongdoing occurred in this county.

FACTS

8. Defendants conspired together and with others in a common scheme designed to deceive all car buyers (the term "car" as used herein includes new and used cars, trucks, sport utility vehicles, and automobiles of all kinds). These actions amount to an unfair business practice.

9. Defendants' conduct vis-a-vis' their consumers, was the product of unfair, misleading, and/or unconscionable business practices.

10. Defendants engaged in a common practice of presenting/advertising car prices in a misleading manner. Defendants set and advertise a sticker price for cars and then in addition charge a second fee often referred to as an "administrative fee," a "recording and processing

fee," "closing fee," "dealer documentation and closing fee" or the like (collectively "administrative fees.").

11. Defendants present and advertise the "administrative fees" in a misleading manner and/or in an effort to mislead car buyers. This practice is a deceptive way to secretly and artificially raise the sticker price after negotiation of the car is complete.

12. Defendants' conduct is not unlike that found to be an unfair trade practice by an Ohio Court in *Motzer Dodge Jeep Eagle, Inc. v. Ohio Attorney General*, 642 N.E.2d 20 (Oh. Ct. App. 1994).

13. The Chief Administrative Judge, Second Judicial Circuit, The Honorable Doyet A. Early, III., in a similar case, recently held as follows in a declaratory judgment order interpreting the South Carolina Closing Fee statute, S.C. Code Ann. § 37-2-307 (1976):

"Defendant Taylor Toyota's proposed interpretation that the fee is not limited and can be charged for any purpose does not protect consumers. Under Defendant Taylor Toyota's interpretation, dealers can charge a fee, call it a 'closing fee' (document fee, processing fee or some other name associated with documentation for an automobile closing), and then use the fee solely to make a profit. This interpretation would authorize the dealers to charge a fee with a potentially misleading name. This interpretation does not protect consumers. I find this interpretation unreasonable in light of the statute's purpose of protecting consumers.

The more reasonable interpretation is that S.C. Code Ann. § 37-2-307 authorizes the charging of 'closing fees' which are for the reimbursement of set overhead costs arising from automobile closings such as document retrieval and document preparation. This interpretation protects consumers because it mandates that the charge is for the actual cost associated with a closing, which can be predetermined, and does not allow a dealer to name a fee a "closing fee" and then use the fee to make a hidden profit.

Accordingly, I find that a "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation. The closing fee is not limited to document retrieval and document preparation; it may include other closing fees actually incurred from the consummation of the transaction. It cannot be arbitrarily set, unlimited or include dealer profit. The dealer may only charge the buyer

closing fees that are actually incurred and are a necessity to the closing, thus reimbursing the dealer for actual closing fees incurred."

14. Defendant Dodgeland charged Plaintiff Melissa York a fee referred to as an "Admin Fee" (on the RISC) and a "Processing Fee" (on the dealer invoice) of \$289.00. Upon information and belief, Defendant Dodgeland's fee charged to Plaintiff York and other car purchasers was arbitrarily set and included dealer profit. Therefore, it was potentially misleading to consumers, and a violation of law.

15. Defendant Jim Hudson charged Plaintiff Olga Cristy a "Processing Fee" of \$289.00. Upon information and belief, Defendant Jim Hudson's fee charged to Plaintiff Cristy and other car purchasers was arbitrarily set and included dealer profit. Therefore, it was potentially misleading to consumers, and a violation of law.

16. Defendants' placement of the "administrative fee" on the dealer invoice is deceptive in that it implies that the fee is separate and distinct from the general overhead that car buyers expect to be included within the sticker price for a car and it deceptively implies that the set fee is mandatory, such as taxes and license fees.

17. The "administrative fees" are deliberately placed as separate line items on Defendants' invoices along with mandatory fees such as taxes, tags and title. This implies that the "administrative fees" like the payment of taxes, fees for tags and fees for obtaining title are separate set fees and that there is no option but to pay this fee with every purchase.

18. The "administrative fees" are not separate and distinct from Defendants' general overhead expected to be included in the advertised price. Instead, the "administrative fees" are misleading add-ons.

19. Defendants' advertising is misleading because it fails to include and/or adequately disclose "administrative fee" in the advertised price of the car.

20. Defendants' advertising is misleading because it fails to include and/or adequately disclose that the "administrative fee," if reflected in the advertisement of the car, is actually a way for the Defendants to make a hidden profit, as opposed to reimbursement for an actual cost associated with any particular buyer's transaction.

21. The illegal "administrative fees" are charged in addition to advertised and/or list prices for cars.

22. Consequently, car buyers purchase cars based on the total sticker price and are misled into believing that any discount received is off the sticker price and that additional illegal "administrative fees" are a special, mandatory fee.

23. In 2000, the General Assembly enacted a very narrow exception for charging "administrative fees."

24. S.C. Code Ann. §37-2-307 allows "administrative fees," if the dealership follows strict rules and if the fee is truthful, as opposed to deceptive.

25. S.C. Code Ann. §37-2-307 requires that "administrative fees" be included in the advertised price, disclosed on the sales contract, and conspicuously displayed at the dealership.

26. S.C. Code Ann. §37-2-307 also requires that Defendants annually register to charge "administrative fees" with the Department of Consumer Affairs.

27. Also, Defendants may only charge the "administrative fees" for reimbursement of actual cost and may not charge administrative fees for profit.

28. Upon information and belief, Defendants have not availed themselves of the limited exception in S.C. Code Ann. §37-2-307.

29. Defendants falsely claim that they are charging "administrative fees" for reimbursement of actual costs of the transaction, but in reality, they are charging illegal "administrative fees" for a profit.

FOR A FIRST CAUSE OF ACTION
(Violations of S.C. Code Ann. §56-15-10 *et. seq.*)

30. The allegations set forth in the paragraphs above are incorporated herein as if set forth verbatim.

31. Defendants are motor vehicle dealers subject to Title 56 of the South Carolina Code.

32. Defendants' deceptive use of "administrative fees" is arbitrary, in bad faith and unconscionable.

33. Defendants' use and presentation of the "administrative fees" is designed to deceive and/or mislead car buyers and thus is arbitrary, in bad faith, and unconscionable and in violation of the statute.

34. Failure to truthfully and adequately disclose and/or include "administrative fees" in the advertised price of cars constitutes misleading advertising in violation of the statute.

35. Defendants conspired with other car dealers to charge similar or identical "administrative fees" in an effort to cause damage to South Carolina car buyers. This conspiracy is in and of itself a violation of the statute.

36. This suit is brought pursuant to S.C. Code Ann. §56-15-110(2) for the benefit of the whole because the action is one of common or general interest to many persons and the parties are numerous and it is impracticable to bring them all before the Court.

37. Accordingly, Plaintiffs are suing for the benefit of all South Carolina car buyers who paid "administrative fees" to Defendants and against all motor vehicle dealers owned or controlled by Defendants as defined in S.C. Code Ann. §56-15-10(h).

38. Plaintiffs and all South Carolina car buyers who paid illegal "administrative fees" to Defendants in the past have been injured by Defendants' deceptive acts as described above.

39. As a result of the aforementioned conduct of Defendants, Plaintiffs are entitled to double actual damages, the cost of the suit and a reasonable attorneys' fee pursuant to S.C. Code Ann. §56-15-110(1).

40. Furthermore, the aforementioned conduct of Defendants was malicious. Thus, Plaintiffs are entitled to punitive damages pursuant to S.C. Code Ann. §56-15-110(3).

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)

41. The allegations set forth in the paragraphs above are incorporated herein as if set forth verbatim.

42. This cause of action seeks a declaratory judgment for the purposes of determining a question of actual controversy between all parties.

43. Plaintiffs seek a determination of their rights and legal relations with the Defendants under S.C. Code Ann. §56-15-10, *et. seq.* and/or § 37-2-307.

44. The issues raised by Defendants' common practice of charging "administrative fees" are of such wide concern and public interest that this declaratory judgment action should be decided for future guidance to insure that the public is protected.

45. Plaintiffs seek an interpretation of the words "closing fee" and "advertised price" as the words appear in S.C. Code Ann. § 37-2-307.

46. Plaintiffs seek a declaratory judgment from this Court that:

- a. Standard "administrative fees" that are not actually incurred by the Defendants from the consummation of each of the car buyers' transactions are illegal, unfair, arbitrary and unreasonable.
- b. Charging "administrative fees" while failing to disclose that the "administrative fees" are actually for dealer profit (in whole or in part) is illegal.
- c. Failing to include the charging of "administrative fees" in the advertised price of a motor vehicle violates S.C. Code Ann. § 37-2-307.
- d. If the conditions of S.C. Code Ann. § 37-2-307 are not followed, "administrative fees" are illegal.
- e. Charging of illegal "administrative fees" by Defendants violates S.C. Code Ann. § 37-2-307 and the Dealers Act, S.C. Code Ann. § 56-15-30(a).
- f. A permanent injunction should be issued preventing Defendants from advertising/charging future customers with "administrative fees" in a manner which violates §56-15-10, *et. seq.* and S.C. Code Ann. § 37-2-307.
- g. Defendants be ordered to disgorge all "administrative fees" collected from Plaintiffs and all car buyers who paid "administrative fees" to Defendants, when such fees were not actually incurred by the Defendants in the consummation of the car purchase transactions.

FOR A THIRD CAUSE OF ACTION
(Unjust Enrichment)

47. The allegations of the preceding paragraphs above are repeated to the extent they are not inconsistent with this cause of action.

48. The Plaintiffs and similarly situated consumers conferred a non-gratuitous benefit on each of the Defendants in the form of grossly excessive profits, as described herein.

49. The Defendants each realized some value from the non-gratuitous benefit from the consumers, and each Defendant induced the consumers to confer the benefit because car buyers are led to believe that the illegal "administrative fees" are mandatory fees, such as taxes and license fees.

50. As described fully herein, the facts of this case are such that the Defendants would be inequitably enriched should they be allowed to retain the profits they earned without paying the consumers the benefit of what they were promised in order to induce the consumers to pay the illegal fees.

51. The consumers have been damaged by the unjust enrichment and request that the Defendants disgorge the profits associated with the illegal "administrative fees".

WHEREFORE, Plaintiffs pray for judgment against the Defendants for actual and compensatory damages, for punitive damages, for disgorgement of all "administrative fees" collected by Defendants, for a permanent injunction, together with attorneys' fees, prejudgment interest and the costs of this action, and for such other and further relief as this Court may deem just and proper.

ATTORNEYS FOR THE PLAINTIFFS:



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Columbia, South Carolina

August 5, 2010

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
Melissa Anne York and Olga Joanne Cristy,
[] Plaintiffs.

vs.

Dodgeland of Columbia, Inc., et al.,
[X] Defendants.
Check box above indicating submitting party

) IN THE [X] COURT OF COMMON PLEAS
) [] FAMILY COURT
) Civil Action No. 2010-CP-40-4244
)
)
)

MOTION AND ORDER INFORMATION FORM
AND COVER SHEET

<u>name, SC Bar no. and address of plaintiff's attorney</u> William E. Hopkins, Jr., Esquire Susan F. Campbell, Esquire McCutchen Blanton Hopkins & Campbell, LLP Post Office Drawer 11316 Columbia, SC 29211-1316 e-mail: other:		<u>name, SC Bar no. and address of defendant's attorney</u> SEE ATTACHED e-mail: other:		2010 SEP -3 PM 3:04 ELEANETTE W. McBRIDE C.C.P. & C.S.	RICHLAND COUNTY CLERK OF COURT
☒ 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: <u>Motion to Dismiss Dodgeland</u> Estimated Time Needed: Court Reporter Needed: YES [X] NO []					
SECTION II: Motion Type ☒ Written motion attached ☐ Form Motion: I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for Dodgeland of Columbia, Inc. Date Submitted					
SECTION III: Motion Fee ☒ PAID - AMOUNT: <u>\$25.00</u> ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect (check reason) ☐ 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, SCRCP) ☐ 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: _____ (print name) ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____					

SCCA/233 (1/2003)

DEFENDANTS' ATTORNEYS:Dodgeland Attorneys:

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Columbia, South Carolina 29202

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Melissa Anne York and Olga)
 Joanne Cristy,)

Civil Action No. 2010-CP-40-424

Plaintiffs,)

vs.)

Dodgeland of Columbia, Inc., Jim)
 Hudson Automotive Group, and)
 Jim Hudson Superstore, Inc. a/k/a)
 Jim Hudson Hyundai,)

Defendants.)

NOTICE OF MOTION AND MOTION
TO DISMISS THE COMPLAINT AND
THIS ACTION, TO COMPEL
ARBITRATION, TO SEVER, TO
STRIKE, FOR A MORE DEFINITE
PLEADING, FOR A PROTECTIVE
ORDER, FOR COSTS AND FEES AND
FOR OTHER RELIEF ON BEHALF OF
DEFENDANT, DODGELAND OF
COLUMBIA, INC.

TO: WILLIAM E. HOPKINS, JR., ESQUIRE, AND SUSAN F. CAMPBELL, ESQUIRE, OF THE LAW FIRM OF MCCUTCHEN BLANTON HOPKINS & CAMPBELL, LLP; PATRICK E. KNIE, ESQUIRE, OF THE LAW FIRM OF PATRICK E. KNIE, P.A, ATTORNEYS FOR THE ABOVE-NAMED PLAINTIFFS:

YOU WILL PLEASE TAKE NOTICE that the defendant, Dodgeland of Columbia, Inc. ("Defendant" or "Dodgeland"), by and through the undersigned attorneys, will move before the Presiding Judge of the Richland County Court of Common Pleas on the tenth (10th) day after the service hereof at 10:00 a.m. or as soon thereafter as counsel may be heard for an Order granting its Motion to strike, for a more definite statement, to dismiss, to compel arbitration, to sever, and for a protective order pursuant to 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), 12(b)(6), 12(b)(7), 12(e), 12(f), 18, 19, 20, 21, 23, and 26(c), SCRCF. Further, Dodgeland respectfully moves this Honorable Court to award costs and

attorney fees in responding to this action pursuant to S.C. Code Ann. § 15-36-10, et seq. (2005). The Defendant Dodgeland hereby moves as follows:

1. Pursuant to Rule 12(f), SCRPC, Defendant Dodgeland moves to strike any and all paragraphs in the First Amended Complaint which reference another trial court and an order, which is not a final order, or an order that is controlling upon this Court (i.e., ¶ 13 on p. 3 of First Amended Complaint). Such material is immaterial, impertinent and scandalous and, upon information and belief, included only as a means to cause prejudice and harm to the Defendant in violation of due process and equal protection afforded the Defendant by the United States Constitution and the Constitution of the State of South Carolina. U.S.C.A Const. Amend. 4; U.S.C.A Const. Amend. 5; S.C. Const. art I, §3. Moreover, such order is not a final binding order upon this court or these parties. Therefore, paragraph 13 and all of its unnumbered paragraphs of the First Amended Complaint should be stricken and removed from the Complaint.

2. Pursuant to Rule 12(e), SCRPC, Defendant Dodgeland moves for a more definite statement in any and all paragraphs in the First Amended Complaint to allege with specificity various alleged illegal, misleading, or deceptive conduct and/or practice by the Defendant without explaining what exactly the Plaintiff is alleging to have occurred. The Defendant demands that the Plaintiff(s) make a more definite and clear statement in their allegations regarding alleged actions, practices or conduct of the Defendant that are illegal, misleading and deceiving that they are complaining to have violated the law as in the following items so that the Defendant can properly and correctly respond in defense of this matter:

(a) explain or specify what the plaintiff is alleging regarding how or why certain administrative fees are illegal as alleged therein (i.e., Complaint ¶3);

(b) explain or specify what the plaintiff is alleging as "some unexplained common scheme" to deceive by the Defendant (i.e., Complaint ¶8);

(c) explain or specify what the plaintiff is alleging regarding how some unexplained and alleged common scheme is deceptive (i.e., Complaint ¶8);

(d) explain or specify what the plaintiff is alleging regarding unexplained conduct alleged to be unfair, misleading, and/or unconscionable business practices (i.e., Complaint ¶9);

(e) explain or specify what the plaintiff is alleging regarding some unspecified conduct alleged to be misleading when presenting or advertizing car prices (i.e., Complaint ¶¶10, 11);

(f) explain or specify what the plaintiff is alleging regarding second fee alleged to be charged when presenting or advertizing car prices (i.e., Complaint ¶10);

(g) explain or specify what the plaintiff is alleging regarding how a sticker price is artificially raised after negotiation of the car (i.e., Complaint ¶11);

(h) explain or specify what the plaintiff is alleging regarding how a fee charged by Defendant is (i) arbitrarily set, (ii) misleading, (iii) a violation of the law, and (iv) how it includes dealer profit (i.e., Complaint ¶15);

(i) explain or specify what the plaintiff is alleging regarding how the placement of the "administrative fee" on the dealer invoice is deceptive (i.e., Complaint ¶16);

(j) explain or specify what the plaintiff is alleging regarding how the placement of the "administrative fee" on the dealer invoice deceptively implies it is mandatory, such as taxes and license fees (i.e., Complaint ¶16);

(k) explain or specify what the plaintiff is alleging regarding how the placement of the "administrative fee" on the dealer invoice deceptively implies it is separate and distinct from general overhead and what Plaintiff York expected (i.e., Complaint ¶¶16, 18);

(l) explain or specify what the plaintiff is alleging regarding how the "administrative fee" is a misleading add-on (i.e., Complaint ¶18);

(m) explain or specify what the plaintiff is alleging regarding how the Defendant's advertising is alleged to be misleading regarding the "administrative fee" and the price of the car (i.e., Complaint ¶¶19, 22);

(n) explain or specify what the plaintiff is alleging regarding how the Defendant's advertising is alleged to be misleading as inadequate regarding the "administrative fee" (i.e., Complaint ¶¶20, 22);

(o) explain or specify what the plaintiff is alleging regarding how the Defendant's advertising is alleged to be misleading regarding the "administrative fee" and the price of the car (i.e., Complaint ¶¶19, 20, 22);

(p) explain or specify what the plaintiff is alleging regarding a truthful fee or how the Defendant's fee is deceptive in paragraph 24 (i.e., Complaint ¶24);

(q) explain or specify what the plaintiff is alleging regarding how the Defendants may only charge the fee for reimbursement of actual cost and not for profit (i.e., Complaint ¶27);

(r) explain or specify what the plaintiff is alleging regarding how the Defendant did not avail itself of the limited exception in S.C. Code §37-2-307 (i.e., Complaint ¶28);

(s) explain or specify what the plaintiff is alleging regarding how the Defendant falsely claims reimbursement of actual costs but is charging an illegal fee for profit (i.e., Complaint ¶29);

(t) explain or specify what the plaintiff is alleging as a deceptive use of an administrative fee and how it is arbitrary, in bad faith, unconscionable and misleading and in violation of which statute (i.e., Complaint ¶¶32, 33);

(u) explain or specify what the plaintiff is alleging as a failure to truthfully and adequately disclose the "administrative fee" and in violation of which statute (i.e., Complaint ¶34);

(v) explain or specify what the plaintiff is alleging failure to truthfully and adequately include the "administrative fee" in the advertized price of the car to constitute misleading advertisement in violation of which statute (i.e., Complaint ¶34);

(w) explain or specify what the plaintiff is alleging regarding a conspiracy to damage car buyers and in violation of which statute (i.e., Complaint ¶35);

(x) explain or specify what the plaintiff is alleging as the "issues raised" in paragraph 44 (i.e., Complaint ¶44);

(y) explain or specify what the plaintiff is alleging to be standard "administrative fees" in paragraph 46 (i.e., Complaint ¶46);

(z) explain or specify what the plaintiff is alleging to have conferred upon the Defendant as a "non-gratuitous benefit in the form of grossly excessive profits" (i.e., Complaint ¶48);

(aa) explain or specify what the plaintiff is alleging by the Defendant to have occurred to induce the Plaintiffs to confer a benefit upon the Defendant (i.e., Complaint ¶49); and

(bb) explain or specify what the plaintiff is alleging as to how the Plaintiff did not get what was bargained for or promised in the transaction with the Defendant and what is the "benefit promised" (i.e., Complaint ¶50).

Such clarity is needed so that the Defendant may properly respond to the pleading and make any further motion or response. Therefore, the Defendant asks that the Court order the Plaintiff(s) to make a more definite statement of what they are alleging to have occurred and how such is a violation of the law.

3. Pursuant to Rule 12(b)(7), SCRCP, Defendant Dodgeland moves to dismiss the claims of any named plaintiff, alleging to have transacted business with this Defendant in which there was a co-purchaser or co-purchasers in the transaction, for failure to join a co-purchaser(s) as a necessary party under SCRCP 19. To the extent that any other Plaintiffs had co-purchasers in their alleged separate vehicle transactions at dealerships other than Defendant Dodgeland, Defendant Dodgeland moves to dismiss the claims of these Plaintiffs for failure to join a co-purchaser as a necessary party under SCRCP 19.

4. Pursuant to Rule 12(b)(6), SCRCP, Defendant Dodgeland moves to dismiss this action on the ground that the claims of all Plaintiffs other than those alleging to have a transaction with this Defendant (i.e., Melissa Anne York) because they lack standing to bring this action against Defendant Dodgeland since all Plaintiffs other than Melissa Anne York allege that they purchased motor vehicles at dealerships other than Defendant Dodgeland. Because none of the aforementioned plaintiffs alleges that she purchased a vehicle from Defendant Dodgeland, such Plaintiffs lack standing to

assert claims against the Defendant, either individually or on behalf of other persons. (See First Amended Complaint ¶¶ 1, 14). Therefore, the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted against Defendant Dodgeland.

5. Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and/or the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.*, and Rules 12(b)(1), 12(b)(2) and 12(b)(6), SCRCF, Defendant Dodgeland moves for an order dismissing this action and Complaint against them on the grounds that it lacks jurisdiction with regard to any such customer or customers, including the named Plaintiff Melissa Anne York,¹ agreeing and/or consenting to arbitration in their respective signed a contract of sale and/or in their respective financed or leased transaction through one of several lending institutions in which they signed a retail installment contract and security agreement or lease agreements containing an arbitration agreement governed by the FAA and/or South Carolina Uniform Arbitration Act. The grounds for this motion are the arbitration provisions and agreements contained in many of their transaction documents that are apart of the transactions with their customers, including but not limited to any prospective or absent purported class members represented in this action by a named plaintiff, wherein such customers agreed to arbitration as expressed in the documentation including but not limited to an invoice, arbitration agreement, finance documents by certain lending institutions, warranty, retail installment contract and/or lease agreement executed by said customers as part of the transaction documents when purchasing, financing or leasing a vehicle. These agreements to arbitrate encompass the disputed

¹ Ms. York signed at least two separate agreements which each contain a separate Arbitration Agreement.

issues in this matter and such claims would require arbitration. Such customers of Defendant Dodgeland agreed to submit any dispute, controversy, or claim arising out of or relating to the purchase or lease of a car to arbitration. Defendant Dodgeland further asks that the Court stay this matter and compel arbitration of Ms. York's claims in accordance with the arbitration agreements that she executed and signed.

6. Pursuant to Rule 12(b)(6), SCRPC, Defendant Dodgeland moves to have this action dismissed because it fails to state facts that would support any cause of action against the Defendant. The Plaintiffs' Amended Complaint is predicated on Defendant's use of closing fees on motor vehicle sales contracts, which is specifically authorized under S.C. Code Ann. § 37-2-307 (2005) and regulated by the South Carolina Department of Consumer Affairs. Because Defendant's allegedly offending conduct is authorized by the State of South Carolina, Plaintiffs fail to state facts sufficient to constitute a cause of action upon which relief may be granted. Moreover, there are no allegations by the Plaintiff that Defendant Dodgeland did not comply with the requirements of the South Carolina Department of Consumer Affairs regarding S.C. Code Ann. § 37-2-307. Nor have the Plaintiffs included the South Carolina Department of Consumer Affairs as a party to this action.

7. Pursuant to Rules 18, 20, and 21, SCRPC, Defendant Dodgeland moves to dismiss this action on the ground that Defendant has been improperly joined in this case. Because Plaintiffs' claims and causes of action against the various Defendants do not arise out of the same transaction, occurrence or series of transactions or occurrences, and do not involve common questions of law or fact, the Defendants are improperly joined. In the alternative, Defendant Dodgeland moves for an order to sever

this matter into separate actions due to Plaintiffs' improper joinder. The Defendant requests severance so that the parties and claims may proceed separately in the county.

8. Pursuant to Rules 12(b)(6) and 12(f), SCRCF, Defendant Dodgeland further moves to dismiss or, in the alternative strike, the second cause of action in the Plaintiffs' Complaint (declaratory relief) on the grounds that it calls for an advisory opinion, fails to state facts sufficient to constitute a cause of action upon which relief may be granted, and ignores adequate and/or other more appropriate remedies under South Carolina law.

9. Pursuant to Rule 12(b)(6) and 12(f), SCRCF, Defendant Dodgeland moves to dismiss or, in the alternative strike, the third cause of action (Unjust Enrichment) because the Defendant did not violate S.C. Code Ann. § 37-2-307 (2005) which is a disclosure statute under the South Carolina Consumer Protection Code and regulated by the South Carolina Department of Consumer Affairs and named Plaintiff York fails to state facts sufficient to constitute a cause of action upon which relief may be granted. Because Defendant's allegedly offending conduct is authorized by the State of South Carolina, Plaintiffs fail to state facts sufficient to constitute a cause of action upon which relief may be granted. Moreover, there are no allegations by the Plaintiff that Defendant Dodgeland did not comply with the requirements of the South Carolina Department of Consumer Affairs regarding S.C. Code Ann. § 37-2-307 and the named Plaintiff York fails to state facts sufficient to constitute a cause of action upon which relief may be granted.

10. Pursuant to Rule 12(b)(6), SCRCF, Defendant Dodgeland moves to dismiss this action on behalf of all unnamed Plaintiffs on the grounds that this action

fails to allege that Plaintiffs have met the requirements of S.C. Code Ann. § 56-15-110(2) (2005) and of Rule 23, SCRCP. (See, first unnumbered or opening paragraph of Complaint; p. 1 ¶ 3; & p. 6, ¶ 36-38). The Plaintiffs may not rely solely on S.C. Code Ann. § 56-15-110 in bringing a purported class action; instead, they are required to allege and meet the requirements of Rule 23. Since Plaintiffs have not alleged that they meet the requirements, the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted for unnamed Plaintiffs. In the alternative, the Defendant Dodgeland moves for an order from the Court requiring that Plaintiffs allege and meet the requirements of Rule 23, SCRCP.

11. Pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5), SCRCP, Defendant Dodgeland moves to dismiss this action against the defendants referred to as "all motor vehicle dealers as defined in S.C. Code Ann. §56-15-10(h) owned or controlled by the named Defendants," on the grounds that the Plaintiffs' process and service of process are insufficient and, as a result, the Court lacks personal jurisdiction over such defendants (Complaint ¶ 37).

12. Pursuant to Rule 12(f), SCRCP, Defendant Dodgeland moves to strike the language in the Plaintiffs' Amended Complaint referring to "all motor dealers as defined in S.C. Code Ann. §56-15-10(h)" on the ground that the Plaintiffs' process and service of process are insufficient and, additionally, that this is an improper and unlawful method of joinder. (Complaint ¶ 37).

13. Pursuant to Rules 12(b)(6), SCRCP, Defendant Dodgeland moves to dismiss this action against the defendants as the Plaintiff fails to state facts that would support any cause of action against the Defendant on the grounds that the Plaintiffs'

claims are barred, in whole or in part, because Plaintiffs do not have a private right of action under S.C. Code Ann. § 37-2-307 for alleged violation thereof other than for the recovery of permissible statutory or administrative penalties.

14. Pursuant to Rules 12(b)(6), SCRPC, Defendant Dodgeland moves to dismiss this action against the defendants as the Plaintiff fails to state facts that would support any cause of action against the Defendant on the grounds that the Plaintiffs' claims are barred, in whole or in part, because Plaintiff does not have a private right of action for declaratory and injunctive relief under S.C. Code Ann. § 37-2-307 for alleged violation thereof other than for the recovery of permissible statutory or administrative penalties.

15. Pursuant to Rules 12(b)(6), SCRPC, Defendant Dodgeland moves to dismiss this action against the defendants as the Plaintiff fails to state facts that would support any cause of action against the Defendant on the grounds that the Plaintiffs' claims are barred, in whole or in part, by the protections afforded the Defendant under S.C. Code Ann. §§37-6-506 and 37-6-104.

16. Pursuant to Rule 26(c), SCRPC, Defendant Dodgeland further moves for a protective order that the discovery propounded by the Plaintiffs be held in abeyance and stayed until the Court rules upon the above-referenced motions. This motion for a protective order is also made on the grounds that the Plaintiffs' discovery requests are unduly burdensome, overly broad, expensive, not reasonably calculated to lead to the discovery of admissible evidence, and seek the discovery of confidential consumer information.

17. Defendant Dodgeland believes that a reasonable person once advised of the Consumer Protection Statute specifically authorizing the charging of closing fees would not continue the present action and would find that the allegations as pleaded are not warranted under existing South Carolina law. Therefore, Defendant Dodgeland respectfully seeks reimbursement of reasonable costs and attorney fees in responding to the Complaint and this action pursuant to S.C. Code Ann. § 15-36-10, *et seq.*

18. Pursuant to Rule 12(b)(6), Defendant moves to dismiss this action based on the fact that the claims based on the transactions involving Defendant Dodgeland are barred by the statute of limitations. Plaintiffs' Complaint arises out of the purchase of an automobile and the allegedly illegal charging of "closing fees" with respect to S.C. Code Ann. § 37-2-307. The defendant, Dodgeland, submits that Plaintiffs' claims are barred by the applicable statute of limitations found in the Consumer Protection Code.

This Motion will be supported by a memorandum, affidavits, and the applicable law that will be filed prior to or at the time of the hearing in this matter. Counsel certifies that consultation with opposing counsel was not required given the nature of the motion.

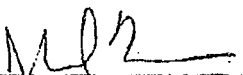
Signature on Following Page

Respectfully submitted,

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Rebecca Laffitte
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Attorneys for Defendant, Dodgeland of Columbia,
Inc.

Columbia, South Carolina

September 3, 2010

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for Defendant, Dodgeland of Columbia, Inc, do hereby certify that I have served all counsel in this action with a copy of the pleading shown below as specified.

Pleadings:

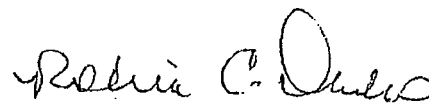
Notice of Motion and Motion to Dismiss on Behalf of Defendant,
Dodgeland of Columbia, Inc.

Counsel Served:**VIA HAND DELIVERY**

William E. Hopkins, Jr., Esquire
Susan F. Campbell, Esquire
McCutchen Blanton Hopkins & Campbell, LLP
1414 Lady Street
Post Office Drawer 11316
Columbia, South Carolina 29211-1316

VIA REGULAR MAIL

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Richardson Plowden & Robinson, P.A.
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Robin C. Owens
Legal Assistant

Columbia, South Carolina

September 3, 2010.

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

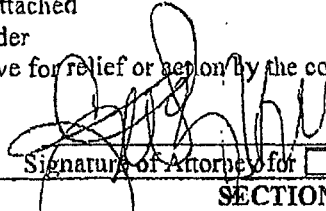
York et al
☐ Plaintiff

v.

Dodgeland Et Al
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2010-CP-40-4244MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: William E. Hopkins, Susan F. Campbell, Bar No. Address: PO Box 11316 Columbia, SC 29211 phone: fax: e-mail: other:	Defendant's Attorney: Steven W. Hamm /C. Joanne Wessinger Hill, Bar No. 2634/15,025 Address: PO Drawer 7788, Columbia, SC 29202 phone: 803 771 4400 fax: 803 779 0016 e-mail: shamm@richardsonplowden.com; jhill@richardsonplowden.com 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 Dismiss Complaint and Action to compel arbitration etc. Estimated Time Needed: 1.5 hours 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 / ☒ Defendant September 3, 2010 Date submitted																					
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: (check reason) <table border="0"> <tr> <td>☐ Rule to Show Cause in Child or Spousal Support</td> <td>☐ State Agency v. Indigent Party</td> </tr> <tr> <td>☐ Domestic Abuse or Abuse and Neglect</td> <td>☐ Post-Conviction Relief</td> </tr> <tr> <td>☐ Indigent Status</td> <td>☐ Motion for Execution (Rule 69, SCRCF)</td> </tr> <tr> <td>☐ Sexually Violent Predator Act</td> <td></td> </tr> <tr> <td>☐ Motion for Stay in Bankruptcy</td> <td></td> </tr> <tr> <td>☐ Motion for Publication</td> <td></td> </tr> <tr> <td colspan="2">☐ Proposed order submitted at request of the court; or,</td> </tr> <tr> <td colspan="2">reduced to writing from motion made in open court per judge's instructions</td> </tr> <tr> <td colspan="2">Name of Court Reporter:</td> </tr> <tr> <td colspan="2">☐ Other:</td> </tr> </table>		☐ Rule to Show Cause in Child or Spousal Support	☐ State Agency v. Indigent Party	☐ Domestic Abuse or Abuse and Neglect	☐ Post-Conviction Relief	☐ Indigent Status	☐ Motion for Execution (Rule 69, SCRCF)	☐ Sexually Violent Predator Act		☐ Motion for Stay in Bankruptcy		☐ Motion for Publication		☐ 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:	
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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 Date Filed: _____ Collected by: _____ ☐ MOTION FEE COLLECTED: _____																					

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Melissa Anne York and Olga Joanne Cristy,	)	Civil Action No.: 10-CP-40-4244
	)	
PLAINTIFFS,	)	
	)	
v.	)	
	)	
Dodgeland of Columbia, Inc. and Jim	)	NOTICE OF MOTION AND MOTION TO
Hudson Automotive Group, and Jim	)	DISMISS THE COMPLAINT AND THIS
Hudson Superstore, a/k/a Jim Hudson	)	ACTION, TO COMPEL ARBITRATION, TO
Hyundai,	)	SEVER, TO STRIKE, FOR A MORE DEFINITE
	)	PLEADING, FOR A PROTECTIVE ORDER
	)	FOR COSTS AND FEES AND FOR OTHER
	)	RELIEF ON BEHALF OF DEFENDANT JIM
	)	HUDSON AUTOMOTIVE GROUP AND JIM
	)	HUDSON SUPERSTORE A/K/A JIM HUDSON
	)	HYUNDAI, WHOSE TRUE NAME IS JIM
	)	HUDSON CARS, LLC D/B/A JIM HUDSON
	)	HYUNDAI
DEFENDANTS.	)	

PLEASE TAKE NOTICE that Defendant Jim Hudson Automotive Group (who is improperly named and who had no transaction with the Plaintiffs) and Jim Hudson Superstore a/k/a Jim Hudson Hyundai, whose true name is Jim Hudson Cars, LLC d/b/a Jim Hudson Hyundai (who is also improperly named), (referred to herein as "Defendant", "Defendant Hyundai" or "Jim Hudson Hyundai"), hereby moves before the presiding judge of the Court of Common Pleas for the Fifth Judicial Circuit to strike, for a more definite statement, to dismiss, to compel arbitration, to sever, and for a protective order pursuant to 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), 12(b)(6), 12(b)(7), 12(e), 12(f), 18, 19, 20, 21, 23, and 26(c), SCRCP. Further, Defendant Hyundai respectfully moves this Honorable Court to award costs and attorney fees in responding to this action pursuant to S.C. Code Ann. § 15-36-10, *et seq.* (2005). The Defendant Hyundai hereby moves as follows:

1) Pursuant to Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6), SCRCP, Jim Hudson Automotive Group and Jim Hudson Superstore, Inc. a/k/a Jim Hudson Hyundai move to dismiss

this action on the ground that the claims of all Plaintiffs, including Olga Joanne Cristy, allege to have a transaction with another Defendant because such Plaintiffs lack standing to bring this action against these Defendants since all named Plaintiffs allege that they purchased motor vehicles at either Jim Hudson Hyundai, whose correct and true name is Jim Hudson Cars, LLC d/b/a Jim Hudson Hyundai, or at Defendant DodgeLand of Columbia, Inc. Because none of the aforementioned plaintiffs alleges that she purchased a vehicle from Jim Hudson Automotive Group or the wrongly named Jim Hudson Hyundai as Jim Hudson Superstore, Inc., d/b/a Jim Hudson Hyundai, Plaintiffs lack standing to assert claims against Jim Hudson Automotive Group or Jim Hudson Superstore, Inc. d/b/a Jim Hudson Hyundai, either individually or on behalf of other persons. (See First Amended Complaint ¶¶ 1, 14). Therefore, the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted against Jim Hudson Automotive Group and Jim Hudson Superstore, Inc. d/b/a Jim Hudson Hyundai.

Additionally, the Plaintiffs have incorrectly named Jim Hudson Hyundai as Jim Hudson Superstore, Inc. a/k/a Jim Hudson Hyundai. Pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5), SCRCF, Jim Hudson Automotive Group and Jim Hudson Superstore, Inc. a/k/a Jim Hudson Hyundai moves to dismiss any alleged action against them on the grounds that the Plaintiffs' process and service of process are insufficient and, as a result, the Court lacks personal jurisdiction over such defendants (Complaint ¶ 37).

2) Pursuant to Rule 12(f), SCRCF, Defendant Hyundai moves to strike any and all paragraphs in the First Amended Complaint which reference another trial court and an order, which is not a final order, or an order that is controlling upon this Court (i.e., ¶ 13 on p 3 of First Amended Complaint). Such material is immaterial, impertinent and scandalous and, upon

information and belief, included only as a means to cause prejudice and harm to the Defendant in violation of due process and equal protection afforded the Defendant by the United States Constitution and the Constitution of the State of South Carolina. U.S.C.A Const. Amend. 4; U.S.C.A Const. Amend. 5; S.C. Const. art I, §3. Moreover, such order is not a final binding order upon this court or these parties. Therefore, paragraph 13 and all of its unnumbered paragraphs of the First Amended Complaint should be stricken and removed from the Complaint.

3) Pursuant to Rule 12(e), SCRPC, Defendant Hyundai moves for a more definite statement in any and all paragraphs in the First Amended Complaint to specifically allege with specificity various alleged illegal, misleading, or deceptive conduct and/or practice by the Defendant without explaining what exactly the Plaintiff is alleging to have occurred. The Defendant demands that the Plaintiff(s) make a more definite and clear statement in their allegations regarding alleged actions, practices or conduct of the Defendant that are illegal, misleading and deceiving that they are complaining to have violated the law as in the following items so that the Defendant can properly and correctly respond in defense of this matter:

(a) explain or specify what the plaintiff is alleging regarding how or why certain administrative fees are illegal as alleged therein (i.e., Complaint ¶3);

(b) explain or specify what the plaintiff is alleging as "some unexplained common scheme" to deceive by the Defendant (i.e., Complaint ¶8);

(c) explain or specify what the plaintiff is alleging regarding how some unexplained and alleged common scheme is deceptive (i.e., Complaint ¶8);

(d) explain or specify what the plaintiff is alleging regarding unexplained conduct alleged to be unfair, misleading, and/or unconscionable business practices (i.e., Complaint ¶9);

(e) explain or specify what the plaintiff is alleging regarding some unspecified conduct alleged to be misleading when presenting or advertising car prices (i.e., Complaint ¶¶10, 11);

(f) explain or specify what the plaintiff is alleging regarding second fee alleged to be charged when presenting or advertizing car prices (i.e., Complaint ¶10);

(g) explain or specify what the plaintiff is alleging regarding how a sticker price is artificially raised after negotiation of the car (i.e., Complaint ¶11);

(h) explain or specify what the plaintiff is alleging regarding how a fee charged by Defendant is (i) arbitrarily set, (ii) misleading, (iii) a violation of the law, and (iv) how it includes dealer profit (i.e., Complaint ¶15);

(i) explain or specify what the plaintiff is alleging regarding how the placement of the "administrative fee" on the dealer invoice is deceptive (i.e., Complaint ¶16);

(j) explain or specify what the plaintiff is alleging regarding how the placement of the "administrative fee" on the dealer invoice deceptively implies it is mandatory, such as taxes and license fees (i.e., Complaint ¶16);

(k) explain or specify what the plaintiff is alleging regarding how the placement of the "administrative fee" on the dealer invoice deceptively implies it is separate and distinct from general overhead and what Plaintiff Cristy expected (i.e., Complaint ¶¶16, 18);

(l) explain or specify what the plaintiff is alleging regarding how the "administrative fee" is a misleading add-on (i.e., Complaint ¶18);

(m) explain or specify what the plaintiff is alleging regarding how the Defendant's advertising is alleged to be misleading regarding the "administrative fee" and the price of the car (i.e., Complaint ¶¶19, 22);

(n) explain or specify what the plaintiff is alleging regarding how the Defendant's advertising is alleged to be misleading as inadequate regarding the "administrative fee" (i.e., Complaint ¶¶20, 22);

(o) explain or specify what the plaintiff is alleging regarding how the Defendant's advertising is alleged to be misleading regarding the "administrative fee" and the price of the car (i.e., Complaint ¶¶19, 20, 22);

(p) explain or specify what the plaintiff is alleging regarding a truthful fee or how the Defendant's fee is deceptive in paragraph 24 (i.e., Complaint ¶24);

(q) explain or specify what the plaintiff is alleging regarding how the Defendants may only charge the fee for reimbursement of actual cost and not for profit (i.e., Complaint ¶27);

(r) explain or specify what the plaintiff is alleging regarding how the Defendant did not avail itself of the limited exception in SC Code §37-2-307 (i.e., Complaint ¶28);

(s) explain or specify what the plaintiff is alleging regarding how the Defendant falsely claims reimbursement of actual costs but is charging an illegal fee for profit (i.e., Complaint ¶29);

(t) explain or specify what the plaintiff is alleging as a deceptive use of an administrative fee and how it is arbitrary, in bad faith, unconscionable and misleading and in violation of what statute (i.e., Complaint ¶¶32, 33);

(u) explain or specify what the plaintiff is alleging as a failure to truthfully and adequately disclose the "administrative fee" in violation of what statute (i.e., Complaint ¶34);

(v) explain or specify what the plaintiff is alleging as a failure to truthfully and adequately include the "administrative fee" in the advertized price of the car to constitute misleading advertisement in violation of what statute (i.e., Complaint ¶34);

(w) explain or specify what the plaintiff is alleging regarding a conspiracy to damage car buyers and in violation of what statute (i.e., Complaint ¶35);

(x) explain or specify what the plaintiff is alleging as the "issues raised" in paragraph 44 (i.e., Complaint ¶44);

(y) explain or specify what the plaintiff is alleging to be "standard administrative fees" in paragraph 46 (i.e., Complaint ¶46);

(z) explain or specify what the plaintiff is alleging to have conferred upon the Defendant as a "non-gratuitous benefit in the form of grossly excessive profits" (i.e., Complaint ¶48);

(aa) explain or specify what the plaintiff is alleging by the Defendant to have occurred to induce the Plaintiffs to confer a benefit upon the Defendant (i.e., Complaint ¶49); and

(bb) explain or specify what the plaintiff is alleging as to how the Plaintiff did not get what was bargained for or promised in the transaction with the Defendant and what is the "benefit promised" (i.e., Complaint ¶50).

Such clarity is needed so that the Defendant may properly respond to the pleading and make any further motion or response. Therefore, the Defendant asks that the Court order the Plaintiff(s) to make a more definite statement of what they are alleging to have occurred and how such is a violation of the law.

4) Pursuant to Rule 12(b)(7), SCRCP, Defendant Hyundai moves to dismiss the claims of any named plaintiff, alleging to have transacted business with this Defendant in which there was a co-purchaser or co-purchasers in the transaction, for failure to join a co-purchaser(s) as a necessary party under SCRCP 19. To the extent that any other Plaintiffs had co-purchasers in their alleged separate vehicle transactions at dealerships other than Defendant Hyundai, Defendant Hyundai moves to dismiss the claims of these Plaintiffs for failure to join a co-purchaser as a necessary party under SCRCP 19.

5) Pursuant to Rule 12(b)(6), SCRCP, Defendant Hyundai moves to dismiss this action on the ground that the claims of all Plaintiffs other than those alleging to have a transaction with the Defendant (i.e., Olga Joanne Cristy) because they lack standing to bring this action against Defendant Hyundai since all Plaintiffs other than Olga Joanne Cristy allege that they purchased motor vehicles at dealerships other than Defendant Hyundai. Because none of the aforementioned plaintiffs alleges that she purchased a vehicle from Defendant Hyundai, such Plaintiffs lack standing to assert claims against the Defendant, either individually or on behalf of other persons. (See First Amended Complaint ¶¶ 1, 14). Therefore, the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted against Defendant Hyundai.

6) Pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, and/or the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.*, and Rules 12(b)(1), 12(b)(2) and 12(b)(6), SCRCP, Defendant Hyundai moves for an order dismissing this action and Complaint against them on the grounds that it lacks jurisdiction with regard to any such customer or customers, including the named Plaintiff Olga Joanne Cristy¹, agreeing and/or

¹ Ms. Cristy signed at least two separate agreements which each contain a separate Arbitration Agreement. These documents are the Contract of Sale between Jim Hudson Hyundai, Inc., d/b/a Jim

consenting to arbitration in their respective signed a contract of sale and/or in their respective financed or leased transaction through one of several lending institutions in which they signed a retail installment contract and security agreement or lease agreements containing an arbitration agreement governed by the FAA and/or South Carolina Uniform Arbitration Act. The grounds for this motion are the arbitration provisions and agreements contained in many of their transaction documents that are apart of the transactions with their customers, including but not limited to any prospective or absent purported class members represented in this action by a named plaintiff, wherein such customers agreed to arbitration as expressed in the documentation including but not limited to an invoice, arbitration agreement, finance documents by certain lending institutions, warranty, retail installment contract and/or lease agreement executed by said customers as part of the transaction documents when purchasing, financing or leasing a vehicle. These agreements to arbitrate encompass the disputed issues in this matter and such claims would require arbitration. Such customers of Defendant Hyundai agreed to submit any dispute, controversy, or claim arising out of or relating to the purchase or lease of a car to arbitration. Defendant Hyundai further asks that the Court stay this matter and compel arbitration of Ms. Cristy's claims in accordance with the arbitration agreements that she executed and signed.

7) Pursuant to Rule 12(b)(6), SCRCF, Defendant Hyundai moves to have this action dismissed because it fails to state facts that would support any cause of action against the Defendant. The Plaintiffs' Complaint are predicated on Defendant's use of closing fees on motor vehicle sales contracts, which is specifically authorized under S.C. Code Ann. § 37-2-307 (2005) and regulated by the South Carolina Department of Consumer Affairs. Because Defendant's allegedly offending conduct is authorized by the State of South Carolina, Plaintiffs

Hudson Hyundai and the Retail Installment Contract and Security Agreement which provided the financing arrangements for Ms. Cristy's motor vehicle.

fail to state facts sufficient to constitute a cause of action upon which relief may be granted. Moreover, there are no allegations by the Plaintiff that Defendant Hyundai did not comply with the requirements of the South Carolina Department of Consumer Affairs regarding S.C. Code Ann. § 37-2-307. Nor have the Plaintiffs included the South Carolina Department of Consumer Affairs as a party to this action.

8) Pursuant to Rules 18, 20, and 21, SCRCP, Defendant Hyundai moves to dismiss this action on the ground that Defendant has been improperly joined in this case. Because Plaintiffs' claims and causes of action against the various Defendants do not arise out of the same transaction, occurrence or series of transactions or occurrences, and do not involve common questions of law or fact, the Defendants are improperly joined. In the alternative, Defendant Hyundai moves for an order to sever this matter into separate actions due to Plaintiffs' improper joinder. The Defendant requests severance so that the parties and claims may proceed separately in the county.

9) Pursuant to Rules 12(b)(6) and 12(f), SCRCP, Defendant Hyundai further moves to dismiss or, in the alternative strike, the second cause of action in the Plaintiffs' Complaint (declaratory relief) on the grounds that it calls for an advisory opinion, fails to state facts sufficient to constitute a cause of action upon which relief may be granted, and ignores adequate and/or other more appropriate remedies under South Carolina law.

10) Pursuant to Rule 12(b)(6) and 12(f), SCRCP, Defendant Hyundai moves to dismiss or, in the alternative strike, the third cause of action (Unjust Enrichment) because the Defendant did not violate S.C. Code Ann. § 37-2-307 (2005) which is a disclosure statute under the South Carolina Consumer Protection Code and regulated by the South Carolina Department of Consumer Affairs and named Plaintiff Cristy fails to state facts sufficient to constitute a cause

of action upon which relief may be granted. Because Defendant's allegedly offending conduct is authorized by the State of South Carolina, Plaintiffs fail to state facts sufficient to constitute a cause of action upon which relief may be granted. Moreover, there is no allegations by the Plaintiff that Defendant Hyundai did not comply with the requirements of the South Carolina Department of Consumer Affairs regarding S.C. Code Ann. § 37-2-307 and the named Plaintiff Cristy fails to state facts sufficient to constitute a cause of action upon which relief may be granted.

11) Pursuant to Rule 12(b)(6), SCRCPP, Defendant Hyundai moves to dismiss this action on behalf of all unnamed Plaintiffs on the grounds that this action fails to allege that Plaintiffs have met the requirements of S.C. Code Ann. § 56-15-110(2) (2005) and of Rule 23, SCRCPP: (See, first unnumbered or opening paragraph of Complaint; p. 1 ¶ 3; & p. 6; ¶ 36-38). The Plaintiffs may not rely solely on S.C. Code Ann. § 56-15-110 in bringing a purported class action; instead, they are required to allege and meet the requirements of Rule 23. Since Plaintiffs have not alleged that they meet the requirements, the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted for unnamed Plaintiffs. In the alternative, the Defendant Hyundai moves for an order from the Court requiring that Plaintiffs allege and meet the requirements of Rule 23, SCRCPP.

12) Pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5), SCRCPP, Defendant Hyundai moves to dismiss this action against the defendants referred to as "all motor vehicle dealers as defined in S.C. Code Ann. §56-15-10(h) owned or controlled by the named Defendants," on the grounds that the Plaintiffs' process and service of process are insufficient and, as a result, the Court lacks personal jurisdiction over such defendants (Complaint ¶ 37).

13) Pursuant to Rule 12(f), SCRCF, Defendant Hyundai moves to strike the language in the Plaintiffs' Complaint referring to "all motor dealers as defined in S.C. Code Ann. §56-15-10(h)" on the ground that the Plaintiffs' process and service of process are insufficient and, additionally, that this is an improper and unlawful method of joinder. (Complaint ¶ 37).

14) Pursuant to Rules 12(b)(6), SCRCF, Defendant Hyundai moves to dismiss this action against the defendants as the Plaintiff fails to state facts that would support any cause of action against the Defendant on the grounds that the Plaintiffs' claims are barred, in whole or in part, because Plaintiffs do not have a private right of action under S.C. Code Ann. § 37-2-307 for alleged violation thereof other than for the recovery of permissible statutory or administrative penalties.

15) Pursuant to Rules 12(b)(6), SCRCF, Defendant Hyundai moves to dismiss this action against the defendants as the Plaintiff fails to state facts that would support any cause of action against the Defendant on the grounds that the Plaintiffs' claims are barred, in whole or in part, because Plaintiff does not have a private right of action for declaratory and injunctive relief under S.C. Code Ann. § 37-2-307 for alleged violation thereof other than for the recovery of permissible statutory or administrative penalties.

16) Pursuant to Rules 12(b)(6), SCRCF, Defendant Hyundai moves to dismiss this action against the defendants as the Plaintiff fails to state facts that would support any cause of action against the Defendant on the grounds that the Plaintiffs' claims are barred, in whole or in part, by the protections afforded the Defendant under S.C. Code Ann. §§37-6-506 and 37-6-104.

17) Pursuant to Rule 26(c), SCRCF, Defendant Hyundai further moves for a protective order that the discovery propounded by the Plaintiffs be held in abeyance and stayed until the Court rules upon the above-referenced motions. This motion for a protective order is

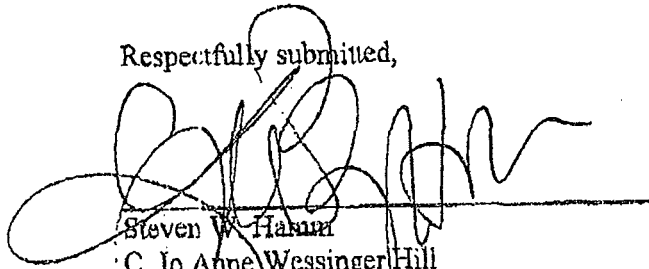
also made on the grounds that the Plaintiffs' discovery requests are unduly burdensome, overly broad, expensive, not reasonably calculated to lead to the discovery of admissible evidence, and seek the discovery of confidential consumer information.

18) Defendant Hyundai believes that a reasonable person, once advised of the Consumer Protection Statute specifically authorizing the charging of closing fees, would not continue the present action and would find that the allegations as pleaded are not warranted under existing South Carolina law. Therefore, Defendant Hyundai respectfully seeks reimbursement of reasonable costs and attorney fees in responding to the Complaint and this action pursuant to S.C. Code Ann. § 15-36-10, *et seq.*

These Motions are based on this Notice of Motion and Motion, the filed pleadings, Memorandum of Law to be filed under separate cover, and the law of this jurisdiction.

In accordance with the South Carolina Rules of Civil Procedure, there is no duty to consult with opposing counsel before filing a Motion to Dismiss. SCRCR Rule 11(a). Furthermore, with regard to the other motions herein, the undersigned certifies that consultation with opposing counsel regarding this motion would serve no useful purpose or could not be timely held.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT JIM HUDSON
AUTOMOTIVE GROUP, AND JIM HUDSON
SUPERSTORE, A/K/A JIM HUDSON WHOSE TRUE AND
CORRECT NAME IS JIM HUDSON CARS, LLC D/B/A
JIM HUDSON HYUNDAI

September 3rd, 2010
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

VERIFICATION

COUNTY OF RICHLAND)

PERSONALLY appeared before me, Donald W. Deese, who says that he is an authorized representative of Defendant Jim Hudson Automotive Group (who is improperly named and who had no transaction with the Plaintiffs) and Jim Hudson Superstore a/k/a Jim Hudson Hyundai, whose true name is Jim Hudson Cars, LLC d/b/a Jim Hudson Hyundai (who is also improperly named), a Defendant in the above-entitled action; that he has read the foregoing Motion(s) and that said Motion was prepared with the assistance and advice of counsel upon which he has relied but that said Motion was nonetheless prepared based upon the information provided by said Defendant; that the Motion set forth herein, subject to inadvertent or undiscovered errors, is based on and therefore necessarily limited by the records and information still in existence, presently recollected and thus far discovered in the course of the preparation of this Motion; and that subject to the limitations set forth herein, the Motion is true to the best of his knowledge, information and belief.

JIM HUDSON CARS, LLC D/B/A JIM HUDSON HYUNDAI

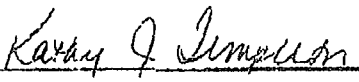
By: Donald W. Deese CFOIts: Secretary - VP

SWORN to before me this
03rd day of September, 2010.

Donald W. Deese (L.S.)
 Notary Public for South Carolina

My Commission Expires: My Commission Expires 10-08-14

Patrick E. Knie
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Spartanburg, SC 29304-5159


Kathy J. Templeton

September 3, 2010
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A No.: 2010-CP-40-4244
Melissa Anne York and Olga Joanne Cristy,	)	
	)	
Plaintiffs,	)	PLAINTIFFS' OMNIBUS
vs.	)	MEMORANDUM IN OPPOSITION
	)	TO ALL MOTIONS FILED
Dodgeland of Columbia, Inc. and Jim Hudson	)	
Automotive Group, and Jim Hudson	)	
Superstore, Inc., a/k/a Jim Hudson Hyundai,	)	
	)	
Defendants.	)	

Plaintiffs Melissa Anne York and Olga Joanne Cristy, individually and for the benefit of all others who paid illegal closing fees to Defendants above-named (hereinafter "Plaintiffs"), submit this Memorandum in Opposition addressing all motions to dismiss, compel arbitration, to sever, to strike, for a more definite statement, for a protective order, for fees and costs, and other relief submitted by both Defendants (with the exception of one paragraph the Defendants' motions are identical).

All the above motions are meritless and should be denied.

BACKGROUND

Defendants are car dealers. This case arises from Defendants' common scheme to illegally charge administrative fees (often referred to as an "administrative fee," "recording and processing fee," "closing fee," or "dealer documentation and closing fees" (collectively "administration fees")). See Exhibit A, First Amended Complaint, ¶10. Administrative fees are an artificial add-on that are charged in a manner designed to deceive car buyers in an effort to artificially raise the sticker price for cars in a way that appears mandatory and not subject to negotiation. *Id.*, ¶¶ 10-11. Basically, Plaintiffs allege Defendants trick customers by negotiating a

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 C.C.P.
 RICHLAND COUNTY

sales price and then adding in the administrative fee, which is unlawfully designed to appear as a fixed cost, but is actually just additional profit. After negotiation is completed, Defendants present pre-printed administrative fees on dealer invoices as a separate pre-printed line item that gives the fees false appearance that they are mandatory fees required to be paid on every car, similar to taxes, tag and title, and that they are non-negotiable. *Id.*, ¶¶ 16-17, 22. This is all intended to deceive the customer: instead of telling the customer that, for example, \$300 additional profit is being added on to the negotiated price, this \$300 is presented as a “closing fee.”

Except for a very narrow and stringent exception, the charging of administrative fees is illegal in South Carolina. *Id.*, ¶ 23-28. The Consumer Protection Code, specifically S.C. Code Ann. § 37-2-307, requires that car dealers take certain affirmative steps in order to charge administrative fees. *Id.*, ¶24. These steps include, *inter alia*, including the administrative fee in the advertised price; disclosing the administrative fee on the sales contract; paying a fee and registering annually with the department of consumer affairs; and conspicuously displaying signs at the dealership disclosing the fact that the dealership charges administrative fees. *Id.*, ¶ 25-27.

The Defendants in this case have not availed themselves of the limited exception of S.C. Code Ann. § 37-2-307. *Id.*, ¶ 28. At a minimum, Defendants have violated the statute by arbitrarily charging fees solely for profit, not to offset costs. *Id.*, ¶ 20 and ¶ 29. Plaintiffs expect discovery to show Defendants are further violating the statute by failing to include the administrative fees in the advertised price for cars.

Plaintiffs are South Carolina consumers who paid illegal administrative fees to these Defendants. *Id.*, ¶¶ 1-2. All others who paid illegal administrative fees to these Defendants were similarly harmed. *Id.*, ¶ 3.

On August 5, 2010, Plaintiffs filed their First Amended Complaint which alleges three causes of action:

1. Violation of S.C. Code Ann. § 56-15-110 et seq. ("Dealers Act");
2. Declaratory Judgment to determine rights and legal relations under S.C. Code Ann. § 56-15-10 and/or S.C. Code Ann. § 37-2-307 ("Consumer Protection Code"); and
3. Unjust Enrichment.

Plaintiffs are bringing this action both individually and pursuant to S.C. Code Ann. § 56-5-110 for the benefit of all others who paid "administrative fees" to Defendants. The South Carolina General Assembly has expressly provided that Plaintiffs can bring this action on behalf of all persons who paid an administrative fee. 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 exact same legal and factual issue is being prosecuted (against different defendants) before the Honorable Doyet A. Early, III, of the Second Judicial Circuit in Aiken, South Carolina. Id., ¶13, and these same motions have been denied in that case.

ARGUMENT

I. DEFENDANTS MOTION TO COMPEL ARBITRATION AND FOR A PROTECTIVE ORDER ARE PREMATURE

Defendants move for both an order compelling arbitration and an order protecting them from discovery. Both motions are premature when Defendants have not even answered.

Defendants have not answered in this matter, and the issues are not joined. In their answer, "A party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted. . . ." Rule 8(b), SCRPC (emphasis added). Here, Defendants have not

offered any facts upon which these motions can be based. The only motions which can be made prior to answering are Rule 12 motions. “A party who makes a motion under this rule may join with it any other motions herein provided for . . .” Rule 12(g), SCRCPP (emphasis added). In other words, any number of Rule 12 motions can be combined and filed together – but other motions outside Rule 12 may not be included. Federal Practice is in accord: “Subdivision (g) contemplates the presentation of an omnibus pre-answer motion in which the defendant advances every available Rule 12 defense and objection he may have that is assertable by motion.” Wright & Miller, *Federal Practice & Procedure*, § 1384 (construing equivalent Federal rule) (emphasis added).

Both the arbitration motion and the discovery motion filed by defendants are therefore premature, because they are not Rule 12 motions and the Defendants have not answered. In ruling on Rule 12 motions, “the trial court must base its ruling solely on allegations set forth in the complaint.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (S.C. 2007). This is only logical – at this stage, there is no other version of the facts before the Court when Defendants have not answered. Plaintiffs’ complaint makes no mention of any alleged arbitration agreements, and Defendants cannot refer to matters outside of the complaint. South Carolina statutory law on motions to compel arbitration is in accord: “On application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration . . .” S.C. Code Ann. § 15-48-20 (emphasis added). No such agreement has been “shown” by Defendants – and cannot be – as Defendants are limited to allegations in the complaint.¹ The frivolousness of the arbitration motion is

¹ The sole exception to this is that Rule 12 permits a motion to dismiss for failure to state a claim to reference outside matter and be converted into a motion for summary judgment. This is inapplicable here, as the motions to compel arbitration or grant protective orders are not motions to dismiss.

underscored because Defendants' motion does not even cite specific language from the alleged agreement(s) – just generic boilerplate such as: “arbitration agreements and provisions contained in many of their transaction documents that are apart [sic] of their transactions with their customers.” See Defendant Hudson's Motion to Dismiss, p. 7, ¶ 6; Defendant Dodgeland's Motion to Dismiss, p. 6, ¶ 5. No purported arbitration agreement is before the Court at this point, and the motion is premature.

Likewise, Defendants seek a protective order shielding them from discovery for a laundry list of reasons, including Plaintiffs' discovery requests are “not reasonably calculated to lead to the discovery of admissible evidence.” Rule 26 motions for protective orders are not permitted at this stage of litigation either – they are not Rule 12 motions. Lacking an answer from Defendants setting forth which facts are contested, the Court cannot even determine at this point what evidence might be admissible. This motion is premature as well.

II. PLAINTIFFS' COMPLAINT COMPLIES WITH RULE 8(a), IS SUFFICIENTLY DEFINITE, AND STATES A CLAIM FOR RELIEF

Plaintiffs' complaint notified Defendants more than adequately regarding Plaintiffs' specific claims, despite their alleged inability to understand twenty-eight (28) individual portions of the Complaint.

A complaint must contain a “short and plain statement of the facts showing that the pleader is entitled to relief.” Rule 8(a)(2), SCRPC. This requires a litigant to plead the ultimate facts which will be proved at trial, not the evidence which will be used to prove those facts. Stroud v. Riddle, 260 S.C. 99, 194 S.E.2d 235 (1973); see also, Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (Ct. App.1985). The test on a motion for more definite statement is whether the complaint states enough facts to inform the adversary of the claim or defense made against him,

and enables him to prepare a responsive pleading, if one is required. Also, a pleading which satisfies Rule 8(a)(1), SCRCF, is not subject to an attack by motion under Rule 12 (e), SCRCF. See Barron & Holtzoff, 1 Fed. Practice and Procedure § 362 at 684-685 cited in Floe v. Plowden, 10 F.R.D. 514, 516 (E.D. S.C. 1950). See also Henry v. Deen, 310 S.E.2d 326, 333 (N.C. 1984). Orders requiring a more definite statement under Rule 12(e) are appropriate where a "pleading's vagueness prohibits defendant from filing a responsive pleading." Glechauf v. Ginsberg, 859 F. Supp. 229 (S.D. W.Va. 1994). In this case, Plaintiffs have stated more than enough facts in detail to inform Defendants of Plaintiffs' allegations and the ways in which these allegations contravene statutory law. Also, the stated facts provide more than enough detailed information to allow Defendants to prepare a responsive pleading.

The standard for motions to dismiss in South Carolina is settled and well-known. "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." Crickel Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (S.C. Ct. App. 2010).

Plaintiffs have pled sufficient facts to state a cause of action under the Dealers Act. Plaintiffs specifically allege that Defendants violated S.C. Code Ann. §56-15-40(1). This section provides:

It shall be deemed a violation of paragraph (a) of 15-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public. (emphasis added)

Bad faith under the Act means: “[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” deBondt v. Carlton Motor Cars, Inc. 342 S.C. 254, 263, 536 S.E. 2d 399, 404 (Ct. App. 2000). “Arbitrary conduct is readily definable and includes acts which are unreasonable, capricious or non-rational; not done according to reason or judgment; depending on will alone.” Taylor v. Nix, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992).

Plaintiffs sufficiently allege a violation of S.C. Code Ann. §56-15-40(1). Plaintiffs alleged that Defendants are charging administrative fees in a manner that is arbitrary, in bad faith and unconscionable. Exhibit A, First Amended Complaint, ¶ 33. Specifically, Plaintiffs alleged that Defendants charge these fees as “a deceptive way to secretly and artificially raise the sticker price after negotiation of the car is complete.” Id., ¶ 11. Further, Plaintiffs alleged these fees were arbitrary, included dealer profit, and were placed on the invoice in such a way as to imply they were mandatory fees such as taxes, tags, and title. Id., ¶¶ 14-15, 17. Plaintiffs also alleged that they and other car buyers who paid administrative fees were injured as a result of Defendants’ actions. Id., ¶¶ 37-38.

Similarly, Plaintiffs sufficiently pled that Defendants violated S.C. Code Ann. §56-15-40(4)(c). This statute provides: “It shall be deemed a violation of paragraph (a) of §56-15-30 for a motor vehicle dealer: . . . to resort to or use any false or misleading advertisement in connection with his business as such motor vehicle dealer.” Plaintiffs alleged that Defendants failed to adequately disclose or include administrative fees in the advertised price of cars which constitutes misleading advertising. Exhibit A, First Amended Complaint, ¶¶ 19-20.

Plaintiffs' allegations are more than sufficient to state a claim "on any theory" and viewing all facts plead in the complaint in the light most favourable to Plaintiffs, as this Court must do under South Carolina law.

III. THIS ACTION SHOULD NOT BE DISMISSED FOR FAILING TO JOIN CO-PURCHASERS AS NO CLAIMS ARE ASSERTED AGAINST DEFENDANTS BY NON-PURCHASERS

Defendants move to dismiss the claims of any named plaintiff, alleging to have transacted business with them with a co-purchaser or co-purchasers in the transaction, for failure to join a necessary party under SCRPC 19. Once again, Defendants are straying outside the boundaries of the complaint, which they cannot do on a Rule 12 motion. Nowhere in the complaint is it alleged that the named plaintiffs had co-purchasers.

Further, even if there were co-purchasers, that is immaterial. "[O]ne or more may sue for benefit of the whole" under S.C. Code Ann. §56-15-110. Since the statute provides that these Plaintiffs can sue these Defendants on behalf of all other purchasers who paid an illegal administrative fee, co-purchasers are necessarily included, their interests are protected, and Defendants will not be subject to double, multiple or inconsistent obligations. See SCRPC 19(a). Further, Rule 21, SCRPC provides that "[m]isjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." The remedy – dismissal – which Defendants seeks is not available for misjoinder. Accordingly, Defendants' motions to dismiss for failure to join a necessary party are meritless.

Defendants also make the strange argument that all claims should be dismissed except those of the named plaintiff who purchased from their dealership – that is, all claims other than

Plaintiff Cristy's must be dismissed against Defendant Jim Hudson. Although this defense is worded oddly, it appears to be an argument that the Defendants in this action are improperly joined. As noted already, dismissal is not the remedy for improper joinder. More importantly, joinder is proper in this case. Rule 20(a), SCRCF, which governs joinder provides:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Rule 20(a), SCRCF rule is to be liberally construed. See Notes to Rules 20, SCRCF ("This Rule 20 (a) is substantially the same as the Federal Rule. This rule liberalizes joinder in State Practice."). Rule 20(a) permits 'the broadest possible scope of action consistent with fairness to the parties [and] joinder of claims, parties and remedies is strongly encouraged.'" King v. Ralston Purina Co., 97 F.R.D. 477, 479 (W.D. N.C.1983).

Plaintiffs specifically alleged that Defendants participated in a common scheme to charge similar or identical "administrative fees" in a combined effort to damage South Carolina car buyers. Exhibit A, First Amended Complaint, ¶ 35. All Plaintiffs must show is "any question of law or fact common to all defendants." In fact, the Complaint contains the exact same factual allegations and causes of action against each defendant. Therefore, the requirements in Rule 20(a) have been satisfied and joinder is both proper and efficient. The claims should not be dismissed or severed.

IV. DEFENDANTS' MOTION TO STRIKE REFERENCE TO JUDGE EARLY'S ORDER SHOULD BE DENIED

Defendants' argument that references in the First Amended Complaint to a declaratory judgment order interpreting the exact statutory language at issue in these proceedings is somehow immaterial, impertinent, and "scandalous" in violation of Rule 12(f) is a frivolous argument.

A motion to strike seeks to have stricken from a pleading "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." S.C.R.C.P. Rule 12(f). In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded. Alladin Plastics, Inc. v. Wintenna, Inc., 301 S.C. 90, 91, 390 S.E.2d 370, 371 (Ct. App. 1990). A motion to strike ... is in the nature of a motion to dismiss under Rule 12(b)(6), SCRC.P. McCormick v. England, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997). There is no authority -- none -- supporting the striking of language quoted directly from an order of a Circuit Court of our state as "scandalous" or "impertinent" or any other pejorative adjective.

The following is the entirety of what Defendants allege to be "scandalous":

"Defendant Taylor Toyota's proposed interpretation that the fee is not limited and can be charged for any purpose does not protect consumers. Under Defendant Taylor Toyota's interpretation, dealers can charge a fee, call it a 'closing fee' (document fee, processing fee or some other name associated with documentation for an automobile closing), and then use the fee solely to make a profit. This interpretation would authorize the dealers to charge a fee with a potentially misleading name. This interpretation does not protect consumers. I find this interpretation unreasonable in light of the statute's purpose of protecting consumers.

The more reasonable interpretation is that S.C. Code Ann. § 37-2-307 authorizes the charging of 'closing fees' which are for the reimbursement of set overhead costs arising from automobile closings such as document retrieval and document preparation. This interpretation protects consumers because it mandates that the charge is for the actual cost associated with a

closing, which can be predetermined, and does not allow a dealer to name a fee a "closing fee" and then use the fee to make a hidden profit.

Accordingly, I find that a "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation. The closing fee is not limited to document retrieval and document preparation; it may include other closing fees actually incurred from the consummation of the transaction. It cannot be arbitrarily set, unlimited or include dealer profit. The dealer may only charge the buyer closing fees that are actually incurred and are a necessity to the closing, thus reimbursing the dealer for actual closing fees incurred."

Exhibit A, First Amended Complaint, ¶ 13.

Far from being immaterial, impertinent, or scandalous, Judge Early's language directly supports a material part of Plaintiffs' cause of action against Defendants for violation of the Dealers Act. Plaintiffs allege Defendants deceptively misrepresent administrative fees as mandatory charges for services directly related to the closing of the automobile transaction, when in fact the fees bear no relation to the closing, and instead are an arbitrary way to increase dealer profit after the negotiation of sale price of the vehicle is complete. Exhibit A, First Amended Complaint, ¶¶ 16-22. Additionally, the quote serves to clarify to the Defendant exactly what conduct these Plaintiffs claim is illegal—a clarification clearly in need considering Defendants claim to not understand the conduct complained of and have requested clarification of twenty-eight (28) individual portions of Plaintiffs' complaint.

V. S.C. CODE ANN. § 37-2-307 OFFERS NO PROTECTION TO DEFENDANTS

Defendants claim that this action is barred because the charging of administrative fees is "regulated" under S. C. Code Ann. § 37-2-307, is absurd. Defendants seem to be making an argument analogous to the line of cases involving the regulated industry exception to the Unfair Trade Practices Statute. See Ward v. Dick Dyer and Assocs., Inc., 304 S.C. 152, 403 S.E.2d 310

(1991). The Unfair Trade Practices Act contains an express exception excepting actions that are administered by a regulatory body. The problem with this theory is the Dealers Act, unlike the Unfair Trade Practices Act, does not contain a regulatory exception.

Further, there is no protections from suit merely because a business's complained of action is subject to some type of regulation. Plaintiffs allege that Defendants are not in compliance with S.C. Code Ann. § 37-2-307 in multiple ways. See Exhibit A, First Amended Complaint, ¶¶ 23-28. Defendant car dealers failed to register with the Department of Consumer Affairs. See Exhibit A, Amended Complaint, ¶¶ 26, 28. Defendant car dealers failed to include the administrative fee in the advertised price of the vehicle. *Id.*, ¶¶ 25, 28. Defendant car dealers charged administrative fees for profit, not to reimburse for cost. *Id.*, ¶27.

There is no basis in the law of South Carolina to claim a statute which Plaintiffs directly allege Defendants are violating somehow shields them from legal action. *See Ward*, 304 S.C. 152, 403 S.E.2d 310 (holding that mere fact of regulation did not prevent a cause of action for unfair trade practices).

VI. PLAINTIFFS' DECLARATORY JUDGMENT COUNT SHOULD NOT BE DISMISSED

Plaintiffs seek a declaration of rights under two different statutes: (1) the Dealers Act; and (2) Consumer Protection Code, S.C. Code Ann. § 37-2-307. Paragraphs 45 and 46 of the First Amended Complaint set forth in extensive detail the "questions of construction" Plaintiffs seek to have this Court declare their rights under. Such a cause of action is clearly permitted. "Any person interested under a . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under

the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.” S.C. Code Ann. § 15-53-130. Contrary to Defendants’ assertion, the availability of other remedies is not relevant. “Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” S.C. Code Ann. § 15-53-130.

The South Carolina Supreme Court has stated the Declaratory Judgment Act is to be liberally construed:

The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, **without awaiting a violation of the rights or a disturbance of the relationship.**

Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 424, 593 S.E.2d 462, 466 (2004) (emphasis added). “Such actions are especially appropriate where, as here, the meaning of the statute is in question.” Ott v. Tindal, 297 S.C. 395, 397-98, 377 S.E.2d 303, 304-05 (1989) (emphasis added). Whether Plaintiffs are right or wrong doesn’t even matter:

The test of sufficiency of such a complaint is not whether it shows that the plaintiff is entitled to a declaration of rights in accordance with his theory, but whether he is entitled to a declaration of rights at all. Even though the plaintiff is on the wrong side of the controversy, if he states the existence of a controversy which should be settled by the court under the Declaratory Judgment Law, he has stated a cause of suit.

Foster v. Foster, 226 S.C. 130, 83 S.E.2d 752 (1954). Further, another Circuit Court of this state is in accord. On January 11, 2010, the Judge Early issued an order with a finding that a request to define the terms “closing fee” and “advertised price” “constitutes a request for a declaration for the purposes of the Declaratory Judgments Act” and “were ripe for determination by the Court.” See Exhibit B, Herron v. Dick Dyer & Assocs., Inc. et al., 2006-CP-02-1230, January 11, 2010 Order, p. 2.

VII. PLAINTIFF DOES NOT ASSERT A PRIVATE RIGHT OF ACTION UNDER § 37-2-307

Defendants variously claim that Plaintiffs' unjust enrichment claim should be dismissed because S.C. Code Ann. § 37-2-307 does not create a private right of action, affords only administrative penalties, and cannot support a claim for unjust enrichment. All of these arguments are red herrings. Plaintiffs agree that S.C. Code Ann. § 37-2-307 does not create a private right of action, and have clearly alleged that failure to comply with §37-2-307 is a violation of the Dealer's Act, S.C. Code Ann. §56-15-30(a).

VIII. THIS ACTION IS NOT A RULE 23 CLASS ACTION AND PLAINTIFFS DO NOT HAVE TO MEET THE REQUIREMENTS OF THAT RULE

This action is brought pursuant to express statutory authority in S. C. Code Ann. § 56-15-110(2) not Rule 23, SCRPC. The Dealers Act provides a statutory right to a specific group of consumers different than the procedural avenue provided in Rule 23, SCRPC. The Dealers Act, 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 benefit of the whole, including actions for injunctive relief."

Thus, Plaintiffs may bring the suit on behalf of a group if two elements are met: (1) the suit is of common or general interest of many persons; or (2) the parties are numerous and it is impractical to bring them before the Court. In comparison, Rule 23, SCRPC has five elements that must be met in order to have a class action under Court rules: (1) numerosity; (2) commonality; (3) typicality; (4) adequately protect the interests of the class; and (5) amount in controversy.

A contrary interpretation, that S.C. Code Ann. § 56-15-110(2) adds nothing to Rule 23, “violates the rule that we should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless.” Hinton v. S.C. Dep’t. of Probation, Parole and Pardon Servs., 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004). Neither was S.C. Code Ann. § 56-15-110(2) impliedly repealed by the enactment of the Rules of Civil Procedure. Repeal by implication is disfavored and requires a showing of actual conflict² between the two competing statutes, incapable of reasonable reconciliation. Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a court shall so construe them. Blyth v. Marcus, 322 S.C. 150, 153, 470 S.E.2d 389, 391 (Ct. App. 1996) (emphasis added). Rule 23, SCRCP is not clearly in conflict with S. C. Code Ann. § 56-15-110(2). “[T]he repugnancy must not only be plain, but the provisions of the two statutes must be incapable of any reasonable reconciliation; for if they can be construed so that both stand, the Court will so construe them.” City of Rock Hill v. SCDHEC, 302 S.C. 161, 167-68, 394 S.E.2d 327, 331 (1990) There is no clear conflict or repugnancy between Rule 23, SCRCP and S. C. Code Ann. § 56-15-110(2). Rule 23, SCRCP and S. C. Code Ann. § 56-15-110(2) cover different situations and are reasonably reconcilable. Rule 23, SCRCP is a general procedural statute that can apply to a wide variety of cases, while S.C. Code Ann. § 56-15-110(2) is a substantive right and only applies to specific lawsuits (a violation of the Dealers Act).

IX. JIM HUDSON AUTOMOTIVE GROUP AND JIM HUDSON SUPERSTORE, INC. WERE PROPERLY NAMED AND SERVED WITH PROCESS.

Jim Hudson Automotive Group and Jim Hudson Superstore, Inc. both allege that pursuant to Rule 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6), this Court lacks personal

² Nor does Act No. 100 § 3, 106th Legislative Session (1985-86), enacting the Rules of Civil Procedure, alter this result: “In the event of conflict between any provision of the South Carolina Rules of Civil Procedure and any other statutory provisions as to practice and procedure not repealed in this act, the provision of the rules shall control . . .” (emphasis added). There is no conflict.

jurisdiction, that process was insufficient, that service of process was insufficient, and that the complaint fails to state a cause of action, respectively.

S.C. Code Ann. § 36-2-802 governs general personal jurisdiction and states: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business or maintaining his or its principle place of business in, this state as to any cause of action." These Defendants are South Carolina entities and the argument that this Court lacks personal jurisdiction over them is frivolous. Similarly, both Jim Hudson Automotive Group and Jim Hudson Superstore, Inc. a/k/a Jim Hudson Hyundai were properly served by service by certified mail upon their registered agent.

The remainder of this argument is an assertion that Jim Hudson Cars LLC is the proper Defendant. This is a matter for summary judgment, not for a motion to dismiss. As noted above, at this stage, Defendants must accept the well-pleaded allegations of the complaint as proven. Plaintiffs allege that each Defendant, by charging administrative fees, violated the Dealers Act. See Exhibit A, Amended Complaint, ¶¶ 14-15. Additionally, Plaintiffs alleged that each Defendant conspired with other dealers in a concerted effort to violate statutes which is also a violation the Dealers Act. Id., ¶35. Plaintiffs alleged that each Defendant's violation of the Dealers Act damaged the Plaintiffs. Id., ¶¶ 38, 51. These allegations are more than sufficient to defeat a motion to dismiss. Defendant Jim Hudson appears to want to argue that the "real" Defendant ought to be Jim Hudson Cars, LLC -- but that is a motion for summary judgment that must be made after discovery.³

³ In the alternative, Plaintiffs Request Leave to File a Second Amended Complaint to Name Jim Hudson Cars, LLC as a Defendant in this Matter. Rule 15(a) provides that a "party may amend his pleading by leave of court . . . and leave shall be freely given when justice so requires and does not prejudice any other party." "The test of whether an amendment should be allowed is whether the amendment will prejudice or work an injustice to the adverse party." Forrester v.

X. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION

A. Plaintiffs Have Standing Under the Dealers Act.

The South Carolina General Assembly specifically provided that plaintiffs can bring these claims on behalf of a group in S.C. Code Ann. §56-15-110. This statute 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 benefit of the whole, including actions for injunctive relief" (emphasis added). The statute is a remedial statute that should be construed liberally. "This action is based not on a common law tort or on contract but is a creature of statute. The legislature obviously enacted the Dealers Act because consumers' remedies at common law were deemed inadequate. Remedial statutes are to be construed liberally in order to effectuate their purpose." Kucharski v. Rick Hendrick Chevrolet, LP, 2002 WL 31386090 (S.C. Ct. App. 2002).

Under this statute, one may sue for the benefit of the whole in two scenarios: (1) If the "action is one of common or general interest to many persons;" or (2) The "parties are numerous

Smith & Steele Builders, Inc., 295 S.C. 504, 509, 369 S.E.2d 156, 159 (Ct. App. 1988). In Forrester, the court found that an amendment requiring defendants "to file new pleadings, engage in new discovery, join new parties, and generally reopen the entire pretrial process" did not prejudice the defendant as long as the plaintiff was not introducing new facts to the case. Id. at 509-10, 369 S.E.2d at 159-60 (citing Thomas v. Medesco, Inc., Div. of Harvard Indus., Inc., 67 F.R.D. 129 (E.D.Pa. 1974)). If these reasons do not constitute legal prejudice, as held in Forrester, surely an amendment to name Jim Hudson Cars, LLC as a defendant prior to the initiation of discovery does not constitute legal prejudice. As noted above, Defendant Jim Hudson Cars, LLC shares a common registered agent with Jim Hudson Automotive Group and Jim Hudson Superstore, Inc. and has been put on notice of proceedings against Jim Hudson Hyundai and therefore will suffer no prejudice by an amendment that simply corrects the parties' names.

and it is impracticable to bring them all before the court." This lawsuit is proper under either scenario. First, the lawsuit is of common or general interest to many persons because of the widespread charging of illegal administrative fees to consumers across the State. Second, the parties are numerous and it would be impractical to bring before this court every single South Carolina consumer who paid an illegally charged administrative fee to the Defendants in the past four years. As such, this lawsuit is expressly authorized by the General Assembly and proper under either scenario.

B. Plaintiffs Have Direct Standing.

The allegations in the Complaint are sufficient to establish standing as to all Defendants on this motion to dismiss. "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint state any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999) (internal citation omitted). When the pleadings in this case are construed in the light most favorable to the Plaintiffs, it is clear that Plaintiffs have made sufficient allegations as to establish direct standing as to all Defendants.

(i) Standing via Each Defendants' Violation of the Dealers Act

Plaintiffs have standing as a result of the harm caused by Defendants' violation of the Dealers Act. A Party seeking to establish standing must prove three elements (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be casually connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. Commander Health Care Facilities, Inc. v. SCDHEC, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Cl. App. 2006).

Plaintiffs' pleadings are sufficient to establish standing under the cause of action for violation of the Dealers Act. Plaintiffs allege that each Defendant, by charging administrative

fees, violated the Dealers Act. See Exhibit A, Amended Complaint, ¶¶ 14-15. Additionally, Plaintiffs alleged that each Defendant conspired with other dealers in a concerted effort to violate statutes which is also a violation the Dealers Act., Id., ¶35 . Plaintiffs alleged that each Defendant's violation of the Dealers Act damaged the Plaintiffs. Id., ¶¶ 38, 51. These allegations are sufficient to establish direct standing against each Defendant for harm caused by the Defendants' violation of the Dealers Act. Consequently, Plaintiffs have direct standing to proceed with this action.

(ii) Standing via Cause of Action Seeking Declaratory Judgment

Plaintiffs also have direct standing via the cause of action requesting a declaratory judgment to determine rights and relations under the Dealers Act and the Consumer Protection Code. The declaratory judgment cause of action is remedial and seeks to afford relief from uncertainty and insecurity with respect to rights, statute and other legal relations. It is to be liberally construed and administered. The South Carolina Supreme Court has stated:

The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship.

Sunset Cay, LLC v. City of Folly Beach. 357 S.C. 414, 423, 424, 593 S.E.2d 462, 466 (2004) (emphasis added). No injury (violation or breach of rights) is even needed to bring a declaratory judgment cause of action; only unsettled legal rights and relationships.

The pleading in this case are sufficient to establish standing under the Declaratory Judgment Act. Plaintiffs seek a declaration of rights under two different statutes: (1) the Dealers Act; and (2) Consumer Protection Code, S.C. Code Ann. § 37-2-307. The meaning of both of these

statutes is at issue. Furthermore, Plaintiffs have alleged a justiciable controversy because Plaintiffs have alleged that each of the Defendants conduct harmed each Plaintiff. Thus, Plaintiffs allegations are sufficient to establish direct standing under the Declaratory Judgment Act.

XI. DEFENDANTS' REQUEST FOR ATTORNEY FEES AND COSTS PURSUANT TO S.C. CODE ANN §15-36-10 IS MERITLESS.

Plaintiffs First Amended Complaint also specifically noted that one circuit court judge in this state has already found that Defendants' assumed interpretation of the Closing Fee Statute is incorrect, and specifically found that the closing fee includes document retrieval, document preparation, and "fees actually incurred from the consummation of the transaction. It cannot be arbitrarily set, unlimited or include dealer profit." Exhibit A, First Amended Complaint, ¶ 13. Plaintiffs' view of the law is the same as Judge Early's, and cannot be labeled frivolous or in bad faith.

XII. THE ACTION IS TIMELY

The First Amended Complaint makes clear this suit is brought pursuant to the Dealers Act, which provides "Actions rising out of any provision of this chapter shall be commenced within four years next after the cause of action accrues. . . ." S.C. Code Ann. §56-15-120 (emphasis in original). Defendants know that neither Plaintiff in this matter purchased their vehicles more than four years prior to filing their Complaint in this matter, and bear the burden of proving that the statute of limitations contained in the Dealers Act bars the Plaintiffs' claims. In any case, this is a matter outside of the complaint and is inappropriate for resolution on a motion to dismiss.

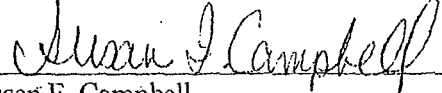
CONCLUSION

Defendants' motions suffer from the consistent defect that they do not recognize they are limited to the well-pleaded allegations of the complaint at this stage of the litigation. The First

Amended Complaint plainly sets forth sufficient allegations against all Defendants. Defendants no doubt want to contest these allegations, but the proper mechanism is through discovery and then motions based on that discovery.

Respectfully submitted,

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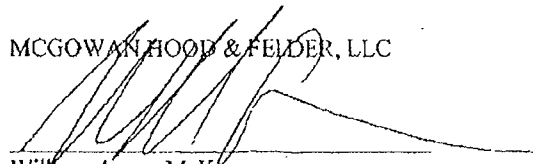
Columbia, South Carolina

March 7, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A No.: 2010-CP-40-4244
Melissa Anne York and Olga Joanne Cristy,	)	
	)	
Plaintiffs,	)	
vs.	)	NOTICE OF APPEARANCE
	)	
Dodgeland of Columbia, Inc. and Jim Hudson)	)	
Automotive Group, and Jim Hudson Superstore,	)	
Inc., a/k/a Jim Hudson Hyundai,	)	
	)	
Defendants.	)	
_____	)	

The undersigned hereby notifies the Court that he will be appearing for the Plaintiffs, Melissa Anne York and Olga Joanne Cristy, in the above-captioned action and requests that he receive notification of all hearings, as well as, copies of all pleadings which may be forwarded by the Court, the opposing party, or opposing counsel.

MCGOWAN HOOD & FELDER, LLC



William Angus McKinnon
 1539 Healthcare Drive
 Rock Hill, South Carolina 29732
 T: (803) 327-7800
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ATTORNEY FOR PLAINTIFFS

Rock Hill, South Carolina
 March 5, 2010

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Melissa Anne York and Olga Joanne Cristy,

Plaintiffs,

vs.

Dodgeland of Columbia, Inc. and Jim Hudson
Automotive Group, and Jim Hudson
Superstore, Inc., a/k/a Jim Hudson Hyundai,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) C/A No.: 2010-CP-40-4244

) CERTIFICATE OF SERVICE

JEANETTE W. McBRIDE
S.C.P. & G.S.

2011 MAR -7 PM 2:12

FILED

I, the undersigned, of the law firm of McGowan Hood & Felder, LLC, do certify that I
have served the below named with a copy of the pleadings specified below on March 7, 2011,
Via Hand Delivery, to the following addresses:

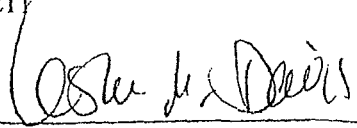
Pleadings:

- 1) Plaintiffs' Omnibus Memorandum in Opposition to All Motions Filed and Notice of Appearance for William A. McKinnon, Esquire.

Served:

Steven W. Hamm, Esquire
Richardson Plowden
1900 Barnwell Street
Columbia, SC 29201

Rebecca Laffitte, Esquire
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Post Office 11449
Columbia, SC 29211



Leslie M. Davis, Paralegal

EXHIBIT A
FIRST AMENDED
COMPLAINT

SEE PAGE 33 OF THIS
RECORD ON APPEAL

EXHIBIT B

HERRON V. DICK DYER
& ASSOCS, INC., ET AL

2006-CP-02-1230

JANUARY 11, 2010

ORDER

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF AIKEN

Case No. 2006-CP-02-1230

Heather Herron, et al.,

Plaintiffs,

v.

Dick Dyer & Associates, Inc. et al.,

Defendants.

THIS is before me on the motion of all Plaintiffs for Declaratory Judgment asking the Court to issue a declaratory judgment against all Defendants interpreting S.C. Code Ann. § 37-2-307 (the "Closing Fee Statute" or "Statute"), and declaring that various actions or practices constitute violations of the Closing Fee Statute, and section 56-15-30(a) of the Regulation of Manufacturers, Distributors and Dealers Act, S.C. Code § 56-15-10, *et seq.* ("Dealers Act"). A hearing was held on Plaintiffs' Motion before this Court on November 23, 2009.

Defendants objected to proceeding forward with the Plaintiffs' Motion for various reasons including improper joinder and improper venue. A ruling on these issues has previously been reserved until after the completion of discovery. There is no dispute that venue is proper as to Defendant Taylor Toyota, and therefore, with the agreement of the Plaintiffs, the Court proceeded with hearing the motion of Plaintiff Michael Ritz against Defendant Taylor Toyota ("Plaintiff's Motion"). Although Plaintiff's Motion requests that the Court issue a number of declarations regarding the meaning of various sections of the Closing Fee Statute and whether particular actions by Defendant violated the Closing Fee Statute and the Dealers' Act, at the

DAE #1

1-11-2010
J. Anderson
Clerk
Deputy Clerk
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hearing, Plaintiff narrowed the scope of his request and asked the Court only to interpret two terms used in the Closing Fee Statute, namely the terms "closing fee" and "advertised price."

Defendants objected to Plaintiff's request, arguing that despite the title of his motion, Plaintiff was really asking for the Court to issue an advisory opinion. Specifically, Defendant argued that a determination of the definitions of "closing fee" and "advertised price" would not settle the legal rights of any party involved, and thus the ruling would only be advisory in nature. Counsel for Defendant Taylor Toyota also objected on the grounds that these more narrow issues had not yet been fully briefed and were not yet ripe for argument.

The South Carolina Declaratory Judgments Act states that "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." S.C. Code Ann. § 15-53-20. I find that the Plaintiff's request that I define the terms "closing fee" and "advertised price" constitutes a request for a declaration for the purposes of the Declaratory Judgments Act and that these issues are ripe for determination by the Court and issue this opinion accordingly.

On June 7, 2003, Plaintiff Ritz purchased a 2003 Toyota Tacoma Truck from Defendant Taylor Toyota. Mr. Ritz's invoice provides in part:

DAE #2

MODEL NO.	STOCK NO.
7188	2303
1. VEHICLE PRICE	22818.33
2. PROCUREMENT/DELIVERY FEE	277.00
3. SECURE ETCH	N/A
4. TOTAL SELLING PRICE	23095.33
5. GROSS VEHICLE ALLOWANCE	N/A
6. TRADING DIFFERENCE	23095.33
7. STATE & LOCAL SALES TAXES	1616.07
8. LICENSE TAG & TITLE FEE	23.00
9. SUBTOTAL	24735.00
10. PAYOFF ON TRADE-IN	N/A
11. TOTAL	24735.00
12. PARTIAL PAYMENT	N/A
13. SUBTOTAL	24735.00
14. SERVICE CONTRACT	N/A
15. CASH ON DELIVERY	3750.00
16. BALANCE/AMT. FINANCED	20985.00

It is undisputed that the \$277.00 "PROCUREMENT/ DELIVERY FEE"¹ shown above is a closing fee as referenced in S.C. Code Ann. §37-2-307.² Mr. Ritz paid the \$277.00 PROCUREMENT/ DELIVERY FEE to Taylor Toyota.

On October 31, 2006, Plaintiff Ritz filed an Amended Complaint in this matter. In the Amended Complaint, Plaintiff Ritz alleges that the \$277 PROCUMENT/DELIVERY FEE charged by Defendant Taylor Toyota violated S.C. Code Ann. §37-2-307 and the Motor Vehicle Dealers Act, S.C. Code Ann. §56-15-10 et. seq. ("Dealers Act"). Plaintiff Ritz alleges that

¹ On the registration form filed with the State Department of Consumer Affairs (hereinafter "the Department of Consumer Affairs") and signed by Taylor Toyota; the form showed the Closing Fees to be charged "will not exceed \$400." See Exhibit 1 to the Rule 30(b)(6) deposition of Taylor Toyota, bates 4669. Taylor Toyota asserts the form covers the "PROCUREMENT/ DELIVERY FEE" of \$277.00

² In the Rule 30(b)(6) deposition of Taylor Toyota, the parties used the terms administrative fees and closing fees interchangeably to describe the \$277 PROCUREMENT/DELIVERY FEE charged to Mr. Ritz. See eg. p. 6, ll. 24-25 and p. 39, ll. 4-21.

DAE #3 3

Defendant Taylor Toyota failed to include the closing fee in the advertised price of his car and that Defendant Taylor Toyota impermissibly charged a closing fee for an improper purpose (for profit and not for reimbursement of closing costs). Plaintiff Ritz alleged a cause of action for violation of the Dealers Act and a cause of action requesting a Declaratory Judgment interpreting S.C. Code Ann. §37-2-307 and the Dealers Act.

Defendant Taylor Toyota denies that it violated S.C. Code Ann. §37-2-307 or the Dealers Act. Defendant Taylor Toyota maintains that Plaintiff Ritz's vehicle did not include an "advertised price" as defined in S.C. Code Ann. §37-2-307 and that the closing fee charged was for a permissible purpose.

On May 28, 2009, Plaintiff Ritz filed a Motion requesting the Court issue the Declaratory Judgment. As stated by Plaintiff's counsel at the hearing, Plaintiff Ritz simply seeks an interpretation of the words "closing fee" and "advertised price" as the words appear in S.C. Code Ann. §37-2-307.

The Closing Fee Statute was enacted in 2000, and made a part of the South Carolina Consumer Protection Code, S.C. Code § 37-1-101, *et seq.* ("SCCPC"). The Closing Fee Statute, in its entirety, 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.

Id. § 37-2-307 (emphasis added).

The Closing Fee Statute authorizes motor vehicle dealers to register the amount of the fee with the Department of Consumer Affairs (hereinafter the "Department") and charge closing

DAE #4

fees to consumers. The Statute imposes three other requirements on dealers charging closing fees:

- (1) the fee must be *disclosed* to the consumer on the sales contract or invoice;
- (2) some notice of the fee must be *displayed* in a conspicuous place in the dealership; and
- (3) the fee must be *included* in the advertised price of the motor vehicle.

The Closing Fee Statute does not further define the terms "closing fee" or "advertised price."

The Department is charged with the administration of the Closing Fee Statute, and the Department also monitors and enforces certain advertising guidelines with respect to motor vehicle dealers and other creditors. As such, in interpreting the Closing Fee Statute, it is appropriate for the Court to review and give deference to any interpretations of the Statute by the Department. *See Faile v. S.C. Employment Sec. Comm'n*, 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976) ("The construction of a statute by the agency charged with executing it is entitled to the most respectful consideration and should not be overruled without cogent reasons."); *Lexington Law Firm v. Dep't of Consumer Affairs*, 2009 S.C. LEXIS 133 (S.C. May 12, 2009) ("The Court should defer to the [Department of Consumer Affairs'] findings where there is no compelling reason to reject it."). Because the Department is charged by the Legislature with regulating closing fees and dealers' compliance with the Closing Fee Statute, it is in the best position to interpret the Statute's meaning. In fact, the SCCPC provides that if an entity regulated under the SCCPC (including motor vehicle dealers) acts in "conformity with any written order, opinion, interpretation or statement" of the Department, then that entity shall be free from penalty. S.C. Code Ann. § 37-6-506(3).

The Department has issued an interpretation of the Closing Fee Statute in Administrative Interpretation 2.307.0101, dated June 7, 2001 (the "Administrative Interpretation" or "Interpretation"). This is the only written interpretation of the Closing Fee Statute by the Department. (Deposition of Danny Collins ("Collins Depo.") p. 25, ll. 19-24.) The Administrative Interpretation explains the procedure for complying with the Closing Fee Statute, and explains how dealers can comply with the registration and disclosure requirements. The Interpretation states, in pertinent part, as follows:

As clearly indicated from the terminology of Section 37-2-307, from the effective date of that section (June 30, 2000), any dealer choosing to assess a closing or documentation fee must: 1.) File a registration fee of ten dollars (\$10.00) with the Department each state fiscal year prior to the assessment of a closing fee; 2.) Disclose the closing fee on its sales contract; 3.) Display in a conspicuous place in the dealership a statement that indicates the closing fee may be charged; and 4.) If the closing fee is charged, and the vehicle is advertised, the closing fee must be included in the advertised price so that consumers cannot be unfairly surprised by having the closing fee added on after the acceptance of an advertisement's terms. In the absence of any of these requirements, the charging of a closing or other similar fee is an excess charge for Consumer Protection Code purposes.

In discussing the Statute's requirement that dealers pay a registration fee to the Department and display a notice in the dealership that the dealer charges a closing fee to consumers, the Interpretation states further:

While the [Statute] does not directly say so, the registration fee is referred to as a registration fee and not merely as a fee, with the apparent implication that the dealership seeking to charge closing fees should likewise file or register the disclosure it seeks to use. The attached disclosure may be used for this purpose. It is not required that the dealers use the attached form, but if they do, they will be deemed compliant if the form is properly filled out. Forms considered to be deceptive or to misstate the law will be rejected by the Department.

(Interpretation at p. 2.)

The Interpretation also states that "[t]he [Statute] does not specify the content of the disclosure other than to indicate that it must be displayed in a conspicuous place." (*Id.* at p. 3.)

DAE #6 6

The "attached disclosure" referenced in the Interpretation is a form issued by the Department and titled "Notice—Closing Fees" ("Registration Form") that all dealers involved in this action used throughout the relevant time period to register their fees with the Department and display at their dealership. The Registration Form states, in pertinent part:

This Dealership charges closing fees as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation. It is a charge that is permitted but not required by law. The full cash price charged at any dealership depends on many factors, including all products and services bought with the vehicle.

(*Id.* at p. 4.)

* The Registration Form was changed by the Department in the spring of 2008, prior to the registration renewal period of July 1st of that year,³ and now states as follows:

This dealership charges closing fees on a motor vehicle sales contract. It is a charge that is permitted but not required by law (Section 37-2-307). The full cash price charged at any dealership depends on many factors, including all products and services bought with the vehicle.

(http://www.sconsumer.gov/licensing/mv_closing_fee.htm.)

Other than as previously discussed herein, the Interpretation does not further define the terms "closing fee" or "advertised price."

Danny Collins, the Deputy for Regulatory Enforcement of the Department, testified that the 2001 Interpretation is the Department's official position as to the Closing Fee Statute and as long as a dealer has complied with the Interpretation, a dealer would not be found by the Department to be in violation of the Closing Fee Statute. As a part of its regular enforcement activities, the Department regularly reviews and stamps approval of automobile dealers' closing

³ In his deposition, Mr. Collins testified that wording change in the Registration Form did not change the Department's interpretation of the closing statute in any manner. (Collins Depo. p. 21, ll. 15-21; p. 91, ll. 16-21.)

DAE #7 7

fee registration forms. (Collins Depo. pp. 37-38, p. 94, ll. 3-5.) The Department also enforces advertising guidelines relating to advertising by automobile dealers. (*Id.* at p. 10, ll. 14-20.)

Section 37-1-102, which sets forth the purposes of the South Carolina Consumer Protection Code, declares that it shall be liberally construed and applied to promote its underlying purposes and policies. S.C. Code Ann. § 37-1-102(1). One of the primary purposes of the Consumer Protection Code is to “protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, having due regard for the interests of legitimate and scrupulous creditors.” *Id.* § 37-1-102(2)(d).

Plaintiff has asked the Court to determine the meaning of two terms as used in S.C. Code Ann. §37-2-307: “closing fee” and “advertised price.”

When interpreting a statute, the court’s primary function is to ascertain the intention of the Legislature. *Plowman v. Bagnal*, 316 S.C. 283, 285, 450 S.E.2d 36, 37 (1994). A statutory provision should be given a reasonable construction consistent with the purpose and policy expressed in the statute. *Jackson v. Charleston County Sch. Dist.*, 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994). Where, as here, a court is confronted with an undefined term in a statute, the term must be interpreted in accordance with its usual and customary meaning. *Branch v. City of Myrtle Beach*, 340 S.C. 405, 410, 532 S.E.2d 289, 292 (2000). Words must also be construed without resorting to subtle or forced constructions which limit or expand the statute’s operation. *SCANA v. S.C. Dept. of Revenue*, 384 S.C. 388, 392, 683 S.E.2d 468, 470 (2009). Finally, terms must be construed in context. *S. Mut. Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass’n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991).

The first term at issue is “closing fee” as used in S.C. Code Ann. §37-2-307. This term appears twice in the statute, which provides:

DTE #8

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).

Plaintiff Ritz contends that a "closing fee" is a pre-determined set fee for the reimbursement of closing costs such as document retrieval and document preparation.

Defendant Taylor Toyota contends that there is no "limit to the purposes for which closing fees can be charged."⁴ Taylor Toyota further argues that a "closing fee" does not have to be for reimbursement or related in any way to an automobile closing and may include dealer profit.

This statute authorizes a motor vehicle dealer to charge "closing fees." Use of the word "closing" must be given some meaning. *See Hartford Acc. and Indem. Co. v. Lindsay*, 273 S.C. 79, 85, 254 S.E.2d 301, 304 (1979)(full effect must be given to each portion of a statute, and a court should avoid interpretation that renders a portion meaningless).

I first look to the plain and ordinary meaning of the word "closing" in relation to the sale of a motor vehicle. Black's Law Dictionary defines "closing" as "the final meeting between the parties to a transaction, at which the transaction is consummated..." Black's Law Dictionary (8th ed. 2004). Closing occurs at the time the purchaser fills out the motor vehicle sales contract and other paperwork necessary to complete a purchase. Accordingly, I find that a "closing fee" as used in S.C. Code Ann. §37-2-307 starts with a fee associated with an automobile closing. I reject Taylor Toyota's assertion that a "closing fee" does not have to be related to an automobile closing. This interpretation would render the word "closing" meaningless.

⁴Defendant Taylor Toyota's Memorandum in Opposition to Motion for Declaratory Judgment, page 14, states "the Closing Fee Statute does not limit the purposes for which closing fees can be charged."

DAE # 9 9

Defendant Taylor Toyota's contention that there is no "limit to the purposes for which closing fees can be charged"⁵ is unreasonable in light of the purpose of the statute. "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers." *Greenville Baseball v. Bearden*, 20 S.E.2d 813, 815 - 816 (1942). When S.C. Code Ann. §37-2-307 was enacted, it was included in the Consumer Protection Code. This indicates that S.C. Code Ann. §37-2-307 was enacted to protect consumers. Accordingly, I find that the statute should be construed to protect consumers.

Defendant Taylor Toyota's proposed interpretation that the fee is not limited and can be charged for any purpose does not protect consumers. Under Defendant Taylor Toyota's interpretation, dealers can charge a fee, call it a "closing fee" (document fee, processing fee or some other name associated with documentation for an automobile closing), and then use the fee solely to make a profit. This interpretation would authorize the dealers to charge a fee with a potentially misleading name. This interpretation does not protect consumers. I find this interpretation unreasonable in light of the statute's purpose of protecting consumers.

The more reasonable interpretation is that S.C. Code Ann. §37-2-307 authorizes the charging of "closing fees" which are for the reimbursement of set overhead costs arising from automobile closings such as document retrieval and document preparation. This interpretation protects consumers because it mandates that the charge is for the actual cost associated with a closing, which can be predetermined, and does not allow a dealer to name a fee a "closing fee" and then use the fee to make a hidden profit.

⁵ See Defendant Taylor Toyota's Memorandum in Opposition to Motion for Declaratory Judgment.

DAE # 10

Accordingly, I hereby find that a "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation.

The "closing fee" is not limited to document retrieval and document preparation; it may include other closing fees actually incurred from the consummation of the transaction. It cannot be arbitrarily set, unlimited or include dealer profit. The dealer may only charge the buyer closing fees that are actually incurred and are a necessity to the closing, thus reimbursing the dealer for actual closing fees incurred.

The second term at issue is "advertised price." The Fee Disclosure Statute provides, in its entirety, that:

[e]very motor vehicle dealer charging closing fees on a motor vehicle 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.

S.C. Code Ann. § 37-2-307 (1976). The statute contains no definition of the term "advertised price." The court must therefore construe the statute to arrive at the appropriate definition.

Canons of statutory construction previously cited will be applied again.

The statute expressly requires every motor vehicle dealer charging closing fees to include the fee in the advertised price of the motor vehicle. S.C. Code Ann. § 37-2-307 (1976). This language indicates that: (1) the statute applies to motor vehicle dealers and (2) an advertisement of the price of a motor vehicle by a dealer must include the closing fee. It is therefore inferable that an advertised price is a price contained in an advertisement of a motor vehicle by a motor vehicle dealer.

The terms "advertise" and "advertising" have been variously defined. The American Heritage Dictionary defines advertising as "[t]he activity of attracting public attention to a

DAE#11

product or business, as by paid announcements in the print, broadcast or electronic media.”

American Heritage Dictionary of the English Language (4th ed. 2000). Webster’s Third New International Dictionary (2002) defines “advertising” as “the action of calling something (as a commodity for sale, a service offered or desired) to the attention of the public esp. by means of printed or broadcast paid announcements.” *Id.* at 31. The Compact Oxford English Dictionary states that “advertise” means “[t]o present or describe (a product, service, or event) in a public medium so as to promote sales.” Compact Oxford English Dictionary (2005). Plaintiff Michael Ritz urges that the Court adopt the definition found in Black’s Law Dictionary:

[t]o advise, announce, appraise, command, give notice of, inform, make known, publish. To call a matter to the attention of the public by any means whatsoever. Any oral, written, or graphic statement made by the seller in any manner in connection with the solicitation of business and includes, without limitation... statements and representations made in a newspaper or on the radio or television or contained in any handbill, sign, catalog, or letter, or presented on or contained in any tag or label attached to or accompanying any merchandise.

Black’s Law Dictionary (6th ed. 1990).

Taken together, these definitions indicate that the plain and ordinary meaning of the term “advertising” and/or “advertisement” is: (1) a notice given by the seller of a product or service; (2) to the general public for the purpose of attracting customers; (3) by means of printed announcements in handbills, signs, catalogs, or letters or announcements paid by or on behalf of the seller in newspapers, radio, television, or electronic media. This definition is also supported by the construction given the statute by the Department of Consumer Affairs. Danny Collins, the Department’s Deputy for Regulatory Enforcement, testified that an advertisement is a display “to the public to try to attract attention.” (Collins Dep. at 6:23 to 7:1 and 123:3-7).

Applying the above definition, the Court specifically excludes “Monroney” labels because they are statements made by the manufacturer and not the dealer.

DAE #12

The Court also concludes that it is improper to consider a negotiated price to be an advertised price. Statements about price made in the course of negotiations do not conform to the Court's findings of the meaning of the words "advertised price." They are made to an individual, rather than to the public.

Based on the foregoing and after full consideration of the issues herein, I hereby declare that:

1) A "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation, but only those actually incurred by the dealer and necessary to the closing transaction.

2) An "advertised price" is a notice given by the seller of a product or service to the general public for the purpose of attracting customers by means of printed announcements in handbills, signs, catalogs, or letters or announcements paid by or on behalf of the seller in newspapers, radio, television, or electronic media.

AND IT IS SO ORDERED.



The Honorable Doyet A. Early, III
Chief Administrative Judge
Second Judicial Circuit

January 11, 2010.

Aiken, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Melissa Anne York and Olga Joanne Cristy,	)	Civil Action No.: 10-CP-40-4244
	)	
PLAINTIFFS,	)	
	)	DEFENDANTS MEMORANDUM IN SUPPORT
	)	OF ITS MOTION TO DISMISS THE
v.	)	COMPLAINT AND THIS ACTION, TO
	)	COMPEL ARBITRATION, TO SEVER, TO
	)	STRIKE, FOR A MORE DEFINITE PLEADING,
	)	FOR A PROTECTIVE ORDER, FOR COSTS
	)	AND FEES AND FOR OTHER RELIEF
Dodgeland of Columbia, Inc. and Jim	)	
Hudson Automotive Group, and Jim	)	
Hudson Superstore, a/k/a Jim Hudson	)	
Hyundai,	)	
	)	
DEFENDANTS.	)	

Defendants Dodgeland of Columbia, Inc. and Jim Hudson Hyundai ("Dodgeland," "Jim Hudson Hyundai" or "Hyundai," or collectively "Defendants") submit this Memorandum of Law in Support of their Motions To Motion To Dismiss The Complaint And This Action, To Compel Arbitration, To Sever, To Strike, For A More Definite Pleading, For A Protective Order pursuant to 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), 12(b)(6), 12(b)(7), 12(e), 12(f), 18, 19, 20, 21, 23, and 26(c), SCRCF. Further, Defendants submit this memorandum to this Honorable Court in support of an award for costs and attorney fees in responding to this action pursuant to S.C. Code Ann. § 15-36-10, *et seq.* (2005).

INTRODUCTION

This case, at its core, is about the authority established by the General Assembly that authorizes an automobile dealer to charge closing fees to customers at the time of vehicle purchase. The concept of closing fees is not new to judicial review in South Carolina. In fact, both the South Carolina Supreme Court and State Legislature have approved the use of closing

fees in vehicle transactions. The two Plaintiffs in this lawsuit seek to challenge the charging of a “closing fee” by these two automobile dealerships, a type of fee which the South Carolina Legislature explicitly authorized by statute in 2000,¹ and which was previously upheld in two South Carolina appellate cases.²

PROCEDURAL HISTORY AND FACTS

The plaintiffs, Melissa York and Olga Jones Cristy, commenced this action against the defendants by filing the Summons and Complaint in the Court of Common Pleas in Richland County on June 25, 2010. An Amended Complaint was then filed on August 5, 2010. Plaintiffs seek damages, individually and for the benefit of others, for the allegedly illegal charging of administrative fees (hereinafter referred to as “closing fees”) by the defendants with respect to the purchase of automobiles. As referenced in Paragraph 1 of the plaintiffs’ Amended Complaint, this administrative fee is often referred to as an “administrative fee,” a “recording fee and processing fee,” “closing fee,” or a “dealer documentation and closing fee.” (See Am. Compl. ¶ 1). These two plaintiffs brought actions against two defendant motor vehicle dealerships located in Richland County who do not have any connection or business relationship or nexus to either of the two separate motor vehicle transactions conducted at different times and at separate locations. Each Plaintiff alleges she purchased a vehicle from a single dealership – either Defendant Dodgeland or Defendant Hyundai – but not the purchase of a vehicle by the Plaintiff from each of the Defendant.

¹ S.C. Code Ann. § 37-2-307 (2002).

² Other plaintiffs in previous cases have unsuccessfully challenged the legitimacy of closing fees in three lawsuits brought since the early 1990s before the enactment of the present statute in Section 37-2-307 authorizing the charging of closing fees. In two of those cases, the circuit court explicitly rejected the plaintiffs’ claims that the closing fee constituted an unfair or deceptive act and also required the compliance with the South Carolina Rules of Civil Procedure, including Rule 23. See discussion *infra* at attached Exhibit B.

The plaintiffs' Amended Complaint sets forth various allegations with respect to the defendants' charging of closing fees. The Amended Complaint outlines general assertions with respect to the charging of closing fees in correlation with the advertised price of a vehicle. (Am. Compl. ¶¶ 8-22). Importantly, the plaintiffs acknowledge that in 2000, the South Carolina General Assembly enacted a statute, S.C. Code Ann. § 37-2-307 (2000), that allows a motor vehicle dealer to charge closing fees, provided the requirements of the statute are met. (Am. Compl. ¶¶ 23-24). Section 37-2-307 is part of the Consumer Protection Code, and accordingly, the administration of the closing fee statute is under the direct authority and regulation by the South Carolina Department of Consumer Affairs. See S.C. Code Ann. § 37-6-101 *et seq.*

The plaintiff allegations are twofold: (1) the defendants have not availed themselves of the statutory requirements of § 37-2-307; and (2) even if the defendants are charging closing fees in accordance with the Consumer Protection Code, the monetary amount of the closing fee allegedly improperly includes profit, as opposed to being limited for reimbursement for actual costs incurred by the defendants.³

Plaintiffs have alleged three causes of action: (1) violation of S.C. Code Ann. § 56-15-10 *et seq.*;⁴ (2) declaratory judgment interpreting § 37-2-307; and (3) unjust enrichment. The allegations in support of the Dealers Act claim only relate to the charging of closing fees and simply restate the contentions previously asserted with respect to § 37-2-307. (Am. Compl. ¶¶ 31-40). Moreover, the plaintiffs merely identify one statutory provision of the Dealers Act, S.C.

³ With regard to the allegations that closing fees charged by the defendants wrongfully include profit, the plaintiffs quote from a lower trial court Order of the Honorable Doyet A. Early, III, in a case that is not final and such order is appealable and not final at this time. It is the position of the Defendants that such Order does not control in this matter and that such Order ignores the specific statutory language enacted by the General Assembly in the Closing Fee statute, § 37-2-307, which does not reference cost. See Am. Compl., ¶ 13.

⁴ This Chapter is commonly referred to as the "Dealers Act."

Code Ann. § 56-15-110, as providing a basis for this claim.⁵ Section 56-15-110 is entitled “Suits for Damages” and although it provides for suits that may be brought on behalf of others and sets out specific relief that may be sought, this statute does not identify any conduct or provide any independent right of action based on alleged conduct of a defendant dealer transaction subject to the Dealers Act.

Further, the allegations against Dodgeland are based solely on a transaction between Dodgeland and the plaintiff, Melissa York. (Am. Compl., ¶ 14). It is notable that, no part of the plaintiffs’ Complaint or Amended Complaint provides the date of this transaction. Because this missing fact, which should be undisputed, Dodgeland is providing copies of the Buyers Orders for the plaintiff York’s purchase of two vehicles on September 4, 2006. (Attached as Exhibit A). The documents signed by Ms. York also contain an agreement to arbitrate which encompasses the disputed issues in this matter.

With regard to Defendant Hyundai, Plaintiff Olga Cristy⁶ Complaint is based only on a single transaction with Jim Hudson Hyundai. It is again notable that the Plaintiff does not identify the date of purchase of a motor vehicle but also does not correctly name or identify the dealer from which she purchased a vehicle. The contract of sale identifies “Jim Hudson Cars, LLC d/b/a Jim Hudson Hyundai and was signed by Plaintiff Cristy. (Am. Compl., ¶ 15). The Contract of Sale includes an arbitration agreement and as required by South Carolina law, notice of the arbitration provision as part of the negotiated agreement between the parties is provided in

ALL CAPS BOLD UNDERLINED statement as follows

⁵ Additionally, the plaintiffs assert that the defendants are motor vehicle dealers subject to the Dealers Act as defined in S.C. Code Ann. § 56-15-10(h): (Am. Compl., ¶¶ 31, 37).

⁶ Ms. Cristy signed at least two separate agreements which each contain a separate Arbitration Agreement. These documents are the Contract of Sale between Jim Hudson Hyundai, Inc., d/b/a Jim Hudson Hyundai and the Retail Installment Contract and Security Agreement which provided the financing arrangements for Ms. Cristy’s motor vehicle.

THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT, AND IF THE FEDERAL ARBITRATION ACT IS NOT APPLICABLE, THEN THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

The Plaintiffs' Amended Complaint essentially and completely ignores the elemental legal requirements of standing, joinder, and Rule 23 relating to class actions which poses problems for the Court and the litigants.

The Defendants filed multiple motions, which include motions to dismiss the action, to compel arbitration, to sever, to strike, for a more definite statement, for a protective order, for costs and fee and other such relief, and which are more fully outlined in their Motions and during oral argument on these motions.

LEGAL STANDARD FOR GRANTING A MOTION TO DISMISS.

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based "solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to "any relief on any theory of the case." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Doe, 373 S.C. at 395, 645 S.E.2d at 247-48 (quoting Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

A trial judge may dismiss a claim when the defendant demonstrates the plaintiff's "failure to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. Rule 12(b)(6), SCRCP. A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts

alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987). When it is determined that a plaintiff does not have standing to prosecute, the court must dismiss the action. Brock v. Bennett, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994).

In the present case, the Plaintiffs' claims against the Defendants should be dismissed as provided herein, as may be supplemented in additional briefing, and as presented during oral argument of these motions at the upcoming hearing.

ARGUMENT

1. Pursuant To The Federal Arbitration Act This Court Should Compel Arbitration Of Plaintiffs' Claims Against The Dealer That She Did Business and Purchased a Vehicle and Dismiss All Other Claims Of The Plaintiff

Both of the Plaintiffs entered into Arbitration Agreements with the defendant dealer from whom they purchased a car. Their respective and individual claims fall squarely within the scope of their own Arbitration Agreement. See Exhibits A and C. These Agreements are unremarkable and of the type that numerous courts have upheld time and again. Accordingly, pursuant to the Federal Arbitration Act and applicable federal and South Carolina law, this Court should dismiss the Plaintiffs' claims and compel arbitration.

a. The Federal Arbitration Act Applies Here.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., applies to "contract[s] evidencing a transaction involving commerce," 9 U.S.C. § 2. A contract to purchase a vehicle clearly is a contract evidencing a transaction involving commerce. Thornton v. Trident Med. Ctr., L.L.C., 592 S.E.2d 50, 52 (S.C. Ct. App. 2003); see also MS Dealer Service Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) (FAA applies to consumer's purchase of automobile);

Stout v. Byrider, 50 F. Supp. 2d 733, 735 (N.D. Ohio 1999) (FAA governs in action by used car buyers against seller because “case concerns arbitration agreements involving transactions in interstate commerce”), aff’d, 228 F.3d 709 (6th Cir. 2000); Wolff Motor Co. v. White, 869 So.2d 1129, 1134 (Ala. 2003) (“[m]otor vehicles are ‘the quintessential instrumentalities of modern interstate commerce’” and “a transaction involving the sale of an instrumentality of commerce . . . satisfies the FAA’s ‘involving commerce’ test” (quoting United States v. Bishop, 66 F.3d 569, 588-90 (3d Cir. 1995))). Accordingly, The FAA governs the enforceability of the Arbitration Agreement and all questions concerning its scope.

The FAA embodies “the strong federal policy in favor of enforcing arbitration agreements.” Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985). Keeping with this “liberal federal policy favoring arbitration agreements,” the Supreme Court has mandated that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Indeed, “the parties’ intentions ‘are generously construed as to issues of arbitrability,’ and any ‘ambiguities as to the scope of the arbitration clause itself’ must be ‘resolved in favor of arbitration.’” Washington Square Secs., Inc. v. Aune, 385 F.3d 432, 436 (4th Cir. 2004) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985) and Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989)).⁷

⁷ Like the FAA, South Carolina law strongly favors arbitration, and “unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” Zabinski v. Bright Acres Assocs., 553 S.E.2d 110, 118 (S.C. 2001) (citing S.C. Pub. Serv. Auth. v. Great W. Coal, 437 S.E.2d 22, 25 (S.C. 1993)); see also South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, et seq.

b. Plaintiffs' Allegations Fall Within the Scope of the Arbitration Agreement the She Signed.

“To decide whether an arbitration agreement covers a particular dispute, the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement, irrespective of the label given to the cause of action.” Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc., 588 S.E.2d 136, 207 (S.C. Ct. App. 2003) (citing Zabinski, 553 S.E.2d at 597). Applying these principles, all of Plaintiffs' individual claims fall within the scope of the Arbitration Agreement that she signed.

Both Plaintiffs allege in the Amended Complaint that the dealer she did business with engaged in a “common practice of presenting/advertising car prices in a misleading manner” because it allegedly “fails to include and/or adequately disclose ‘administrative fee’ in the advertised price of the car” and misleads buyers “that the set fee is mandatory fee, such as taxes and license fees.” Amended Complaint ¶¶ 10, 11, 16, 17 & 19. The Plaintiffs acknowledge that such fees are specifically authorized by S.C. Code Ann. § 37-2-307, see Amended Complaint ¶¶ 23-26, but each Plaintiffs alleges that the Defendants did not comply with the statute, although the complaint fails to identify the specific basis of a violation. see id. ¶¶ 10-11, 16-22, 29.

Each of these allegations clearly falls under the claims that Ms. Cristy and Jim Hudson Hyundai and that Ms. York and Dodgeland respectively and individually agreed to arbitrate if any dispute arose between the parties. . The Arbitration Agreements provide that “any and all disputes” between the dealer and purchaser relating to the vehicle are covered under the Agreement. See Exhibits A and C. Each Agreement expressly encompasses all subjects relating to its respective Plaintiffs claims.

c. The Arbitration Clauses are Unremarkable and Not Subject to Challenge.

The Arbitration Agreement signed by these Plaintiffs and their particular dealer that they did business with is unremarkable and of a type countless courts have upheld. Moreover, each respective agreement authorize the arbitrator to determine the validity of the agreement⁸ or to decide all issues of arbitrability.

i. Allegations Against Other Defendants Do Not Prevent Arbitration.

A Plaintiff cannot avoid arbitration by naming other dealerships, with which she has no connection, as a defendant. Even if a Plaintiff had standing against the other Defendant that she did not do business, which she does not, Ms. Cristy must arbitrate her dispute with Jim Hudson Hyundai pursuant to the Arbitration Agreement between them and Ms. York must arbitrate her dispute with Dodgeland pursuant to the Arbitration Argeement if her claims were not barred by the expiration of the applicable statute of limitations. See S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., ___ S.C. ___, 437 S.E.2d 22, 24 (1993) (“[A] party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would nullify the rule requiring arbitration.”).

d. The Court Should Dismiss All Judicial Proceedings Against the Defendants and Compel Arbitration.

Pursuant to Section 3 of the FAA, any court of the United States must, at a minimum, stay judicial proceedings involving claims, like those here, that fall within the arbitration provisions of written agreements. See 9 U.S.C. § 3; see also Moses H. Cone, 460 U.S. at 26 (“[S]tate courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act.”). “Notwithstanding the terms of § 3, however, dismissal is a proper remedy

⁸ In Exhibit A, the Dodgeland Arbitration Agreement signed by Ms. York provides that the “...arbitrator shall decide all issues of arbitrability.” Whereas, the Agreement signed by Ms. Cristy in her transaction with Jim Hudson Hyundai provides that “... the validity of this arbitration clause ... shall be resolved by the binding arbitration by one arbitrator.” See Exhibit C.

when all of the issues presented in a lawsuit are arbitrable.” Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, 252 F.3d 707, 709-710 (4th Cir. 2001); see also Alford v. Dean Witter Reynolds, 975 F.2d 1161, 1164 (5th Cir. 1992) (“The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.”); Payton v. Nordstrom, Inc., 462 F.Supp.2d 706, 708 (M.D.N.C. 2006) (“[T]he Fourth Circuit has held that, despite the language of the FAA regarding a stay of arbitration, when all of the claims in a lawsuit are required to be arbitrated, dismissal, rather than a stay, is a proper remedy.”). Because all of Plaintiffs’ claims against the dealership from whom she purchased a car must be resolved through arbitration, the Court should dismiss her actions against Jim Hudson Hyundai and against Dodgeland in this Court.

2. The Court Should Dismiss The Claims Of Plaintiff York Against The Defendants As Her Claims Are Barred By The Statute Of Limitations

In the present case, the plaintiffs’ claims against the defendant, Dodgeland, should be dismissed. Simply put, the issue in this case is whether the plaintiffs can circumvent the applicable statute of limitations with respect to the Closing Fee statute by asking for relief under the Dealers Act. Regardless of the viability of the claims brought pursuant to the Dealers Act, which again, as pled, only includes the right to bring a class action and identifies no substantive provisions, the plaintiffs’ claims in this case rise and fall solely on the Closing Fee statute, § 37-2-307. Accordingly, the applicable statute of limitations period is three years, and because the plaintiff, York, did not file her action within the three year period following her purchase of two automobiles on September 4, 2006, the claims against Dodgeland must be dismissed.

The Closing Fee statute provides in its entirety:

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.

S.C. Code Ann. § 37-2-307 (Rev. 2002). The specific claims set forth in plaintiffs' Amended Complaint address this statute. For example, plaintiffs make the following assertions with respect to the defendants' charging of closing fees: (1) the manner in which the closing fees are advertised and disclosed is misleading (§§ 11, 16-19, 21, 22); and (2) the closing fees charged by the defendants improperly include for-profit amounts (§§ 13, 14, 15, 20, 27). Therefore, the allegations in the Amended Complaint can only be proved if it is shown that the defendants somehow violated the Closing Fee statute contained in Title 37 of the Consumer Protection Code. In other words, because the wrongful conduct alleged by the plaintiffs is limited to the charging of closing fees, the plaintiffs must show that the defendants have violated the Closing Fee statute before ever getting to any claims under the Dealers Act.

As previously stated, § 15-3-530(2) provides a three-year statute of limitations for an action upon a liability created by statute, which in this case would be §37-2-307. *See also* Tilley v. Pacesetter Corp., 333 S.C. 33, 508 S.E.2d 16 (1998) (holding prior version of § 15-3-530 applied to statutory violation of Consumer Protection Code). On the other hand, the Dealers Act provides for a four-year statute of limitations pursuant to S.C. Code Ann. § 56-15-120 ("Actions rising out of any provision of this chapter shall be commenced within four years next after the cause of action accrues...."). Even if the Court were to find that plaintiffs have validly asserted the necessary elements of a claim under the Dealers Act vis-à-vis the Closing Fee statute, it is clear the Closing Fee statute governs the specific conduct at issue in this present lawsuit. As such, the statute of limitations applicable to § 37-2-307 controls this case.

Several principles of statutory construction mandate dismissal of the claims against Dodgeland due to the plaintiffs' failure to bring their claims within the three-year statute of limitations. First, the primary purpose in interpreting statutes is to ascertain and effectuate the intent of the legislature. Cain v. Nationwide Prop. and Cas. Ins. Co., 378 S.C. 25, 29, 661 S.E.2d 349, 351 (2008). "It is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result." Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). However, where two statutes are in conflict, the more recent and specific statute should prevail so as to repeal the earlier, general statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581; Stone v. City of Orangeburg, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994).

Importantly, where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. See Denman v. City of Columbia, 387 S.C. 131, 691 S.E.2d 465 (2010) (holding specific statute requiring election of vacant council seat to take place at the next general election controlled, as opposed to two general statutes requiring sixty days notice of a municipal election); Spectre, LLC v. S.C. Dept. of Health and Env. Control, 386 S.C. 357, 688 S.E.2d 844 (2010) (specific statutory enactment procedure for coastal management program governed DHEC permit, as opposed to regulations promulgated under the Administrative Procedures Act); Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc., 368 S.C. 17, 628 S.E.2d 38 (2006) (holding 13-year statute of repose barred contribution action against construction company, as action was filed seventeen years after construction but within one year statute of limitations period for contribution actions); Ramsey v. County of McCormick, 306 S.C. 393, 412 S.E.2d

408 (1991) (holding Magistrate's Pay Act specifically controlled compensation of magistrate plaintiff); and State ex rel. Condon v. City of Columbia, 339 S.C. 8, 528 S.E.2d 408 (2000) (finding ninety-day deadline for contesting extension of municipal limits is the statute of limitations in annexation matters, as opposed to ten-year "catch-all" statute of limitations for State's quo warranto action).

The Capco case is particularly instructive. In that case, the parking lot of a shopping center was completed in 1986 by J.H. Gayle Construction Company ("Gayle"). In 1996, Pauline Conner was involved in an automobile accident in the parking lot, and in 1998, she filed lawsuits against Capco and Gayle, alleging negligent design and construction. In June of 2003, Capco settled Conner's claim and obtained a release in favor of both Capco and Gayle, although Gayle did not contribute to the settlement. Two months later, Capco filed a contribution action against Gayle.

The trial court granted Gayle's motion for summary judgment on the grounds that the thirteen-year statute of repose set forth in S.C. Code Ann. § 15-3-640(6) barred Capco's claim, despite the fact that the contribution action had been filed within the one-year statute of limitations period found in S.C. Code Ann. § 15-38-40(D).⁹ The Supreme Court affirmed, holding that the statute of repose was the more specific statute and controlled, as opposed to the statute generally applicable to all contribution actions. The Capco court also cited State v. Life Insurance Company of Georgia, 254 S.C.286, 175 S.E.2d 203 (1970), for the proposition that the court will apply a more specific statute of limitations instead of a general one.

In the present case, although the plaintiffs have pled a cause of action under the Dealers Act, the claims in this case rise and fall on the interpretation of § 37-2-307, a provision of the Consumer Protection Code. Just like the contribution statute at issue in Capco, the Dealers Act

⁹ Commonly referred to as the Uniform Contribution Among Tortfeasors Act.

purports to provide a procedure for recovery against motor vehicle dealers. However, the actual claim itself against Dodgeland is based on an alleged statutory violation of the Consumer Protection Code, which governs the specific conduct at issue, just as the statute of repose governed the actual conduct at issue in Capco. Accordingly, the three-year statute of limitations applies to the claims against Dodgeland, as these claims are wholly dependent on the construction and interpretation of the Closing Fee statute.

The plaintiffs failed to bring their closing fee claims against Dodgeland within the three-year statute of limitations and are attempting to circumvent this deficiency by attempting to proceed under the Dealers Act. The basic rules of statutory interpretation require that the statute of limitations applicable to the Closing Fee statute control this issue, and therefore, dismissal of the defendant, Dodgeland, is appropriate.

3. **The Plaintiffs Lack Standing Against Those Defendants With Which They Did No Business**¹⁰

Plaintiffs' action arises from administrative or document preparation fees that each Plaintiff allegedly paid to a single motor vehicle dealership in connection with her purchase of a vehicle. The two Defendants allegedly did business with either named Plaintiff York or named Plaintiff Cristy and neither of these Plaintiffs is alleged to have done business with both Defendants. The Plaintiffs lack standing to sue any dealership with which she individually did not conduct business.

Standing is a "fundamental requirement for instituting an action," without which "[n]o justiciable controversy is presented." Brock, 443 S.E.2d at 412-13. As a result, upon

¹⁰ The Defendants has also moved to strike the language in the Plaintiffs' Complaint referring to "all motor dealers as defined in S.C. Code Ann. §56-15-10(h)" on the ground that the Plaintiffs' process and service of process are insufficient and, additionally, that this is an improper and unlawful method of joinder and lack of standing. (Complaint ¶ 37).

determining a plaintiff has no standing to prosecute a cause of action, the court must dismiss the action. Id. Generally, a litigant “must have a personal stake in the subject matter of the lawsuit. In other words, one must be a real party in interest.” Sea Pines Ass’n for the Prot. of Wildlife, Inc. v. S.C. Dep’t of Natural Res., 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001). A real party in interest is one “who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.” Id. (internal citation and quotation omitted). Neither of these Plaintiffs has a personal stake in an action against both named dealerships; each Plaintiff’s only stake is with the dealership with which she did business.

Constitutional standing requires, at a minimum, that the party bringing the action sustain a direct injury or the immediate danger a direct injury will be sustained; the injury must be of a personal nature to the party bringing the action, not merely of a general nature that is common to all members of the public. Commander Health Care Facilities, Inc. v. South Carolina Dept. of Health and Environmental Control, 370 S.C. 296, 634 S.E.2d 664 (Ct. App. 2006). The two Plaintiffs have sustained no injury from any dealerships with which they did not conduct business and are not in immediate danger of a direct injury from the other dealership.

The South Carolina Supreme Court has also recognized a “stringent standing test.” Commander Health Care, 634 S.E.2d at 666 (citing Sea Pines, 550 S.E.2d at 291). To have standing, a party must prove all elements that constitute the “irreducible constitutional minimum of standing:”

(1) the plaintiff must have suffered an injury in fact; (2) there must be a “causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court;” and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a

favorable decision. Sea Pines, 550 S.E.2d at 291 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-61 (1992)).¹¹

The Plaintiffs have the burden of demonstrating each of the three elements. Sea Pines, 550 S.E.2d at 291. Plaintiffs cannot establish standing against both dealerships as they have no causal connection with the dealerships with which she did not transact business. A plaintiff cannot sue a defendant with which it has had no dealings because South Carolina law precludes a plaintiff from suing a defendant “unless the plaintiff has suffered an injury at the hands of the defendant.” Gardner v. S.C. Dep’t of Revenue, 353 S.C. 1, 577 S.E.2d 190, 201 n.14 (S.C. 2003).

Additionally, the mere fact that each Defendant may charge a closing fee does not give a Plaintiff standing against the other defendant from which she did not purchase a vehicle. In Rock Hill Nat. Bank v. Honeycutt, 289 S.C. 98, 344 S.E.2d 875 (Ct. App. 1986), the Court held that guarantors lacked standing to assert a claim based on harm to others because they had no personal stake in the subject matter. Likewise, the improprieties alleged by Plaintiffs cannot establish her standing with respect to the no-sale Defendant. The Amended Complaint alleges that the Plaintiffs were misled by the Defendants’ salespeople and by the method in which the dealerships prepared and presented documents. The Defendant could not have misled a Plaintiff with whom it did no business. The Amended Complaint also alleges that the Plaintiffs were misled by the Defendants’ advertising. Again, this cannot be true for the Defendant with whom the Plaintiff did no business. Without any direct transaction, a Plaintiff cannot establish any harm suffered at the hands of any no-sale Defendant and, therefore, lacks standing with respect to such dealership. Thus, this Court should dismiss for lack of standing each Plaintiff’s claims against the other Defendant except the single Defendant with which the Plaintiff did business.

¹¹ See also Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 369 S.C. 498, 632 S.E.2d 864 (2006); Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000).

In this case, all Plaintiffs, including Olga Joanne Cristy, allege to have a transaction with another Defendants than Jim Hudson Hyundai and did not even use the correct name of the dealership. Whereas, Melissa Anne York alleges to have a transaction with another Defendant than Dodgeland. Plaintiffs lack standing to bring this action against any one other than the dealer that they purchased a vehicle from and that is only: (a) Ms. Cristy purchased a motor vehicle from Jim Hudson Hyundai, whose correct and true name is Jim Hudson Cars, LLC d/b/a Jim Hudson Hyundai, and (b) Ms. York purchased a motor vehicle from Defendant Dodgeland of Columbia, Inc if her claims were not barred by the expiration of the applicable statute of limitations. Because none of the aforementioned plaintiffs alleges that she purchased a vehicle from Jim Hudson Automotive Group or the wrongly named Jim Hudson Hyundai as Jim Hudson Superstore, Inc., d/b/a Jim Hudson Hyundai, Plaintiffs lack standing to assert claims against Jim Hudson Automotive Group or Jim Hudson Superstore, Inc. d/b/a Jim Hudson Hyundai, either individually or on behalf of other persons. (See First Amended Complaint ¶¶ 1, 14). Therefore, the Plaintiffs' Complaint fails to state facts sufficient to constitute a cause of action upon which relief may be granted against Jim Hudson Automotive Group and Jim Hudson Superstore, Inc. d/b/a Jim Hudson Hyundai.¹²

4. The Plaintiffs Do Not Have Standing to Sue the No-sale Defendants Under South Carolina Code Ann § 56-15-110(2)

a. Well-established precedent prohibits the use of class action procedures to confer standing on plaintiffs.

¹² Additionally, the Plaintiffs have incorrectly named Jim Hudson Hyundai as Jim Hudson Superstore, Inc. a/k/a Jim Hudson Hyundai. Pursuant to Rules 12(b)(2), 12(b)(4) and 12(b)(5), SCRCP, Jim Hudson Automotive Group and Jim Hudson Superstore, Inc. a/k/a Jim Hudson Hyundai moves to dismiss any alleged action against them on the grounds that the Plaintiffs' process and service of process are insufficient and, as a result, the Court lacks personal jurisdiction over such defendants (Complaint ¶ 37).

S.C. Code Ann § 56-15-110(2) also fails to establish Plaintiffs' standing as to those Defendants with which no business was conducted. According to well-established precedent, a plaintiff cannot bring a class action against persons at whose hands he suffered no injury. Gardner, 577 S.E.2d 190.¹³

In Gardner, plaintiffs brought an action for violations of the South Carolina Debt Setoff Act and, like Plaintiffs in this case, they sued defendants with which they had no connection whatsoever. The plaintiffs alleged that public agencies that collected debts by setoffs to state income tax refunds under the Debt Setoff Act had failed to comply with the Act's notice provisions. They sued defendant class members that had *not* collected debts from them (but had collected debts from other persons) using the Act. The Supreme Court held that the plaintiffs could not sue persons who did *not* collect debts from them and at whose hands they had suffered no injury.

The same is true here for the other Defendant with which a Plaintiff transacted no business. Just as the plaintiffs in Gardner suffered no injury at the hands of defendants that did not collect debts from them, so each Plaintiff in this case suffered no injury at the hands of the other named Defendant that did not collect a closing fee from her. Consequently, just as the plaintiffs in Gardner lacked standing, so does the Plaintiff here lack standing to sue a dealership that did not sell her vehicle or charge her a closing fee.

- b. The plain language of the statute prevents a Plaintiff from doing on behalf of others what they could not do on behalf of themselves.**

¹³ See also Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997). (Individual or group must have standing to proceed in either a derivative or class action suit.); Furman Univ. v. Livingston, 244 S.C. 200, 136 S.E.2d 254, 256 (1964) ("Accordingly, a person who has no financial interest in taxes alleged to have been erroneously collected has no legal standing to sue for their refund"); Wilder v. S.C. State Highway Dept., 228 S.C. 448, 90 S.E.2d 635, 639 (1955) (class action cannot be brought on behalf of automobile owners who have been improperly charged postage by the State Highway Department when they received their license plates in person).

A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115 (1992). A statute must be interpreted with common sense to avoid unreasonable consequences and must be construed to avoid absurd results. A sensible construction, rather than one which leads to irrational results, is always warranted. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). Under § 56-15-110(1):

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.
(emphasis added)

This subsection gives an injured person a right to sue for his actual damages. To be liable under the Act, however, the dealer must participate in the wrongdoing. Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997); Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996). Each named Plaintiff was not injured in her person or property by the named defendant dealer with whom she did no business. Therefore, the Plaintiffs have no claim under § 56-15-110(1) against the other Defendant which she did no business.

Subsection (2) is limited to actions brought under subsection (1), i.e., actions by persons injured against those who injured them:

(2) 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,¹⁴ including actions for injunctive relief. § 56-15-110(2) (emphasis added).

Thus, actions on behalf of others are limited, as a matter of statutory construction, to those persons at whose hands the plaintiff suffered injury to “his business or property.” Subsection (2) does not authorize Plaintiffs to act as private attorneys general.

¹⁴ The statute does not relieve the putative class representative of the burden of establishing each of the prerequisites for class certification under Rule 23, SCRCP, and the Plaintiffs have not alleged any facts in support of class certification under Rule 23.

**c. Rule 23 of the South Carolina Rules of Civil Procedure Pre-empts S.C.
Code Ann. § 56-15-100(2).**

The language in subsection (2) is essentially the same as the former class action statute, 15-5-50 (repealed 1985) which stated:

When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

In 1985, nine years after enacting subsection (2), South Carolina adopted the Rules of Civil Procedure. Along with establishing these Rules, South Carolina through 1985 Act No. 100 repealed Section 15-5-50 (the old class action statute, with substantially similar language as Section 56-15-110(2)). Section 3 of 1985 Act No. 100 (repealing Section 15-5-50) and provided that:

In the event of conflict between any provision of the South Carolina Rules of Civil Procedure and any other statutory provisions as to practice and procedure not repealed by this act, the provision of the rules shall control. However, neither the promulgation of the rules nor this act may be construed to affect the substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of practice and procedure. (emphasis added).

When a procedural statute is repealed and a new rule of civil procedure such as Rule 23 is adopted, the new rule governs all pending cases. McGann v. Mungo, 287 S.C. 561, 568 (1986) holds; see also Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (1986) (new rules of civil procedure replace the repealed statute). South Carolina's adoption of the Rules of Civil Procedure and 1985 Act No. 100 § 3 precludes Plaintiffs' attempt to utilize Section 56-15-110(2) to avoid the substantive requirements of standing or the procedural requirements of the South Carolina Rules of Civil Procedure, particularly Rule 23.¹⁵ The fact that the two statutes, Sections 56-15-110(2) and 15-5-50, were substantially the same demonstrates that Section 56-15-110(2)

¹⁵ The Amended Complaint is defective on its face in that it does not allege that the requirements of Rule 23 have been met.

was intended merely to allow a representative action at a time when civil procedure rules did not contain such a provision. Section 56-15-110(2) did not (and could not) reference Rule 23, SCRCF, because it did not exist at the time. Rather, Section 56-15-110(2) simply echoed the now-repealed Section 15-5-50 allowing for class actions. Thus, the statute lost much of its importance upon adoption of the Rules of Civil Procedure. More importantly, because South Carolina established that the Rules of Civil Procedure preempt conflicting procedural rules, Plaintiffs are foreclosed from using § 56-15-110(2) to circumvent procedural requirements. Consequently, Plaintiffs cannot use the statute to establish standing.

Defendants' argument is further buttressed by ample case law in which courts have not allowed a plaintiff who lacks standing to assert statutory rights granted to a third person.¹⁶ Because the Plaintiffs do not have individual standing against each of the two defendants, the case should be dismissed as to any Defendant with whom the Plaintiff did not transact business. Thus, this Court should dismiss for lack of standing each Plaintiff's claims against the no-sale Defendant, leaving only the claims of a Plaintiff against the named defendant dealer that she specifically did business. In other words, Plaintiff York cannot sue Defendant Jim Hudson and Plaintiff Cristy cannot sue Defendant Dodgeland. This action should likewise be dismissed as to all unnamed Plaintiffs.

5. The Mere Assertion of a Conspiracy Does Not Confer Standing on the Plaintiffs to Sue No-Sale Defendants.

Although Plaintiffs allege that the Defendants "conspired" in an attempt to join these two dealerships, this attempt at backdoor standing is precluded by our Supreme Court. More

¹⁶ See e.g. Childress v. City of Richmond, 134 F.3d 1205 (4th Cir. 2005) (White mail police officers brought claims pursuant to Title VII, alleging that supervisor made disparaging remarks about black and female police officers and that city officials took no corrective action. The Fourth Circuit affirmed the dismissal of the white officers' action on the ground the officers did not have standing to bring an action for discrimination directed at fellow officers.)

specifically, any use of the conspiracy allegation to circumvent the standing requirements would entail applying the “juridical links doctrine,” which the South Carolina Supreme Court has squarely rejected.

Under some jurisdictions, the “juridical links doctrine” is a device of limited applicability, providing a narrow exception to the requirement that a Plaintiff can only maintain an action against defendants which he has dealt. In La Mar v. H & B Novelty & Loan Co., 489 F.2d 461 (9th Cir. 1973), which first conceived the “juridical links doctrine,” the question was whether “a plaintiff having a cause of action against a single defendant can institute a class action against the single defendant and an unrelated group of defendants who have engaged in conduct closely similarly to that of the single defendant on behalf of all those injured by all the defendants sought to be included in the defendant class.” Id. at 462. The court answered no, holding that the plaintiff could not maintain a claim against the defendants with which he did not have any dealings. Id. at 465-67. Nevertheless, the court went on to suggest, in dicta, that if the plaintiff’s injuries are the result “of a conspiracy or concerted schemes between the defendants,” or otherwise “juridically related in a manner that suggests a single resolution of the dispute would be expeditious,” the claim could go forward. Id. at 466.¹⁷ In crafting these exceptions, collectively labeled the “juridical links doctrine,” see In re Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 170 (D. Mass. 2004),¹⁸ the court provided a narrow avenue for certain plaintiffs to establish standing despite not directly dealing with each defendant.

¹⁷ Although the court in La Mar framed its conclusion in terms of the class certification requirement of typicality, over time courts have expanded La Mar’s holding – and the juridical links doctrine – for use not only in class certification analysis, but also when evaluating standing. See Popoola v. M.D. Individual Practice Ass’n, Inc., 230 F.R.D. 424, 431-32 (D. Md. 2005); Henry v. Circus Circus Casinos, 223 F.R.D. 541, 543 (D. Nev. 2004); In re: Eaton Vance Corp. Sec. Litig., 220 F.R.D. 162, 170 (D. Mass. 2004).

¹⁸ See also William D. Henderson, Comment, *Reconciling the Juridical Links Doctrine with the Federal Rules of Civil Procedure and Article III*, 67 U. CHI. L. REV. 1347 (2000).

The South Carolina Supreme Court has rejected the “juridical links” doctrine. Gardner, 577 S.E.2d 190. The Gardner Court found the doctrine ran counter to its previous decisions that a plaintiff may not sue a defendant unless the plaintiff has suffered an injury at the hands of the defendant. Edisto Fleets, Inc., v. South Carolina Tax Commission, 256 S.C. 350, 182 S.E.2d 713 (1971) (A plaintiff cannot maintain a class action where record indicates he was not directly harmed by defendant’s actions); Livingston, 136 S.E.2d 254 (only a taxpayer directly affected by erroneously paying taxes has a right to seek a refund).

Given the South Carolina Supreme Court’s manifest refusal to adopt the “juridical links doctrine,” Plaintiffs cannot now rely on their conspiracy or any other potential “link” to circumvent the standing requirements. Plaintiffs’ cause of action for civil conspiracy should be dismissed as to all Defendants.

If a plaintiff has standing to sue any defendant simply by asserting a civil conspiracy no matter how temporally, geographically or physically remote from the facts and circumstances of that plaintiff’s particular case, then “mass actions” like the present one, will become the norm, a judicial and procedural nightmare not envisioned by any principled system of justice.

6. The Plaintiffs Do Not Obtain Standing Through Their Declaratory Judgment Action

Plaintiffs’ declaratory judgment cause of action also fails to establish standing as to a Defendant with which the Plaintiff did not transact business. The Declaratory Judgment Act provides:

[a]ny person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute,

ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder. S.C. Code Ann § 15-53-30.¹⁹

To state a cause of action under the Declaratory Judgment Act, a party “must demonstrate “a justiciable controversy.” *Id.* A justiciable controversy exists “when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.” Graham v. State Farm Mutual Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). Additionally, in declaratory judgment actions “[t]he interest of the parties . . . to the subject matter of the controversy must be more than merely general. It must be a substantial, direct, and legally protected present interest in the relief sought.” Quinn v. City of Columbia 303 S.C. 405, 407-408, 401 S.E.2d 165, 167 (1991). In Quinn, the South Carolina Supreme Court held that subdivision residents lacked standing under the Declaratory Judgments Act to challenge the city’s annexation of the subdivision because the residents did not own real property in the subdivision and, therefore, had no “legally protected present interest.” *Id.* Because there was no transaction or interaction between the named Plaintiffs and the no-sale dealerships, Plaintiffs’ legal interest with respect to such dealerships is neither “concrete” nor “legally protected” and any declaratory judgment would be “merely advisory in nature.” Plaintiffs’ declaratory judgment cause of action is, therefore, an impermissible basis to establish standing.

7. The Court Should Dismiss The Actions Against The No-Sale Defendant Because Plaintiffs Have Improperly Joined Unrelated Lawsuits In One Action.

Defendants jointly move for an order, pursuant to Rules 12(b)(6) and 20(a), SCRCP, dismissing the actions against the no-sale Defendant dealership on the ground of improper

¹⁹ Despite the Act’s “broad language, it has limits.” Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004). An adjudication that “would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of [the Act.]” *Id.*

joinder and request that the claims of the Plaintiffs be severed into separate cases. Plaintiffs and Defendants are improperly joined as parties in this action.

Permissive joinder of parties is governed by Rule 20, SCRCP, which provides as follows with respect to the joinder of plaintiffs:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all these persons will arise in the action.

Rule 20(a), SCRCP (emphasis added).

Rule 20 similarly provides as follows with respect to the joinder of defendants:

All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences *and* if any question of law or fact common to all defendants will arise in the action.

Id (emphasis added).

The two criteria for determining whether either plaintiffs or defendants may be joined in the same case are similar, but they must be satisfied separately. Joinder of plaintiffs or defendants is proper only when the claim (1) arises out of the same transaction, occurrence, or series of transactions or occurrences *and* (2) a question of law or fact common to all plaintiffs or all defendants will arise in the action. Joinder is improper unless both criteria are satisfied. Ellis v. Oliver, 307 S.C. 365, 367, 415 S.E.2d 400, 401 (1992). “In spite of the great liberality of Rule 20(a), the rule does not excuse any of the joined parties from the obligation to state a claim against defendant or defendants upon which relief may be granted.” Karmanos v. Baker, 617 F. Supp. 809, 814 (E.D. Mich. 1985) (denying motion of plaintiff hockey player’s father to join in son’s lawsuit because father could not state a claim against defendant university).

Joinder is not proper when the cases do not involve the same transaction or occurrence, do not involve a common question of law or fact, or a party simply is not involved or liable at all in a given transaction.²⁰ A particularly instructive case is Saval v. BL, Ltd., 710 F.2d 1027 (4th Cir. 1983). In that case, several buyers of Jaguar automobiles in a single lawsuit alleging warranty, negligence, and product liability claims sued everyone in the chain of distribution for a various defects allegedly caused by badly designed cooling systems. The Fourth Circuit affirmed the district court's rejection of the plaintiffs' effort to bring a single lawsuit pursuant to Rule 20, FRCP.

The district court did not err in determining that the allegedly similar problems did not satisfy the transaction or occurrence test. The cars were purchased at different times, were driven differently, and had different service histories. Quite probably, severance would have been required in order to keep straight the facts pertaining to the separate automobiles. . . .

Saval, 710 F.2d at 1031-32.

In the present case, joinder is improper because the Plaintiffs are unable to satisfy either of the two requirements for permissive joinder. There was no common transaction because each Plaintiff's individual claim did not arise out of the same transaction or occurrence. Each of the two Plaintiffs purchased a single vehicle from a single dealership. These completely separate and unrelated sales occurred on different dates at different dealerships. Each sale involved

²⁰ See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 127-28, 341 S.E.2d 622, 626 (1986) (reversing judgment against bank, which had been improperly joined as defendant only in its capacity as trustee of defendant tortfeasor's funds, because there was no evidence bank had anything to do with tortuous conduct of other defendants); Valentine v. Davis, 319 S.C. 169, 172, 460 S.E.2d 218, 220 (Ct. App. 1995) (upholding denial of joinder of additional plaintiffs because allegations asserted by plaintiffs against defendants who allegedly performed defective home repairs did not arise out of the same transaction or occurrence, and "the only connection between the claims is that the [proposed plaintiffs] are represented by the same attorney and they all assert different personal claims against the [defendants]"); Norris v. City of Anderson, 1999 U.S. Dist. LEXIS 21893 (D.S.C. 1999) (denying joinder under Rule 20, FRCP, in suit by seven employees for racially hostile work environment because numerous supervisors and co-workers were implicated in the claims, employees worked in different areas, alleged discrimination occurred at different times and shifts, and combining the factually dissimilar cases would certainly confuse jurors).

different sales people; different sales managers; different vehicles with different accessories and different prices; different closing fees; different negotiations and discussions about price, accessories, and fees; different sales contracts; and different policies and procedures at each dealership – to name only a few of the obvious differences. While there may appear at first glance to be a common question of law because the Dealers Act provisions and closing fee statute will be discussed in both cases, there is no common question of law due to the different factual circumstances of each transaction. The criterion of common question is not satisfied by claims that are merely based on the same legal theory. Wynn v. National Broadcasting Co., Inc., 234 F.Supp.2d 1067, 1081 (C.D. Cal. 2002); Grayson v. K Mart Corp., 849 F. Supp. 785, 789 (N.D. Ga. 1994).

8. Court Has Discretion To Grant Defendants Motion to Strike Certain Allegations In The Complaint

Defendants move to strike any and all paragraphs in the First Amended Complaint which reference another trial court and an order, which is not a final order, or an order that is controlling upon this Court (i.e., ¶ 13 on p 3 of First Amended Complaint). Such material is immaterial, impertinent and scandalous and, upon information and belief, included only as a means to cause prejudice and harm to the Defendant in violation of due process and equal protection afforded the Defendant by the United States Constitution and the Constitution of the State of South Carolina. U.S.C.A Const. Amend. 4; U.S.C.A Const. Amend. 5; S.C. Const. art I, §3. Moreover, such order is not a final binding order upon this court or these parties. It is within the Court's discretion to strike allegations which are not relevant and have nothing to do with the parties to action. South Carolina Dept. of Health and Environmental Control v. Fed-Serv Industries, Inc., 294 S.C. 33, 362 S.E.2d 311 (SC App. 1987). Therefore, paragraph 13 and all of

its unnumbered paragraphs of the First Amended Complaint should be stricken and removed from the Complaint.

9. Other Reasons And Grounds Exist To Dismiss The Action Against The Defendants Who Are Regulated By The SC Department Of Consumer Affairs

Pursuant to Rule 12(b)(6) and 12(f), SCRCP, the Defendants move to dismiss or, in the alternative strike, the third cause of action (Unjust Enrichment) because the Defendant did not violate S.C. Code Ann. § 37-2-307 (2005) which is a disclosure statute under the South Carolina Consumer Protection Code and regulated by the South Carolina Department of Consumer Affairs and named Plaintiff Cristy fails to state facts sufficient to constitute a cause of action upon which relief may be granted. Because Defendant's allegedly offending conduct is authorized by the State of South Carolina, Plaintiffs fail to state facts sufficient to constitute a cause of action upon which relief may be granted. Moreover, there is no allegations by the Plaintiff that Defendant Hyundai or Defendant Dodgeland did not comply with the requirements of the South Carolina Department of Consumer Affairs regarding S.C. Code Ann. § 37-2-307 and the named Plaintiffs fail to state facts sufficient to constitute a cause of action upon which relief may be granted.

10. In The Alternative If The Action Is Not Dismissed And/Or Arbitration Compelled, The Plaintiffs Need To Specifically or Actually Plead With Specificity As To Their Claims Of Illegal Fees and Matters Against The Defendants

In the alternative, if the Amended Complaint is not dismissed against these Defendants and/or arbitration is not compelled, the Defendants moved pursuant to Rule 12(e), SCRCP, for a more definite statement in any and all paragraphs in the Complaint as specifically outlined and set forth in their motion for the Plaintiff to allege with specificity the various alleged acts that they claim; The Defendants demand that the Plaintiffs make a more definite and clear statement

in their allegations regarding alleged actions, practices or conduct of the Defendant(s) that are illegal, misleading and deceiving that they are complaining to have violated the law as in the following items so that the Defendants can properly and correctly respond in defense of this matter:

(a) explain or specify what the plaintiff is alleging regarding how or why certain administrative fees are illegal as alleged therein (i.e., Complaint ¶3);

(b) explain or specify what the plaintiff is alleging as “some unexplained common scheme” to deceive by the Defendant (i.e., Complaint ¶8);

(c) explain or specify what the plaintiff is alleging regarding how some unexplained and alleged common scheme is deceptive (i.e., Complaint ¶8);

(d) explain or specify what the plaintiff is alleging regarding unexplained conduct alleged to be unfair, misleading, and/or unconscionable business practices (i.e., Complaint ¶9);

(e) explain or specify what the plaintiff is alleging regarding some unspecified conduct alleged to be misleading when presenting or advertizing car prices (i.e., Complaint ¶¶10, 11);

(f) explain or specify what the plaintiff is alleging regarding second fee alleged to be charged when presenting or advertizing car prices (i.e., Complaint ¶10);

(g) explain or specify what the plaintiff is alleging regarding how a sticker price is artificially raised after negotiation of the car (i.e., Complaint ¶11);

(h) explain or specify what the plaintiff is alleging regarding how a fee charged by Defendant is (i) arbitrarily set, (ii) misleading, (iii) a violation of the law, and (iv) how it includes dealer profit (i.e., Complaint ¶15);

(i) explain or specify what the plaintiff is alleging regarding how the placement of the “administrative fee” on the dealer invoice is deceptive (i.e., Complaint ¶16);

(j) explain or specify what the plaintiff is alleging regarding how the placement of the “administrative fee” on the dealer invoice deceptively implies it is mandatory, such as taxes and license fees (i.e., Complaint ¶16);

(k) explain or specify what the plaintiff is alleging regarding how the placement of the “administrative fee” on the dealer invoice deceptively implies it is separate and distinct from general overhead and what Plaintiff Cristy expected (i.e., Complaint ¶¶16, 18);

(l) explain or specify what the plaintiff is alleging regarding how the “administrative fee” is a misleading add-on (i.e., Complaint ¶18);

(m) explain or specify what the plaintiff is alleging regarding how the Defendant’s advertising is alleged to be misleading regarding the “administrative fee” and the price of the car (i.e., Complaint ¶¶19, 22);

(n) explain or specify what the plaintiff is alleging regarding how the Defendant’s advertising is alleged to be misleading as inadequate regarding the “administrative fee” (i.e., Complaint ¶¶20, 22);

(o) explain or specify what the plaintiff is alleging regarding how the Defendant’s advertising is alleged to be misleading regarding the “administrative fee” and the price of the car (i.e., Complaint ¶¶19, 20, 22);

(p) explain or specify what the plaintiff is alleging regarding a truthful fee or how the Defendant’s fee is deceptive in paragraph 24 (i.e., Complaint ¶24);

(q) explain or specify what the plaintiff is alleging regarding how the Defendants may only charge the fee for reimbursement of actual cost and not for profit (i.e., Complaint ¶27);

(r) explain or specify what the plaintiff is alleging regarding how the Defendant did not avail itself of the limited exception in SC Code §37-2-307 (i.e., Complaint ¶28);

(s) explain or specify what the plaintiff is alleging regarding how the Defendant falsely claims reimbursement of actual costs but is charging an illegal fee for profit (i.e., Complaint ¶29);

(t) explain or specify what the plaintiff is alleging as a deceptive use of an administrative fee and how it is arbitrary, in bad faith, unconscionable and misleading and in violation of what statute (i.e., Complaint ¶¶32, 33);

(u) explain or specify what the plaintiff is alleging as a failure to truthfully and adequately disclose the “administrative fee” in violation of what statute (i.e., Complaint ¶34);

(v) explain or specify what the plaintiff is alleging as a failure to truthfully and adequately include the “administrative fee” in the advertized price of the car to constitute misleading advertisement in violation of what statute (i.e., Complaint ¶34);

(w) explain or specify what the plaintiff is alleging regarding a conspiracy to damage car buyers and in violation of what statute (i.e., Complaint ¶35);

(x) explain or specify what the plaintiff is alleging as the “issues raised” in paragraph 44 (i.e., Complaint ¶44);

(y) explain or specify what the plaintiff is alleging to be “standard administrative fees” in paragraph 46 (i.e., Complaint ¶46);

(z) explain or specify what the plaintiff is alleging to have conferred upon the Defendant as a “non-gratuitous benefit in the form of grossly excessive profits” (i.e., Complaint ¶48);

(aa) explain or specify what the plaintiff is alleging by the Defendant to have occurred to induce the Plaintiffs to confer a benefit upon the Defendant (i.e., Complaint ¶49); and

(bb) explain or specify what the plaintiff is alleging as to how the Plaintiff did not get what was bargained for or promised in the transaction with the Defendant and what is the “benefit promised” (i.e., Complaint ¶50).

Such clarity is needed so that the Defendant may properly respond to the pleading and make any further motion or response. Therefore, the Defendant asks that the Court order the Plaintiff(s) to make a more definite statement of what they are alleging to have occurred and how such is a violation of the law.

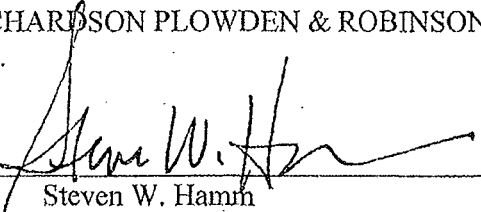
CONCLUSION

For the reasons stated herein and during the argument and presentment before the Court, the Defendants respectfully requests that their motions be granted. The Defendants further reserve the right to supplement this Memorandum.

Respectfully submitted, this 8th day of March, 2011.

RICHARDSON PLOWDEN & ROBINSON,
P.A.

By:


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SOWELL GRAY STEPP & LAFFITTE,
L.L.C.

By:


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Columbia, South Carolina 29211
(803) 929-1400

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CARUSO, PLLC

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ATTORNEYS FOR DEFENDANT JIM HUDSON
AUTOMOTIVE GROUP, AND JIM HUDSON
SUPERSTORE, A/K/A JIM HUDSON WHOSE TRUE
AND CORRECT NAME IS JIM HUDSON CARS, LLC
D/B/A JIM HUDSON HYUNDAI

ATTORNEYS FOR DEFENDANT, DODGELAND OF
COLUMBIA, INC.

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Melissa Anne York and Olga Joanne Cristy,

PLAINTIFFS,

v.

Dodgeland of Columbia, Inc. and Jim Hudson
Automotive Group and Jim Hudson Superstore,
Inc., a/k/a Jim Hudson Hyundai,

DEFENDANTS.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.: 2010-CP-40-4244

CERTIFICATE OF SERVICE

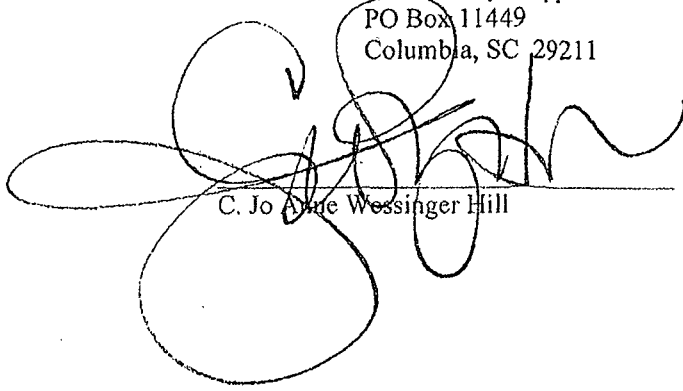
I, the undersigned attorney with the firm of Richardson, Plowden and Robinson, P.A., attorneys for the Defendants do hereby certify that the foregoing **DEFENDANTS MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT AND THIS ACTION, TO COMPEL ARBITRATION, TO SEVER, TO STRIKE, FOR A MORE DEFINITE PLEADING, FOR A PROTECTIVE ORDER, FOR COSTS AND FEES AND FOR OTHER RELIEF** was served upon the following parties by electronic mail at their addresses herein on March 8, 2011 and that a copy shall also be deposited in a United States Postal Service mailbox to those as indicated, postage prepaid, return address clearly indicated, or shall be hand delivery as indicated on March 9, 2011, addressed to the following:

VIA HAND DELIVERY ON 3/9/2011
Susan F. Campbell
McGowan Hood & Felder LLC
1517 Hampton Street
Columbia, SC 29202
SCampbell@mcgowanhood.com on 3/8/2011

VIA US MAIL AND FAX ON 3/9/2011
William Angus McKinnon, Esq.
McGowan Hood & Felder LLC
1539 Healthcare Drive
Rock Hill, SC 29732
WMckinnon@mcgowanhood.com on
3/8/2011

VIA US MAIL AND FAX ON 3/9/2011
Patrick Knie, Esq.
PO Box 5159
Spartanburg, SC 29304-5159
pknie@knielaw.com on 3/8/2011

VIA HAND DELIVERY ON 3/9/2011
Rebecca Laffitte, Esq.
rlaffitte@sowellgray.com on 3/8/2011
J. Michael Montgomery, Esq.
mmontgomery@sowellgray.com
Sowell Gray Stepp & Laffitte, LLC
PO Box 11449
Columbia, SC 29211


C. Jo Anne Wessinger Hill

Columbia, SC
March 8, 2011

THIS BUYER'S ORDER IS SUBJECT TO ARBITRATION PURSUANT TO SC CODE SECTION 15-48-10

DATE 09/04/2006


DodgeLand of Columbia

 A TRADENAME OF DODGELAND OF RICHLAND LP
 190 Graystone Boulevard / COLUMBIA - SOUTH CAROLINA / 29210
 (803) 799-1800 - Fax (803) 256-9729

 A FIVE STAR
 ★ ★ ★ ★ ★
 Dealership

PURCHASER'S NAME Mrs. Melissa York		SOCIAL SECURITY #	D.O.B.
CO-PURCHASER'S NAME Jessie E. James York		SOCIAL SECURITY #	D.O.B.
STREET ADDRESS			
CITY	COUNTY	STATE	ZIP
RES. PHONE		BUS. PHONE	CELL PHONE

☐ NEW ☐ CAR
☒ USED ☐ TRUCK
☐ DEMO ☐ RV

YEAR 2005 MAKE Dodge Truck

MODEL Ram 2500 BODY TYPE P/U COLOR Red TRIM V.I.N.

ODOM. 41,077 CYL. INSPECTION STK# 629359A SALES REP. Major Hicks

TRADE INFORMATION			
YEAR 1999 MAKE Nissan		DEALER OPTIONS:	
MODEL Pathfinder	BODY SUV		
COLOR Silver	CYL. 6		
ODOM.	ACTUAL Y I N TITLE Y I N		
V.I.N.	VALIDATION NO.	EXP. DATE	
LIEN HOLDER:			
ADDRESS:			
PHONE #:			
VERIFIED BY:	DATE GIVEN	CASH DELIVERED PRICE OF VEHICLE	31990
GIVEN BY:	GOOD UNTIL	TRADE-IN ALLOWANCE	6000
PAYOFF	(IF BALANCE IS ESTIMATED UPON VERIFICATION BUYER AGREES TO PAY AMOUNT EXCEEDING THIS FIGURE)	DIFFERENCE	
ACCOUNT #		SALES TAX	300
IS THERE A SECOND LIEN?		DMV FEES NEW ☐ TRANS. ☒	64
NAMES THAT APPEAR ON TITLE		COMPUTER VEHICLE REGISTRATION	
		PROCESSING FEES	289
		SUB TOTAL	
INSURANCE CO.		AMOUNT OWED ON TRADE-IN	
POLICY #		TOTAL BALANCE	
DATES to		PARTIAL PAYMENT RECEIPT #	
AGENT		CASH ON DELIVERY RECEIPT #	
ADDRESS			
TELEPHONE	GIVEN BY		
COLLISION DEDUCTIBLE	COMPREHENSIVE DEDUCTIBLE		
LIEN HOLDER:		If due to manufacturer's price increase, the base price varies from that shown above, buyer may elect to pay the new price or to have his deposit returned.	AMOUNT FINANCED 29643

IN CONSIDERATION FOR SELLER AGREEING TO SELL TO PURCHASER THE ABOVE DESCRIBED VEHICLE, PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT. BUYER UNDERSTANDS AND AGREES THAT THIS TRANSACTION INVOLVES INTERSTATE COMMERCE AND THAT NO ACTION IN A REPRESENTATIVE CAPACITY MAY BE FILED WITH THE ARBITRATOR AND THAT ARBITRATOR HAS NO AUTHORITY TO AWARD ANY RELIEF TO ANYONE OTHER THAN THE ABOVE NAMED PURCHASER OR SELLER AND THAT ARBITRATOR SHALL DECIDE ALL ISSUES OF ARBITRABILITY.

Purchaser agrees that this Order includes all of the terms and conditions on both the face and the reverse side hereof, that this Order cancels and supersedes any prior agreement and as of the date hereof comprises the complete and exclusive statement of the terms of the agreement relating to the subject matters covered hereby, and that this Order shall not become binding until accepted by dealer or his authorized representative AND IN THE EVENT OF A TIME SALE, DEALER SHALL NOT BE OBLIGATED TO SELL UNTIL APPROVAL OF THE TERMS HEREOF IS GIVEN BY A BANK OR FINANCE COMPANY WILLING TO PURCHASE A RETAIL INSTALLMENT CONTRACT BETWEEN THE PARTIES HERETO BASED ON SUCH TERMS. ALL WARRANTIES, IF ANY, BY A MANUFACTURER OR SUPPLIER OTHER THAN DEALER ARE THEIR'S, NOT DEALER'S, AND ONLY SUCH MANUFACTURER OR OTHER SUPPLIER SHALL BE LIABLE FOR PERFORMANCE UNDER SUCH WARRANTIES UNLESS DEALER FURNISHES BUYER WITH A SEPARATE WRITTEN WARRANTY OR SERVICE CONTRACT MADE BY DEALER ON ITS OWN BEHALF. DEALER HEREBY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, IN ALL GOODS AND SERVICES SOLD BY DEALER, AND IN ALL USED VEHICLES WHICH ARE HEREBY SOLD "AS IS," NOT EXPRESSLY WARRANTED OR GUARANTEED. Purchaser by his execution of this Order certifies that he is of legal age to execute binding contracts in this State and acknowledges that he has read its terms and conditions and has received true copy of this Order. Dealer or authorized selling dealer to obtain consumer credit information contained herein.

PURCHASER'S SIGNATURE *[Signature]* DATE 09-04-06 ACCEPTED BY: *[Signature]* DEALER OR HIS AUTHORIZED REPRESENTATIVE

 Exhibit A
 145

EXHIBIT B

Discussion of South Carolina Cases Involving Closing Fees

This memorandum briefly outlines the three reported cases in South Carolina which implicate automobile transaction closing fees, all of which were brought or decided before the enactment of South Carolina Code Ann. § 37-2-307 (2002), which explicitly authorizes the charging of closing fees.

The first reported case in South Carolina implicating closing fees is Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 404 S.E.2d 200 (1991). In this case, a single plaintiff attempted to bring a class action lawsuit against a single dealership in Kershaw County,¹ alleging that a \$99.50 charge identified as a “closing fee” on the sales contract constituted an unfair or deceptive practice pursuant to S.C. Code Ann. 56-15-30 (2006), a provision of the Regulation of Manufacturers, Distributors and Dealers Act (Dealers Act). The trial court held the plaintiff had satisfied all requirements of Rule 23, SCRCP, except the “amount in controversy” requirement.

The only issue addressed by the Supreme Court was whether the fee met the “amount in controversy” requirement of Rule 23(a)(5), SCRCP. This rule requires each class member’s claim to exceed \$100. The Supreme Court held the requirement was met because a prevailing plaintiff is entitled to double his actual damages pursuant to S.C. Code Ann. § 56-15-110 of the Dealers Act. Thus, the amount awarded to a prevailing plaintiff in this instance would be \$199, satisfying the requirement. The Court further held that attorney’s fees and punitive damages would not be considered in calculating the amount in controversy. The Court remanded the cases for further proceedings. Gardner, 304 S.C. at 330-31, 404 S.E.2d at 201-02. It is Defendants’ understanding, upon information and belief, that the case later was settled for a nominal amount.

¹ The Gardner appeal was consolidated with a related case raising the same issue, which was brought by the same lawyers, but involved a different single plaintiff suing a different single dealership (Newsome Toyota, Inc. of Kershaw County).

Five years later, the Supreme Court issued its second opinion in which closing fees were an issue. In Fanning v. Fritz's Pontiac Cadillac Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996), the plaintiff in a class action filed against a single Newberry dealer alleged the dealer violated the state Consumer Protection Code by charging an \$87 "procurement fee."² The plaintiff alleged the fee was an illegal "additional charge" and that it was unconscionable. The Supreme Court affirmed the trial court's ruling that the fee was permissible under the Consumer Protection Code, finding it to be "an element of the negotiated cash price of the vehicle" which was charged to cash and credit buyers alike. Fanning, 322 S.C. at 402, 472 S.E.2d at 244. The Court noted that "to accept the [plaintiff's] contention that the only permissible inclusions to 'cash price' are those specifically enumerated in § 37-2-110 would prevent car dealers, and other merchants, from including expenses, overhead, profit, etc., [in the] total cash price. This would produce an illogical result, not intended by the [Consumer Protection Code]." Id. at 403 n.6, 472 S.E.2d at 245 n.6. "[C]ash and credit customers alike are free to negotiate" the procurement fee. Id. at 404, 472 S.E.2d at 245.

The Fanning Court further held that the procurement fee was not unconscionable, i.e., there was no evidence the transaction entailed "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 403, 472 S.E.2d at 245. The Court explicitly did not express an opinion on the plaintiff's claims of fraud, misrepresentation, and unfair trade practices related to the procurement fee, which remained pending in circuit court. Id. at 404 n.8, 472 S.E.2d at 245 n.8.

² Fritz Waidner, chief executive officer of the defendant dealership in Fanning, stated in an affidavit filed March 24, 1992, in circuit court that "[t]his fee was used to receive the tags from the Highway Department, and for title, odometer, and registration administration, as well as travel to and from Columbia to Newberry."

Following the Supreme Court's opinion in Fanning, both parties moved for summary judgment in circuit court on the issue of whether the disclosure and imposition of the procurement fee constituted an unfair or deceptive act in violation of §§ 56-15-30(a) and 56-15-40(1) of the Dealers Act. (Plaintiff's Motion for Summary Judgment filed March 20, 1998, in Fanning v. Fritz's Pontiac-Cadillac-Buick et al., C.A. No. 90-CP-40-3555; Defendant Fritz's Cross Motion for Summary Judgment filed April 20, 1998.) The Honorable L. Henry McKellar by order filed October 14, 1998, granted the defendant dealership's motion for summary judgment. Judge McKellar ruled that the procurement fee, a component of the cash price of the vehicle, was properly and fully disclosed to the plaintiffs. The circuit court further ruled that the defendant dealer's conduct surrounding the charging of the procurement fee was not arbitrary, in bad faith or unconscionable, and thus there was no violation of the Dealers Act. (Order of Judge McKellar at pp. 3-8).

The plaintiffs in Fanning also sued the bank which financed their vehicle purchase, alleging the dealership and bank had conspired to conceal the procurement fee by not including it on disclosure forms submitted to the bank. After the Supreme Court issued its opinion, the plaintiffs settled the class action lawsuit against the defendant bank for \$25,000, with about one-third paid to the plaintiffs' attorneys and each class member expected to receive about \$52. (Order of the Honorable J. Derham Cole filed March 18, 1998.)

Six years after Fanning, the Supreme Court issued its opinion in Ferguson v. Charleston Lincoln Mercury, 349 S.C. 558, 564 S.E.2d 94 (2002).³ In that case, the plaintiff in a purported Rule 23 class action lawsuit alleged the dealer committed an unfair or deceptive act by charging a \$189.50 "closing fee" in a used car sale. The Honorable R. Markley Dennis, Jr., ruled that the

³ The Court of Appeals' opinion is reported at Ferguson v. Charleston Lincoln-Mercury, Inc. 344 S.C. 502, 544 S.E.2d 285 (Ct. App. 2001).

charging of the closing fee was not unfair or deceptive act, and the defendant dealer had a reasonable basis for charging the fee. Judge Dennis granted summary judgment to the dealer on that ground. (Orders of Judge Dennis filed January 11 and 15, 1999, in Ferguson v. Charleston Lincoln Mercury, Inc., C.A. No. 97-CP-10-2020).

Neither appellate court addressed the legitimacy of the closing fee. Id. at 561-62, 564 S.E.2d at 95-96. Instead, the appellate courts focused on whether the cause of action survived the death of the plaintiff, such that the plaintiff's wife should be able to step in as the named plaintiff and continue the litigation. The Supreme Court, affirming the Court of Appeals, held that a cause of action grounded in fraud and deceit does not survive the plaintiff's death under the general survivability statute; therefore the case was properly dismissed. The Supreme Court further held that the issue of whether the lower court erred in denying the plaintiff's motion for class certification was moot. Ferguson, 349 S.C. at 562-65, 564 S.E.2d at 96-98.

In short, none of the plaintiffs in the three reported cases who challenged the legitimacy of the closing fee prevailed either on appeal or after appeal. Circuit court judges in Fanning and Ferguson – in cases brought before the Legislature explicitly authorized the charging of closing fees in 2000 – rejected arguments that the imposition of a closing fee is an unlawful, unfair or deceptive act. Furthermore, the Supreme Court in Fanning indicated that a closing fee is a lawful component of the negotiated cash price of a vehicle even in the absence of a statute authorizing the fee.

**THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE FEDERAL
ARBITRATION ACT, AND IF THE FEDERAL ARBITRATION ACT IS NOT
APPLICABLE, THEN
THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH
CAROLINA UNIFORM ARBITRATION ACT**

CONTRACT OF SALE

Jim Hudson Cars, L.L.C. dba Jim Hudson Hyundai

310 Greystone Boulevard, Columbia, SC 29210 - Phone: (803) 799-1234 Fax: (803) 771-4321

This Contract of Sale is made and entered into between Jim Hudson Hyundai, hereinafter called Dealer, and Customer, as identified below. Any retail installment contract or other document executed by Customer in connection herewith is simply a means of satisfying Customer's obligations under this Contract of Sale, hereinafter called Contract.

CUSTOMER INFORMATION

Name: OLGA
(FIRST) CRISTY (MI)
Address: _____
City _____ County _____
State _____ Zip _____
Hm. Phone _____
Bus Phone _____
SSN _____
D.O.B. _____ D.L.# _____
Employer: _____
Address: _____
AND / OR
Name: _____
(FIRST) _____ (MI)

(LAST)
Address: _____
City _____ County _____
State _____ Zip _____
Hm. Phone _____
Bus Phone _____
SSN _____
D.O.B. _____ D.L.# _____
Employer: _____
Address: _____

TRADE-IN INFORMATION

Year 2004 Make TOYOTA
License Tag # TURDRA
Model TURDRA Body Style _____
VIN _____
Color WHITE Mileage 113056
Lienholder _____
Address _____
City _____ State _____
Acct. No. _____ Balance N/A
Quoted By _____ As Of _____
Other Liens _____

Date 03/28/2008 Salesperson ANDREW A. HOLLADAY

VEHICLE INFORMATION

☒ New ☐ Demo ☐ Used
Stock Number 1384
Year 2008 Make HYUNDAI
Model TUCSON Body Style _____
VIN _____
Color GREY Mileage 98

INSURANCE INFORMATION

Insurance Co.: FARM BUREAU
Policy No.: _____
Dates: From: _____ To: _____
Agency: _____
Address: _____
Phone No.: _____ Contact Person _____

SUMMARY

Price of Vehicle	24385.00
First Place Finish:	N/A
Exterior Protection w/TEFLON® Forms a clear shell to seal out damaging oxidation, pollutants, detergents, and ultraviolet rays. Carries a 5-year warranty.	
Interior Protection w/BANOYL® Fabric has been thoroughly protected. Safeguards your car's interior from oil and water based stains.	
Other	N/A
Total Price	24385.00
Trade Allowance	6000.00
Subtotal Amount Due	18385.00
Processing Fee	289.00
Subject to S.C. Sales Tax	18674.00
S.C. Sales Tax	300.00
Luxury Tax/Other	N/A
License Fees () New () Transfer	39.00
Balance Owed on Trade	N/A
Total Amount Due	19013.00
Cash Down Payment	(N/A)
Rebate/Other	(1000.00)
Balance Due	18013.00

(A Processing Fee is charged to offset the overhead costs incidental to the retail sale of motor vehicles.)

**THE INFORMATION YOU SEE ON THE WINDOW FORM (BUYERS GUIDE) FOR THIS
VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM
OVERRIDES ANY CONTRARY PROVISIONS IN THIS CONTRACT.**

This Contract is not binding upon Dealer unless accepted in writing by an officer or a sales manager or assistant sales manager of Dealer and until a retail installment contract for any deferred balance has been approved and funded by a third-party financing source acceptable to Dealer.

SEE ADDITIONAL TERMS AND CONDITIONS ON OPPOSITE PAGE

CUSTOMER HAS READ BOTH SIDES OF THIS CONTRACT AND ACKNOWLEDGES RECEIPT OF A COMPLETELY FILLED-IN COPY OF THIS CONTRACT.

Date 03/28/2008

Olga J. Cristy
Customer Signature(s)

Salesman Signature

Jim Hudson Hyundai
Accepted By _____
Title _____

ALL VEHICLES SOLD "AS IS" UNLESS INDICATED OTHERWISE IN WRITING.

ADDITIONAL TERMS AND CONDITIONS

1. **SPOT DELIVERY.** If a Balance Due is shown on the front of this Contract, Dealer hereby conditionally delivers the vehicle to Customer subject to approval and funding of a retail installment contract by a third-party financing source acceptable to Dealer. Customer will cooperate with Dealer in arranging financing by providing any requested documents and information and by executing substitute retail installment contracts if requested by Dealer. Notwithstanding any other form, document, representation, or understanding whatsoever, title shall remain in Dealer until funded. Until such funding, Customer may use and enjoy the vehicle for up to 50 miles per day. Customer may not allow another person to use the vehicle nor may Customer use the vehicle to transport persons or property for hire; in any race, test, or competitive event; after drinking any alcohol or using drugs; for any illegal purpose; to carry loads beyond its capacity; for off road use; to carry hazardous or explosive substances; if further use might cause damage; to push or tow any vehicle; in violation of any of the terms or conditions of this Contract; or in a reckless, abusive, or negligent manner. Regardless of fault, Customer is responsible for any loss or damage to the vehicle up to the full price together with loss of use, appraisal fees, and recovery costs. If Customer is not approved and funded by a third-party financing source within 30 days or such additional time as Dealer may in its sole discretion permit, fails to keep and honor any of the terms of this Contract, has obtained the vehicle by fraud or misrepresentation, or if Dealer otherwise reasonably deems itself insecure, Customer shall return the vehicle upon Dealer's demand. In any of the above events, Dealer may peacefully repossess the vehicle, without demand, and Customer hereby consents to **WAIVER OF HEARING PRIOR TO IMMEDIATE POSSESSION.**

2. **DISCLAIMER OF WARRANTIES. DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.** Any description of the vehicle contained in this Contract is for the sole purpose of identifying the vehicle and does not constitute a warranty that the vehicle shall conform to the description. Any limited warranty, specifications, or representations of the manufacturer are those of the manufacturer only and are not adopted by Dealer.

3. **USED VEHICLE DISCLOSURE. USED VEHICLES MAY HAVE A HISTORY OF PRIOR DAMAGE, MECHANICAL FAILURE OR BOTH. DEALER MAKES NO REPRESENTATIONS WHATSOEVER AS TO THE PRESENCE OR ABSENCE OF SUCH HISTORY. DO NOT RELY UPON OPINIONS OR STATEMENTS OF DEALER'S EMPLOYEES AS TO SUCH HISTORY AS SUCH EMPLOYEES GENERALLY HAVE NO WAY OF KNOWING OF SUCH MATTERS.** Customer may obtain information about prior ownership from the DMV's of the appropriate states. Customer also has the right to have the vehicle inspected at Customer's expense by any mechanic or garage of Customer's choice prior to consummation of this transaction. Customer agrees to hold Dealer harmless from any claims arising out of the prior history of the vehicle.

4. **WE OWE.** Dealer agrees to provide the following labor and/or material at no extra charge within (30) thirty days and no other unless specifically itemized here: _____

Customer must make an appointment with Dealer's service department before labor or materials can be provided.

5. **PERSONAL USE.** Customer certifies that the vehicle is intended for his or her personal use unless the Customer is shown in this Contract as a business entity.

6. **INSURANCE.** Customer represents that he or she has full coverage insurance in effect and hereby releases and agrees to hold Dealer harmless from any liability in connection therewith.

7. **REBATES & INCENTIVES.** Customer hereby assigns all right, title, and interest in and to any manufacturer's rebates and incentives to Dealer other than as follows: _____

8. **WARRANTY OF TITLE ON TRADE-IN.** For and in consideration of the trade allowance listed under SUMMARY, Customer does hereby bargain, sell, and deliver the trade-in vehicle to Dealer. Customer warrants title to be in Customer's name and that same is free and clear of all liens, and encumbrances other than those listed under TRADE-IN INFORMATION, that Customer has the right to sell said vehicle, and that Customer will warrant and defend said title against all other claims.

9. **REPRESENTATIONS AS TO TRADE-IN.** The only existing material defects known to Customer concerning the trade-in vehicle are: _____

Customer warrants and certifies that the trade-in vehicle does not have a salvage title history.

10. **BALANCE OWED ON TRADE.** If the balance owed on the trade-in vehicle is less than that indicated under TRADE-IN INFORMATION, Dealer will refund the difference. If the balance owed is greater than indicated, Customer will pay Dealer the difference upon demand.

11. **ARBITRATION.** Any and all disputes, claims or controversies between Dealer or any officers, directors, agents, employees, or assignees of Dealer, and Customer arising from or relating to this Contract or the relationships which result from this Contract, or the validity of this arbitration clause or the entire Contract, shall be resolved by binding arbitration by one arbitrator, selected by Dealer with Customer's consent. **The parties expressly waive all rights to trial by jury on such claims.** Provided, however, that nothing in this Contract shall require Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Customer in connection with the purchase or lease of any vehicle, and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration. The filing fees for arbitration shall be paid by the party initiating arbitration. The arbitrator may allocate the other arbitration fees as he/she deems appropriate. Any party may take one deposition of an opposing party. The parties agree to exchange all exhibits to be used in arbitration 7 days before arbitration. The arbitrator shall determine the controversy in accordance with the terms of this Contract between the parties and shall not consider any parole evidence which purports to alter, modify, vary, add to, or contradict such Contract. The arbitrator shall give effect to all applicable statutes of limitation. Any arbitration under this agreement shall take place in Richland County, South Carolina and Customer agrees that the courts of Richland County, South Carolina shall have exclusive jurisdiction over enforcement of this Contract and any award made by the arbitrator pursuant to this Contract. **In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party. Unless otherwise agreed in writing, no claims against Dealer shall be consolidated with other claims in the nature of a class action.**

12. **PREJUDGMENT INTEREST.** Any sums due Dealer from Customer not otherwise subject to a retail installment Contract shall bear interest at 18.0% per annum.

13. **ATTORNEY'S FEES.** In the event either Dealer or Customer shall enforce the terms of this Contract, the parties agree that the arbitrator or court will be given the authority to award costs and expenses, including reasonable attorney's fees to one of the parties.

14. **CHOICE OF LAW.** This Contract shall be governed by and construed under the laws of the state of South Carolina.

15. **MODIFICATION.** Any modification of this Contract or additional obligation assumed by either party shall be binding only if evidenced in writing and signed by Customer and an authorized representative of Dealer.

16. **SEVERABILITY.** In the event any provision of this Contract shall be held invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby.

17. **ENTIRE AGREEMENT.** This Contract constitutes the entire agreement between Dealer and Customer and any prior understanding or representation of any kind preceding this Contract shall not be binding on either party except to the extent incorporated in this Contract.

Richland County, SC Only 05/10/04

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Melissa Anne York and Olga Joanne Cristy,

Plaintiffs,

vs.

Dodgeland of Columbia, Inc. and Jim Hudson
Automotive Group, and Jim Hudson
Superstore, Inc., a/k/a Jim Hudson Hyundai,

Defendants.

)
) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) C/A No.: 2010-CP-40-4244
)

) **MOTION TO RECONSIDER, ALTER**
) **AND AMEND JUDGMENT**
) **PURSUANT TO RULE 59(e) AND**
) **FOR RULE 60(b) RELIEF FROM**
) **JUDGMENT**

TO: STEVEN W. HAMM, ATTORNEYS FOR DEFENDANTS DODGELAND OF COLUMBIA, INC. AND JIM HUDSON AUTOMOTIVE GROUP, AND JIM HUDSON SUPERSTORE, INC., A/K/A JIM HUDSON HYUNDAI, AND J. MICHAEL MONTGOMERY, ATTORNEY FOR DEFENDANT DODGELAND OF COLUMBIA, INC AND THEIR CLIENTS:

YOU WILL PLEASE TAKE NOTICE that pursuant to S.C.R.C.P. 59(e) and Rule 60(b), Plaintiffs Melissa Anne York and Olga Joanne Cristy, by and through undersigned counsel, will move at a date and time to be set by the Court, but no sooner than ten (10) days after service of this notice and motion, for a Rule 59 Order altering, amending, or reconsidering the June 10, 2011, Order¹ dismissing this action and compelling arbitration, or in the alternative, a Rule 60 motion granting relief from the Order dismissing this action and compelling arbitration, on the ground that the Order is contrary to controlling South Carolina precedent. The grounds for this motion are more fully set forth below:

¹ Pursuant to SCRCPP, Rule 59(e), the undersigned counsel received written notice of the entry of the June 10, 2011, Order on June 15, 2011. Pursuant to SCRCPP, Rule 6(a), this motion is timely, in that the last day of the ten (10) day time period was a Saturday, in which event the deadline ran through Monday, June 27, 2011.

- 1) The Court's conclusion that an arbitrator, and not this Court, must rule on the validity of the arbitration agreements disregards binding South Carolina precedent. "Although the clause specifically stated that arbitration applied to issues involving 'the validity and scope of this contract,' [Plaintiff] challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. Under the UAA, the question of this clause's validity was for the court to decide." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23-24, 644 S.E.2d 663, 668 (2007).
- 2) The Court's ruling that discovery is not needed and that there is "no question" an arbitration agreement existed is an improper weighing of evidence and totally disregards the holding of our Supreme Court in *Simpson*, which held: "courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). This Court took none of those factors into account, because the parties were not permitted discovery and there was no evidence before the Court.
- 3) There was no meeting of the minds with Plaintiff York with regard to arbitration because there are no terms at all. "In order to have a valid and enforceable [arbitration] contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). Neither the forum,

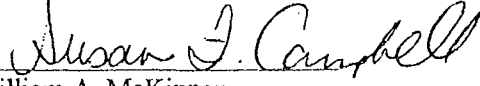
nor the rules, nor the procedure for selecting an arbitrator were included in the contract.

- 4) There was no meeting of the minds with Plaintiff Cristy because Defendant Jim Hudson had her sign two different agreements with different material terms. For example, the two-page retail installment contract contains language specifically permitting an award of punitive damages, while the contract of sale arbitration language precludes punitive damage awards.
- 5) Both of Plaintiff Cristy's purported arbitration agreements are unenforceable because both allow repossession and other such remedies by the dealer, while arbitration is pending – creating an unbalanced situation where one side can seize the property of the other without redress. The *Simpson* court held that this type of one-sided arbitration provision is “unconscionable and unenforceable.” “To this effect, we can easily envision a scenario in which a dealer's claim and delivery action is initiated in court, completed, and the vehicle sold prior to an arbitrator's determination of the consumer's rights in the same vehicle . . . the provision is unconscionable and unenforceable.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 32, 644 S.E.2d 663, 672 (2007)
- 6) Plaintiff Cristy may not be compelled to arbitrate because her “contract” includes a ban on punitive damages, a provision specifically held to be “an unconscionable waiver of statutory rights, and therefore, unenforceable” by the Court in *Simpson*, which also found severing the provision was not appropriate and held the whole arbitration clause unenforceable.

- 7) By the plain language of the “agreement” with Plaintiff York, quoted in the Court’s order, there is no agreement to arbitrate. The “contract” merely states the agreement is “subject to” the Federal Arbitration Act. There is no language evidencing an intention to arbitrate. Nowhere does Plaintiff York agree to give up her right to a civil action.
- 8) Such other grounds as are supported by the common and statutory law and the record in this case.

The Plaintiffs request oral argument on this motion.

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Columbia, South Carolina

June 27, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	C/A No.: 2010-CP-40-4244
Melissa Anne York and Olga Joanne Cristy,	)	
	)	
Plaintiffs,	)	
vs.	)	CERTIFICATE OF SERVICE
	)	FILED IN W. HARRIS
Dodgeland of Columbia, Inc. and Jim Hudson	)	2011 JUN 27 PM 3:33
Automotive Group, and Jim Hudson	)	C.C.P. & G.S.
Superstore, Inc., a/k/a Jim Hudson Hyundai,	)	
	)	
Defendants.	)	
_____	)	

I, the undersigned, of the law firm of McGowan Hood & Felder, LLC, do certify that I have served the below named with a copy of the pleadings specified below on June 27, 2011,

Via US Mail, to the following addresses:

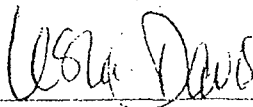
Pleadings:

- 1) Plaintiffs' Motion to Reconsider, Alter and Amend Judgment.

Served:

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Richardson Plowden
1900 Barnwell Street
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Sowell Gray Stepp & Laffitte, LLC
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Columbia, SC 29211



Leslie M. Davis, Paralegal

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Melissa Anne York and Olga)
Joanne Cristy,)

Civil Action No. 2010-CP-40-4244

Plaintiffs,)

vs.)

Dodgeland of Columbia, Inc., Jim)
Hudson Automotive Group, and)
Jim Hudson Superstore, Inc. a/k/a)
Jim Hudson Hyundai,)

Defendants.)

DEFENDANT'S, DODGELAND OF
COLUMBIA, INC.'S, MEMORANDUM
IN RESPONSE TO PLAINTIFFS'
MOTION TO RECONSIDER, ALTER
AND AMEND JUDGMENT
PURSUANT TO RULE 59(e) AND 60(b)

JUN-7 PM 4:47
RECEIVED

The defendants, Dodgeland of Columbia, Inc. ("Dodgeland"), and Jim Hudson Automotive Group, and Jim Hudson Superstore, Inc. a/k/a Jim Hudson Hyundai ("Jim Hudson") (collectively, "Defendants"), by and through their undersigned attorneys, respectfully submit this Memorandum in Response to Plaintiffs' Motion to Reconsider, Alter and Amend Judgment pursuant to Rule 59(e) and Rule 60(b). As set forth more fully below, the court should uphold its prior Order granting Defendants' Motion to Dismiss and Motion to Compel Arbitration.

The Defendants would initially note that the Court's Order dated and filed June 10, 2011, adequately addresses the arguments raised in Plaintiffs' Motion to Reconsider. The parties had two opportunities to present their positions at hearings before the Court, and these issues were thoroughly briefed before the Court issued its June 10th Order. Despite the sufficient discussion of the relevant issues in the Court's

Order, the Defendants would briefly respond to the first two grounds raised in Plaintiffs' Motion to Reconsider.

At the outset, there is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). At the same time, general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause governed by the Federal Arbitration Act (FAA). Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (citing Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 685 (1996)). Importantly, an agreement providing for arbitration does not necessarily determine underlying issues, such as available remedies and procedure, but only the forum in which the matter is to be adjudicated. See Munoz, 343 S.C. at 542, 542 S.E.2d at 365 (citing Ex parte McNaughton, 728 So.2d 592, 598 (Ala. 1998)).

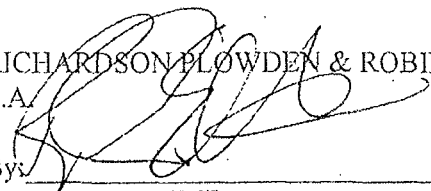
The Plaintiffs' argument that this Court has disregarded Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007), is misplaced. Under Simpson, the Court is required to address the "question whether an arbitration agreement even existed in the first place." Id. at 23-24, 668. This Court's ruling that arbitration is required because an arbitration agreement existed between the parties is soundly based on a review of the contract documents and the relevant language of the arbitration clauses in the Dodgeland and Jim Hudson closing documents. As the South Carolina Supreme Court stated in Munoz, a valid arbitration clause simply mandates the forum in which the matter will proceed. The Plaintiffs' contention that discovery must be permitted in every dispute over the validity of an arbitration clause is not supported by Simpson or any other precedent binding on this Court. The holding in Simpson merely requires the Court to

determine if an arbitration agreement initially exists, and this Court has fulfilled its role in this matter after reviewing the language of the contracts and determining that arbitration is proper.

Based on the foregoing, the Defendants respectfully submit that Plaintiffs' Motion to Reconsider be denied, and additional oral argument in this case is not necessary given the prior hearings before the Court issued its Order.

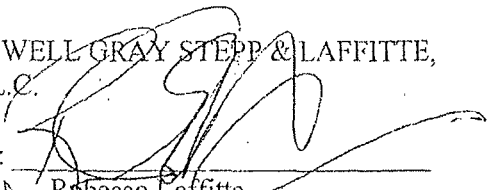
Respectfully submitted, this 7 day of July, 2011.

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P.A.

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ATTORNEYS FOR DEFENDANT JIM HUDSON
AUTOMOTIVE GROUP, AND JIM HUDSON
SUPERSTORE, A/K/A JIM HUDSON WHOSE TRUE
AND CORRECT NAME IS JIM HUDSON CARS,
LLC D/B/A JIM HUDSON HYUNDAI

ATTORNEYS FOR DEFENDANT,
DODGELAND OF COLUMBIA, INC.

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for Defendant, Dodgeland of Columbia, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Defendant's, Dodgeland of Columbia, Inc.'s, Memorandum
Response to Plaintiffs' Motion to Reconsider, Alter and Amend
Judgment pursuant to Rule 59(e) and Rule 60(b)

Counsel Served:

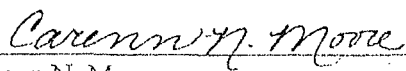
VIA E-MAIL AND U.S. MAIL

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Carenn N. Moore
Legal Assistant

Columbia, South Carolina

July 7, 2011.

1 STATE OF SOUTH CAROLINA)
2) IN THE COURT OF COMMON PLEAS
3 COUNTY OF RICHLAND)
4 Melissa Anne York and)
5 Olga Joanne Cristy,) TRANSCRIPT OF RECORD
6) 2010-CP-40-4244
7 Plaintiffs,)
8 -vs-)
9)
10 Dodgeland of Columbia,)
11 Inc. and Jim Hudson)
12 Automotive Group, et al.,)
13)
14 Defendants.) March 10, 2011
15) Columbia, South Carolina
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

B E F O R E:

HONORABLE G. THOMAS COOPER, JR., JUDGE

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

PATRICK E. KNIE, ESQ.
WILLIAM A. MCKINNON, ESQ.
Attorneys for the Plaintiffs

STEVEN W. HAMM, ESQ.
JO ANNE WESSINGER HILL, ESQ.
MICHAEL MONTGOMERY, ESQ.
Attorneys for the Defendants

Margaret A. Woods
Circuit Court Reporter

COPY

1 THE COURT: Alright. Who represents whom? Let's go from
2 my left.

3 MR. MONTGOMERY: Michael Montgomery representing
4 Dodgeland.

5 THE COURT: Dodgeland?

6 MS. HILL: Jo Anne Wessinger Hill, Your Honor, with
7 Richardson Plowden on behalf of Jim Hudson and Dodgeland.

8 MR. HAMM: Steve Hamm, Your Honor, on behalf of ---

9 THE COURT: Wait just ---

10 MR. HAMM: --- Dodgeland.

11 THE COURT: --- a minute. Ms. Wessinger, you represent
12 who?

13 MS. HILL: With Steve Hamm Dodge -- Jim Hudson Hyundai
14 and Dodgeland of Columbia.

15 THE COURT: And Dodgeland?

16 MS. HILL: Yes, sir.

17 MR. HAMM: Steve Hamm, Your Honor, Richardson Plowden,
18 represent Dodgeland of Columbia and Hudson Hyundai.

19 MR. MCKINNON: Bill McKinnon, Your Honor, of McGowan,
20 Hood on behalf of plaintiffs.

21 MR. KNIE: Patrick Knie, K-N-I-E is the last name, on
22 behalf of the plaintiffs.

23 THE COURT: Alright, thank you. Alright, your motion,
24 Mr. Hamm, Ms. Wessinger. Is this your motion?

25 MR. HAMM: Yes, Your Honor, it is. May I proceed?

1 THE COURT: Yes, sir. Give me a little factual
2 background, please.

3 MR. HAMM: Yes, sir, I'd be happy to. Plaintiffs filed
4 lawsuits against Dodgeland of Columbia and essentially Jim
5 Hudson Hyundai in June the 25th of last summer, they then
6 amended their complaint on August the 5th of of last summer
7 2010. The core gravamen of the complaint was that our client
8 dealers violated the closing fee statute contained in Title 37
9 which as you're aware is the Consumer Protection Code. In
10 addition to claiming violations of the closing fee statute,
11 they then made claims under the Dealers Act assuming a
12 violation under the closing fee statute, they then make claims
13 that such violations constitute a violation of the Dealers Act
14 and they then sought a a declaratory judgment. Your Honor,
15 our clients we have not answered at this point, we have filed
16 motions. I think the core motion before the Court this
17 afternoon, Your Honor, is a motion to compel arbitration and
18 with your permission I would like to address that as well as
19 allow Mr. Montgomery to briefly address a related statute of
20 limitations issue.

21 THE COURT: Go right ahead.

22 MR. HAMM: Alright. In the matter of the plaintiffs in
23 this particular circumstances, both of the named plaintiffs
24 have filed a joint lawsuit against both Dodgeland of Columbia
25 and Jim Hudson Hyundai. One of our motions is a motion to

1 strike and that one plaintiff had no business transaction with
2 one of the defendants and the other didn't have a business
3 transaction with the remaining defendant. We've moved to
4 strike on that basis but I'd like to address the motion to
5 compel arbitration. Both of the plaintiffs signed agreements
6 in which they under the terms of the State and Federal
7 Arbitration Act agreed that they would arbitrate any disputes.
8 As this court is aware, there have been a number of cases in
9 South Carolina regarding the enforceability of arbitration
10 cases: the *Munoz vs. Green Tree* case, the other Green Tree
11 case that ultimately went to the United States Supreme Court
12 that Mr. Dibble and myself participated in. In this
13 circumstance the parties agreed that they would have any
14 dispute, complaint of any nature involving any aspect of the
15 transaction to be resolved under the terms of arbitration.
16 The Federal Arbitration Act applies by rulings of the South
17 Carolina Supreme Court to automobile transactions which are
18 deemed to be matters involving transactions in commerce which
19 meet the constitutional requirements under the Federal
20 Arbitration Act. In the pleadings filed in this case, Your
21 Honor, it is notable that the plaintiffs apparently did not
22 examine the core purchase transaction documents and in fact in
23 the pleadings they assert a violation of the closing fee
24 statute generically. We'd note that the defendants in this
25 case did exactly what the state agency charged with construing

1 the statute told them to do. They are on a yearly basis
2 required to file the rate they want to charge as a closing
3 fee, get it stamped and approved by the Department of Consumer
4 Affairs, not charge that rate until they get that stamped
5 filing back, post that notice that they charge a closing fee
6 in a conspicuous place in the location, they must also include
7 the -- a separate line item of that fee on their contract
8 documents and include the closing fee in the advertised price.
9 In all those occasions our client has done exactly what
10 Consumer Affairs has directed them to do. We are now finding
11 ourselves in a situation where the plaintiffs are essentially
12 challenging the legal interpretation of the agency charged
13 with construing the closing fee statute and alleging we -- our
14 dealers have violated the law because we have done exactly
15 what Consumer Affairs told us to do and have charged rates
16 less than the rates approved by the Department of Consumer
17 Affairs. We find ourself in a very difficult circumstance
18 consistent with the *Lexington Law Firm* decision issued in
19 2009, consistent with the *King vs. the American General*
20 decision issued in August of 2009 withdrawn and replaced on
21 December the 21st of 2009. The South Carolina Supreme Court
22 has repeatedly held that interpretations of law by the agency
23 charged with its construction both of those cases deal with
24 the South Carolina Department of Consumer Affairs. In the
25 first case they reversed the administrative law court because

1 it did not properly apply the interpretation of the Department
2 of Consumer Affairs and the second case, in the *American*
3 *General* case they reversed the lower trial court and all of
4 those rulings 'cuz those rulings were not consistent with the
5 interpretation of the Department of Consumer Affairs. Supreme
6 Court ruled that it would apply those rulings unless there was
7 some compelling reason for which the Court should not uphold
8 that interpretation. We stand here today, Your Honor, a --
9 ten and a half years after the statute was passed, the
10 Department of Consumer Affairs has not deviated in its
11 interpretation of the statute. They have taken the position
12 that the statute is a disclosure statute. The plaintiffs have
13 apparently taken the position that somehow or another it is a
14 cost limitation statute, a position expressly rejected by the
15 lawyer in a deposition for the Department of Consumer Affairs
16 about that statutory construction and so we think this court
17 can bring this matter to a head by simply having the parties
18 go to the arbitration and which they agreed to in their
19 purchase documents. These documents are as we said in our
20 memorandum to the Court not remarkable, they are the kinds of
21 documents that have been upheld by the, by the Court and
22 indeed we think this court faces a jurisdictional challenge in
23 light of the existence of the arbitration agreements. So all
24 of the remarks ---

25 THE COURT: Answer this: Where are they?

1 MR. HAMM: Pardon me?
2 THE COURT: Where are the arbitration agreements?
3 MR. HAMM: Right here (indicating).
4 THE COURT: Are they in your ---
5 MR. HAMM: Yes.
6 THE COURT: --- motion?
7 MR. HAMM: Yes, but I wanna -- I mean, your -- I'm
8 handing you my marked one so I do so with -- I've highlighted,
9 for the record, Your Honor, I've highlighted the reference to
10 the arbitration. Would you like me to remove this?
11 THE COURT: No, I -- let the other side know what you're
12 doing. Let them know what you're doing.
13 MR. HAMM: I apologize. I'm sorry.
14 THE COURT: Okay. No -- any any objection?
15 MR. MCKINNON: Your Honor, I would a little bit like to
16 see what Mr. Hamm has highlighted if you don't mind.
17 THE COURT: Show show him the file. And I assume they're
18 in file somewhere.
19 MR. HAMM: Yes, sir, they were delivered to your office
20 and filed yesterday along with our ---
21 THE COURT: You mean those documents?
22 MR. HAMM: Yes.
23 THE COURT: They're not in your motion to dismiss?
24 MR. HAMM: No.
25 MR. MCKINNON: They were not not attached to the

1 motion ---

2 MR. HAMM: They were not attached to the motion to
3 dismiss.

4 MR. MCKINNON: They were Exhibits A and C to his
5 memorandum, Your Honor.

6 MR. HAMM: That's correct.

7 THE COURT: I have the memorandum. Let me make sure I've
8 got it. Well, ---

9 (Whereupon, a discussion was held off the record.)

10 MR. HAMM: I have another copy if that's ---

11 THE COURT: Wait a minute. Let me look.

12 MR. HAMM: Um, ---

13 THE COURT: They are attached.

14 MR. HAMM: Yes.

15 THE COURT: I have 'em. Thank you.

16 MR. HAMM: Yes.

17 THE COURT: Unhighlighted.

18 MR. HAMM: Yes, sir, I ---

19 THE COURT: Wait a minute.

20 MR. HAMM: --- I I don't highlight documents I file with
21 the Court, Your Honor.

22 THE COURT: Maybe you should.

23 MR. HAMM: I never thought that was a particularly good
24 idea, Your Honor.

25 THE COURT: Well let me back up. I have the Jim Hudson

1 Hyundai arbitration, I mean, that looks like a sales contract.

2 MR. HAMM: Yes, Your Honor, that is correct.

3 THE COURT: But that -- that's the only one that's
4 attached.

5 MR. MCKINNON: Your Honor, they were, they were separate
6 exhibits, Your Honor, and there was an Exhibit A and Exhibit C
7 there was something else ---

8 MR. HAMM: That's correct.

9 MR. MCKINNON: --- in between, Your Honor.

10 THE COURT: Now I've got -- mine says -- the copy I've
11 got and I guess it was emailed it's -- just has Exhibit C,
12 don't have Exhibit A or B.

13 MR. HAMM: Well I'm gonna hand you --

14 MR. MONTGOMERY: Well here, I have a clean copy.

15 (Whereupon, a discussion was held off the record.)

16 MR. HAMM: I have a clean -- they were both sent over.
17 I'm not -- I I don't know ---

18 MR. MONTGOMERY: How 'bout the answer ---

19 THE COURT: Were they on a email?

20 MR. HAMM: They were emailed, they were hand delivered,
21 they were all ---

22 THE COURT: Hand delivered?

23 MR. HAMM: Yes. Yes.

24 THE COURT: Alright, well let's don't quibble about
25 that.

1 MR. HAMM: Alright. Let me know when I might proceed,
2 Your Honor.

3 THE COURT: Let me just look at these.
4 (Pause.)

5 THE COURT: Alright, go ahead. You may proceed.

6 MR. HAMM: Thank you, Your Honor. Let me, let me first
7 with with the permission of the Court may I address Dodgeland
8 since my co-counsel Mr. Montgomery who's with the Sowell Gray
9 firm is also participating in this matter, Your Honor. The
10 buyer's order in the Dodgeland case expressly states that a
11 consideration for the seller agreeing to purchase the above --
12 agreeing to sell to the purchaser the above described vehicle
13 they agree that any and all basically disputes will be handled
14 in arbitration subject to the Federal Arbitration Act, it's
15 signed and dated 9/4/06, it's not on a separate piece of
16 paper, it's not on anything else, it is on the core document
17 signed at the time of purchase. In the Jim Hudson matter,
18 Your Honor, it also has disclosure language, the contract is
19 subject to arbitration, and there also is a directive at the
20 bottom directing the individual to the next page and they're
21 acknowledging they -- that they have read it, it acknowledges
22 that that they got a copy of it and has read both sides and on
23 that second page, Your Honor, in Paragraph No. 11 it in fact
24 references the c -- that the parties agreed to arbitration.
25 Our South Carolina Supreme Court has for many years adopted

1 the principle that it will in fact honor arbitration
2 agreements and that under the terms and especially since both
3 of these transactions are subject with the Federal Arbitration
4 Act, are subject to interstate commerce and the commerce
5 clause that the Federal Arbitration Act would apply and that
6 the parties would be afforded the rights under under that
7 particular act. The United States Supreme Court has issued
8 rulings in recent times regarding arbitration subject to the
9 Federal Arbitration Act, the South Carolina Supreme Court has
10 issued rulings. None of those rulings preclude these subject
11 transactions from going into arbitration pursuant to the
12 agreement of the parties.

13 I would call the Court's attention to one of the core
14 issues that the arbitrator is going to have to address, Your
15 Honor, as I've annou -- as I have pointed out plaintiffs
16 complain that our clients somehow, but not specifically,
17 somehow violated the State's closing fee statute
18 notwithstanding they did everything a statute told them to do
19 and they got their charges specifically approved by the
20 Department of Consumer Affairs. What is notable, Your Honor,
21 is that the Consumer Protection Code does not authorize class
22 actions and the arbitrator is going to have to address the
23 application of the law to determine number one, if there's a
24 violation of the closing fee statute contained in Title 37 and
25 whether that statute provides the remedies or whether the

1 plaintiffs in fact could then try to jump to another statute
2 that authorizes class actions. I'm not asking this court to
3 address that issue, I'm just saying that is a core issue that
4 will have to be decided in arbitration or the Federal
5 Arbitration Act. As you're aware, arbitrators are directed to
6 comply with applicable rulings of state and federal law and we
7 will address those issues at that point. So it's premature
8 for my client, either Dodgeland or or Hudson Hyundai, to do
9 anything other than file a motion to compel arbitration. It
10 is not -- we are faced with a difficult circumstance, let's
11 put on the table.

12 (Whereupon, a cell phone rang.)

13 MR. HAMM: I have this thing on vibrate, Your Honor. I
14 don't understand why this is -- I still have it on vibrate, be
15 that as it may. Excuse me.

16 THE COURT: Go ahead.

17 MR. HAMM: So we're now -- we were faced with they filed
18 this lawsuit, we got all the documents that shows we've done
19 everything the State has told us to do, we have an arbitration
20 clause, I don't want to file an answer and do -- somehow
21 subject or in any way waive a claim that I -- my clients have
22 for arbitration so we filed a motion. The documents that we
23 rely on are in fact the core document that they allege my
24 clients charged an illegal charge and factly with the clients
25 this is the evidence that our clients charged they did and

1 they don't even reference this document in their pleadings so
2 I'm then confronted with, Well what do ya do? They claim that
3 we violated this, they claimed that we charged it, well how
4 would they have known that? they woulda known it on the very
5 document that outlines that the transaction is subject to
6 arbitration and signed by the plaintiffs. I am mindful of a
7 comment that you made in the previous case and I'm mindful of
8 one of the remarks in the memorandum of the other side, well
9 you have to look at the four corners of the pleadings. Well
10 under the four corners of the pleadings in terms of filing a
11 motion they simply ignore the existence of an arbitration
12 clause so out of an abundance of caution, Your Honor, I filed
13 a motion to compel arbitration, I filed a motion to strike to
14 get these two separate dealers, they don't have a common
15 transaction, they shouldn't be involved in the same lawsuit as
16 well as a series of other motions. I believe this court will
17 have discharged its duty and re -- and allow the arbitration
18 process to go forward if it dismisses, compels arbitration and
19 all of the claims and issues raised by the defendants can be
20 heard and consider and decided by the arbitrator. I now want
21 to turn to Mr. Montgomery because ---

22 THE COURT: Let me ask you one question ---

23 MR. HAMM: Yes, sir.

24 THE COURT: --- before you do that. With regard to these
25 documents exhibits, the -- you refer to a closing fee, is

1 that -- where is that on the document? Is that the processing
2 fee?

3 MR. HAMM: That's the same thing as a processing fee as
4 the interpretation issued by the Department of Consumer
5 Affairs dealerships call them administrative fees, processing
6 fees, closing fees. The Department of Consumer Affairs has
7 opined that they are one and the same and in fact they are
8 encompassed by the statute that authorizes charging closing
9 fees if the dealer files and gets the rate approved and
10 follows the other steps enumerated in the statute but that is
11 the same, one and the same, Your Honor.

12 THE COURT: Thank you.

13 MR. HAMM: In Dodgeland, I'm going to turn now to
14 Mr. Montgomery, we think there's also a fundamental problem in
15 that the statute of limitations has passed with regard to the
16 plaintiff against Dodgeland and with the Court's permission
17 I'd like to turn to Michael Montgomery to address that
18 issue.

19 THE COURT: Is that, uh, that's part of your motion?

20 MR. HAMM: Yes.

21 THE COURT: Alright. Mr. Montgomery.

22 MR. MONTGOMERY: Thank you, Your Honor. May it please
23 the Court. Just as Mr. Hamm said the issue of the Dealers Act
24 remedy and how that would work within the closing fee statute
25 would be a core issue for the arbitrator, we we would agree

1 that the determination of statute of limitations if
2 arbitration is not compelled that would be another issue
3 before the arbitrator. And briefly the York plaintiff who had
4 the transaction with Dodgeland that occurred on September the
5 4th 2006 the basic statute of limitations issue is whether the
6 four-year statute of limitations that is provided in the
7 Dealers Act can be used to get around the three-year statute
8 of limitations that's applicable to the closing fee statute
9 and being that the transaction occurred in September of 2006
10 it falls within four years but not three years.

11 With respect to the closing fee statute 37-2-307, based
12 on *Tilley vs. Pacesetter* there's a three-year statute of
13 limitations applicable to the closing fee statute. In *Tilley*
14 you had a Consumer Protection Code provision dealing with
15 notice of attorney and insurance agent preference to
16 consumers, um, although no provision of the Consumer
17 Protection Code mandated the statute in that case, the court
18 applied a three-year statute limitations on action -- under
19 Statute No. 15-3-530. Basically, Your Honor, in this case
20 this -- all the allegations as to the conduct of the
21 defendants is based on the charging of closing fees, it's how
22 they were advertised, how the -- how they were presented and
23 the amount, it -- it's all dependent upon the closing fee
24 statute. In other words, there's no scenario by which they
25 can meet the requirements of the closing fee but not meet the

1 sub -- substantive provisions of the Dealers Act. You can't
2 get -- you can't bypass closing fee statute to get to the
3 Dealers Act and here since the closing fee statute has a
4 three-year statute of limitations, it is the more specific
5 statute, it controls the specific conduct in this case and
6 under the the general provisions of our statutory
7 interpretation defenses which I've cited there are a lot of
8 recent cases where you've got a specific more recent statute
9 that will control determination of the issue. In this case
10 you have a specific statute as to the conduct which is closing
11 fee statute which has a three-year statute of limitations
12 which was not met in this case and therefore if arbitration is
13 not compelled, we believe that Dodgeland should be dismissed
14 because the three-year statute of limitations is being
15 circumvented by claiming remedies under the Dealers Act when
16 the substantive provisions and the closing fee statute is what
17 control and I think the *Capco* case which is one I I kinda
18 talked about in our brief,
19 it -- it's had a claim that was brought within the one-year
20 statute of limitations for a contribution action but it did
21 not meet the requirements of the statute it proposed which was
22 really the underlying, what the underlying action was based on
23 which was an action on improvement to real property. That
24 case is similar to this one in that the specific conduct
25 underlying this case is the closing fee statute and that

1 statute of limitations applies which is three years and was
2 not met in this case.

3 THE COURT: Alright. Mr. Hamm.

4 MR. HAMM: Your Honor, for for purposes of our motion, I
5 think I -- be appropriate for us to at this point rest on our
6 motion to compel. We have filed the the other motions. To
7 the extent the Court were to grant our motion to compel, they
8 would all be addressed before the arbitrator and for purposes
9 of this record I want to again indicate that our addressing
10 any other argument is not a waiver of that and I think it
11 might be best use of the Court's time for me to sit down, hear
12 from the plaintiffs and then I can respond probably more
13 timely and in a briefer time period than attempting to thread
14 into other issues that I don't think the Court need address if
15 it is inclined to compel arbitration. Thank you, Your
16 Honor.

17 THE COURT: Alright. Mr. McKinnon.

18 MR. MCKINNON: Your Honor, Bill McKinnon on behalf of the
19 plaintiffs. I I will try to be brief, Your Honor. As to the
20 arbitration issue, the first issue, Your Honor, as Your Honor
21 mentioned in the previous matter, Your Honor, earlier in this
22 afternoon, this is a motion to dismiss. They are restricted
23 to the four corners of the complaint. We make no mention of
24 the arbitration agreement, ordered arbitration agreement, it's
25 not included in the complaint, it's clearly premature for them

1 to make this motion, Your Honor, ---

2 THE COURT: Why do you say that?

3 MR. MCKINNON: --- um, ---

4 THE COURT: I mean, if this court doesn't have
5 jurisdiction, I mean, if it's subject to arbitration and and
6 on a motion to dismiss based on the fact that there's an
7 arbitration agreement and I don't think, I don't think that
8 needs to be pled the four corners. In other words, certainly
9 I've gotta look at the four corners on the motion to dismiss,
10 this is a motion to compel arbitration.

11 MR. MCKINNON: That's correct, Your Honor, but to the
12 extent these are arbitration agreements, they're plainly
13 unconscionable because ---

14 THE COURT: Right.

15 MR. MCKINNON: --- the Supreme Court's decision in
16 *Simpson* and *Herron*. Your Honor, I'll be happy -- I'm
17 gonna -- I'll be return to those cases in a second but the
18 factors you analyze in those cases are all fact questions. I
19 mean, for example, from *Herron* and *Simpson*, Whether the
20 plaintiff had sufficient business judgment, whether the
21 plaintiff had a lawyer present, whether the plaintiff was
22 aware of the implications of the contract, was there an
23 element of surprise in the presentation of the arbitration
24 agreement? All of these things are fact questions, Your
25 Honor, that have to be done after depositions, that's why it's

1 inappropriate now but, Your Honor, I'll be ha -- um, -- before
2 before ---

3 THE COURT: What's the name of that case?

4 MR. MCKINNON: Your Honor, and it's just so, Your Honor,
5 these are the two cases that are directly on point, they are
6 car dealer arbitration cases neither of which were cited by
7 the defendants because they're plainly against them.

8 THE COURT: Have you got a memo?

9 MR. MCKINNON: I would be happy, I have both cases, Your
10 Honor, I'll be happy to pass them up, they're in the memo,
11 they're the *Simpson* case and the *Herron* case.

12 THE COURT: Well I don't ---

13 MR. MCKINNON: Would you like copies ---

14 THE COURT: I'm not sure I have a memo from you.

15 MR. MCKINNON: Your Honor, our memo was hand delivered on
16 Monday to the clerk of court. I have, I have an additional
17 copy here if Your Honor would want it.

18 THE COURT: Just hold on a minute. I do have it. Okay.

19 MR. MCKINNON: Your Honor, I have ---

20 THE COURT: I was lookin' at Susan Campbell.

21 MR. MCKINNON: I -- I'm here on her behalf, Your Honor,
22 I'm -- we're all co-counsel together.

23 THE COURT: Thank you.

24 MR. MCKINNON: Would you like, ---

25 THE COURT: You may proceed.

1 MR. MCKINNON: --- would you like copies of the cases,
2 Your Honor?

3 THE COURT: If they're cited in here, you don't need
4 to.

5 MR. MCKINNON: Okay. Thank you, Your Honor. As I said,
6 Your Honor, ---

7 THE COURT: Wait. Which two are cited and where?

8 MR. MCKINNON: These are the *Simpson vs. MSA* case, Your
9 Honor, from 2007 a Supreme Court case and then the *Herron vs.*
10 *Century BMW* case, Your Honor, that's a 2010 case ---

11 THE COURT: Okay.

12 MR. MCKINNON: --- that both of these are car dealer
13 arbitration agreement cases, they are directly on point.

14 THE COURT: Alright. Thank you.

15 MR. MCKINNON: As I said, Your Honor, the
16 unconscionabilities of defense, the unconscionability factors
17 are all fact specific, all which is gonna require discovery
18 depositions in this case but before we even get to that, Your
19 Honor, Mr. Hamm with all due respect kind of enlightened over
20 what the actual language was. The *Cristy, Cristy*, the the
21 *Cristy* argument, the document the one with small print, Your
22 Honor, does claim to be a waiver in an arbitration agreement.
23 The *Dodgeland* agreement, Your Honor, the one that looks like
24 this (indicating) for plaintiff York, it doesn't even say the
25 claimants have to go to arbitration. It's the most poorly

1 drafted agreement I've ever seen if you look at the lingo and
2 all is says is, Disputes are subject to the Federal
3 Arbitration Act. I mean, we're all subject to federal law,
4 your Honor. It does not say the right, the right to take a
5 claimant to court is waived, it does not say claimants must be
6 taken to arbitration. All it says is disputes are subject to
7 the Federal Arbitration Act. Everything's subject to federal
8 law, Your Honor, it is not an arbitration agreement. It's
9 poorly drafted, it's not effective.

10 THE COURT: How 'bout the language at the top of the
11 page?

12 MR. MCKINNON: Language at the top of the page. Well
13 that's merely limited to the buyer's order, Your Honor.

14 THE COURT: Sir?

15 MR. MCKINNON: That's limited to the buyer's order, Your
16 Honor.

17 THE COURT: Well what is this?

18 MR. MCKINNON: What -- this is a dispute about the
19 closing fees not the order, Your Honor.

20 THE COURT: This buyer's order is subject to
21 arbitration.

22 MR. MCKINNON: Okay. Well Your Honor let me, I mean, the
23 the dispositive cases are *Simpson* and *Herron*, Your Honor.

24 THE COURT: Alright. I'll read 'em.

25 MR. MCKINNON: Okay. May may I just briefly, Your .

1 Honor, ---

2 THE COURT: Floor's yours.

3 MR. MCKINNON: Thank you, Your Honor. They clearl -- the
4 the *Simpson* case struck down on an arbitration agreement as
5 unconscionable on the basis that it was an adhesion contract
6 and it wasn't -- the plaintiff didn't have any meaningful
7 choice. It is -- the the the language it's, the language the
8 *Simpson* court criticizes is straight out of this arbitration
9 agreement: the barring of treble damages, barring of punitive
10 damages, that's straight outta the *Simpson* case, it's it's
11 unconscionable in South Carolina, it cannot be enforced but
12 and the more recent case, the *Herron* case, which was the
13 parallel litigation in Aiken, Your Honor, but was serving
14 basically the same claims as in this case. In the *Herron*
15 case, the Supreme Court did say the arbitration agreement was
16 enforceable but the two grounds they distinguish on *Simpson*
17 were number one, the arbitration agreement was a separate
18 document, was a totally separate document and therefore the
19 buyer have the right to sign or not sign and still get their
20 car and secondly, it was clearly labeled arbitration agreement
21 in big print in bold face at the top of the agreement.
22 Neither of those factors is present in this case. These
23 agreements are clearly unconscionable and not enforceable
24 under *Herron*, Your Honor.

25 And, Your Honor, we had to respond to a memorandum and a

1 motion that had nineteen different arguments in it and
2 Mr. Hamm seems to be saying he doesn't wanna argue the rest of
3 the points, I'll be happy to sit down as well, Your Honor.
4 All of these points were argued by Mr. Hamm in the *Aiken* case,
5 they've been rejected by another court already, I'll be happy
6 to argue what Your Honor wants to hear but I don't wanna waste
7 the Court's time.

8 THE COURT: Well, I can't tell you what to argue. I've
9 I've heard about this case for about twelve minutes ---

10 MR. MCKINNON: Okay.

11 THE COURT: --- so if you want me to understand your
12 position, I'll be glad to hear from ya. Mr. Hamm said he,
13 maybe he needs to get back up and argue the balance of his
14 motion to dismiss. He says he's relying on the arbitration
15 agreement clause/clause at this point and if the Court's
16 favorable to his position then he need not go any further but
17 I don't know whether he needs to go further or not. I think
18 you might just get it all out on the table.

19 MR. MCKINNON: Okay. Steve, you wanna take back over?

20 MR. HAMM: That's fine.

21 MR. MCKINNON: Okay. Oh I'm sorry, Your Honor, my
22 counsel does remind me the statute of limitations issue, you
23 know, that raised by Mr. Hamm's co-counsel. Very briefly on
24 that, Your Honor, this applies to only one of the plaintiffs.
25 The statute of limitations under the Dealer Act is four years,

1 it is well settled law that the plaintiff is the master of a
2 complaint, Your Honor. We can choose -- there are lots of
3 different statutes of limitations in South Carolina we can
4 choose to assert what causes of action we want to, Your Honor.
5 The cau -- the statute of limitations under the Dealers Act
6 which is Title 56 Chapter 15 is plainly four years, we get to
7 choose what claims we assert. If they wanna argue we don't,
8 we don't state a claim under that statute, they can argue
9 that, they can't argue we're really staking claim under
10 another statute. We get to choose what claim we assert, Your
11 Honor. We assert the Dealer Act claim, it's four years, the
12 argument is frivolous. Thank you, Your Honor.

13 MR. HAMM: Well, Your Honor, let me just go ahead and
14 start there and then I'll work through the remainder of the
15 motion. The Dealers Act in itself does not create specific
16 violations. The Dealers Act allows a party to make a claim
17 that there has been a violation of the law. Here the
18 fundamental and core claim is contained in another statute
19 that has a three-year statute of limitations and under
20 counsel's argument a party can simply ignore their obligation
21 and in fact attempt to extend the jurisdiction of a court
22 beyond the statute of limitation at issue which in this case
23 is three years so it's our position that for them to get to
24 the Dealers Act they first have to show a violation of the
25 core statute. Again, I think that issue will be addressed in

1 the course of arbitration but no they don't get the the
2 authority, Your Honor, to attempt to somehow move this courts
3 jurisdiction beyond the statutory limitations imposed by both
4 the General Assembly and rulings of the South Carolina Supreme
5 Court. Mr. Montgomery noted that the Supreme Court is already
6 under the South Carolina Consumer Protection Code has ruled
7 that a three-year statute a limitations applies where the
8 statute itself does not enumerate a specific statute of
9 limitations for the violation in question, exactly the
10 circumstances now before this court. So this court will just
11 simply have to determine whether you need to rea -- reach that
12 issue if in fact the Court determines that they will -- he
13 --you will compel arbitration.

14 Alright, now we have, let me go through my my motion,
15 Your Honor, for purposes of hopefully assisting the Court and
16 clarifying on the record. We first start off saying that;
17 number one, these two plaintiffs did not have a transaction
18 with both defendants so we make a motion to strike saying a
19 person that did not buy a car from Cooper Motors can't sue
20 Cooper Motors if they bought a car from Smith Motors and we
21 simply said it's inappropriate joinder under Rule 20, there is
22 not a common transaction or series of transactions, these are
23 two separate businesses, no connection, common ownership, any
24 connection whatsoever, they are in fact competitors. We then
25 move to strike in the pleadings themselves references to a

1 decision by another circuit court judge, that ruling is not
2 final, it is contested now and for the pleadings to expect me,
3 Your Honor, on behalf of my clients to answer to a ruling in
4 another case that has nothing to do with this case is improper
5 and we simply ask the Court to direct the plaintiffs to
6 correct their pleadings and remove references to what another
7 circuit court might have done from the pleadings.

8 THE COURT: Alright, where are -- what are you talking
9 about here? What are you talking about?

10 MR. HAMM: I'm talking about in their pleadings they
11 make, they make a quote from an order issued by Judge Early
12 that says that the closing fee cannot contain a profit. Now
13 we don't know whether the closing fees in this case contain a
14 profit or not but in Paragraph 13 of their complaint, Your
15 Honor, it says the chief administrative judge, the Honorable
16 Doyet Early, in a similar case recently held a declaratory
17 judgment order interpreting a South Carolina closing fee
18 statute and the judge then goes forward and makes certain
19 rulings that are at odds with the official interpretation of
20 the Department of Consumer Affairs. Now whether this court or
21 an arbitrator might arrive at the same conclusion is an
22 entirely separate question but to include that in official
23 pleadings that are attempting to put my client on notice of
24 what they've done wrong a reference to another circuit court
25 judge we have a ruling and, Your Honor, you can't reverse

1 another circuit court judge in the course of a case, the
2 decision of another circuit court judge is not, in any circuit
3 or even in your own, is not binding or controlling upon a
4 decision before a particular bench such as this one and we
5 think that Paragraph 13 should be stricken in its entirety.

6 THE COURT: You talking about the Ohio court?

7 MR. HAMM: I am talking about Paragraph 13 of
8 complaint ---

9 THE COURT: Well I'm looking at Paragraph 13.

10 MR. MCKINNON: There's an amended complaint, Your Honor,
11 it may be the ---

12 MR. HAMM: I may be sending you to the wrong ---

13 THE COURT: Well I'm lookin' at the complaint; now you
14 tell me there's an amended complaint.

15 MR. HAMM: I have it -- yeah, I am correct, Your Honor.
16 I am looking at the amended complaint Paragraph ---

17 THE COURT: Alright, let me look at it.

18 MR. HAMM: Yes, sir.

19 THE COURT: Let me -- no. It's in this file. I don't, I
20 don't need any more paper.

21 MR. HAMM: I thought you said you didn't have it. I'm
22 sorry.

23 THE COURT: I said I was looking at the complaint. Now
24 let me find the amended complaint. If it's here I'll find it.

25 (Pause.)

1 THE COURT: When was the amended complaint filed?

2 MR. HAMM: August the 5th 2010 two o'clock in the
3 afternoon, Your Honor.

4 THE COURT: Well it appears it's not in the file.

5 MR. HAMM: I have a copy, Your Honor.

6 THE COURT: That be fine.

7 (Whereupon, a discussion was held off the record.)

8 THE COURT: The motions and the memorandum.

9 (Whereupon, a discussion was held off the record.)

10 MR. HAMM: For the record I've handed Your Honor a copy
11 of the amended complaint filed on August the 5th 2010. There
12 are no marks or notations on the document.

13 THE COURT: Thank you.

14 MR. HAMM: I direct the Court's attention with great
15 respect to Paragraph 13.

16 THE COURT: I see it.

17 MR. HAMM: That is the paragraph that we object to, it is
18 a ruling in a case that is heavily contested.

19 THE COURT: It's under appeal?

20 MR. HAMM: It is under lots of things yes, Your Honor.

21 THE COURT: Well ---

22 MR. HAMM: It is, it is not a final determination and
23 it'll ult -- that that issue will ultimately go to the Supreme
24 Court. Again, whether this court might reach, if the Court
25 were to deem this matter not subject to arbitration, whether

1 this court would reach a same or similar result I don't know,
2 I will certainly argue strenuously that it should not but it
3 is inappropriate to be putting a circuit court judge ruling in
4 pleadings and then asking me to respond and answer to it
5 either in a judicial form or an arbitration form and my
6 motion ---

7 THE COURT: How 'bout Number 12?

8 MR. HAMM: --- is to strike. Yes, same.

9 THE COURT: Same thing?

10 MR. HAMM: Yes. And we think citations to any other
11 cases they are distinguishable. Again, we believe we should
12 address all those in our arbitration.

13 THE COURT: How 'bout that, Mr. McKinnon? What ---

14 MR. MCKINNON: Your Honor, I -- the standard for striking
15 is immaterial or scandalous. I don't believe they fall under
16 that category but I'm certainly willing to concede it if it --
17 if this is a big deal to Mr. Hamm, we will strike those
18 paragraphs from the complaint.

19 THE COURT: Motion's granted.

20 MR. HAMM: Alright. Next, Your Honor, going back to my
21 motion, my motion, Your Honor, ---

22 THE COURT: Okay.

23 MR. HAMM: --- I'm now on Page 3 of my motion, Paragraph
24 Number 3 and I have gone through and made a motion to make
25 more definite the allegations listed starting on the bottom of

1 Page 3, all of Page 4 and the top and through almost the
2 bottom of Page 5 in which in the course of the pleadings they
3 make all of these allegations. Notable -- notably absent is
4 an allegation that we did not do exactly what the Department
5 of Consumer Affairs told us to do. There's no allegation we
6 didn't timely make a filing, there is no allegation that the
7 rates that we're charging have been specifically approved by
8 the Department of Consumer Affairs so we're left at a loss as
9 how will we respond when the state regulatory agency has said
10 we are in compliance with their requirements and we have
11 simply in Paragraph 3 on Page 3 of my motion, Page 4, Page 5
12 to the extent that this matter proceeds in any fashion, we are
13 gonna make the same request; if we go to arbitration, we'll
14 make the same request; if this court were to determine we are
15 not going to arbitration, we're going to be expected to
16 answer, they ought to deal exactly what we did that was in
17 fact is illegal. They don't tell us. They make reference
18 we're engaging in illegal conduct without telling us what it
19 is.

20 THE COURT: And where do they allege that?

21 MR. HAMM: Well, I I would refer you to just first line
22 on Page 3 of my motion, Explain or specify, and I'm now
23 talking about their complaint Paragraph 3 and how or why
24 certain administrative fees are illegal.

25 THE COURT: Alright. I see.

1 MR. HAMM: And then if you'll just follow them down
2 during the alphabet we we literally cite to in every one of
3 those allegations where that allegation is contained in the
4 plaintiffs' complaint, Your Honor.

5 THE COURT: Thank you.

6 MR. HAMM: I think they're self-explanatory and I I don't
7 see the need to spend more time going over them individually.
8 Unless the Court desires further explanation, I'll move on to
9 the next point in my motion.

10 THE COURT: Go ahead.

11 MR. HAMM: Alright. And in Paragraph 4, Page 6 of my
12 motion we're making a motion to strike a a named plaintiff
13 suing a dealership from whom they did not purchase a vehicle.
14 We are also make a claim that ---

15 THE COURT: Which, just out of curiosity which motion are
16 you referring to?

17 MR. HAMM: I am now referring to my 12(b)(7) motion shown
18 on Page 6.

19 THE COURT: You misunderstood my question.

20 MR. HAMM: I'm sorry.

21 THE COURT: You filed two motions: one for Dodgeland and
22 one for Jim Hudson.

23 MR. HAMM: And it's the same for both, Your Honor, the
24 circumstances are identical.

25 THE COURT: I understand but is the pagination and the

1 numbering of the paragraphs the same?

2 MR. HAMM: Yes.

3 THE COURT: Thank you.

4 MR. HAMM: Should I proceed, Your Honor?

5 THE COURT: Sure.

6 MR. HAMM: We've then -- in Paragraph 4 we're simply
7 alleging to the extent that there was a co-purchaser and there
8 were in these transactions, they're not even named as parties
9 and then in Paragraph No. 5 we move to dismiss again for
10 example Ol -- Olga Joanne Cristy from bringin' a claim against
11 Dodgeland since she did not purchase a vehicle against
12 Dodgeland. And and the same is true with Ms. York, she who
13 purchased a vehicle from Dodgeland did not purchase a vehicle
14 from Jim Hudson Hyundai. Paragraph 6 of the ---

15 THE COURT: Why can't the plaintiff just clear that up?

16 MR. HAMM: Because they don't seem to have a desire to do
17 that, that's why we're here.

18 THE COURT: How 'bout that, Mr. McKinnon? I mean, how do
19 ya ---

20 MR. MCKINNON: Your Honor, ---

21 THE COURT: --- how do, how do you file a claim against
22 somebody who didn't buy a car from 'em? Why why don't ya just
23 file two complaints?

24 MR. MCKINNON: Well, Your Honor, because the Dealers Act
25 allows that things be brought in a represented capacity when

1 matters are in public interest and our -- and all, both of
2 these dealers are charge -- are violating the law in the same,
3 way, Your Honor. This is a -- these plaintiffs are not just
4 filing their own claims, they're filing in represented
5 capacity on behalf of all the people who purchased from both
6 dealers. We also allege a conspiracy, Your Honor, between the
7 dealerships, joint conduct. Your Honor, and I'll just -- I --
8 the the statute in question, Your Honor, is 56-15-110 to the
9 Dealer Act, When such action is one of common or general
10 interest to many persons or when the parties are numerous, one
11 or more may sue for the benefit of the whole including
12 injunctive relief. That's the, that's the statute we're
13 filing under, Your Honor.

14 THE COURT: Alright.

15 MR. HAMM: Your Honor, that statute does not address
16 constitutional standing. To have constitutional standing, you
17 must have had an injury created by the conduct or the other
18 action of a party and it is impossible for Ms. York to allege
19 an injury on the part of Jim Hudson who she never even did
20 business with and we think that, just as the Court suggested
21 from the bench, they oughta file separate lawsuits, let them
22 stand on their own, we'll deal with the Dealers Act. The
23 section that he makes reference to that 110 Subsection(2) at
24 least would suggest that to the extent a party brings an
25 action they can only bring an action against individuals who

1 also had transactions with exactly that same dealership and so
2 what we're arguing is consistent with basic due process and
3 constitutional protections. What in the world is Dodgeland
4 going to say to Ms. Cristy regarding her complaint when we
5 never had a transaction with her in the first place? We are
6 in an impossible circumstance.

7 THE COURT: Well I don't know if the light's red or the
8 light's green. He says ---

9 MR. HAMM: Well guess what, ---

10 THE COURT: --- he says ---

11 MR. HAMM: --- you're the judge and you're gonna decide.

12 THE COURT: He says it says one thing, you say it says
13 sumtin' else.

14 MR. HAMM: Well ---

15 THE COURT: Go ahead.

16 MR. HAMM: --- that's why you get to be the judge.

17 THE COURT: I wish I had your big bucks.

18 MR. HAMM: I wish you did too, Your Honor. May I
19 proceed?

20 THE COURT: Please proceed.

21 (Laughter.)

22 MR. HAMM: Your Honor, I would like to now address
23 Paragraph No. 6 of the motion which deals with the Federal
24 Arbitration Act and it deals -- Paragraph 6 is dealing
25 specifically with Jim Hudson Hyundai and the arbitration

1 agreement and basically saying that the Court should compel
2 arbitration, that the Court in fact since there is an
3 arbitration agreement susceptible to construction to make an
4 enforcement at least to get it before the arbitrator, let the
5 parties address, dress the matter that the Paragraph 6
6 addresses the Hyundai Arbitration. Yeah, I also have in here
7 it's in a diff -- it's another paragraph but there is a mirror
8 motion contained in the document that is identical that deals
9 with Dodgeland and it says we have an arbitration agreement,
10 they've signed it, we need to proceed. The Supreme Court of
11 South Carolina has in fact ruled on dealer arbitration
12 agreements and with all deference to counsel I don't think
13 that they were accurately described. I think the most, the
14 most recent discussion of arbitration agreements involving
15 automobile dealers is in fact the *Herron* case that counsel
16 makes reference to but in fact in that case Judge Early was
17 reversed because he struck down that arbitration clause and
18 the South Carolina Supreme Court said, No, it was not
19 unconscionable and did not contain the issues contained in the
20 ruling of *Simpson* and now the Supreme Court having done so has
21 rejected the core claim the plaintiffs make here that if some
22 sort of arbitration clause is inherently unconscionable and a
23 reading of that case, I think a fair reading of that case,
24 Your Honor, would reflect that the Supreme Court in fact
25 rejected that decision. I will tell you that what made that

1 case interesting is that in the course of the case counsel
2 that argued that case, it was not me, told the Court that it
3 was not goin -- did not want to proceed in class arbitration.
4 As is this court is I think aware, I argued successfully the
5 first class action and arbitration in South Carolina in the
6 *Green Tree* case that ultimately went to the United States
7 Supreme Court. I'm aware the Supreme Court has said cases can
8 be susceptible to class treatment. Again, wasn't -- the
9 Supreme Court did not address in the *Herron* case is whether or
10 not the Consumer Protection Code which does not authorize
11 class actions whether a claim under the Dealers Act is subject
12 to class treatment under any regard whether it be in
13 arbitration or otherwise, that was an issue that was not
14 addressed and may well be addressed in the course of this case
15 depending on Your Honor's ruling.

16 Next, Your Honor, I address my Paragraph No. 7, Page 7 of
17 my motion, motion to dismiss because it stails -- fails to
18 state a cause of action. Again, we have done everything the
19 State has told us to do. If they're so unhappy with the
20 Department of Consumer Affairs, they need to go sue the
21 Department of Consumer Affairs. Notably they have not asked
22 the Department of Consumer Affairs to reverse or reconsider an
23 interpretation that's 9-years-old, they're simply alleging
24 that even though our clients complied with the department's
25 interpretation, our clients have somehow violated the law.

1 The problem with that, Your Honor, is a unique statute in the
2 Consumer Protection Code which under 37 -- I'll find the
3 section, Your Honor. There is a provision under the South
4 Carolina Consumer Protection Code that protects parties that
5 act in compliance with rulings of the Department of Consumer
6 Affairs and protects them from any penalty. I direct the
7 Court's attention to 37-6-5063, No penalty will be imposed if
8 an act by a party is in conformity with the department's
9 opinion, interpretation or statement and we have both an
10 interpretation and an official statement in a, in a
11 deposition involving one of the the enforcement lawyer on this
12 issue stating that the department does not recognize a
13 limitation on the amount of a closing fee, it is subject to
14 disclosure, that is consistent with the 1996 *Fanning* case,
15 Your Honor, where no closing fee statute existed. The
16 plaintiffs in that case attempted to claim that that charge
17 was an improper additional charge. Under the terms of the,
18 under the terms of the Consumer Protection Code, the South
19 Carolina Supreme Court rejected that position and said since
20 it was a fee charged in cash and credit transactions it was
21 simply a charge that ultimately went to the total negotiated
22 price of the parties and so absent of the statute the South
23 Carolina Supreme Court said that a dealer if it properly
24 disclosed it was not; number one, violating the consumer
25 protection code and; number two, it was not violating the

1 Dealers Act which is Title 56 in this particular case, Your
2 Honor.

3 Next, Your Honor, in terms of the motion before the
4 Court, Paragraph 8 on Page 8 of my motion, Your Honor, I make
5 a motion under under the Rules 18, 20 and 21 that basically
6 that we have improper joinder. Again, there is no common
7 transaction or occurrence or series of occurrences. These
8 transactions took place over a year apart, they took place at
9 two different dealerships, two different kinds of vehicles,
10 there is no basis for Dodgeland and Jim Hudson Hyundai to be
11 joined in this case and we make a motion to dismiss on that
12 basis.

13 On Paragraph 9, Page 8 of my memorandum and part of my
14 motion, Your Honor, I make a motion under 12(b)(6) and 12(f)
15 that to strike or dismiss because what they're essentially
16 asking for is an advisory opinion given the fact that the
17 state agency charged with the construction of the statute has
18 already construed the statute consistent with the conduct of
19 the defendants.

20 Paragraph No. 10 I again make a motion under 12(b)(6) and
21 12(f). There is a claim, Your Honor, that my clients have
22 somehow or another obtained unjust enrichment. In in this
23 particular case, Your Honor, both of the defendants charge
24 significantly less than the rate of proof by the Department of
25 Consumer Affairs. I think we could potentially be subject to

1 a claim for unjust enrichment if we've charged a rate higher
2 than that approved by the department but the defendants in
3 this case have not engaged in such conduct and in fact the
4 department has approved fees substantially greater than
5 charged to either of the plaintiffs in this matter.

6 THE COURT: It's just coincidental that both dealership
7 charge the same fee?

8 MR. HAMM: Ya know I noticed the same thing, Your Honor,
9 but yes it is. I I will say as an officer of the Court fees
10 in South Carolina range fairly dramatically, Your Honor. They
11 range from a hundred and twenty-five or a hundred and fifty to
12 maybe six, seven hundred dollars depending on on the type of
13 vehicle that's being sold. What I -- what you might typically
14 see is higher-end vehicles whose purchase price is
15 substantially above quote the average, sometimes you'll see a
16 higher fee in that circumstance as well, Your Honor. But
17 again, ultimately it is a matter of negotiation of the parties
18 what the ultimate price of the vehicle might be and in this
19 case the clients have done exactly what the statute says that
20 they must do and therefore we're we're at a loss to how to
21 defend when we've done what Consumer Affairs -- charge less
22 what Consumer Affairs is authorized to do, we're now being
23 told we've charged illegal charges and that establish no basis
24 for the claim.

25 Well the the the next one is Paragraph 11, Your Honor, on

1 Page 9, 12(b)(6) strike -- move to dismiss on the grounds they
2 failed to allege the plaintiffs have met the requirements in
3 Rule 23. Now that -- let me be, let me be candid with the
4 Court so you have a sense of the the battle that is raging out
5 in the jurisdictions right now. In the the *Herron* case that
6 was originally brought by four or five named plaintiffs
7 against, I don't know, fifteen or twenty dealerships, there
8 was then an amended complaint and ultimately the defendants in
9 that case including clients that Ms. Hill and I represent made
10 the same argument that we made to you that a party could bring
11 an action against a dealership from which they did not
12 purchase a vehicle. Plaintiffs in that case attempted to
13 amend their pleadings, we argued that was precluded by law and
14 rulings of the Supreme Court, Judge Early agreed and then
15 defendant dealers were dismissed and then they went out
16 hunting for individual named plaintiffs that actually
17 purchased a vehicle from the dealership in question but what
18 is, what is in there is a a, currently I can't, I cannot
19 candidly call it a ruling but I I -- I'm trying to be very
20 candid with the Court, Judge Early has indicated that the
21 Dealers Act since it allows for some sort of group act that
22 the plaintiffs do not have to comply with Rule 23 which as you
23 know typically what you have is you have a punitive class that
24 only obtains legal rights under the law once the class has
25 been certified, the named plaintiffs have met the Rule 23

1 requirements. Judge Early has ruled and and has despite
2 numerous requests for reconsideration has stood by the
3 position that the plaintiffs don't have to comply with
4 Rule 23. My allegation in Paragraph 11 raises that issue. I
5 believe very clearly that if you look at the legislation that
6 was passed, as you might recall, Your Honor, our -- the rules
7 of civil procedure were amended in 1985 when the Court was
8 attempting to codify and make more harmonious a rule and as
9 you know prior to Rule 23 there were representative actions
10 being filed. In 1985 the General Assembly and they they they
11 enacted Rule 23 and specifically in Act 100 of Section 3 of
12 1985 Act 100 says that in the event of a conflict between any
13 provision of South Carolina Rules of Civil Procedure and any
14 other statutory procedures as to practice and procedure, the
15 rules, the provisions of the rules shall control. In the
16 *Herron* case the issue is whether or not the right to bring a
17 representative action is procedural which is probably what a
18 majority of the jurisdictions have ruled but in fairness there
19 are other jurisdictions that have said that the ability to
20 bring an action in a group or representative capacity rises
21 beyond procedural and may in fact be substantive and at the
22 moment Judge Early has ruled that the rights under the Dealers
23 Act are substantive and therefore the plaintiffs need not be
24 constrained by the application of Rule 23, that'll be an issue
25 that will ultimately be addressed by the Supreme Court but it

1 is a matter of some significant controversy and out of an
2 abundance of protection I also gave to you an Exhibit B, you
3 you were looking for Exhibit A and Exhibit C, they've been
4 handed to you, I also gave you Exhibit B. The reason I
5 included that exhibit, Your Honor, and I'm gonna stop until
6 I'm confirmed you have it. At the top, Your Honor, it says
7 Exhibit B in bo ---

8 THE COURT: I have it. I have it.

9 MR. HAMM: Alright. The reason ---

10 THE COURT: Alright, go ahead.

11 MR. HAMM: Thank you. The reason I included that
12 exhibit, Your Honor, is because all of the cases dealing with
13 closing fees and the Dealers Act every one of them Rule 23
14 applied, every one of them. There is no precedent other than
15 the precedent that Rule 23 applies to representative actions
16 under the Dealers Act. Again, I am not here to be making
17 remarks about any other judge, he may be right, he may be
18 wrong, I'm not -- from an advocate's position I have certainly
19 challenged that and I have simply in Exhibit No. B identified
20 the cases issued by the courts in which each one of 'em in
21 fact involved Rule 23 and this claim that Rule 23 does not
22 apply is it in fairness at at least is not consi -- consistent
23 with any precedent reported by the South Carolina Supreme
24 Court and I'll move on, Your Honor.

25 I'm now, Your Honor, on Page 9, Paragraph No. 12. These

1 pleadings appear to suggest or claim that to the extent that
2 either Dodgeland or Jim Hudson or their ownership entities
3 operate other dealerships that somehow or another this
4 litigation ensnares them even though they don't have the
5 plaintiffs, a named plaintiff bringing an action against them.
6 If you'll recall, Your Honor, we have argued that the
7 plaintiffs have improperly named the Jim Hudson business
8 entity that actually runs Jim Hudson Hyundai. We have noticed
9 that in our motion but in Paragraph No. 12 they have this
10 broad language that they're bringing an action against all
11 motor vehicle dealers as defined under Title 56, and that's
12 the definition of dealers that they refer to and I quote from
13 it on Page 9, Paragraph 12 of my memorandum, owned or
14 controlled by the named defendants. Well, number one, we
15 allege there's been no service of process against any of these
16 other entities, there is no named plaintiffs and we moved to
17 dismiss any claim that these broadly generally word pleadings
18 somehow ensnare business entities to which no business
19 transaction is in fact in question.

20 And 13 is simply the same; I made a motion to dismiss.
21 In 13 I just made the similar motion but styled it as a motion
22 to strike out of an abundance of caution. I seek the same
23 result, Your Honor. There is an interesting question on
24 Paragraph 14, Page 10, Your Honor. Again, in candor to the
25 Court there's a very interesting question as to whether or not

1 37-2-307 which is the closing fee statute in fact affords a
2 private cause of action. There's no question that the
3 Department of Consumer Affairs can bring an action against a
4 dealer. Here we simply raise the question as to whether under
5 a 12(b)(6) motion since the statute does not delineate a cause
6 of action we raise that issue, we think that issue would be
7 addressed in the course of arbitration and my raising it now
8 does not waive my claim that this entire matter is subject to
9 arbitration. And I simply again attempt to sort of restate
10 that attempt trying to make the same claim they don't have a
11 private right for a declaratory injunctive relief. I think at
12 the very least, Your Honor, to the extent that the the
13 plaintiffs assert that the defendants are somehow violating
14 the law, we think they have an obligation to go challenge the
15 law by the agency charged with its construction, that is
16 essentially what happened in the *Lexington Law Firm* case in
17 which they re -- the Supreme Court reversed the administrative
18 law court and that is the essentially what happened in the
19 *King vs. American General* when the Supreme Court struck down
20 the rulings of Judge Williams in that particular case, they
21 said you've got to look at what the state agency charged with
22 that construction it said and the plaintiffs in this case
23 don't even make reference to the agency decisions under which
24 the defendants have attempted to comply.

25 Alright, and then the -- my next -- I've I've covered 14

1 and 15, I then have in Paragraph 16 under 12(b)(6) they fail
2 to state a cause of action that the claims are barred in whole
3 or in part by the protections and I've cited to you that
4 37-6-506 and that is -- let's just address that issue, Your
5 Honor. Let's say some -- a Supreme Court rules, well Consumer
6 Affairs, You were wrong. There is a limitation in the fact
7 for the last decade you have approved hundreds and hundreds of
8 dealer's filings and there have been several million
9 automobile transactions, you were wrong. Well the sa -- this
10 this particular statute that I make reference to in Paragraph
11 16 on Page 10 is the statute that says that if a party acts in
12 conformity with a ruling, a statement or interpretation, no
13 penalty can be imposed against them which is then raises the
14 issue well how in the world can you get to the Dealers Act
15 when that the code dealing with code issues says you can't pay
16 a penalty.

17 Alright, and then in 17 I simply under 26(c) basically
18 say we ask you to rule. Again, I believe respectfully the
19 core issue before the Court is whether or not the Court is
20 going to compel arbitration. All of these issues would be
21 addressed and resolved at some point under arbitration. I
22 would briefly simply respond that the DodgeLand agreement on
23 its face says that this contract is subject to arbitration,
24 makes clear that it's subject to Federal Arbitration Act, that
25 is enough to invoke the provisions of the Federal Arbitration

1 Act and indeed the Hyundai transaction does those things
2 necessary to evident the intent for arbitration and based on
3 all of the matters contained in my motion in addition to the
4 discussion and explanation in the memos and exhibits filed
5 with the court I would simply and respectfully ask the Court
6 compel this matter to arbitration and the arbitrator will be
7 responsible for determining the scope of the Consumer
8 Protection Code, the potential application of the Dealers Act
9 and that this court does not have jurisdiction under Dodgeland
10 because the statute of limitations has passed and even if it
11 hasn't, the arbitration clause then takes jurisdiction from
12 the Court and as regard to defendant, Hudson Hyundai, this
13 court should compel arbitration which again would divest this
14 court of jurisdiction and allow the parties to proceed under
15 the written documents that they signed. Thank you, Your
16 Honor.

17 THE COURT: Alright. Just hold.

18 (Whereupon, a discussion regarding another case was held
19 off the record.)

20 THE COURT: We're gonna take five minutes.

21 UNIDENTIFIED ATTORNEY: Yes, sir.

22 THE COURT: And the court reporter needs a break then
23 we'll go through all plaintiffs' motions -- I mean, the
24 defendants' motions, alright?

25 MR. HAMM: The plaintiff. Yeah, this, yeah, this was my

1 motion.

2 THE COURT: That's what I said, the defendants' motions.

3 (Whereupon, a recess was taken.)

4 THE COURT: Mr. McKinnon.

5 MR. MCKINNON: Thank you, Your Honor. I'll try to be
6 very brief, Your Honor. Let me just first turn to the
7 arbitration issue, Your Honor. As Mr. Hamm says, the *Herron*
8 case is the latest and greatest, it's the 2010 Supreme Court
9 case that we talked about and I apologize, Your Honor, I was
10 tryin' to keep my memo brief and I -- my memo I focused on
11 whether the arbitration is premature to decide at this point,
12 I did not cite those two cases, I have a citation for it now
13 for, Your Honor, if you'd like me to pass those up.

14 THE COURT: Why don't you just tell me and I'll ---

15 MR. MCKINNON: Your Honor, the *Simpson* case is 373 S.C.
16 14.

17 THE COURT: 373 ---

18 MR. MCKINNON: SC 14, yes, Your Honor.

19 THE COURT: Alright.

20 MR. MCKINNON: That's *Simpson vs. MSA*.

21 THE COURT: Okay.

22 MR. MCKINNON: And the the newer case, Your Honor, is
23 *Herron*, H-E-R-R-O-N, vs. *Century BMW* and that's 387 S.C. 525,
24 Your Honor.

25 THE COURT: Thank you.

1 MR. MCKINNON: But as, you know, as Mr. Hamm said, *Herron*
2 is the latest and greatest case. In that case, Your Honor,
3 they went to the the state of mind of the plaintiffs, did they
4 have enough time to look at the agreement, did they get to
5 read the agreement or not, one of the factors they focus on
6 was the plaintiff in that case admitted to reading the
7 arbitration agreement, it's all, they're all clearly fact-
8 specific decisions, Your Honor, we need discovery on those
9 issues. And then secondly, Your Honor, but that the the when
10 the *Herron* court refused to enforce the arbitration agreement
11 in return they made the decision to enforce it the reason they
12 did because it was a separate agreement with a separate page
13 that would adjust the arbitration agreement, that is how we
14 distinguish the *Simpson* case, that's not what we have here.

15 THE COURT: I remember one time when Judge Anderson ruled
16 in a case Timmonsville Baptist Church that if the chairman of
17 the building committee didn't read the arbitration agreement
18 it was not enforceable, clearly pli -- printed everywhere.
19 That was the first case he was reversed on and he never
20 forgave me.

21 (Laughter.)

22 THE COURT: Go ahead, Mr. McKinnon.

23 MR. MCKINNON: And, Your Honor, very briefly turning to
24 the statute of limitations issue, my esteemed opposing counsel
25 keep trying to shoehorn us into a consumer protection cause of

1 action under Title 37; that is not what we're alleging, Your
2 Honor. We are alleging a Dealer Act claim under Title 56 and
3 the stat -- 56-15-40 it says it shall be deemed a violation
4 for any dealer to engage in any action which is arbitrary, in
5 bad faith or unconscionable, that is our claim. And then they
6 cl -- and then flip through the same a little bit later to
7 56-15-110 it says when such an action is one of common or
8 general interest to many persons it may be brought, one may
9 sue for the benefit of the whole, that is our f -- and it says
10 the statute of limitations is four years, Your Honor. That is
11 what we are alleging. We as the plaintiff are masters of
12 complaint, we get to allege what we want and we're alleging a
13 Dealer Act violation, Your Honor.

14 A lot of what Mr. Hamm mentioned, Your Honor, goes way
15 beyond the four corners of the complaint. At one point he's
16 talkin' about the deposition of someone, an executive of the
17 Consumer Protection Agency. I I don't know how that's
18 relevant, Your Honor, but at this point that we are limited to
19 what's in our complaint. We clearly allege that our
20 plaintiffs were harmed by both dealers. We allege there was a
21 conspiracy between the dealerships. We allege as Your
22 Honor -- I mean, Your Honor, picked up on the fact very
23 quickly that miraculously the charge is the same and these two
24 unrelated dealerships that they say have nothing to do with
25 each other miraculously the fee is the same in both. We

1 allege, Your Honor, we allege the dealership conspired against
2 each other, we allege they're unjustly enriched, we allege
3 that they violated Consumer Protection statute by number one,
4 not including the fees in the advertisement which is a
5 statutory violation and by illegally including profit and not
6 just, not just recovering their costs which is what's
7 permitted. But in any case, Your Honor, we're limited now to
8 what's in our complaint and we plainly allege multiple
9 violations of the statutes, ya know, and Mr. Hamm can make a
10 lotta arguments he wants later after discovery, right now
11 under what's in our complaint it meets the the Rule, the Rule
12 12 requirements.

13 As far as the joinder issue, really briefly, Your Honor,
14 as to whether we need to separate this into two separate
15 actions, as I said, Your Honor, we allege the defendants
16 conspired against each other and we also, the Dealer Act Title
17 56 allows a representative -- allows a claim to be brought in
18 a representative capacity so the claims do not need to be
19 split and I would, I would say, Your Honor, that judicial
20 economy would strongly militate they're for keeping 'em
21 together rather than having two parallel actions with the same
22 legal claims making, you know, letting Mr. Hamm and I argue
23 the same thing twice in front of two different courts.

24 Your Honor, I may -- let me just flip really briefly,
25 Your Honor, I don't wanna miss anything but I think, I think I

1 may be done. Your Honor, I'd like to rely on my memorandum,
2 you know, for the rest of it, if that's okay, Your Honor.

3 THE COURT: Well that -- how 'bout your Paragraph 37 of
4 your complaint?

5 MR. MCKINNON: One second, Your Honor.

6 THE COURT: He's mo -- he moved to strike that.

7 MR. MCKINNON: Your Honor, again, Your Honor, I think
8 this is premature. The reason the -- that paragraph is in the
9 complaint, Your Honor, is that the the statute that governs
10 these closing fees says that every dealership has to apply if
11 you're gonna do that. The Jim Hudson dealership's only a
12 single Jim Hudson entity has applied and has been authorized
13 under that statute, Jim Hudson Cars, LLC. So our position is
14 that that under the statute it's all one entity. I think
15 discovery will solve that, Your Honor, but, I mean, that --
16 that's the reason we pled that.

17 (Whereupon, a discussion was held off the record.)

18 MR. MCKINNON: And we are happy to amend the complaint to
19 add Jim Hudson Cars, LLC, Your Honor, if that's that's what
20 defendants would like us to do.

21 THE COURT: Alright. He'd like you to take it out.

22 MR. HAMM: Yes.

23 THE COURT: All motor vehicle dealers owned, what's that
24 mean, in whole or in part or controlled ---

25 MR. MCKINNON: Owned ---

1 THE COURT: --- by defendants. Isn't that pretty broad?

2 MR. MCKINNON: It is, Your Honor.

3 THE COURT: I I don't know what you -- I'm not that
4 familiar with the statute what 10(h) says but ---

5 MR. MCKINNON: Um, ---

6 THE COURT: --- I don't see how you can sue for these --
7 your client for the benefit of all car buyers against all
8 motor vehicle dealers unless you have a certified class I
9 guess.

10 MR. MCKINNON: Well it -- owner controlled ---

11 THE COURT: I know it does.

12 MR. MCKINNON: --- only by these defendants, Your Honor,
13 dealerships owned or controlled by these defendants, it's it's
14 the -- in the Paragraph 37, that's the limitation, Your
15 Honor.

16 THE COURT: Ya know, I I read that. You mean this -- and
17 until you get certified which I assume is the next logical
18 step, uh, ---

19 MR. MCKINNON: Your Honor, there's no class certification
20 actually and I represent it -- it's a different mechanism
21 under the dealer statute, it's not a Rule 23 class. We're
22 we're alleging at ---

23 THE COURT: So you got the same, you think you have the
24 same remedies under the statute that you would have under 23?

25 MR. MCKINNON: We have the the Dealer Act specifies the

1 remedies, Your Honor, which are both conjunctive relief and
2 damages.

3 THE COURT: All South Carolina car buyers?

4 MR. MCKINNON: Well it says, Your Honor, I don't wanna
5 misquote the language, one or more may sue for the benefit of
6 the whole.

7 THE COURT: Alright. I'll take a look at it. Anything
8 further?

9 MR. HAMM: No, Your Honor. I think that we have
10 attempted to articulate the basis. You are correct, I mean I
11 don't even know how to, I don't even now how to construe
12 Paragraph 37 in terms of what they own or anything else, they
13 haven't been served. To the extent that they have a named
14 plaintiff that wants to bring an action against an operating
15 dealership, I think they have to do that under constitutional
16 standing issues. I was just looking at in response to the
17 question you just posed to counsel looking at 56-15-10
18 Subparagraph (h) it says a dealer or a motor vehicle dealer is
19 any person who sells or attempts to effect the sale of any
20 motor vehicle then it -- then there are numerous exceptions to
21 that. They haven't attempted to, uh, ---

22 THE COURT: So that's just the definition?

23 MR. MCKINNON: That's just the definition under the
24 Dealers Act. And again, the Department of Consumer Affairs
25 has its own requirement as to the filing procedures and the

1 dealerships owned by the Hudson Organization have filed their
2 rates. I don't know what counsel was referring to but again,
3 they have sued only Jim Hudson Hyundai, the named plaintiff,
4 only had a tran -- a transaction with Mr. Jim Hudson Hyundai
5 and we think that Paragraph 37 attempts to go totally around
6 constitutional standing claims of a violation and they have no
7 basis to assert anything about a dealership for which they
8 have virtually no transaction to complain about. So we stand
9 by our motion to strike that particular matter and conclude
10 again that we ask the Court to compel arbitration. I would, I
11 would say that I think the *Herron* decision on an automobile
12 arbitration act I certainly invite the Court's examination of
13 that decision. I think that case reflects actually a step
14 back from the *Simpson* decision because there is the
15 severability clause and obviously under the arbitration clause
16 itself the arbitrator has to comply with actual law and of
17 course the arbitrator during the course of the arbitration
18 would say, Well the South Carolina Supreme Court has ruled
19 this, the United States Supreme Court has ruled that. The
20 Court can't presume that the arbitrator's in fact going to
21 engage in unlawful or ignore the law 'cuz as you know under
22 the Federal Arbitration Act, you can demonstrate, you set it
23 aside so the parties still have their due process protections
24 so again we simply request that the Court compel arbitration,
25 allow these matters to proceed as the parties agreed in

1 written documents that contain the appropriate evidence that
2 the party signed an arbitration agreement. Thank you, Your
3 Honor.

4 THE COURT: Alright. Thank you. How much time do you
5 need for proposed orders? Mr. McKinnon, I assume you don't
6 need much.

7 MR. MCKINNON: No, Your Honor.

8 THE COURT: But I think, I think even in a draft order
9 that it it needs to address the all -- I mean, the the points
10 made -- the specifications made by defendants. In other
11 words, ---

12 MR. MCKINNON: It would address ---

13 THE COURT: --- address each of their arguments.

14 MR. MCKINNON: It would, Your Honor.

15 THE COURT: How much time ya need?

16 MR. HAMM: I'd like to get two weeks, Your Honor? I've
17 got two cases comin' up and I wanna ---

18 THE COURT: Give you three weeks.

19 MR. HAMM: I'll take it.

20 MR. MCKINNON: That be fine, Your Honor.

21 THE COURT: So let's let's be clear then. Today's the
22 10th, have them ---

23 MR. HAMM: Can we have 'em ---

24 THE COURT: --- postmarked no later than the 31st.

25 MR. HAMM: I'm just lookin' at my calendar right now,

1 Your Honor, that that will be fine, Your Honor.
2 MR. MCKINNON: That will be, that will be fine, Your
3 Honor.
4 MR. HAMM: It would be, ---
5 THE COURT: March 31st.
6 MR. HAMM: --- it would be my practice that I would both
7 email it to the court that day and mail it that day so we ---
8 THE COURT: That's fine. That's fine.
9 MR. HAMM: That would be the practice I normally follow.
10 THE COURT: And I don't know -- I caution and I caution
11 lawyers all the time delivery to the clerk of court is
12 effective filing, ---
13 MR. HAMM: I understand that.
14 THE COURT: --- doesn't mean it always gets to the
15 appropriate judge that you're, you know, seeking consideration
16 from. Now ---
17 MR. MCKINNON: Does, Your Honor, prefer to get them
18 in ---
19 THE COURT: Things just get ---
20 MR. HAMM: Do you have a format that you ---
21 THE COURT: Word.
22 MR. HAMM: Word? We will -- we'll do so, Your Honor.
23 THE COURT: Thank you.
24 MR. MONTGOMERY: Thank you for your time.
25 THE COURT: Mr. McKinnon, you had a question?

1 MR. MCKINNON: The same question does Your Honor have a
2 preferred format.

3 THE COURT: You want the -- you have the address?

4 MR. MONTGOMERY: Yes, we do.

5 THE COURT: Have the address.

6 MR. MCKINNON: You you gave it to the first party, Your
7 Honor.

8 THE COURT: Thank you very much.

9 MR. MONTGOMERY: Thank you, Your Honor.
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1 CERTIFICATE OF REPORTER

2
3 I, Margaret A. Woods, Court Reporter in and for the State
4 of South Carolina at Large, hereby certify that I reported the
5 preceding case on March 10, 2011 at the time and place
6 heretofore set forth; and that the foregoing pages numbered
7 from 2 through 57, inclusive, constitute a true and accurate
8 transcription of my stenographic notes of the said proceeding.

9 I further certify that I am neither attorney nor counsel
10 for, nor related to or employed by any of the parties
11 connected to the action, nor am I financially interested in
12 the action.

13 September 30, 2011.

14
15 Margaret A. Woods

16 Margaret A. Woods, Court Reporter
17 in and for the State of South Carolina at Large.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
County of Richland	)	2010-CP-40-04274
	)	
Melissa Anne York and	)	
Olga Joanne Cristy,	)	
Plaintiffs,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Dodgeland of Columbia, Inc.,	)	
Jim Hudson Automotive Group,	)	
And Jim Hudson Superstore,	)	
a/k/a Jim Hudson Hyundai,	)	
Defendants	)	

May 18, 2011,
Columbia, South Carolina

BEFORE:

The Honorable G. Thomas Cooper, Judge

APPEARANCES:

Patrick E. Knie, Esq.
Susan Campbell, Esq.
Attorneys for the Plaintiffs

Michael Montgomery, Esq.
Steven Hamm, Esq.
Jo Anne Wessinger-Hill, Esq.
Attorneys for the Defendants

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

(There were no witnesses called.)

(There were no exhibits introduced.)

1 THE COURT: All right. Thank you, Counsel, for
2 agreeing to revisit these issues.

3 When I got back to the office to consider this
4 matter, I looked at the defendant's memorandum in
5 support of its motion, and I read that they filed this
6 motion to compel arbitration, to sever, to strike, for
7 a more definite pleading for a protective order
8 pursuant to 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5),
9 12(b)(6), 12(b)(7), 12(e), 12(f), 18, 19, 20, 21, 23, 26(c).
10 I just didn't remember all of that.

11 Very creative, Mr. Hamm.

12 Let's proceed.

13 The first thing, I -- well, I think I'll let you
14 decide how to proceed. I will tell you, I'm concerned
15 about the statute of limitations issue, and I'm also
16 concerned about the plaintiff's position that this is a
17 Rule 12 motion.

18 The fact that the contracts or the arbitration
19 agreements themselves were not presented, are not in
20 evidence, so to speak, in terms of a 12(b) motion, they
21 were only submitted to the Court with the defendant's
22 memorandum, and I wonder if -- since that's your basis
23 for arbitration, if that is properly handled in a
24 motion to dismiss.

25 MR. HAMM: Your Honor, let me -- I am absorbing what

1 you just said so that I can concisely address the issues
2 you have suggested. Number one, I think it is -- for
3 purposes of both defendants in this matter, I would note,
4 Your Honor, my client, Jim Hudson, is present in the
5 courtroom.

6 THE COURT: All right.

7 MR. HAMM: Jo Anne Wessinger-Hill and myself, Steven
8 Hamm, represent Jim Hudson. Jo Anne Wessinger-Hill,
9 myself, and Michael Montgomery represent Dodgeland.

10 Let me go directly to your issue. I think it is a
11 subject of the motion to dismiss. What I think is
12 something that ought to be somewhat troubling to the
13 Court, one of the core issues is a claim that both
14 defendants improperly charged closing fees, a matter
15 authorized by statute. I don't need to get into that.

16 THE COURT: Right.

17 MR. HAMM: But the very document, the very document
18 that discloses the closing fee is on the document that
19 discloses the arbitration clause --

20 THE COURT: Correct.

21 MR. HAMM: -- which raises a very troubling issue to
22 me that there -- they suggested to you at the last
23 hearing, well, since we didn't put it in there, Mr. Hamm
24 can't raise it.

25 Well, my point is either, one, that makes this the

1 subject to a motion to dismiss or number two, more
2 troubling, they used the document that discloses the fee
3 as our clients are required to by statute, but very
4 conveniently ignored the disclosure that it's subject to
5 arbitration, very noticeably ignore the disclosure
6 that it was subject to the Federal Arbitration Act, and
7 both documents were signed by their clients on the first
8 page.

9 THE COURT: But that's -- are you saying that because
10 they referenced that in the complaint, that that
11 therefore, brings in the entire --

12 MR. HAMM: Yes.

13 THE COURT: -- document?

14 MR. HAMM: Yes.

15 THE COURT: Okay.

16 MR. HAMM: Because this is the core document in which
17 that disclosure was made. This is the document where
18 they learned that, in fact, that the plaintiffs in both
19 of these matters were charged a closing fee.

20 I think it's rather disingenuous under a 12(b)
21 motion to say, "Well, we made the decision to ignore the
22 applicable arbitration provision, and therefore, this
23 Court ought to proceed and pretend that an arbitration
24 provision does not exist."

25 We think since they have made the assertion in

1 their pleadings that our clients, the defendant,
2 Dodgeland of Columbia and Mr. Hudson's dealership,
3 charged that, was disclosed in this document, they
4 themselves brought this very document in, and thus,
5 encompasses the arbitration agreement.

6 THE COURT: All right. Thank you.

7 MR. HAMM: Can I proceed on other matters?

8 THE COURT: Yes, sir.

9 MR. HAMM: All right. I'd like to first start,
10 number one, by stating on the record that I would rely
11 upon oral argument already presented to the Court, and
12 I don't intend to repeat it unless the Court has questions
13 which, of course, I will address.

14 I would like to address both the Dodgeland and the
15 Jim Hudson arbitration agreements, the very documents
16 that disclose the existence of, and a charge of, a fee
17 expressly approved and filed with the South Carolina
18 Department of Consumer Affairs.

19 Both of these agreements, Your Honor, contain
20 provisions that say they are subject to the Federal
21 Arbitration Act; number two, they contain provisions
22 that say that the parties agree that they will not
23 proceed in a representative or class action proceeding
24 in arbitration.

25 THE COURT: Is that a subject to severance?

1 MR. HAMM: That's subject to severance, but
2 fortunately for me, I am in a position to advise you of
3 a decision the United States Supreme Court issued about
4 a month ago. In the AT&T decision, a copy all of which
5 I have with me, I'll tender at the time you deem
6 appropriate, the United States Supreme Court did two
7 things that I think are instructive and, in fact, leads
8 to the result that I see in this case, either a motion
9 to dismiss or a motion to compel arbitration.

10 The United States Supreme Court, approximately
11 thirty days, reversed a California court decision that
12 said, yes, you can have an arbitration agreement, but
13 under state policy or under conscionability
14 provisions, you cannot have an anti-class action
15 provision in an arbitration agreement subject to the
16 Federal Arbitration Act.

17 The United States Supreme Court reversed that
18 decision and ruled that state courts may not, under the
19 name of unconscionability or public policy attempt to
20 strike anti-class provisions and arbitration
21 agreements subject to the Federal Arbitration Act.

22 THE COURT: So that goes in the face of Herron?

23 MR. HAMM: Well, that doesn't go in the face of Herron
24 at all. In fact, I next want to advise you that in the
25 Century BMW decision, which I think you may be

1 referencing, which is a product of the Herron cases, a
2 year ago, the South Carolina Supreme Court examined the
3 Century BMW arbitration agreement.

4 They said it contained no oppressive terms or
5 conditions under the terms of the previous Simpson
6 decision, Your Honor, but what they -- the South
7 Carolina Supreme Court says is, "We are going to strike
8 this anti-class provision, because we think it is void
9 as a matter of public policy and unconscionability."

10 That decision was appealed to the United States
11 Supreme Court. The AT&T decision was filed earlier. We
12 filed an appeal with the United States Supreme Court.

13 We advised the United States Supreme Court that we
14 believe that the decision in the AT&T case would
15 directly impact any decision on the century BMW case.

16 When the United States Supreme Court reversed the
17 California court's attempt to strike anti-class
18 provisions in the arbitration agreement, subject to
19 the Federal Arbitration Act, we immediately filed a
20 petition with the United States Supreme Court and said,
21 "We now ask you, based on your ruling in the AT&T
22 decision, to vacate the decision of the Century BMW
23 case.

24 I will tell you that on May 2nd of this month, the
25 United States Supreme Court vacated the Herron

1 decision, also known as the Century BMW decision,
2 because it was directly opposite to the ruling announced
3 in the AT&T decision.

4 So the Century BMW decision in which South Carolina
5 struck an anti-class provision has now been vacated by
6 the United States Supreme Court. Now, to make sure that
7 I am absolutely candid with the Court, as you are aware,
8 Your Honor, the United States Supreme Court under their
9 rules of procedure has a certain number of days in which
10 they can send what is known as the mandate back to the
11 South Carolina Supreme Court.

12 That mandate directs, and the rulings in their
13 procedures, means that on May 27th, the case will leave
14 the jurisdiction of the United States Supreme Court and
15 return to the jurisdiction of the South Carolina
16 Supreme Court.

17 The sheets issued by the U.S. Supreme Court state
18 that the decision had been vacated and will be returned
19 to the South Carolina Supreme Court for them to
20 consider in light of the ruling of the AT&T case.

21 The only issue on appeal in the Century BMW case was
22 the Court's decision to strike the anti-class
23 provision. They vacated that position, and we think
24 that position is controlling in both of the arbitration
25 clauses now present before this Court.

1 A couple of --

2 THE COURT: Do you have copies of those?

3 MR. HAMM: Do I have copies of -- I have a copy of
4 the United States Supreme Court decision, yes.

5 THE COURT: AT&T. Well, I trust what you're saying.
6 I just...

7 MR. HAMM: Oh --

8 THE COURT: I think I -- I just need it for this file.

9 MR. HAMM: I will tender to the --

10 THE COURT: Do you have copies for the other parties?

11 MR. HAMM: May I -- I don't have another. I'm
12 assuming counsel has a copy of the AT&T decision.

13 MR. MCKINNON: I have a copy which is highlighted,
14 which I was going to reference in my argument.

15 MR. HAMM: That's fine. I am -- Your Honor, if I can
16 approach.

17 THE COURT: Sure.

18 MR. HAMM: I will tender to you an unmarked copy
19 printed off of the United States Supreme Court website.

20 THE COURT: All right. Thank you.

21 MR. HAMM: I also need to tender to you the
22 second document that I just referenced. In fact, let
23 me -- this is the one I need to tender to you. This is
24 my notes, because I know it's not marked.

25 There is a separate document, and I am uncertain as

1 I stand here, but you will have it within -- this
2 afternoon. It's the second document issued by the
3 Supreme Court where they say vacate it and return to the
4 United -- to the South Carolina Supreme Court for a
5 decision in accordance with the AT&T decision. That's
6 a print out of that website, and I would tender it to
7 you.

8 THE COURT: Well, how would you suggest this Court
9 deal with that at this time?

10 MR. HAMM: All right. I think -- I think there's
11 several things this Court can do. I think this Court,
12 number one, since this is clearly an arbitration
13 agreement that is...

14 THE COURT: Invokes a federal act.

15 MR. HAMM: Invokes a federal act. The South Carolina
16 Supreme Court in its own decision, some of which
17 Mr. Beard were involved in, where the Supreme Court has
18 basically said, "When in doubt, if there is an
19 implication of arbitration" --

20 THE COURT: When in doubt?

21 MR. HAMM: Yes.

22 So I think this Court, this document has the
23 authority to say the plaintiff's signed an arbitration
24 agreement subject to the Federal Arbitration Act.

25 We know -- I guess at this point, I think the

1 appropriate point would be, you know as a matter of
2 knowledge of the United States Supreme Court decision,
3 but I've already advised you that --

4 THE COURT: Judicial notice.

5 MR. HAMM: Judicial notice, because I've advised you
6 under the Supreme Court rules, it won't return to the
7 jurisdiction of the South Carolina Supreme Court until
8 May 7th.

9 My position, it doesn't make any difference. I have
10 an arbitration agreement. The parties signed it. On
11 both of them, there is not an issue of conspicuousness
12 under the terms of the Simpson decision. They are both
13 on the first page of the agreement containing the
14 arbitration provision.

15 So on that basis, I think you can say, "Mr. Hamm;
16 I don't need to address any other motions. I'm going to
17 grant your motion to compel, and the arbitrator from
18 then -- by the time the parties select an arbitrator or
19 whatever, the arbitrator will have an obligation to
20 follow the mandates of whatever decision flows from
21 it."

22 The issue is do you have enough now to compel
23 arbitration in the Hudson case, in the Dodgeland case,
24 and I think the answer to that is unequivocally yes.

25 All disclosures were made. Nothing was snuck up on

1 either of the plaintiffs. In both of the documents,
2 they expressly state that there is -- it is subject to
3 arbitration under the Federal Arbitration Act.

4 The crucial documents contain the imposition of the
5 fee, to which the plaintiffs object, notwithstanding the
6 fact that fee has been approved by the Department of
7 Consumer Affairs, but I recognize they're saying, "Well,
8 we don't care that the Department of Consumer Affairs
9 approved the fee. We have a theory by which your
10 clients are liable."

11 Well, under the arbitration agreement, they can
12 raise every one of those issues to the arbitrator. The
13 arbitrator has the expressed authority to make those
14 decisions, and I believe that there is no basis upon
15 this Court needing to wait for anything.

16 Obviously, when the case comes back to the South
17 Carolina Supreme Court, I don't think it's going to make
18 a difference. Whatever they do in Century does not
19 affect my two clients.

20 And let me explain why I say that: We now know that
21 the law of the land is if arbitration agreements, that
22 on their face, reference application to the Federal
23 Arbitration Act, we now know, the United States
24 Supreme Court has said, "If there is an anti--class
25 provision in there under Section 2 of the Federal

1 Arbitration Act, it shall be enforced," quote "according
2 to its terms." So that's all I need from my two clients.
3 What --

4 THE COURT: Are you suggesting the arbitrator
5 could not sever that provision?

6 MR. HAMM: There are severability clauses, but
7 given that the anti-class --

8 THE COURT: Are you saying -- you think that the
9 arbitrator himself or herself could not strike?

10 MR. HAMM: No. I think the arbitrator could.

11 THE COURT: The anti-class provision?

12 MR. HAMM: Absolutely.

13 THE COURT: Under Herron.

14 MR. HAMM: Under Herron and under the United States
15 Supreme Court, absolutely. I mean, we're now in a
16 situation, as best I understand my 30-plus years of
17 practice, once the United States Supreme Court
18 directly applies the law here in the Federal
19 Arbitration Act, applies an issue now before you and
20 says, "No, it is not lawful for state courts to strike
21 anti-class provisions, but one thing that I've learned,
22 Your Honor, we have devolved onto the arbitrator the
23 authority to make decisions.

24 I am very aware that arbitrators have a great deal
25 of authority, and we'll have to live with that

1 decision, but I have not run into an arbitrator in all
2 of my years of practice that openly or intentionally
3 attempted to avoid whatever the law was that applied.
4 Those arbitration agreements say it's fair to do that.

5 So I think in terms of where this case is before
6 you, you are in a relatively simple position. The
7 parties signed agreements subject to the Federal
8 Arbitration Act. The disclosures were on the very
9 documents, on the face of them. They weren't buried
10 somewhere else, and under the Simpson decision, you
11 don't even get to these other issues if you can show
12 that there was an awareness of arbitration on the
13 first page of the document. So Simpson is a relatively
14 little issue here.

15 Now, let me again in the -- attempting to maintain
16 credibility with the Court, the Dodgeland arbitration
17 clause, if you'll recall the comments by counsel said,
18 "Well, this is just a simple little agreement. I've
19 just never seen such an awful arbitration agreement."

20 Well, the Federal Arbitration Act simply says you
21 have to invoke the application of the Act. It doesn't
22 require that you place all other kinds of provisions.

23 For example, this is the document in 2006, long
24 before this litigation, Dodgeland has updated its
25 arbitration agreement in which it says it will pay the

1 first \$1,500 of arbitration costs; it will do it in
2 this county; what rules apply, and we would certainly
3 attempt to be consistent and use that agreement.

4 We have enough in the Dodgeland agreement. We
5 don't have the pressing terms. We have don't have an
6 issue of conspicuousness, so Dodgeland certainly goes
7 forward. Then we turn to Mr. Hudson's clause, and it
8 boldly states on the top, "This arbitration is subject
9 to arbitration pursuant to the Federal Arbitration
10 Act," then if it's not applicable, then under the
11 South Carolina Act, and then on the bottom of that very
12 same page, the page that discloses the closing fee, which
13 is the core issue, says to the consumer, "See the
14 additional terms and conditions on the opposite page" in
15 bold print.

16 In that case, Olga Cristy signed it and said that
17 she has read both sides of the document, and then on the
18 second page is an arbitration agreement that does
19 contain a severability clause.

20 Why do I raise that? Because that severability,
21 that arbitration agreement contains a provision that is
22 now no longer enforceable, and that provision in the
23 Hudson agreement is a limitation that the arbitrator
24 can't award punitive, exemplary, or treble damages.

25 In the Simpson case, the South Carolina Supreme

1 Court said that provision is not enforceable. In
2 paragraph 16, you have a severability clause that comes
3 out.

4 The arbitration agreement in the Hudson case
5 passes the Simpson case. Now, there is only that one
6 difficulty, and we acknowledge on this record as an
7 officer of the Court that we can't enforce or argue to
8 the arbitrator that he doesn't have those authorities
9 because, in fact, under the Dealers Act, he does.

10 THE COURT: I was going to say, you need not do that
11 here.

12 MR. HAMM: Right. Exactly. I don't need get to
13 that.

14 And as a matter, again, of continuing disclosure to
15 the Court, we have now located in Olga Cristy, who is the
16 named plaintiff against my client, Mr. Hudson, in her
17 financing documents, it also contains an Arbitration
18 Agreement in which it is prominently disclosed, and in
19 fact, it is -- contains zero problems under the Simpson
20 decision.

21 It, itself, also says the consumer will receive the
22 first \$1,500 in costs of the arbitration. Well,
23 under -- we were in regular litigation, Your Honor, you
24 know, the plaintiffs would be paying the court fees and
25 whatever, but since it's subject to arbitration under

1 the Federal Arbitration Act, Mr. Hudson, in fact, would
2 be paying the cost of the arbitration itself.

3 THE COURT: All right. Let me -- let's move on to
4 the Statute of Limitations issue.

5 MR. HAMM: All right. Under the statute of
6 limitations, Your Honor, the Dealers Act -- just so
7 we're here, the statute of limitations issues applies
8 only in the York case against Dodgeland.

9 THE COURT: Right.

10 MR. HAMM: It does not apply to Olga Cristy in the
11 Hudson case.

12 THE COURT: That's the September 4th, 2006?

13 MR. HAMM: Yes.

14 THE COURT: York case, which the plaintiff claims
15 he has the advantage of the Dealers Act statute of
16 limitations, four-year statute.

17 MR. HAMM: That's what it says, and my response to
18 that is, Your Honor, in terms of a 12(b) motion, in
19 terms of looking at the four corners of the pleadings,
20 you will see that their core complaint is that you're
21 charging closing fees unlawfully.

22 Where does the authority for charging a closing fee
23 originate? It originates in Title 37, chapter two, in
24 a statute enacted in the year 2000.

25 I would remind the Court that in 1996, the South

1 Carolina Supreme Court issued the Fanning decision. In
2 that case, the plaintiffs attempted to claim that a
3 closing fee not authorized by statute was an
4 unauthorized, quote, additional charge under Chapter 2
5 of the code.

6 The South Carolina Supreme Court rejected that and
7 said this is simply part of the total cash price. If you
8 charge both your cash and --

9 THE COURT: We have got a statute now.

10 MR. HAMM: Right. Now, we have a statute that
11 expressly authorizes it, and in both -- both the cases
12 for Mr. Hudson and for Dodgeland, they, in the course of
13 the arbitration -- this is not the time to raise it, but
14 we will demonstrate it. Here is a document where we
15 filed it. Here is where it got approved. Here is what
16 we charge is consistent with what was approved by the
17 State of South Carolina.

18 I'm still amazed my clients are defending and
19 spending lots of money on a statute when they haven't
20 even gone after and asked for reconsideration of the
21 administrative interpretation issued by the Department
22 of Consumer Affairs.

23 They politely state, "Well, we don't care what they
24 say," and our position is, "And we'll argue that out in
25 arbitration."

1 So the --

2 THE COURT: You take the position that 15-3-530,
3 since the action is based on a statute --

4 MR. HAMM: Yes.

5 THE COURT: -- that it invokes the three-year
6 statute?

7 MR. HAMM: Yes, and because -- in addition -- two
8 interesting issues that I think that are -- I don't want
9 to be moving away from my position that I believe the
10 Court is in a position to compel arbitration, but I think
11 it's helpful to make the following observation.

12 The Statute of Limitations, under the consumer
13 credit code, number one, does not authorize class
14 actions; number two, it has a three-year Statute of
15 Limitations.

16 If Ms. York in Dodgeland wanted to expressly
17 challenge the closing fee charged by Dodgeland under
18 approval of the Department of Consumer Affairs, in order
19 for her to do that, she had to do that within three
20 years. That three years came and went.

21 They're now saying, "How do we resurrect this?"

22 "Well, I know. We'll do it under the Dealers Act."

23 Well, our position is if you're going to claim a
24 violation in order to get -- there's a claim here that
25 my client ought to pay punitive or treble or

1 exemplary damages based on a statute they can't do
2 directly.

3 Our position will be in arbitration, because I'm
4 not asking you to rule upon this at this point. If you
5 rule in arbitration, I'm going to say to the arbitrator,
6 "Your Honor, if they're going to fuss and complain
7 about the closing fee, the statute that authorizes it,
8 at least they have to bring it timely under that statute
9 and they did not." That's another reason that I think
10 it supports my motion to dismiss with regard to York, if
11 the Court is ready to go that far. If not, I can return
12 and hold tight to my motion to compel arbitration.

13 You are right, it is the 15-3-532, three-year
14 statute of limitations, for all liability created by
15 statute and --

16 THE COURT: That prevents class action?

17 MR. HAMM: Yeah, in this circumstance because
18 they're out of time. They can't bring it individually,
19 much less in a representative capacity.

20 I ran into this, Your Honor. In the Tilley case vs.
21 Pacesetter, one of those attorney preference cases. The
22 South Carolina Supreme Court said that in that
23 circumstance, it was also under the code, a three-year
24 statute of limitations.

25 So I just rely upon that if York in this matter

1 against Dodgeland did not timely file under the statute
2 that authorizes the fee to begin with, they cannot
3 connive to use the Dealers Act to resurrect a claim that
4 has died by operation of the statute of limitations,
5 which then takes me back to my motion to dismiss.

6 THE COURT: Do you have any comments with regard to
7 the joinder argument?

8 MR. HAMM: Yes. We have made a motion to sever. We
9 have two dealerships that have zero financial
10 relationship. They run separate operations.

11 They are located near each other, but there is not
12 a common transaction that the plaintiffs have that goes
13 to both Dodgeland and to Hudson.

14 Our position is that we -- those cases must be
15 severed. Number one -- two reasons: Number one, there
16 is no common course of action between the two;
17 number two, we have two separate arbitration
18 agreements.

19 Both of those arbitration agreements say we're
20 going to have an arbitration between the dealer and
21 the consumer.

22 Neither of those arbitration agreements authorize
23 the intermingling of two different businesses and
24 disputes that may be different, and I think the issues
25 of proof and everything go directly to the relationship

1 between Olga Cristy and Mr. Hudson or Ms. York and her
2 husband James against Dodgeland, and there is no reason
3 or basis for them to remain joined and which is the
4 occasion of my motion to sever.

5 Now, we --

6 THE COURT: Now, one wonders why they were joined in
7 the first place.

8 MR. HAMM: My thoughts on that are irrelevant, Your
9 Honor.

10 THE COURT: Mine aren't. Maybe they are.

11 MR. HAMM: Well, I --

12 THE COURT: Go ahead.

13 MR. HAMM: I don't think it's appropriate for me.
14 I think it's improper. I know it's -- it's a very
15 serious issue in the Herron case. I can say that.
16 That's -- there is one dealership that does business
17 within the confines of Aiken where that case is
18 commencing, and we have motions to sever. We have
19 motions to send us back to the appropriate venue. We
20 have been -- we have gone over five years, and we cannot
21 get a ruling on sending us back for our appropriate venue.

22 THE COURT: All right.

23 MR. HAMM: But unfortunately, that's not an issue
24 you can confront in this case is the point.

25 THE COURT: I understand that. I understand that.

1 MR. HAMM: I believe that encompasses my argument.
2 I would rely upon the transcript of arguments I made
3 before. I see no need to take the Court's time to do
4 that. I would respectfully request the Court go ahead
5 and at least grant our motion to compel arbitration.

6 The arbitrator can address the statute of
7 limitations and other issues. The arbitrator has all of
8 that authority, but the motion to dismiss, again, to be
9 clear on the record, would apply directly to Dodgeland.

10 It is not a motion that applies to Hudson, and I want
11 to make sure I'm not co-mingling any claim or suggestion
12 in that respect.

13 We believe that at the end of the day, given the
14 decision of the United States Supreme Court, given the
15 fact that these arbitration agreements are subject to
16 the Federal Arbitration Act, the agreements are not
17 oppressive to meet the standards of Simpson.

18 The signatures were done in a conspicuous manner.
19 We would like to go to arbitration. We think we can
20 resolve these problems in short order because
21 litigation is going to take a long time, and that is not
22 what the parties agreed to, and subject to questions
23 from the Court, I'm going to stop at this point, Your
24 Honor.

25 THE COURT: Thank you, Mr. Hamm.

1 Mr. McKinnon.

2 MR. MCKINNON: Thank you, Your Honor.

3 Your Honor, if you don't mind, I'm just going to
4 start very briefly with the joinder issue. Again, this
5 was at the 12(b)(6) stage, Your Honor.

6 We've alleged very plainly in the complaint a common
7 scheme and conspiracy. As Your Honor pointed out at the
8 first hearing, it's very interesting that the fee is
9 exactly the same, a \$289 fee, charged by both of these
10 totally unrelated defendants, never crossed the point
11 with Mr. Hamm.

12 Yet, they, to the dollar, selected the same
13 processing fee, the same fee that we say is illegal. We
14 clearly allege it's a common scheme in the complaint,
15 Your Honor.

16 At this 12(b)(6) stage, everything we see in the
17 complaint must be taken as true. Mr. Hamm, of course,
18 may contest that during the discovery. He's welcome to
19 argue there's no common scheme, and they just happened
20 to get -- you know, there were between one and 500 with
21 the exact same fee. He can make that argument, but it's
22 not an argument he can make now, Your Honor, not at the
23 12(b)(6) stage.

24 Mr. Hamm and I have very, very different views, Your
25 Honor, on the recent Supreme Court case, AT&T Mobility

1 vs. Concepcion.

2 Your Honor, this was a case where the California
3 state courts have a rule called the Dixon Rule. Excuse
4 me, the Discover Bank Rule. That rule, Your Honor, said
5 that no matter what the other terms of the contract
6 were, no matter how quickly it was at the consumer, if
7 class actions were prohibited, the arbitration
8 agreement was unconscionable on that basis alone. That
9 is the only thing that Supreme Court disagreed with. The
10 Supreme Court said that's not correct.

11 Let me just give you an example. This is the
12 contract that was enforced by the U.S. Supreme Court. It
13 is incredibly consumer friendly. It said the consumer
14 can choose whether to do the arbitration by phone or in
15 person. All fees, the entire arbitration fee is paid
16 by AT&T.

17 If the arbitrator awards money that is greater
18 than AT&T's last written offer, AT&T has to pay double
19 attorneys' fees. I know of a lot of very favorable
20 consumer provisions. That was an incredibly favorable
21 contract to the consumer with the exception that it
22 barred class actions.

23 All the Supreme Court said was that's not correct.
24 What you're going to hold, you cannot hold a boil out on
25 the class actions, per se, makes arbitration contact

1 unconscionable. That was the holding of Concepcion.

2 It's not applicable here. We're not arguing in
3 either of these cases that the contracts are
4 unconscionable because of -- solely because of the
5 arbitration provision, because of the banner on class
6 actions, Your Honor.

7 Briefly, Your Honor, turning to what Mr. Hamm
8 addressed first, again, this is the 12(b)(6) action, Your
9 Honor. There is no case law in South Carolina that I'm
10 aware of that says if a plaintiff mentions something in
11 the complaint, that any document that referenced that
12 figure are somehow brought into a 12(b)(6) motion.
13 I've never heard of such case law. Mr. Hamm never cited
14 any.

15 THE COURT: Well, he just says you shouldn't
16 have -- shouldn't -- whether it's the rule of
17 completeness or anything else, you shouldn't be able to
18 pick and choose.

19 MR. MCKINNON: Your Honor, we didn't reference --

20 THE COURT: The --

21 MR. MCKINNON: We don't reference the doctrine at
22 all. We just said our clients were charged a \$289 fee.

23 THE COURT: Where did you get that?

24 MR. MCKINNON: To be honest, I don't know, Your Honor,
25 and from --

1 THE COURT: You've had to get it off the documents.

2 MR. MCKINNON: Well, there are multiple documents in
3 the closing and the financial documents, Your Honor. In
4 fact, I'm not even sure the complaints mentioned the
5 fee. Does it say --

6 THE COURT: It does.

7 MR. MCKINNON: It -- okay.

8 THE COURT: I'm looking right at it.

9 MR. MCKINNON: Your Honor, that's just not -- I
10 don't -- I'm not -- I don't believe there's been an actual
11 mention of the amount of the fee.

12 THE COURT: Well, look at paragraph 15 of the
13 complaint.

14 MR. MCKINNON: I could be wrong, Your Honor.

15 THE COURT: That's 14 and 15.

16 MR. MCKINNON: That was in the complaint?

17 THE COURT: The amended complaint.

18 MR. MCKINNON: Yes, you're correct, Your Honor.

19 So -- but nevertheless, Your Honor, there is no case law
20 saying that because we refer to a charge, that they are
21 allowed to bring in a contract and make what is -- in
22 essence --

23 THE COURT: Well, you're bringing it in.

24 MR. MCKINNON: What?

25 THE COURT: Your bringing it in.

1 MR. MCKINNON: Well, your --

2 THE COURT: The complaint brings it in.

3 MR. MCKINNON: Your Honor, the complaint only brings
4 it in when we have to support it with evidence. The
5 contract is evidence of a \$289 fee. The complaint is
6 only an allegation.

7 At the summary judgment phase, we will have to
8 provide evidence that we were, in fact, charged that fee,
9 and we'll present the contract at that point.

10 At the complaint stage, all we have are allegations.
11 There's no documents that we have to support. That's
12 not the law. Mr. Hamm is trying to twist the law to make
13 a summary judgment argument at the 12(b)(6) stage.

14 Moving on to the contracts themselves, Your Honor,
15 again, we don't believe these are properly before the
16 court. The only -- Mr. Hamm has not answered. The only
17 motions that can be made prior to answering are the
18 12(b) motions. The motion to compel arbitration is not
19 such an issue. That may not be made prior to answering.
20 That's -- again, that makes sense, Your Honor.

21 THE COURT: Do you have a case that says that?

22 MR. MCKINNON: The rule says, Your Honor, the only
23 motions that can be made prior to answering Rule 12 are
24 the specific ones listed in Rule 12(b) in which a
25 motion to compel arbitration is not so listed, Your

1 Honor.

2 THE COURT: Well, I will tell you that motions to
3 dismiss and compel arbitration are done all the time.

4 MR. MCKINNON: Well, Your Honor, I can't speak to
5 what's done all the time. A motion to dismiss is
6 proper, but a motion to compel arbitration is not a
7 motion listed under Rule 12(b).

8 THE COURT: Well, it doesn't use the words
9 "arbitration" but 12(b)(6) could include it.

10 MR. HAMM: Yes.

11 MR. MCKINNON: Your Honor, it's a statutory motion
12 in South Carolina. Regardless, the motion requires
13 discovery. I mean, Mr. Hamm has made it clear, he's
14 trying to put the contract into evidence for a
15 12(b)(6) motion. It's completely improper.

16 Your Honor, as we discussed previously under the
17 Simpson case, the Court addresses all sorts of factors
18 that require discovery and whether an agreement is
19 unconscionable or not: How much time the parties had to
20 look at the contract? Did they have legal counsel? What
21 was the disparity of the bargain? The size of the print?
22 Whether they read it, all of these are factors addressed
23 by both the Simpson Court and the Herron Court.

24 They are fact specific and require depositions,
25 Your Honor. Both of those South Carolina Supreme Court

1 cases references all of those factors, and -- which is
2 another reason, as I said, why it's completely improper
3 to make this motion prior to discovery.

4 There is no evidence in the record how long our
5 clients had to look at these documents. There is no
6 evidence as to whether they had legal counsel.

7 One of the factors the Simpson Court references is
8 whether this is the sole vehicle that are -- that the
9 people have access to. Is this their sole vehicle they're
10 buying? That puts more pressure on them.

11 None of these factors are before the Court. They all
12 require discovery. The decision at this point is
13 completely improper.

14 Actually, Mr. Hamm provided us late yesterday,
15 Your Honor, with an additional arbitration agreement.

16 Mr. Hamm, are you saying that is the second
17 agreement from Cristy or is that for York? What are
18 you -- the one you sent us yesterday?

19 MR. HAMM: May I respond?

20 THE COURT: Sure.

21 MR. HAMM: That is the second agreement for Cristy.

22 MR. MCKINNON: Okay. So I just -- just to make sure
23 I'm understanding, so that this -- this is still the
24 only referenced arbitration for Ms. York?

25 MR. HAMM: Yes.

1 MR. MCKINNON: Your Honor, so I'll take them
2 separately, Your Honor.

3 Ms. York has a single page, Your Honor. Again,
4 Your Honor, our position is these documents are not
5 before the Court, and they can't be ruled on at this
6 point, but because Mr. Hamm has addressed them, I'd like
7 to go ahead and address the actual arbitration
8 agreements.

9 THE COURT: Yes, sir, go ahead.

10 MR. MCKINNON: Ms. York's agreement has no terms. It
11 is unenforceable under -- it lacks all material terms.
12 All it says is, "In consideration, the purchaser
13 agrees that all disputes are subject to the Federal
14 Arbitration Act."

15 THE COURT: What are reading? Are you reading --

16 MR. MCKINNON: May I approach, Your Honor?

17 THE COURT: Just tell me.

18 MR. MCKINNON: I'm reading on the York contract at
19 the bottom.

20 THE COURT: All right. I've got it.

21 MR. MCKINNON: It has no terms, Your Honor. It's a
22 completely unenforceable contract. It says --

23 THE COURT: Well, wait a minute. Tell me what you
24 mean by that.

25 MR. MCKINNON: Well, all it says is, quote, "This

1 agreement is subject to the Federal Arbitration Act."
2 That is the law of the land. Everything is subject to
3 the law. For example, who -- which organization is
4 going to arbitrate? What are the rules going to be?
5 Who is going to pay the fees?

6 This doesn't even say that A.A.A. is going to do the
7 arbitration. It doesn't even say who -- who is going
8 to -- which arbitrator is going to rule. That is, at a
9 minimum, for an arbitration agreement, you've got to
10 say what organization it is that -- what the rules are
11 going to proceed under.

12 THE COURT: Well, it says both.

13 MR. MCKINNON: I'm sorry, Your Honor?

14 THE COURT: It says both.

15 MR. MCKINNON: I'm not sure we can say it says
16 both, Your Honor.

17 THE COURT: Well, if you look at it and study it, you
18 will see that the top line of the document says, "This
19 buyer is ordered subject to arbitration pursuant to
20 15-48-10," which is the State statute.

21 MR. MCKINNON: That's correct, Your Honor.

22 THE COURT: And then at the bottom, it says its
23 subject to the Federal Arbitration Act, so it's...

24 MR. MCKINNON: Your Honor.

25 THE COURT: There's a conflict. It it's says subject

1 to both.

2 MR. MCKINNON: Your Honor, I understand what you're
3 saying, that doesn't say how an arbitrator was
4 selected. The --

5 THE COURT: I don't know either.

6 MR. MCKINNON: The bare minimum --

7 THE COURT: You say both of them. I don't know
8 either.

9 MR. MCKINNON: The bare minimum for an arbitration
10 contract to be enforceable is you at least have to
11 say who -- what rules are going to govern the proceeding.

12 THE COURT: Well, of the two, which would take
13 precedence?

14 MR. MCKINNON: Well, Your Honor, if there's a
15 conflict, the federal rule takes precedence.

16 THE COURT: Sure.

17 MR. MCKINNON: But the contract has to provide, at
18 the very minimum, that it stated, "Governed by the
19 American Arbitration Association," or some other
20 entity that's going to rule. This has no terms
21 whatsoever. It's concluded -- it's lacking in material
22 terms.

23 THE COURT: You mean an arbitration agreement that
24 says it's subject to the Federal Arbitration Act is
25 invalid?

1 MR. MCKINNON: If that's all it says. If it's
2 invalid for lack of material terms, Your Honor. It -- well,
3 take the --

4 THE COURT: It could be written better. I understand
5 that.

6 MR. MCKINNON: At the bare minimum, you have to know
7 what rules govern, and the Arbitration Rules are
8 different for each organization that handles
9 arbitration.

10 If you take a look at the other arbitration
11 agreement, Your Honor, for Ms. Cristy, the one Mr. Hamm
12 provided me yesterday, it says, "For the arbitration, you
13 may choose one of the following organizations: The
14 American Arbitration Association of Madison Avenue,
15 New York or the National Arbitration Forum in
16 Minneapolis, Minnesota.

17 It gives -- it tells you how to get the rules of
18 those organizations. It also has provisions regarding
19 discovery and other evidence.

20 This provision that says it's subject to the law
21 has no terms whatsoever, the duty. Is there a
22 discovery? Can you take depositions?

23 The statutes don't provided any of that, Your
24 Honor. The parties have to contract for it. All it says
25 is it's subject to arbitration. That is completely

1 unenforceable for lack of material terms, Your Honor.

2 THE COURT: Okay.

3 MR. MCKINNON: The other arbitration agreement, Your
4 Honor, and there appear to be two different ones.

5 That's what I was clarifying with Mr. Hamm.

6 There was -- the one they provided us earlier,
7 which is a page which looks like this, Your Honor.
8 It's -- these are both for Ms. Cristy, apparently. It
9 has additional terms and conditions.

10 Then there's another one that Mr. Hamm provided
11 last night, which is a multiple page document which
12 says, "Please read carefully, Notice of Arbitration."
13 Am I correct that both of these apply to Ms. Cristy?

14 MR. HAMM: Yes, sir.

15 MR. MCKINNON: Okay. And Your Honor --

16 THE COURT: So I have an incomplete set?

17 MR. MCKINNON: You may, Your Honor. If you'll --

18 THE COURT: I was only given two pages.

19 MR. MCKINNON: May I approach, Your Honor?

20 THE COURT: Through 17.

21 MR. MCKINNON: May I approach?

22 THE COURT: If it's an unmarked copy.

23 MR. MCKINNON: I have no unmarked copy, Your Honor.
24 If I can show you they look like.

25 MR. HAMM: I can assist, Your Honor.

1 THE COURT: Well, what is the ultimate provision?

2 MR. MCKINNON: Well, Your Honor, that's the thing.
3 I'm not even sure because the agreements don't agree
4 with each other.

5 I mean, it -- I believe -- I mean, like I said, the
6 second document that Mr. Hamm provided late last
7 night, if this is also for Ms. Cristy, which it appears
8 to be, has different terms than the agreement he
9 provided first to Ms. Cristy, they're both separate
10 arbitration provisions.

11 They have entirely different text. I'm confused
12 because I guess -- for one, which one Mr. Hamm is trying
13 to enforce.

14 THE COURT: Well, normally speaking, the document
15 that ends with "entire agreement", that's usually an
16 ultimate provision of a contract. So does it -- are the
17 numbers serial to 18 on the page that you just got? Is --

18 MR. MCKINNON: Your Honor, they are totally
19 different documents, different numbering and a different
20 format.

21 THE COURT: You better hand it up.

22 MR. HAMM: And I'll be prepared to address it,
23 whenever you deem.

24 THE COURT: These are --

25 MR. HAMM: This is the document I just talked about.

1 You should have this document.

2 THE COURT: I do.

3 MR. HAMM: All right.

4 MR. MCKINNON: Your Honor, if it's okay with Your
5 Honor, it might be beneficial for the sake of efficiency
6 for Mr. Hamm to address whether he's trying to enforce
7 both of these with regard to Ms. Cristy.

8 THE COURT: Well, this is a financing contract.

9 MR. HAMM: Yes, sir, it is.

10 THE COURT: It's not -- it's not the purchase
11 agreement. Now, I understand.

12 MR. MCKINNON: I understand, as well, Your Honor,
13 but which one is he trying to enforcement? That's my
14 question.

15 THE COURT: Oh, I would assume he's trying to
16 enforce both of them.

17 MR. MCKINNON: He's trying to enforce both of them.
18 Okay, Your Honor.

19 THE COURT: That's what I'm assuming.

20 MR. MCKINNON: And, Your Honor, I believe that. I
21 just -- he's filed a motion to compel arbitration, and
22 I feel like it's at least his obligation to assert what
23 are the terms of the arbitration he was trying to
24 compel. He has provided the plaintiff with two
25 different contracts, one of which as late as late

1 night.

2 THE COURT: They're similar only from the aspect
3 that they contain the \$289 processing fee.

4 MR. MCKINNON: I am not -- well, yes. The contracts
5 are similar in that regard, Your Honor, but the
6 arbitration agreements, as far as I can tell, have no
7 such agreement.

8 THE COURT: Okay.

9 MR. MCKINNON: It's very well common language at
10 all.

11 THE COURT: Well, I'm going to assume if it's the
12 same transaction, that the purchaser would have the
13 option to -- if arbitration is ordered, that the
14 purchaser would have the option to select either
15 document for -- unless there is a separate
16 arbitration -- arbitration with a finance agreement
17 and arbitration of the purchase agreement, which
18 is -- doesn't make good sense to me.

19 MR. MCKINNON: Well, Your Honor, I guess in that
20 way, would you prefer that I address both agreements?

21 THE COURT: Sir?

22 MR. MCKINNON: Would you prefer that I address both
23 of them?

24 THE COURT: You've got the floor.

25 MR. MCKINNON: Okay, Your Honor. Well, I'll

1 just -- I'll be brief. Your Honor, the agreement
2 that was provided last night from the financing
3 agreement, this is the longer document, Your Honor, this
4 is a better drafted arbitration agreement than the
5 other one, but it still contains the provision that is
6 flatly improper under the Simpson cases, and therefore,
7 must be stricken, Your Honor.

8 If you look at the part where it says "arbitration
9 agreement" in the two columns, on the right side about
10 a little over half-way down, it says that the parties
11 retain the right to take measures that do not involve
12 court ordered arbitration and he says --

13 THE COURT: Let me find it.

14 MR. MCKINNON: -- repossessing property, Your
15 Honor.

16 What this arbitration agreement allows is for, if
17 there's a dispute between the dealer and the customer,
18 the dealer can repossess the customer's vehicle while
19 the arbitration proceeding is pending and the customer
20 has no recourse.

21 The dealer can elect arbitration, but the agreement
22 specifically says they may still repossess the vehicle.

23 THE COURT: What if the arbitrator decided that that
24 was an unconscionable provision?

25 MR. MCKINNON: Well, he doesn't have to, Your Honor,

1 because the Simpson court has already decided for us that
2 very provision, and they referenced repossession. It's
3 an unconscionable provision. It will not be enforced by
4 South Carolina courts, Your Honor.

5 THE COURT: Well, I agree with you on that.

6 THE COURT: So I mean, that makes that provision
7 unenforceable, and then the other provision that
8 Mr. Hamm recognized as the other provision of the
9 Simpson court specifically says may not be enforced,
10 which is a ban on multiplier damages and punitive
11 damages, Your Honor.

12 These agreements are -- have severability
13 clauses, Your Honor. They may sever the arbitration
14 clause, but they may not sever parts of the arbitration
15 clause and remake the arbitration agreement with --

16 THE COURT: I thought that was what Herron said they
17 couldn't do.

18 MR. MCKINNON: No. Herron said the arbitration
19 agreement -- that -- in other words --

20 THE COURT: It's enforceable even though it has an
21 anti-class provision.

22 MR. MCKINNON: It's -- and that -- and that case was
23 vacated by the U.S. Supreme Court, Your Honor.

24 THE COURT: Okay. You got me there.

25 MR. MCKINNON: Your Honor, but I said, I'm

1 uncomfortable arguing over the content of these
2 agreements because our strong position is that the
3 Simpson court and the Herron court have very specific
4 factual inquiries the court is inquiring to -- including
5 the amount of time that's in --

6 THE COURT: All right. Address the statute of
7 limitations issue.

8 MR. MCKINNON: Your Honor, that one --

9 THE COURT: Just with regard to the York agreement.

10 MR. MCKINNON: Well, with regard to both -- well, in
11 regard to that one, Your Honor, the plaintiff is the
12 master of that complaint, Your Honor.

13 We have pled this as a violation of the Dealers
14 Acts under Title 56. By making this argument, Mr. Hamm
15 is basically trying to recast our complaint for us in
16 saying we are really making the claim under some other
17 statute.

18 The Dealers Act very plainly states -- and I can
19 quote it, Your Honor -- the Dealers Act says any actions
20 arising out of any provision of this chapter shall be
21 commenced within four years after the date and cause of
22 action accrues.

23 As explained before, your cause of action --

24 THE COURT: Well, what --

25 MR. MCKINNON: -- Mr. Hamm is --

1 THE COURT: What provision are you bringing the
2 action under?

3 MR. MCKINNON: The Dealers Act. That's --

4 THE COURT: I know that, but it says -- the Dealers
5 Act says by reason of anything forbidden in this chapter.

6 MR. MCKINNON: Right. That would be 56-15-10, Your
7 Honor, where it lists off the --

8 THE COURT: 15-10 is just the definition provision.

9 MR. MCKINNON: All right. Let me --

10 THE COURT: 15-10 says definitions.

11 MR. MCKINNON: Give me just one moment, Your Honor.
12 I'll give you the correct reference.

13 THE COURT: Well, look at 15-30 and 15-40. It might
14 help.

15 MR. MCKINNON: I mean, it's the section that says
16 unfair deceptive practices in --

17 THE COURT: 15-40.

18 MR. MCKINNON: Okay. I apologize, Your Honor. I
19 have cited the wrong provision. That is what we are
20 bringing our cause of action under, and that is where
21 our complaint states is that Mr. Hamm's argument is, in
22 essence, that we're really bringing some other claim.

23 THE COURT: Well, what is the -- what is the unfair
24 or deceptive act or practice?

25 MR. MCKINNON: Well, the charging of administrative

1 fees disguised as government-mandated fees.

2 THE COURT: Wait a minute, disguised as
3 administrative fees?

4 MR. MCKINNON: Yes, sir.

5 THE COURT: Tell me --

6 MR. MCKINNON: Disguised as government-mandated
7 fees, Your Honor.

8 THE COURT: Where is --

9 MR. MCKINNON: That is --

10 THE COURT: How do you come to that conclusion?

11 MR. MCKINNON: Is Your Honor arguing where in our
12 complaint that we --

13 THE COURT: I'm not arguing anything.

14 MR. MCKINNON: Yeah. I just -- I want to answer your
15 question so...

16 THE COURT: Okay.

17 MR. MCKINNON: Are you asking where in our complaint
18 I'm referring to or to explain my argument that
19 they're disguised if they were trying to --

20 THE COURT: Well, it seems to me that the unfair or
21 deceptive act or practice that you complain of is based
22 on the processing fee, which is authorized by 37-23-07.

23 MR. MCKINNON: Okay.

24 THE COURT: That's what it seems like.

25 MR. MCKINNON: Your Honor, but we're arguing that

1 the fee that they charged is not authorized by that
2 statute because they don't follow its terms. They
3 don't post the proper sign -- don't post the proper signage
4 and because we argue the statute only allows them to
5 charge an administrative fee that's actually for an
6 administrative fee. They can't just make up extra
7 profit and slap a label on it and call it an
8 administrative fee.

9 THE COURT: Right.

10 MR. MCKINNON: So they're trying to argue an
11 affirmative defense, Your Honor. We're arguing that it
12 violates the plain language of the statutes. It's an
13 unfair, deceptive practice. It's not really
14 administrative fees, disguised dealer profit.

15 It's not -- the proper signage is not posted. It
16 does not comply with Title 37. We said, Your Honor -- we
17 get to assert what causes of action we want to assert.
18 We're asserting one in the Dealers Act.

19 If Mr. Hamm wants to make a motion for summary
20 judgment and claim -- or he can claim there's no cause
21 of action under the Dealers Act. I mean, that's not true
22 under South Carolina case law.

23 THE COURT: Well, he only says -- well, go ahead.

24 MR. MCKINNON: That's -- that's basically our
25 argument on that point, Your Honor. We're -- you know,

1 we are asserting a violation under Title 56.

2 We're asserting that title -- they do not meet the
3 requirements of Title 37, because the administrative
4 fees are not really administrative because they don't
5 meet the other requirements like posting a sign.

6 THE COURT: Why can't an arbitrator decide that?

7 MR. MCKINNON: Because the arbitration agreements
8 are unconscionable, Your Honor. They're not enforceable
9 under Simpson and Herron.

10 THE COURT: Well, that wasn't responsive to my
11 question.

12 MR. MCKINNON: Well, okay. I apologize, Your
13 Honor. I'll be careful. Like I said, if there were, in
14 fact, enforceable arbitration agreements, then an
15 arbitrator would be able to make those decisions, Your
16 Honor.

17 THE COURT: Well, that's what I thought. Okay. I
18 understand.

19 Anything further?

20 Mr. Hamm?

21 MR. HAMM: I'm struck by one of the most recent
22 comments he just made to you is they don't comply with
23 Title 37. That's what he just told you.

24 THE COURT: That's correct.

25 MR. HAMM: If we don't comply with Title 37, then he

1 needs -- then he is recognizing that it has
2 requirements, and the arbitrator can establish that
3 fact.

4 We're in a strange position, and I want to be
5 careful. I don't mean to in any way move away from my
6 motion to compel arbitration, but the fact remains is the
7 State of South Carolina under the Lexington Law Firm
8 decision, the South Carolina Supreme Court said, the
9 construction of a statute subject to the enforcement of
10 a State agency is entitled to deference and
11 consideration.

12 In a more recent case in which I, fortunately, had
13 some success with, in King vs. American General, the
14 South Carolina Supreme Court said, "Look, let's first
15 see if the interpretation of the agency is worthy of
16 deference."

17 In both of these cases, the South Carolina
18 Department of Consumer Affairs issued an
19 interpretation and said you've got to file the maximum
20 rate you want to charge. You have got to pay your ten
21 bucks. You have to include it in your contract
22 documents. You have to include it in the advertised
23 price.

24 Both of our defendants in this case, they've done
25 all of those things but --

1 THE COURT: Put up the sign?

2 MR. HAMM: Put up the signs, yes, sir, put up the
3 signs. The statute requires that they post in one
4 conspicuous place, and they have been doing that for
5 years.

6 So all of statutory requirements have been met.
7 The arbitrator can address those issues. I also want to
8 cling to an argument that was just made on this record.

9 We are not arguing that the arbitration agreements
10 are unconscionable. He just said that. Well, the only
11 way that this court is now going to engage in all of
12 these other examinations is, "Well, Mr. Hamm, I can't send
13 you to arbitration because it's unconscionable."

14 He just admitted we're not claiming that they're
15 unconscionable. Let's go to the Dodgeland matter.
16 Yes, that is a broad claim. It basically says any
17 dispute is going to be subject to arbitration.

18 In an updated arbitration agreement, and in this
19 case, the consumer is going to be involved in selecting
20 the rules that apply and in selecting the arbitrator.

21 Dealers are sort of stuck with damned if you do and
22 damned if you don't. If you get too specific, they
23 claim it's oppressive. If you try to keep it broad
24 so -- and you certainly have no oppressive matters before
25 you.

1 We think under the Federal Arbitration Act, and its
2 progeny of cases going to Stolt-Nielsen and the AT&T
3 decision and the Munoz case here in South Carolina. You
4 say, "All right. I'm sending this to arbitration." The
5 arbitrator can decide those issues.

6 He is incorrect when he says, "Well, this
7 arbitration agreement, the arbitrator can't strike a
8 portion of it." Of course, he can. Both of the
9 arbitration agreements, both of them, give to the
10 arbitrator the total authority to conduct it as he
11 deems appropriate, and we'll live with the good and
12 we'll live with the bad. That authority is resonant in
13 the arbitrator.

14 So we simply, number one, he has conceded they
15 are claiming our clients violated the Title 37,
16 notwithstanding we have done everything, under the
17 Lexington Law Firm case, as the agency said we were
18 supposed to do.

19 So we stand here, respectfully again, asking you
20 to either dismiss with regard to the York vs. Dodgeland,
21 but at the very least, the arbitration agreements are
22 susceptible to arbitration. They have severability
23 clauses, neither of them have problems under Simpson,
24 and the arbitrator can we resolve --

25 THE COURT: How about the class?

1 MR. HAMM: The arbitrator will have to address that
2 issue. They --

3 THE COURT: Well, left me finish the question.

4 MR. HAMM: Oh, excuse me.

5 THE COURT: The class prohibitive provision of
6 these two contracts, how does that square with AT&T?

7 MR. HAMM: On all fours. They are totally in
8 accord with AT&T. The AT&T decision says under the
9 Federal Arbitration Act, a business can insert a
10 clause that prohibits class treatment in arbitration
11 subject to the Federal Arbitration Act.

12 The Stolt-Nielsen case -- just so you have a sense
13 of how this plays -- you may be familiar with the Green
14 Tree case in which I participated and went to the U.S.
15 Supreme Court.

16 We were successful because the arbitration
17 agreement was silent. We got the arbitrator to say -- to
18 agree with the position that I argued; that it was broad
19 enough to encompass class arbitration. He agreed,
20 issued an order. We went to the South Carolina --

21 THE COURT: If I agree with your position, do you
22 think you're subject to class treatment?

23 MR. HAMM: No, but that -- but let me be clear. What
24 you think, with all due respect, and what I think, once
25 you send us to arbitration, that is a decision for the

1 arbitrator. That was the one thing I learned in Green
2 Tree.

3 Stolt-Nielsen said a silent agreement will not
4 allow class agreement. The AT&T decision now sets aside
5 the Green Tree decision that I was involved in.

6 It said if you put it in there, you absolutely
7 can -- if it is enforceable under the Federal Arbitration
8 Act, but it doesn't make any difference what you think
9 or I think.

10 We sent it to arbitration. We all have to presume
11 good faith on the part of the arbitrator. The plaintiffs
12 will have -- nothing is going to get rammed down their
13 throat. They'll have their rights.

14 The Supreme Court in Munoz said, "Wait a minute, this
15 is just another forum. Our law is when in doubt, we're
16 going to enforce arbitrability." On that basis, the
17 arbitrator is going to decide that issue.

18 Now, I will tell you on this record, I'm going to
19 say to the arbitrator -- the United States Supreme
20 Court just ruled on this issue. We have the very clause
21 the United States Supreme Court upheld, and on that
22 basis, we don't think you can proceed.

23 Does that mean he's going to adopt it? I would hope
24 so, but the fact that you ruled or whatever is not going
25 to be relevant to the decision of the arbitrator. That

1 is the process that we must follow.

2 THE COURT: All right. Thank you very much.

3 MR. HAMM: Thank you.

4 THE COURT: Anything further?

5 MR. MCKINNON: Very briefly, Your Honor. Just two
6 quick points. Again, I disagree with Mr. Hamm on the
7 AT&T decision.

8 THE COURT: I'll read it.

9 MR. MCKINNON: Thank you, Your Honor.

10 On the point of the Title 37, Your Honor, I mean,
11 this -- our claim is that statute allows a legitimate
12 administrative fee.

13 If it cost \$5 to make copies and \$2 for the faxes,
14 the Carfax, they can charge an administrative fee. Our
15 cause of action is they are fraudulently disguising
16 profit as an administrative fee.

17 There is no regulatory guidance. There is no case
18 in South Carolina. There is no authority anywhere in
19 South Carolina that says they may do that. That is our
20 cause of action in a nutshell.

21 They are fraudulently claiming an administrative
22 fee, when it is, in fact, disguised, a dealer profit,
23 which creates deceptive practices, Your Honor, and is a
24 violation of Title 56.

25 We are the master of our complaint. We think we are

1 allowed to assert that cause of action, and the statute
2 is four years.

3 Finally, Your Honor, if I can just return real
4 briefly again, Mr. Hamm characterized that the York
5 contract is a brief contract.

6 Your Honor, it has no terms at all. It doesn't even
7 say, for example -- if our client says, "I want Mr. Jones
8 as an arbitrator," and Mr. Hamm's client says, "I want
9 Mr. Smith as an arbitrator," it doesn't have a provision
10 to select an arbitrator. It has --

11 THE COURT: Does the act?

12 MR. MCKINNON: I'm sorry?

13 THE COURT: Does the act?

14 MR. MCKINNON: It does not, Your Honor. It has no
15 terms at all, Your Honor. It's not enforceable.

16 THE COURT: Well, you may have to make that up with
17 Judge Anderson.

18 All right. Thank you very much, counsel. I have a
19 jury that's waiting, and I need to get back to this
20 very interesting trial with these lawyers that are
21 observing are conducting at the present time. Thank you
22 very much.

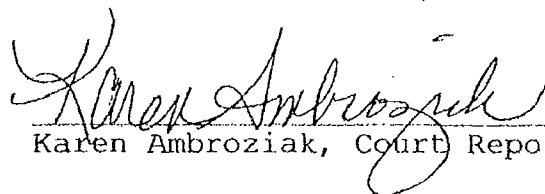
23 (Whereupon, the proceedings were concluded.)
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Common Pleas Court for Richland County, South Carolina, on the 18th day of May, 2011.

June 27, 2011


Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

Unmarked Exhibit Provided
to Court by Defendants during
May 18, 2011 Hearing:
Retail Installment Contract
and Security Agreement
between Appellant Cristy and
Respondent Jim Hudson
Hyundai, dated
March 28, 2008

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT	Seller JIM HUDSON-HYUNDAI 310 CHEVYSTONE BLVD. COLUMBIA, SC 29210	Buyer OLGA JOANNE BRISTY
No. MARCH 28th, 2008 Date	We and us mean the Seller above, its successors and assigns.	You and you mean each Buyer above, and guarantor, jointly and individually.

SALE: You agree to purchase from us, on a time basis, subject to the terms and conditions of this contract and security agreement (Contract), the Motor Vehicle (Vehicle) and services described below. The Vehicle is sold to you in its present condition, together with the usual accessories and attachments.

Description of Motor Vehicle	Year	Make	VIN	Other
Purchased	Model	Year	Use	
			☐ New ☐ Used	

Description of Trade-In	2004 TOYOTA TUNDRA

SECURITY: To secure your payment and performance under the terms of this Contract, you give us a security interest in the Vehicle, all accessories, attachments, accessories, and equipment placed in or on the Vehicle, together called Property, and proceeds of the Property. You also assign to us and give us a security interest in proceeds and premium refunds of any insurance and service contracts purchased with this Contract, except where prohibited by law.

PROMISE TO PAY AND PAYMENT TERMS: You promise to pay us the principal amount of \$18463.06, plus credit service charges according to the unpaid balance at the rate of 7.99% per year from today's date until paid in full. If goods are delivered or services performed more than ten days from today, credit service charges will begin to accrue on the date of delivery or performance. Credit service charges accrue on a 360-day year, on a daily basis. You agree to pay this Contract according to the payment schedule and late charge provisions shown in the TRUTH IN LENDING DISCLOSURES. You also agree to pay any additional amounts according to the terms and conditions of this Contract.

☒ **DOCUMENTATION FEE:** You also agree to pay a documentation fee of \$289.00, and it will be ☐ paid in cash ☐ paid pro rata over the loan term ☐ will be held from the proceeds. (If this fee is withheld from the proceeds, the amount is included in the principal sum.)

☐ **MINIMUM CREDIT SERVICE CHARGE:** You agree to pay a minimum credit service charge of \$ N/A if you pay this Contract in full before we have earned that much in credit service charges.

DOWN PAYMENT: You also agree to pay, or apply to the Cash Price, on or before today's date, any cash, rebate and net trade-in value described in the ITEMIZATION OF AMOUNT FINANCED. ☐ You agree to make deferred payments as part of the cash down payment as reflected in your Payment Schedule.

☐ **SOUTH CAROLINA UCCC APPLIES:** Even if the South Carolina Uniform Consumer Credit Code would not otherwise apply, this Contract is a consumer credit transaction. This Contract is, therefore, subject to the South Carolina UCCC, including the permissible rates and charges.

TRUTH IN LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE (the cost of your credit as a yearly rate)	FINANCE CHARGE (The dollar amount the credit will cost you)	AMOUNT FINANCED (The amount of credit provided to you or on your behalf)	TOTAL OF PAYMENTS (The amount you will have paid when you have made all scheduled payments)	TOTAL SALE PRICE (The total cost of your purchase on credit, including your down payment of)
6.99 %	\$ 1201.27	\$ 18463.06	\$ 22464.72	\$ 29464.72

Payment Schedule: Your payment schedule will be:		
Number of Payments	Amount of Payments	When Payments Are Due
72	312.01	MONTHLY BEGINNING: MAY 12th, 2008

Security: You are giving a security interest in the Motor Vehicle purchased.

Late Charge: If all or any portion of a payment is not paid within 10 days of its due date, you will be charged a late charge of the lesser of 5% of the unpaid amount of the payment due or \$15.50. (Minimum late charge \$6.20). These amounts may change pursuant to §§ 37-2-203 and 37-1-109 of the S.C. Code Ann. so as to be the maximum allowed by law.

Prepayment: If you pay off this Contract early, you ☐ may ☒ will not have to pay a Minimum Credit Service Charge.

☐ If you pay off this Contract early, you will not be entitled to a refund of part of the documentation fee.

Contract Provisions: You can see the terms of this Contract for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds.

CREDIT INSURANCE: Credit life, credit disability (accident and health or accident and sickness), and any other insurance coverage quoted below are not required to obtain credit and we will not provide them unless you sign and agree to pay the additional premium. If you want such insurance, we will obtain it for you (if you qualify for coverage). We are quoting below ONLY the coverages you have chosen to purchase.

Credit Life: Insured
☐ Single ☐ Joint Prem. \$ N/A Term N/A

Credit Disability: Insured
☐ Single ☐ Joint Prem. \$ N/A Term N/A

Your signature below means you want (only) the insurance coverage(s) quoted above. If none are quoted, you have declined any coverages we offered.

Buyer _____ Dated 4/6/08

Buyer _____ Dated 4/6/08

PROPERTY INSURANCE: You must insure the Property securing this Contract. You may purchase or provide the insurance through any insurance company reasonably acceptable to us. The collision coverage deductible may not exceed \$ N/A. If you get insurance from or through us you will pay \$ N/A for _____ of coverage.

This premium is calculated as follows:

☐ \$ N/A Deductible, Collision Coverage \$ N/A

☐ \$ N/A Deductible, Comprehensive Cov. \$ N/A

☐ Fire Theft and Combined Additional Coverage \$ N/A

☐ \$ N/A

Liability insurance coverage for bodily injury and motor

ITEMIZATION OF AMOUNT FINANCED

Vehicle Price (incl. sales tax of \$ 300.00)	\$ 24635.00
Service Contract, Paid to: N/A	\$ N/A
Cash Price	\$ 24635.00
Manufacturer's Rebate	\$ 1000.00
Cash Down Payment	\$ N/A
Deferred Down Payment	\$ N/A
a. Total Cash/Rebate Down	\$ 1000.00
b. Trade-In Allowance	\$ 6000.00
c. Less: Amount owing	\$ N/A
Paid to (includes f): N/A	
d. Net Trade-In (b. minus c.)	\$ 6000.00
e. Net Cash/Trade-In (a. plus d.)	\$ 7000.00
f. Amount to Finance Line (e. (if e. is negative))	\$ N/A
Down Payment (e. disclose as \$0 if negative)	\$ 7000.00
Unpaid Balance of Cash Price	\$ 17635.00
Paid to Public Officials - Filing Fees	\$ 39.00
Insurance Premiums	\$ N/A
To: JIM HUDSON-HYUNDAI	\$ 289.00
To: JIMBA GAP	\$ 490.00
To: N/A	\$ N/A
To: N/A	\$ N/A
To: N/A	\$ N/A
To: N/A	\$ N/A
Total Other Charges/Amounts Pd. to Others	\$ 778.00
Less: Prepaid Charges	\$ N/A
Amount Financed	\$ 18463.06

We may retain or receive a portion of this amount.

(repayment before the scheduled date, and prepayment refunds).

CREDIT INSURANCE: Credit life, credit disability (accident and health or accident and sickness), and any other insurance coverage added below are not required to obtain credit and we will not provide them unless you sign and agree to pay the additional premium. If you want such insurance, we will obtain it for you (if you qualify for coverage). We are quoting below ONLY the coverages you have chosen to purchase.

Credit Life Insured:
☐ Single ☐ Joint ☐ Term ☐ N/A
Credit Disability Insured:
☐ Single ☐ Joint ☐ Term ☐ N/A

Your signature below means you want (only) the insurance coverage(s) quoted above. If the above quoted you have declined any coverages we offered.

Buyer: _____ Dated: 03/28/2008

PROPERTY INSURANCE: You must insure the property securing this contract. You may purchase or provide the insurance through any insurance company reasonably acceptable to us. The collision coverage deductible may not exceed \$_____. N/A. If you get insurance from or through us, you will pay \$_____ N/A for _____ of coverage.

The premiums calculated as follows:
☐ \$_____ N/A Deductible, Collision Coverage \$_____ N/A
☐ \$_____ N/A Deductible, Comprehensive Cov. \$_____ N/A
☐ Fire Theft and Combined Additional Coverage \$_____ N/A
☐ _____ \$_____ N/A

Liability Insurance coverage for bodily injury and motor vehicle damage caused to others is not included in this contract unless checked and indicated.

☐ **SINGLE-INTEREST INSURANCE:** You must purchase single-interest insurance as part of this sale transaction. You may purchase the coverage from a company of your choice, reasonably acceptable to us. If you buy the coverage from or through us, you will pay \$_____ N/A for _____ of coverage.

☒ **SERVICE CONTRACT:** With your purchase of the vehicle, you agree to purchase a Service Contract to cover _____ N/A.

This Service Contract will be in effect for _____ N/A.

ASSIGNMENT: This Contract and Security Agreement is assigned to _____ H&T the Assignee, phone (502) 862-7552. This assignment is made ☐ under the terms of a separate agreement. ☒ under the terms of the ASSIGNMENT BY SELLER on page 2. This assignment is made with recourse.
Seller: By _____ Date 03/28/2008

ITEMIZATION OF AMOUNT FINANCED

Vehicle Price (incl. sales tax) of \$	300,000.00	\$	24685.00
Service Contract Paid to:	N/A	\$	N/A
Cash Price:	\$	24685.00	
Manufacturers Rebate:	\$	1000.00	
Cash Down Payment:	\$	N/A	
Deferred Down Payment:	\$	N/A	
a. Total Cash/Rebate/Down:	\$	1000.00	
b. Trade-in Allowance:	\$	6000.00	
c. Less: Amount Owng:	\$	N/A	
Paid to (includes f):	\$	N/A	
d. Net Trade-in (b minus c):	\$	6000.00	
e. Net Cash/Trade-in (a plus d):	\$	7000.00	
Amount to Finance (line e, if negative):	\$	N/A	
Down Payment (e, disclose as \$0 if negative):	\$	7000.00	
Unpaid Balance of Cash Price:	\$	17685.00	
Paid to Public Officials: Filing Fees:	\$	39.00	
Insurance Premiums:	\$	N/A	
To: TIM HUDSON HYUNDAI	\$	289.00	
To: TINA GAP	\$	450.00	
To: N/A	\$	N/A	
To: N/A	\$	N/A	
To: N/A	\$	N/A	
To: N/A	\$	N/A	
Total Other Charges/Amounts Pd. to Others:	\$	170.00	
Less: Prepaid Charges:	\$	N/A	
Amount Financed:	\$	13403.00	

We may retain or receive a portion of this amount.

NOTICE TO BUYER:
(1) Do not sign this Agreement before you read it or if it contains any blank spaces. (2) You are entitled to a completely filled-in copy of this Agreement. (3) Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the Credit Service Charge.

BY SIGNING BELOW BUYER AGREES TO THE TERMS ON PAGES 1 AND 2 OF THIS CONTRACT AND ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT.
The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this Contract and retain its right to receive a part of the Finance Charge.

Buyer: DLGA JOANNE CRISTY 03/28/2008
Signature: _____ Date: _____

Signature: _____ Date: _____

Seller: By _____

ADDITIONAL TERMS OF THIS CONTRACT AND SECURITY AGREEMENT

GENERAL TERMS: You have been given the opportunity to purchase the Vehicle and described services for the Cash Price or the Total Sale Price. The Total Sale Price is the total price of the Vehicle and any services if you buy them over time. You agreed to purchase the items over time. The Total Sale Price shown in the TRUTH IN LENDING DISCLOSURES assumes that all payments will be made as scheduled. The actual amount you will pay may be more or less depending on your payment record.

We do not intend to charge or collect, and you do not agree to pay, any credit service charge or fee that is more than the maximum amount permitted for this sale by state or federal law. If you pay a credit service charge or fee that is contrary to this provision, we will instead apply it first to reduce the principal balance, and when the principal has been paid in full, refund it to you.

The law of South Carolina will govern this transaction. It is also governed by applicable federal law and regulations. In the event of a dispute, the exclusive forum, venue, and place of jurisdiction will be in South Carolina, unless otherwise required by law.

You understand and agree that some payments to third parties as a part of this Contract may involve money retained by us or paid back to us as commissions or other remuneration.

If any action or provision of this Contract is not enforceable, the other terms will remain part of this Contract.

NAME AND LOCATION: Your name and address indicated on page 1 are your exact legal name and your principal residence. You will provide us with at least 30 days' notice prior to changing your name or principal residence.

BALLOON PAYMENT: If any payment is more than twice as large as the average of earlier scheduled payments, you may refinance that payment when due without penalty. Your right is subject to the exceptions specified in S.C. Code Ann. § 37-2-405.

PREPAYMENT: You may prepay this Contract in full or in part at any time. Any partial prepayment will not excuse any later scheduled payments until you pay in full.

If a documentation fee has been collected and the loan is prepaid in full, or upon maturity by acceleration, this fee, or a portion thereof, may be refundable if the prepayment causes the recalculated APR to exceed the finance charge allowed by law.

A refund of any prepaid, unearned insurance premiums may be obtained from us or from the insurance company named in your policy or certificate of insurance.

OWNERSHIP AND DUTIES TOWARD PROPERTY: By giving us a security interest in the Property, you represent and agree to the following:

- Our security interest will not extend to consumer goods unless you acquire rights to them within 10 days after we enter into this Contract, or they are installed in or affixed to the Vehicle.
- You will defend our interests in the Property against claims made by anyone else. You will do whatever is necessary to keep our claim to the Property ahead of the claim of anyone else.
- The security interest you are giving us in the Property comes ahead of the claim of any other of your general or secured creditors. You agree to sign any additional documents or provide us with any additional information we may require to keep our claim to the Property ahead of the claim of anyone else. You will not do anything to change our interest in the Property.
- You will keep the Property in your possession in good condition and repair. You will use the Property for its intended and lawful purposes. Unless otherwise agreed in writing, the Property will be located at your address listed on page 1 of this Contract.
- You will not attempt to sell the Property (unless it is properly identified inventory) or otherwise transfer any rights in the Property to anyone else, without our prior written consent.
- You will pay all taxes and assessments on the Property as they become due.
- You will notify us of any loss or damage to the Property. You will provide us reasonable access to the Property for the purpose of inspection. Our entry and inspection must be accomplished lawfully, and without breaching the peace.

DEFAULT: You will be in default on this Contract if any one of the following occurs (except as prohibited by law):

- You fail to make a payment as required by this Contract.
- The prospect of payment, performance, or realization of the Property is significantly impaired.

If you default, you agree to pay our reasonable attorneys' fees limited to 15% of the unpaid debt after default and referral, if we refer this contract to an attorney who is not a salaried employee of ours. You also agree to pay any other reasonable expenses and charges allowed by law.

If an event of default occurs as to any one of you, we may exercise our remedies against any or all of you.

REMEDIES: If you are in default on this Contract, we have, subject to any right to cure that you may exercise, all of the remedies provided by law and this Contract:

- We may require you to immediately pay us, subject to any refund required by law, the remaining unpaid balance of the amount financed, credit service charges and all other agreed charges.
- We may pay taxes, assessments, or other liens or make repairs to the Property if you have not done so. We are not required to do so. This amount will be due immediately. This amount will earn credit service charges from the date paid at the rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.
- We may require you to make the Property available to us at a place we designate that is reasonably convenient to you and us.
- We may immediately take possession of the Property by legal process or self-help, but in doing so we may not breach the peace or unlawfully enter onto your premises. We may then sell the Property and apply what we receive as provided by law to our reasonable expenses and then toward your obligations.

Except when prohibited by law, we may sue you for additional amounts if the proceeds of a sale do not pay all of the amounts you owe us.

By choosing any one or more of these remedies, we do not waive our right to later use another remedy. By deciding not to use any remedy, we do not give up our right to consider the event a default if it happens again.

You agree that if any notice is required to be given to you of an intended sale or transfer of the Property, notice is reasonable if mailed to your last known address, as reflected in our records, at least 10 days before the date of the intended sale or transfer (or such other period of time as is required by law).

RETURNED CHECK CHARGE: If you make any payment required by this Contract with a check that is dishonored, we may charge you a service charge of not more than \$30.

PROPERTY INSURANCE: You agree to buy property insurance on the Property, protecting against loss and physical damage and subject to a maximum deductible amount indicated in the PROPERTY INSURANCE section, or as we will otherwise require. You will name us as loss payee on any such policy. In the event of loss or damage to the Property, we may require additional security or assurances of payment before we allow insurance proceeds to be used to repair or replace the Property. You agree that if the insurance proceeds do not cover the amounts you still owe us, you will pay the difference. You may purchase or provide the insurance through any insurance company reasonably acceptable to us. You will keep the insurance in full force and effect until this Contract is paid in full.

If you fail to obtain or maintain this insurance, or name us as a loss payee, we may obtain insurance to protect our interest in the Property. This insurance may include coverages not required of you. This insurance may be written by a company other than one you would choose. It may be written at a rate higher than a rate you could obtain if you purchased the property insurance required by this Contract. We will add the premium for this insurance to the amount you owe us. Any amount we pay will be due immediately. This amount will earn credit service charges from the date paid at the rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.

CREDIT INSURANCE: CREDIT INSURANCE MAY NOT COVER THE AMOUNT DUE UNDER THIS CONTRACT. YOU SHOULD REVIEW YOUR POLICY OR CERTIFICATE TO DETERMINE THE EXACT AMOUNT OF COVERAGE.

OBLIGATIONS INDEPENDENT: Each person who signs this Contract agrees to pay this Contract according to its terms. This means the following:

- You must pay this Contract even if someone else has also signed it.
- We may release any co-buyer or guarantor and you will still be obligated to pay this Contract.
- We may release any security, and you will still be obligated to pay this Contract.
- If we give up any of our rights, it will not affect your duty to pay this Contract.
- If we extend new credit or renew this Contract, it will not affect your duty to pay this Contract.

WARRANTY: Warranty information is provided to you separately.

WAIVER: To the extent permitted by law, you agree to give up your rights to require us to do certain things. Except for giving a required notice of right to cure for the failure to make a payment, we are not required to: (1) demand payment of amounts due; (2) give notice that amounts due have not been paid, or have not been paid in the appropriate amount, time or manner; or, (3) give notice that we intend to make, or are making, this Contract immediately due.

THIRD PARTY AGREEMENT

By signing below you agree to give us a security interest in the Property described in the SALE section. You also agree to the terms of this Contract, including the WAIVER section above, except that you will not be liable for the payments it requires. Your interest in the Property may be used to satisfy the Buyer's obligation. You agree that we may renew, extend, change this Contract, or release any party or property without releasing you from this Contract. We may take these steps without notice or demand upon you.

You acknowledge receipt of a completed copy of this Contract.

Signature

Date

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

IF YOU ARE BUYING A USED VEHICLE, THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

PLEASE READ CAREFULLY! NOTICE OF ARBITRATION

If you agree to Arbitration you are giving up your right to go to court for claims and disputes arising from this Contract.

- You or we may choose to have any dispute between us decided by arbitration, and not by a court or by jury trial.
- If a dispute is arbitrated, you give up your right to join in as a class representative or class member on any class claim you may have against us, including any right to class arbitration.

In arbitration, discovery and rights to appeal are generally more limited than in a judicial proceeding, and other facts that

...without breaching the peace.

DEFAULT: You will be in default on this Contract if any one of the following occurs (except as prohibited by law):

- A. You fail to make a payment as required by this Contract.
- B. The prospect of payment, performance, or realization of the Property is significantly impaired.
- If you default, you agree to pay our reasonable attorneys' fees limited to 15% of the unpaid debt after default and referral. If we refer this contract to an attorney who is not a salaried employee of ours, you also agree to pay any other reasonable expenses and charges allowed by law.

If an event of default occurs as to any one of you, we may exercise our remedies against any or all of you.

REMEDIES: If you are in default on this Contract, we have, subject to any right to cure that you may exercise, all of the remedies provided by law and this Contract.

- A. We may require you to immediately pay us, subject to any refund required by law, the remaining unpaid balance of the amount financed, credit service charges and all other agreed charges.
- B. We may pay taxes, assessments, or other liens or make repairs to the Property if you have not done so. We are not required to do so. This amount will be due immediately. This amount will earn credit service charges from the date paid at the rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.
- C. We may require you to make the Property available to us at a place we designate that is reasonably convenient to you and us.
- D. We may immediately take possession of the Property by legal process or self-help, but in doing so we may not breach the peace or unlawfully enter onto your premises. We may then sell the Property and apply what we receive as provided by law to our reasonable expenses and then toward your obligations.

THIRD PARTY AGREEMENT

By signing below you agree to give us a security interest in the Property described in the SALE section. You also agree to the terms of this Contract including the WAIVER section above, except that you will not be liable for the payments it requires. Your interest in the Property may be used to satisfy the Buyer's obligation. You agree that we may renew, extend, change this Contract, or release any party or property without releasing you from this Contract. We may take these steps without notice or demand upon you.

You acknowledge receipt of a completed copy of this Contract.

Signature _____

Date _____

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

IF YOU ARE BUYING A USED VEHICLE, THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

PLEASE READ CAREFULLY: NOTICE OF ARBITRATION

If you agree to Arbitration you are giving up your right to go to court for claims and disputes arising from this Contract.

- You or we may choose to have any dispute between us decided by arbitration, and not by a court or by jury trial.
- If a dispute is arbitrated, you give up your right to join in as a class representative or class member on any class claim you may have against us, including any right to class arbitration.
- In arbitration, discovery and rights to appeal are generally more limited than in a judicial proceeding, and other rights that you and we would have in court may not be available.

ARBITRATION AGREEMENT: At your or our election, any claim or dispute in contract, tort, statute or otherwise between you and us or our employees, agents, successors or assigns that arises out of or relates to your credit application, this Contract or any resulting transaction or relationship, including those with third parties who do not sign this Contract, is to be decided by neutral, binding arbitration. The interpretation and scope of this arbitration agreement, including the arbitrability of a claim or dispute, is also to be decided by neutral, binding arbitration.

If you or we choose to arbitrate our claim or dispute, you and we agree that no trial by jury or other judicial proceeding take place. In addition, you agree not to participate as a class representative or class member on any class claim that you may have against us, including class arbitration. You and we also agree that any claim or dispute is to be heard and decided by one arbitrator only, only on an individual basis, and not as a class action.

For the arbitration, you or we may choose one of the following arbitration organizations with its applicable rules: the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4805 (www.adr.org), the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), or JAMS, 235 Peachtree St., NE, 600 North Tower, Atlanta, GA 30303 (www.jamsadr.com). You can get a copy of the rules of these arbitration organizations by contacting the respective organization directly or by visiting their respective website.

The arbitration hearing will be carried out in the federal district where you reside, unless you and we agree otherwise. If arbitration begins, we would advance your filing, administration, service or case management fee, and your arbitrator or hearing fee all up to a total maximum of \$1,500. Unless the arbitrator

awards them to a party, each party is responsible for the fees of its attorney(s), experts, witnesses, and any other fees and costs of arbitration, including any amount we have advanced.

The arbitrator will be a lawyer or a former judge. In making an award, the arbitrator shall follow governing substantive law. The arbitrator has the authority to order specific performance, monetary damages, and punitive damages or to provide any relief allowed by applicable law. Other than the grounds for review under the Federal Arbitration Act, the arbitration award is final and binding on all parties. Any court having jurisdiction may enforce the arbitrator's award.

You and we retain rights to self-help remedies and to seek remedies in small claims court for claims or disputes within that court's jurisdiction, unless those claims or disputes are transferred, removed, or appealed to a different court. You and we retain rights to take measures that do not involve a court or arbitration. These measures include, but are not limited to, setting off against a deposit account, repossessing property, and foreclosing on property. You or we may obtain a temporary court order necessary to prevent harm until the arbitration is completed. By exercising any retained rights or by taking measures that do not involve a court or arbitration, neither you nor we waive the right to arbitrate any claim or dispute.

The Federal Arbitration Act (9 U.S.C. § 1 et. seq.) governs this arbitration agreement and not any state law concerning arbitration, including state law arbitration rules and procedures. This arbitration agreement survives any termination, payoff or transfer of this Contract. Except for the waivers of class action rights, if any part of this arbitration agreement is found to be unenforceable, the remainder is enforceable.

By signing this Contract you and we understand and agree to be bound by its terms, and expressly waive our rights to trial by jury and judicial process, and review, except as allowed by law.

CAUTION: It is important that you read this arbitration agreement thoroughly before you sign this Contract. By signing it, you are accepting that you have read and understand this arbitration agreement, and have received a copy of it. If you do not understand something in this arbitration agreement, do not sign this Contract; instead ask your lawyer.

ASSIGNMENT BY SELLER

Seller sells and assigns this Retail Installment Contract and Security Agreement (Contract) to the Assignee, its successors and assigns, including all its rights, title and interest in this Contract, and any guarantee executed in connection with this Contract. Seller gives Assignee full power, either in its own name or in Seller's name, to take all legal or other actions which Seller could have taken under this Contract. (SEPARATE AGREEMENT: If this Assignment is made "under the terms of a separate agreement" as indicated on page 1, the terms of this assignment are described in a separate writing(s) and not as provided below.)

Seller warrants:

- A. This Contract represents a sale by Seller to Buyer on a time price basis and not on a cash basis.
 - B. The statements contained in this Contract are true and correct.
 - C. The down payment was made by the Buyer in the manner stated on page 1 of this Contract and, except for the application of any manufacturer's rebate, no part of the down payment was cashed or paid to the Buyer by Seller or Seller's representative.
 - D. This sale was completed in accordance with all applicable federal and state laws and regulations.
 - E. This Contract is valid and enforceable in accordance with its terms.
 - F. The names and signatures on this Contract are not forged, fictitious or assumed, and are true and correct.
 - G. This Contract is vested in the Seller free of all liens, is not subject to any claims or defenses of the Buyer, and may be sold or assigned by the Seller.
 - H. A completely filled-in copy of this Contract was delivered to the Buyer at the time of execution.
 - I. The Vehicle has been delivered to the Buyer in good condition and has been accepted by Buyer.
 - J. Seller has or will perfect a security interest in the Property in favor of the Assignee.
- If any of these warranties is breached or untrue, Seller will, upon Assignee's demand, purchase this Contract from Assignee. The purchase shall be in cash in the amount of the unpaid balance (including credit service charges) plus the costs and expenses of Assignee, including attorneys' fees.

Seller will indemnify Assignee for any loss sustained by it because of judicial set-off or as the result of a recovery made against Assignee as a result of a claim or defense Buyer has against Seller.

Seller waives notice of the acceptance of this Assignment, notice of non-payment or non-performance and notice of any other remedies available to Assignee. Assignee may, without notice to Seller, and without affecting the liability of Seller, under this Assignment, compound or release any rights against, and grant extensions of time for payment to be made, to Buyer and any other person obligated under this Contract.

UNLESS OTHERWISE INDICATED ON PAGE 1, THIS ASSIGNMENT IS WITHOUT RECOURSE.

WITH RECOURSE: If this Assignment is made "with recourse" as indicated on page 1, Assignee takes this Assignment with certain rights of recourse against Seller. Seller agrees that if the Buyer defaults on any obligation of payment or performance under this Contract, Seller will, upon demand, repurchase this Contract for the amount of the unpaid balance, including finance charges, due at that time.

March 31, 2011

VIA US MAIL AND

EMAIL: GCOOPERLC@SCCOURTS.ORG

The Hon. G. Thomas Cooper, Jr.
1701 Main Street, Suite 323
Columbia, SC 29201

Re: Melissa Anne York and Olga Joanne Cristy v. Dodgeland of
Columbia, Inc., and Jim Hudson Automotive Group et al
Civil Action No. 2010-CP-40-4274

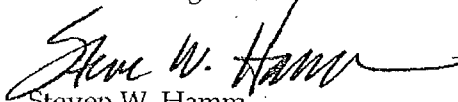
Dear Judge Cooper:

On behalf of the Defendants, we, together with Ms. Laffitte and Mr. Montgomery, are submitting the enclosed proposed Order in the above-mentioned matter as directed at the motions hearing held on Thursday, March 10, 2011, at 2:00 p.m. We respectfully ask that the Court address the issue of arbitration first. If arbitration is compelled then the Arbitrator can address any other remaining issues. If arbitration is not compelled, we would ask for the opportunity, and we are prepared, to submit a proposed Order on all remaining issues presented by Steve Hamm and Michael Montgomery.

By a copy of this letter, we are serving the same upon all parties of record.

If you should have any questions, please do not hesitate to contact me.

With kind regards,


Steven W. Hamm

C. Jo Anne Wessinger Hill

CJWH:SWH:kjt

Enclosure

Cc: Jennifer E. Roberts, Esq., Law Clerk to
The Hon. G. Thomas Cooper, Jr., w/enc.
Rebecca Laffitte, Esq., w/enc.
J. Michael Montgomery, Esq., w/enc.
William Angus McKinnon, Esq., w/enc.
Patrick Knie, Esq., w/enc.
Susan F. Campbell, Esq., w/enc.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
	)	
Melissa Anne York and Olga Joanne Cristy,	)	Civil Action No.: 10-CP-40-4244
	)	
PLAINTIFFS,	)	
	)	
	)	
v.	)	
	)	ORDER
	)	
	)	
Dodgeland of Columbia, Inc. and Jim	)	
Hudson Automotive Group, and Jim	)	
Hudson Superstore, a/k/a Jim Hudson	)	
Hyundai,	)	
	)	
DEFENDANTS.	)	

This matter came before the Court on March 10, 2011, upon motions by the defendants to dismiss the Amended Complaint, to compel arbitration, to sever, to strike, for a more definite pleading, and for a Protective Order pursuant to Rules 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), 12(b)(6), 12(b)(7), 12(e), 12(f), 18, 19, 20, 21, 23, and 26(c), SCRCP. Patrick E. Knie of Patrick E. Knie, P.A., and William A. McKinnon of McGowan, Hood, & Felder appeared on behalf of the plaintiffs. Steven W. Hamm and C. Jo Anne Wessinger Hill of Richardson, Plowden & Robinson, P.A., appeared on behalf of the defendants, Dodgeland of Columbia, Inc., Jim Hudson Automotive Group, and Jim Hudson Superstore, a/k/a Jim Hudson Hyundai; J. Michael Montgomery of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of the defendant, Dodgeland of Columbia, Inc. After considering the motions, supporting memoranda, arguments of counsel, and the materials presented at the hearing, the Court grants the defendants' motion to dismiss and compel arbitration.

PROCEDURAL HISTORY AND FACTS

The plaintiffs, Melissa York and Olga Jones Cristy, filed this lawsuit challenging the charging of a “closing fee” by these two automobile dealerships, a type of fee which the South Carolina Legislature directly authorized by statute in 2000,¹ and which has been previously upheld by South Carolina appellate and trial courts.² The plaintiffs commenced this action against the defendants by filing the Summons and Complaint in the Court of Common Pleas in Richland County on June 25, 2010. An Amended Complaint was filed on August 5, 2010. Plaintiffs seek damages, individually and for the benefit of others, for the allegedly illegal charging of administrative fees (hereinafter referred to as “closing fees”) by the defendants with respect to the purchase of automobiles. These two plaintiffs brought actions against two defendant motor vehicle dealerships located in Richland County, and each plaintiff alleges she purchased a vehicle from a single dealership – either Defendant Dodgeland or Defendant Hyundai – but not the purchase of a vehicle by the respective plaintiffs from each of the individual defendants.

The plaintiffs’ Amended Complaint sets forth various allegations with respect to the defendants’ charging of closing fees. The Amended Complaint outlines general assertions with

¹ S.C. Code Ann. § 37-2-307 (2002).

² Other plaintiffs in previous cases have unsuccessfully challenged the legitimacy of closing fees in lawsuits brought before the enactment of the present statute in Section 37-2-307 authorizing the charging of closing fees. In two of those cases, the circuit court explicitly rejected the plaintiffs’ claims that the closing fee constituted an unfair or deceptive act and also required the compliance with the South Carolina Rules of Civil Procedure, including Rule 23. See Fanning v. Fritz’s Pontiac Cadillac Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) (finding that the charging of closing fees were permissible under the Consumer Protection Code); Fanning v. Fritz’s Pontiac Cadillac Buick, Inc., C.A. No. 90-CP-40-3555 (Order of Hon. L. Henry McKellar, October 14, 1998) (granting defendant’s motion for summary judgment on plaintiff’s challenge to the manner in which the closing fees were disclosed); Ferguson v. Charleston Lincoln Mercury, Inc., C.A. No. 97-CP-10-2020 (Orders of Hon. R. Markley Dennis, Jr., January 11 and 15, 1999) (holding that the charging of the closing fee was not an unfair or deceptive act, and the defendant dealer had a reasonable basis for charging the fee).

respect to the charging of closing fees in correlation with the advertised price of a vehicle. The plaintiffs acknowledge that in 2000, the South Carolina General Assembly enacted a statute, S.C. Code Ann. § 37-2-307, that allows a motor vehicle dealer to charge closing fees, provided the requirements of the statute are met. Section 37-2-307 is part of the Consumer Protection Code, and accordingly, the administration and construction of this statute is under the authority of the South Carolina Department of Consumer Affairs. *See* S.C. Code Ann. § 37-6-101, *et seq*; see also Lexington Law Firm v. S.C. Dep't of Consumer Affairs, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009) (noting that an agency's construction of a statute within its purview is entitled to respectful consideration and, absent compelling reasons, should not be rejected).

The allegations with respect to the charging of closing fees are twofold: (1) the plaintiffs allege that defendants have not availed themselves of the statutory requirements of § 37-2-307; and (2) even if the defendants are charging closing fees in accordance with the Consumer Protection Code, the monetary amount of the closing fee improperly includes profit, as opposed to being limited for reimbursement for actual costs incurred by the defendants.³

Plaintiffs have alleged three causes of action: (1) violation of S.C. Code Ann. § 56-15-10 *et seq.*;⁴ (2) declaratory judgment interpreting § 37-2-307; and (3) unjust enrichment. The allegations in support of the Dealers Act claim only relate to the charging of closing fees and simply restate the contentions previously asserted with respect to § 37-2-307. Moreover, the plaintiffs identify one statutory provision of the Dealers Act, S.C. Code Ann. § 56-15-110, entitled "Suits for Damages," which provides for lawsuits to be brought on behalf of others and sets out specific relief that may be sought. However, § 56-15-110 does not identify any conduct

³ With regard to the allegations that closing fees charged by the defendants wrongfully include profit, the plaintiffs quote from a lower trial court Order of the Honorable Doyet A. Early, III, in a case that is not final and such order is appealable and not final at this time. At oral argument, counsel for the plaintiffs consented to defendants' motion to strike this reference from the Amended Complaint.

⁴ This Chapter is commonly referred to as the "Dealers Act."

or provide any independent right of action based on any specific alleged conduct of a defendant subject to the Dealers Act.

With regard to the transaction between plaintiff York and Dodgeland, the Buyers Orders executed between the parties both contain an arbitration clause. The Buyers Order has a notice of the arbitration provision at the top, in all caps and in bold, stating "**THIS BUYERS ORDER IS SUBJECT TO ARBITRATION PURSUANT TO SC CODE SECTION 15-48-10.**" The arbitration clause itself is found on the first page of the Buyers Order in all caps and in bold, right above the signature line. The first sentence of the arbitration clause provides:

IN CONSIDERATION FOR SELLER AGREEING TO SELL TO PURCHASER THE ABOVE DESCRIBED VEHICLE, PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT.

With regard to Defendant Hyundai, Plaintiff Olga Cristy⁵ is based only upon a single transaction between her and Jim Hudson Hyundai. The Contract of Sale does include an arbitration agreement and as required by South Carolina law, notice of the arbitration provision as part of the negotiated agreement between the parties is provided in a statement that:

THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT, AND IF THE FEDERAL ARBITRATION ACT IS NOT APPLICABLE, THEN THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

The defendants have filed multiple motions, which include motions to dismiss the action, to compel arbitration, to sever, to strike, for a more definite statement, for a protective order, for

⁵ Ms. Cristy signed at least two separate agreements which each contain a separate Arbitration Agreement. These documents are the Contract of Sale between Jim Hudson Hyundai, Inc., d/b/a Jim Hudson Hyundai and the Retail Installment Contract and Security Agreement which provided the financing arrangements for Ms. Cristy's motor vehicle.

costs and fee and other such relief. Because the Court grants the motion to dismiss the action and compel arbitration, the remaining issues raised by the defendants do not need to be addressed by this Court and may be raised in the arbitration process.

LEGAL STANDARD

A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to “any relief on any theory of the case.” Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” Doe, 373 S.C. at 395, 645 S.E.2d at 247–48 (quoting Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

A trial judge may dismiss a claim when the defendant demonstrates the plaintiff’s “failure to state facts sufficient to constitute a cause of action” in the pleadings filed with the court. Rule 12(b)(6), SCRCP. A ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987). When it is determined that a plaintiff does not have standing to prosecute, the court must dismiss the action. Brock v. Bennett, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994).

In the present case, the plaintiffs’ claims against the Defendants should be dismissed so that these claims may be presented and considered within the context of arbitration.

DISCUSSION

- I. Pursuant to the Federal Arbitration Act, Arbitration of Plaintiffs’ Claims against the Dealer from whom She Purchased is Required.**

Both of the plaintiffs entered into agreements with the defendant dealer from whom they purchased a car that contained arbitration clauses (hereinafter "Arbitration Agreement(s)"). Their respective and individual claims fall squarely within the scope of their own Arbitration Agreement. These Agreements are unremarkable and of the type that numerous courts have upheld time and again. Accordingly, pursuant to the Federal Arbitration Act and applicable federal and South Carolina law control in this dispute, the Court dismisses the plaintiffs' claims and compels arbitration.

a. **The Federal Arbitration Act Applies in This Dispute**

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., applies to "contract[s] evidencing a transaction involving commerce," 9 U.S.C. § 2. A contract to purchase a vehicle clearly is a contract evidencing a transaction involving commerce. Thornton v. Trident Med. Ctr., L.L.C., 592 S.E.2d 50, 52 (S.C. Ct. App. 2003); *see also* MS Dealer Service Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) (FAA applies to consumer's purchase of automobile); Stout v. Byrider, 50 F. Supp. 2d 733, 735 (N.D. Ohio 1999) (FAA governs in action by used car buyers against seller because "case concerns arbitration agreements involving transactions in interstate commerce"), *aff'd*, 228 F.3d 709 (6th Cir. 2000); Wolff Motor Co. v. White, 869 So.2d 1129, 1134 (Ala. 2003) ("[m]otor vehicles are 'the quintessential instrumentalities of modern interstate commerce'" and "a transaction involving the sale of an instrumentality of commerce . . . satisfies the FAA's 'involving commerce' test" (quoting United States v. Bishop, 66 F.3d 569, 588-90 (3d Cir. 1995))). Accordingly, the FAA governs the enforceability of the Arbitration Agreement and all questions concerning its scope.

The FAA embodies "the strong federal policy in favor of enforcing arbitration agreements." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985). Keeping with this

“liberal federal policy favoring arbitration agreements,” the Supreme Court has mandated that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Indeed, “the parties’ intentions ‘are generously construed as to issues of arbitrability,’ and any ‘ambiguities as to the scope of the arbitration clause itself’ must be ‘resolved in favor of arbitration.’” Washington Square Secs., Inc. v. Aune, 385 F.3d 432, 436 (4th Cir. 2004) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985) and Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989)).⁶

b. Plaintiffs’ Allegations Fall within the Scope of the Arbitration Agreement that She Signed.

“To decide whether an arbitration agreement covers a particular dispute, the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement, irrespective of the label given to the cause of action.” Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc., 588 S.E.2d 136, 207 (S.C. Ct. App. 2003) (citing Zabinski, 553 S.E.2d at 597). Applying these principles, all of plaintiffs’ individual claims fall within the scope of the Arbitration Agreement that she signed.

Both plaintiffs allege in the Amended Complaint that the dealer she did business with engaged in a “common practice of presenting/advertising car prices in a misleading manner” because it allegedly “fails to include and/or adequately disclose ‘administrative fee’ in the advertised price of the car” and misleads buyers “that the set fee is mandatory fee, such as taxes and license fees.” The plaintiffs acknowledge that such fees are specifically authorized by S.C.

⁶ Like the FAA, South Carolina law strongly favors arbitration, and “unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” Zabinski v. Bright Acres Assocs., 553 S.E.2d 110, 118 (S.C. 2001) (citing S.C. Pub. Serv. Auth. v. Great W. Coal, 437 S.E.2d 22, 25 (S.C. 1993)); *see also* South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.*

Code Ann. § 37-2-307, but each plaintiff alleges that the defendants did not comply with the statute, although each plaintiff does not specify the statutory basis of the alleged non compliance with the closing fee statute.

Each of these allegations clearly falls under the claims that Ms. Cristy and Jim Hudson Hyundai and that Ms. York and Dodgeland respectively and individually agreed to arbitrate. The Arbitration Agreements provide that “any and all disputes” between the dealer and purchaser relating to the vehicle are covered under the Agreement. Each Agreement expressly encompasses all subjects relating to its respective plaintiffs’ claims.

c. The Arbitration Clauses are Unremarkable and Not Subject to Challenge.

The Arbitration Agreement signed by these Plaintiffs and their particular dealer that they did business with is unremarkable and of a type countless courts have upheld. Moreover, each respective agreement authorizes the arbitrator to determine the validity of the agreement⁷ or to decide all issues of arbitrability. Accordingly, these Agreements are not unconscionable or unenforceable, and arbitration is proper.

The plaintiffs’ reliance on Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010), and Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) does not preclude this Court from holding that the Arbitration Agreements are valid. Both of these cases involved arbitration clauses in automobile sales contracts. The Simpson court upheld the trial court’s ruling that the arbitration clause in that case was unconscionable, whereas the Herron court reversed the trial court’s ruling that the arbitration clause in that case was unconscionable. The Arbitration Agreements in the present case are more akin to the arbitration

⁷ The Dodgeland Arbitration Agreement signed by Ms. York provides that the “...arbitrator shall decide all issues of arbitrability.” Whereas, the Agreement signed by Ms. Cristy in her transaction with Jim Hudson Hyundai provides that “... the validity of this arbitration clause ... shall be resolved by the binding arbitration by one arbitrator.”

clause in Herron and are therefore enforceable.⁸ For example, both documents are clearly labeled at the top in bold type and capital letters to alert the plaintiffs that the agreements are subject to arbitration. In addition, the court notes that the South Carolina Supreme Court has previously ruled that the Federal Arbitration Act preempts the South Carolina Arbitration Act in the event of a conflict between state and federal provisions. Rich v. Walsh, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000).

Finally, plaintiffs' argument that discovery is necessary before determining whether the arbitration clauses are valid is unavailing. To allow these cases to proceed in discovery when the existence of the arbitration clauses are clear from the face of the sales documents would completely defeat the purpose of the arbitration clause, which is to avoid litigation in state court in order to resolve any pending disputes. Again, plaintiffs may raise these and other issues in arbitration, as each of the Arbitration Agreements provides for the arbitrator to determine issues related to the validity of specific provisions of the arbitration clause. The issue before this Court is whether the agreement to arbitrate is initially enforceable, and it is clear from the Arbitration Agreements that the parties agreed to arbitrate. Unlike Simpson, there is no question that an arbitration agreement existed between the parties in the respective transactions in the present case.

⁸ Even if specific portions of the Arbitration Agreements were unenforceable, the unenforceable provisions may be severed from the remaining provisions. Although the court in Herron upheld the denial of the defendant's motion to compel arbitration, the Herron court acknowledged that the defendant waived its right of severability. Regardless, the issue of severability may be raised in arbitration as contemplated in the Arbitration Agreements.

d. Allegations Against Other Defendants Do Not Prevent Arbitration.

A plaintiff cannot avoid arbitration by naming other dealerships, with which she has no connection, as a defendant. Even if a plaintiff had standing against the other defendant that she did not do business, Ms. Cristy must arbitrate her dispute with Jim Hudson Hyundai pursuant to the Arbitration Agreement between them and Ms. York must arbitrate her dispute with DodgeLand.⁹ See S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 437 S.E.2d 22, 24 (1993) (“[A] party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would nullify the rule requiring arbitration.”).

d. All Judicial Proceedings against the Defendants shall be Dismissed while Arbitration Proceeds.

Pursuant to Section 3 of the FAA, any court of the United States must, at a minimum, stay judicial proceedings involving claims, like those here, that fall within the arbitration provisions of written agreements. See 9 U.S.C. § 3; see also Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 26 (“[S]tate courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act.”). “Notwithstanding the terms of § 3, however, dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.” Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, 252 F.3d 707, 709-710 (4th Cir. 2001); see also Alford v. Dean Witter Reynolds, 975 F.2d 1161, 1164 (5th Cir. 1992) (“The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.”); Payton v. Nordstrom, Inc., 462 F.Supp.2d 706, 708 (M.D.N.C. 2006) (“[T]he Fourth Circuit has held that, despite the language of the FAA

⁹ Although DodgeLand has moved to dismiss on the grounds that York’s claims are barred by the applicable statute of limitations, this Court, in compelling arbitration, does not need to rule on this issue. DodgeLand may raise this issue in arbitration, and this Court’s Order compelling arbitration shall not be construed as a decision on the statute of limitations issue or any other issue raised by the parties.

regarding a stay of arbitration, when all of the claims in a lawsuit are required to be arbitrated, dismissal, rather than a stay, is a proper remedy.”). Because all of plaintiffs’ claims against the dealership from whom she purchased a car must be resolved through arbitration, the Court hereby dismisses their actions against Jim Hudson Hyundai and against Dodgeland in this Court and grants defendants’ Motion to Compel Arbitration.

CONCLUSION

The court has determined that the claims raised by plaintiffs in the present suit are subject to arbitration, as the Arbitration Agreements between the parties are valid and enforceable as to the initial question of whether an arbitration agreement existed between the parties. Having determined that arbitration is required, the Court declines to rule on other issues that were raised by any party, as these issues may be addressed in arbitration. Accordingly, the defendants’ motion to dismiss and to compel arbitration is GRANTED.

AND IT IS SO ORDERED.

Hon. G. Thomas Cooper, Jr.
Judge
Fifth Judicial Circuit

_____, 2011.

Columbia, South Carolina.

Leslie Davis

From: Leslie Davis
Sent: Thursday, March 31, 2011 3:35 PM
To: 'GCooperLC@sccourts.org'
Cc: Susie Campbell; Bill McKinnon; Patrick E. Knie (pknie@knielaw.com);
mgabriel@knielaw.com; 'swhamm@vzw.blackberry.net'; 'blaffitte@sowellgray.com';
'Shamm@richardsonplowden.com'
Subject: York, et al v. Dodgeland and Jim Hudson; Civil Action No.: 2010-CP-40-4244
Attachments: Draft Order Denying Defs Motions FINAL.doc

Ms Roberts,

Please find attached Plaintiffs' draft Order Denying Defendants' Motion to Dismiss, Motion to Compel Arbitration, and other Pending Motions in regard to the above-referenced matter. Please let me know if you need anything else.

Thanks, Leslie

Leslie M. Davis
Paralegal to Susan F. Campbell
McGowan Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100
(803) 256-0702-Facsimile
ldavis@mcgowanhood.com

Please note our new contact information

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Melissa Anne York and Olga Joanne Cristy,

Plaintiffs,

vs.

Dodgeland of Columbia, Inc. and Jim Hudson
Automotive Group, and Jim Hudson
Superstore, Inc., a/k/a Jim Hudson Hyundai,

Defendants.

)
) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT

) C/A No.: 2010-CP-40-4244
)

) **ORDER DENYING DEFENDANTS'**
) **MOTION TO DISMISS, MOTION TO**
) **COMPEL ARBITRATION, AND**
) **OTHER PENDING MOTIONS**
)
)
)
)
)

Plaintiffs Melissa Anne York and Olga Joanne Cristy, brought this action individually and purportedly for the benefit of other car buyers who allegedly paid illegal "closing fees" to Defendants. Defendants have jointly filed motions to dismiss, compel arbitration, to sever, to strike, for a more definite statement, for a protective order, for fees and costs, and other relief. These motions were heard before this Court on March 10, 2011 and all parties were represented by counsel and made oral argument. For the reasons set forth below, all of Defendants' pending motions are DENIED.

FACTUAL BACKGROUND

This matter is at the pleading stage. Defendants have not answered and their motions are made pursuant to Rule 12. In ruling on Rule 12 motions, this Court "must base its ruling solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (S.C. 2007). The following factual summary is therefore drawn from the complaint and assumed to be true for this purpose.

Defendants are car dealers. Plaintiffs allege Defendants participate in a common scheme to illegally charge administrative fees (often referred to as an “administrative fee,” “recording and processing fee,” “closing fee,” or “dealer documentation and closing fees” (collectively “administration fees”)).¹ Plaintiffs allege these administrative fees are an artificial add-on that are charged in a manner designed to deceive car buyers in an effort to artificially raise the sticker price for cars in a way that appears mandatory and not subject to negotiation -- that Defendants deceive customers by negotiating a sales price and then adding in the administrative fee, which is unlawfully designed to appear as a fixed cost and pre-printed on the forms, but is actually just additional profit.² Plaintiffs specifically allege Defendants have failed to meet the statutory requirements of S.C. Code Ann. § 37-2-307.³

Plaintiffs’ First Amended Complaint alleges three causes of action: (1) violation of S.C. Code Ann. § 56-15-110 et seq. (“Dealers Act”); (2) Declaratory Judgment to determine rights and legal relations under S.C. Code Ann. § 56-15-10 and/or S.C. Code Ann. § 37-2-307 (“Consumer Protection Code”); and (3) Unjust Enrichment. Plaintiffs are bringing this action both individually and purportedly pursuant to S.C. Code Ann. § 56-5-110 for the benefit of all others who paid “administrative fees” to Defendants.

MOTION TO COMPEL ARBITRATION

Defendants have moved for both an order compelling arbitration and an order protecting them from discovery. Both motions are premature when Defendants have not even answered.

In ruling on Rule 12 motions, “the trial court must base its ruling solely on allegations set forth in the complaint.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (S.C. 2007).

¹ First Amended Complaint, ¶10.

² *Id.* at 10-11.

³ *Id.* at 25-28.

Plaintiffs' complaint makes no mention of any alleged arbitration agreements, and Defendants cannot refer to matters outside of the complaint. South Carolina statutory law on motions to compel arbitration is in accord: "On application of a party showing an agreement described in §15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration" S.C. Code Ann. § 15-48-20 (emphasis added).

The prematurity of Defendants' motions are made even more clear when evaluated with our Supreme Court's recent decisions governing the enforceability of automobile consumer arbitration agreements: *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) and *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (2010). The determination of unconscionability in both of these decisions turned on the specific facts of each case, facts which require discovery. In the *Simpson* case, which held the arbitration agreement was unenforceable, the Supreme Court based its decision on, among other factors: (1) the print size of the arbitration clause, (2) whether the car buyer was a "sophisticated business interest," (3) which party drafted the agreement, (4) how long the buyer had to read the agreement before she signed it, (5) whether the buyer had "the business judgment necessary to make her aware of the implications of the arbitration agreement," and (6) whether the vehicle being purchased was going to be used as "primary transportation." In the *Herron* case, the Supreme Court specifically referenced the factors from *Simpson*, and added whether or not the Plaintiff had actually read the arbitration agreement. All of these factors require discovery. For example, this Court cannot make a decision based on the pleadings as to whether Plaintiffs possessed "the business judgment necessary to make [them] aware of the implications of the arbitration agreement," as the *Simpson* Court instructs us to do.

Defendants' motions to compel arbitration and for protection from discovery are premature and therefore DENIED.⁴

FAILURE TO STATE A CLAIM/DEFINITENESS OF CLAIM

Defendants claim Plaintiffs' complaint lacks sufficient specificity. A complaint must contain only a "short and plain statement of the facts showing that the pleader is entitled to relief." Rule 8(a)(2), SCRPC. This requires a litigant to plead the ultimate facts which will be proved at trial, not the evidence which will be used to prove those facts. *Stroud v. Riddle*, 260 S.C. 99, 194 S.E.2d 235 (1973); see also, *Moore v. City of Columbia*, 284 S.C. 278, 326 S.E.2d 157 (Ct. App.1985). Plaintiffs' first amended complaint contains fifty-one specific numbered paragraphs of allegations, and more than satisfies the pleading standards of Rule 8.

Defendants also claim Plaintiffs fail to state a claim. The standard for motions to dismiss in South Carolina is settled and well-known. "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to

⁴ In the alternative, the Court notes that (assuming the arbitration agreements attached to Defendants' memorandum are authentic), the agreements appear to be on all-fours with the agreement deemed unconscionable in *Simpson*. The bases for enforcing the agreement in *Herron* and distinguishing *Simpson* were: explicit "the arbitration agreement is a separate, one-page document which [Plaintiffs] signed. It is clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font. The important terms and provisions of the agreement appear in the body of the contract and again in capital letters just above the signature line." None of these factors is present here, and therefore *Simpson* is controlling and the agreements are unconscionable and unenforceable.

See *Herron v. Century BMW*, 387 S.C. 525, 533, 693 S.E.2d 394, 398 (2010), reh'g denied (June 9, 2010)

state a claim is improper.” *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (S.C. Ct. App. 2010).

Plaintiffs have pled sufficient facts to state a cause of action under the Dealers Act. Plaintiffs specifically allege that Defendants violated S.C. Code Ann. §56-15-40(1), which prohibits acts “which [are] arbitrary, in bad faith, or unconscionable.” Plaintiffs alleged that Defendants are charging administrative fees in a manner that is arbitrary, in bad faith and unconscionable. Specifically, Plaintiffs alleged that Defendants charge these fees as “a deceptive way to secretly and artificially raise the sticker price after negotiation of the car is complete.”⁵ Further, Plaintiffs alleged these fees were arbitrary, included dealer profit, and were placed on the invoice in such a way as to imply they were mandatory fees such as taxes, tags, and title.⁶ Similarly, Plaintiffs sufficiently pled that Defendants violated S.C. Code Ann. 56-15-40(4)(c), which prohibits using “any false or misleading advertisement in connection with his business as such motor vehicle dealer.” Plaintiffs alleged that Defendants failed to adequately disclose or include administrative fees in the advertised price of cars which constitutes misleading advertising.⁷ Plaintiffs’ allegations are more than sufficient to state a claim “on any theory” when viewing all facts plead in the complaint in the light most favourable to Plaintiffs, as this Court must do at this stage of the litigation.

**THIS ACTION IS NOT A RULE 23 CLASS ACTION AND PLAINTIFFS DO NOT
HAVE TO MEET THE REQUIREMENTS OF THAT RULE**

This action is brought pursuant to express statutory authority in S. C. Code Ann. § 56-15-110(2) not Rule 23, SCRCP. The Dealers Act provides a statutory right to a specific group of

⁵ First Amended Complaint at ¶¶ 11, 14-15, 17, 33.

⁶ *Id.*

⁷ *Id.* at ¶¶ 19-20.

consumers different than the procedural avenue provided in Rule 23, SCRCP. The Dealers Act, 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 benefit of the whole, including actions for injunctive relief."

Thus, Plaintiffs may bring the suit on behalf of a group if two elements are met: (1) the suit is of common or general interest of many persons; or (2) the parties are numerous and it is impractical to bring them before the Court. In comparison, Rule 23, SCRCP has five elements that must be met in order to have a class action under Court rules: (1) numerosity; (2) commonality; (3) typicality; (4) adequately protect the interests of the class; and (5) amount in controversy. A holding that the procedure set forth in S.C. Code Ann. § 56-15-110(2) does not provide anything different than Rule 23's Class Action procedure "violates the rule that we should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." *Hinton v. S.C. Dep't. of Probation, Parole and Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004). Nor is there any conflict. S.C. Code Ann. § 56-15-110(2) and Rule 23 provide separate, complementary procedures in cases such as this dealing with automobile dealers.

PLAINTIFFS' CLAIMS ARE BROUGHT PURSUANT TO S.C. CODE ANN. §56-15-10, et seq., NOT S.C. CODE ANN. § 37-2-307

Defendants variously claim that Plaintiffs' unjust enrichment claim should be dismissed because S.C. Code Ann. § 37-2-307 does not create a private right of action, affords only administrative penalties, and cannot support a claim for unjust enrichment. All of these arguments miss the mark because Plaintiffs alleged violations of the Dealer's Act, S.C. Code Ann. §56-15-10, et seq.. It is well-settled law the Plaintiffs are the "master[s] of [their]

complaint.” See, e.g., *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002). Plaintiffs have chosen to assert claims under the Dealers Act, and Defendants cannot argue the claims are or really ought to be asserted under some other statute, such as S.C. Code Ann. § 37-2-307. That the claims are brought pursuant to the Dealers Act also requires rejecting Defendants’ statute of limitations argument. See S.C. Code Ann. §56-15-120 (“Actions rising out of any provision of this chapter shall be commenced within four years next after the cause of action accrues. . . .”).

REGULATORY PREEMPTION

Defendants claim that this action must be dismissed because the charging of administrative fees is “regulated” under S. C. Code Ann. § 37-2-307. This argument is unsupported by precedent. Plaintiffs allege that Defendants are not in compliance with S. C. Code Ann. § 37-2-307 in multiple ways: that the dealers (1) failed to register with the Department of Consumer Affairs, (2) failed to include the administrative fee in the advertised price of the vehicle, and (3) charged administrative fees for profit, not to reimburse for cost.⁸ There is no basis in the law of South Carolina to claim a statute which Plaintiffs directly allege Defendants are violating somehow shields them from legal action for unfair trade practices. See *Ward v. Dick Dyer and Assocs., Inc.*, 304 S.C. 152, 403 S.E.2d 310 (1991) (holding that mere fact of regulation did not prevent a cause of action for unfair trade practices). Further, the legislature expressly declined to include a “regulatory exception” in the Dealers Act such as that present in the Unfair Trade Practices Act.

⁸ See First Amended Complaint at ¶¶23-28.

CONCLUSION

Defendants' remaining motions, including motions to dismiss for lack of standing and improper joinder, are denied for the reasons set forth in oral argument and Plaintiffs' memorandum. At this stage of the litigation, this Court is limited to the allegations of Plaintiffs' complaint. The complaint plainly sets forth sufficient allegations against all Defendants. Defendants may contest these allegations with appropriate motions following discovery. However, at this time, DEFENDANTS' PENDING MOTIONS ARE DENIED.

SO ORDERED.

The Honorable G. Thomas Cooper, Jr.
Circuit Judge
Fifth Judicial Circuit

Columbia, South Carolina

_____, 2011

Susie Campbell

From: Cooper, G. Thomas Law Clerk (Jennifer Roberts) <GCooperLC@sccourts.org>
Sent: Tuesday, May 03, 2011 2:01 PM
To: Laffitte, Becky; Montgomery, Michael; Susie Campbell; Steve Hamm; swamm@vzw.blackberry.net; Bill McKinnon; JoAnne Wessinger Hill; Knie, Patrick
Subject: 2010-CP-40-4274 Melissa Anne York and Olga Joanne Cristy v. Dodgeland of Columbia, Inc. and Jim Hudson Automotive Group et al.

Dear Counsel,

Due to the multiplicity and complexity of issues raised by the parties at the hearing on March 10, 2011, and due to the limited time available to the Court for the deliberation of these matters, Judge Cooper is requesting that the motions be reargued as soon as possible. At that time, he will have a better grasp of the issues and be in a position to move the case along expeditiously.

Please contact me to set up a convenient time, preferably during the week of May 16-20.

Thank you,

Jennifer Ellis Roberts
Law Clerk to The Honorable G. Thomas Cooper, Jr.
Fifth Judicial Circuit
1701 Main Street
Post Office Box 192
Columbia, SC 29202
Office: 803-576-1783
Fax: 803-576-1741
GCooperLC@sccourts.org

Susie Campbell

From: JoAnne Wessinger Hill <JWessingerHill@RichardsonPlowden.com>
Sent: Tuesday, May 17, 2011 5:25 PM
To: Susie Campbell; Bill McKinnon; 'pknie@knielaw.com'; Montgomery, Michael; 'Laffitte, Becky'
Cc: 'swhamm@vzw.blackberry.net'; Steve Hamm; JoAnne Wessinger Hill
Subject: 2010-CP-40-4274 Melissa Anne York and Olga Joanne Cristy v. Dodgeland of Columbia, Inc. and Jim Hudson Automotive Group et al.
Attachments: Retail Installment Contract.pdf
Importance: High

Dear Plaintiff Counsel:

For your preparations for the motion hearing tomorrow, attached is an copy of the Ms. Cristy's Retail Installment Contract and Security Agreement related to the purchase of the 2008 Hyundai from Jim Hudson Hyundai. It also contains an Arbitration Agreement related to such transaction.

If you should have any questions, please advise.

Steven W. Hamm
C. Jo Anne Wessinger Hill

<u>HOME</u>	<u>VCARD</u>	<u>BIO</u>	<u>LOCATION</u>
			C. Jo Anne Wessinger Hill Attorney at Law jwessingerhill@richardsonplowden.com
RICHARDSON PLOWDEN ATTORNEYS AT LAW			Richardson Plowden & Robinson, P.A. 1900 Barnwell Street Columbia, SC 29201 Tel: 803.576.3714 Fax: 803.779.0016 www.RichardsonPlowden.com

1. The proposed plan, including the proposed new well, complies with the applicable provisions of the Massachusetts Groundwater Protection Act, Chapter 269A, and the applicable provisions of the Massachusetts Groundwater Protection Regulations, 816 CMR 1.00, and the applicable provisions of the Massachusetts Groundwater Protection Regulations, 816 CMR 1.00, and the applicable provisions of the Massachusetts Groundwater Protection Regulations, 816 CMR 1.00.

For information on how to use the information provided on this page, click on the links below. For more information on how to use the information provided on this page, click on the links below. For more information on how to use the information provided on this page, click on the links below.

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT		Seller JIM HUDSON (HYUNDAI) 310 DREYFUS BLVD. COLUMBIA, SC 29210	Buyer OLGA JOANNE TRISTY
No. (ARCH FOUR 2004)	Date	We and us mean the Seller above, its successors and assigns.	You and yours mean each Buyer above, and guarantor, jointly and individually.

SALE: You agree to purchase from Us, on a "like" basis, subject to the terms and conditions of this contract and security agreement (Contract), the Motor Vehicle (Vehicle) and services described below. The Vehicle is in its present condition, together with the usual accessories and attachments.

Description of Year (HYUNDAI)	VIN	Other
Motor Vehicle Make (HYUNDAI)	Lic. No./Year	
Purchased (Model)	☐ New ☐ Used	

Description of Trade-In	2004 TOYOTA TUNDRA

SECURITY: To secure your payment and performance under the terms of this Contract, you give us a security interest in the Vehicle, all accessories, attachments, accessories and equipment placed in or on the Vehicle, together called Property, and proceeds of the Property. You assign to us and give us a security interest in proceeds and premium refunds of any insurance and service contracts purchased with this Contract, except where prohibited by law.

PROMISE TO PAY AND PAYMENT TERMS: You promise to pay us the principal amount of \$ 18463.00 plus credit service charges accruing on the unpaid balance at the rate of 10.33% per year from today's date until paid in full. If goods are delivered or services performed more than ten days from today, credit service charges will begin to accrue on the date of delivery or performance. Credit service charges accrue on a day basis. You agree to pay this Contract according to the payment schedule and late charge provisions shown in the TRUTH IN LENDING DISCLOSURES. You also agree to pay any additional amounts according to the terms and conditions of this Contract.

☒ **DOCUMENTATION FEE:** You also agree to pay a documentation fee of \$ 200.00, and it will be ☐ paid in cash ☐ paid pro rata over the loan term. It will be withheld from the proceeds. (If this fee is withheld from the proceeds, the amount is included in the principal sum.)

☐ **MINIMUM CREDIT SERVICE CHARGE:** You agree to pay a minimum credit service charge of \$ N/A if you pay this Contract in full before we have earned that much in credit service charges.

DOWN PAYMENT: You also agree to pay, or apply to the Cash Price, on or before today's date, any cash rebates and net trade-in value described in the ITEMIZATION OF AMOUNT FINANCED. ☐ You agree to make deferred payments as part of the cash down payment as reflected in your Payment Schedule.

☐ **SOUTH CAROLINA UCCC APPLIES:** Even if the South Carolina Uniform Consumer Credit Code would not otherwise apply, this Contract is a consumer credit transaction. This Contract is therefore subject to the South Carolina UCCC, including the permissible rates and charges.

TRUTH IN LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS	TOTAL SALE PRICE
The cost of your credit as a yearly rate	The dollar amount the credit will cost you	The amount of credit provided to you or on your behalf	The amount you will have paid when you have made all scheduled payments	The total cost of your purchase on credit, including your down payment of
9.33%	\$ 4061.72	\$ 18463.00	\$ 22464.72	\$ 23464.72

Payment Schedule: Your payment schedule will be		
Number of Payments	Amount of Payments	When Payments Are Due
72	312.01	MONTHLY BEGINNING: MAY 12th, 2004

Security: You are giving a security interest in the Motor Vehicle purchased.

Late Charge: If all or any portion of a payment is not paid within 10 days of its due date, you will be charged a late charge of the lesser of 5% of the unpaid amount of the payment due or \$15.50. (Minimum late charge \$0.20). These amounts may change pursuant to §§ 37-2-203 and 37-3-100 of the S.C. Code Ann., so as to be the maximum allowed by law.

Prepayment: If you pay off this Contract early, you ☐ may ☒ will not have to pay a Minimum Credit Service Charge.

☒ If you pay off this Contract early, you will not be entitled to a refund of part of the documentation fee.

Contract Provisions: You can see the terms of this Contract for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds.

CREDIT INSURANCE: Credit life, credit disability (accident and health or accident and sickness), and any other insurance coverage quoted below are not required to obtain credit and we will not provide them unless you sign and agree to pay the additional premium. If you want such insurance, we will obtain it for you (if you qualify for coverage). We are quoting below ONLY the coverages you have chosen to purchase:

Credit Life: Insured	☐ Single ☐ Joint Prem: \$ N/A Term: N/A
Credit Disability: Insured	☐ Single ☐ Joint Prem: \$ N/A Term: N/A

Your signature below means you want (only) the insurance coverage(s) quoted above. If none are quoted, you have declined any coverages we offered.

Buyer	Dated	d/b

Buyer	Dated	d/b

PROPERTY INSURANCE: You must insure the Property securing this Contract. You may purchase or provide the insurance through any insurance company reasonably acceptable to us. The collision coverage deductible may not exceed \$ N/A. If you get insurance from or through us, you will pay \$ N/A for of coverage.

This premium is calculated as follows:	
☒ \$ N/A Deductible, Collision Coverage	\$ N/A
☒ \$ N/A Deductible, Comprehensive Cov.	\$ N/A
☐ Fire Theft and Combined Additional Coverage	\$ N/A
☐	\$ N/A

Liability insurance coverage for bodily injury and motor

ITEMIZATION OF AMOUNT FINANCED

Vehicle Price (incl. sales tax of \$ 300.00)	\$ 24635.00
Service Contract, Paid to: N/A	\$ N/A
Cash Price	\$ 24633.00
Manufacturer's Rebate	\$ 1000.00
Cash Down Payment	\$ N/A
Deferred Down Payment	\$ N/A
a. Total Cash Rebate Down	\$ 1000.00
b. Trade-In Allowance	\$ 6000.00
c. Less: Amount owing	\$ N/A
Paid to (includes): N/A	
d. Net Trade-In (b. minus c.)	\$ 6000.00
e. Net Cash/Trade-In (a. plus d.)	\$ 7000.00
f. Amount to Finance (line g. if it is negative)	\$ N/A
Down Payment (6. if disclose as \$0 if negative)	\$ 7000.00
Unpaid Balance of Cash Price	\$ 17633.00
Paid to Public Officials - Filing Fees	\$ 39.00
Insurance Premiums:	\$ N/A
To: JIM HUDSON, HYUNDAI	\$ 289.00
To: JINZO GGP	\$ 450.00
To: N/A	\$ N/A
To: N/A	\$ N/A
To: N/A	\$ N/A
To: N/A	\$ N/A
To: N/A	\$ N/A
Total Other Charges/Amounts Pd. to Others	\$ 778.00
Less: Prepaid Charges	\$ N/A
Amount Financed	\$ 18463.00

*We may retain or receive a portion of this amount.

(repayment) and the scheduled date and prepayment refund(s).

CREDIT INSURANCE: Credit life, credit disability (accident and health or accident and sickness) and any other insurance coverage quoted below are not required to obtain credit and we will not provide them unless you sign and agree to pay the additional premium. If you want such insurance, you will obtain it for you (if you qualify for coverage) or the quoting below ONLY the coverages you have chosen to purchase.

Credit Life Insured: ☐ Single ☐ Joint Prem. \$ N/A Term N/A
Credit Disability Insured: ☐ Single ☐ Joint Prem. \$ N/A Term N/A

Your signature below means you want (only) the insurance coverage(s) quoted above. If none are quoted, you have declined any coverages we offered.

Buyer _____ Dated 4/00

Buyer _____ Dated 4/00
PROPERTY INSURANCE: You must insure the Property securing this Contract. You may purchase or provide the insurance through any insurance company reasonably acceptable to us. The collision coverage deductible may not exceed \$ N/A. If you get insurance from or through us you will pay \$ N/A for _____ of coverage.

This premium is calculated as follows:
☐ \$ N/A Deductible, Collision Coverage \$ N/A
☐ \$ N/A Deductible, Comprehensive Cov. \$ N/A
☐ Fire Theft and Combined Additional Coverage \$ N/A
☐ _____ \$ N/A

Liability Insurance: coverage for bodily injury and motor vehicle damage caused to others is not included in this Contract unless checked and indicated.

☐ **SINGLE-INTEREST INSURANCE:** You must purchase single interest insurance as part of this sale transaction. You may purchase the coverage from a company of your choice reasonably acceptable to us. If you buy the coverage from or through us, you will pay \$ N/A for _____ of coverage.

☒ **SERVICE CONTRACT:** With your purchase of the Vehicle, you agree to purchase a Service Contract to cover _____
N/A

This Service Contract will be in effect for N/A

ASSIGNMENT: This Contract and Security Agreement is assigned to _____

the Assignee, phone _____ This assignment is made ☐ under the terms of a separate agreement ☐ under the terms of the ASSIGNMENT BY SELLER on page 2. ☐ This assignment is made with recourse.

Seller: By _____ Date 03/28/2000

ITEMIZATION OF AMOUNT FINANCED

Vehicle Price (incl. sales tax) of \$	3000.00	\$	24685.00
Service Contract Paid to	N/A	\$	N/A
Cash Price		\$	24685.00
Manufacturer's Rebate	\$ 1000.00		
Cash Down Payment	\$	N/A	
Deferred Down Payment	\$	N/A	
Trade-In Allowance	\$ 6000.00		
Less: Amount Owning	\$	N/A	
Paid to (includes)	N/A		
d. Net Trade-In (b minus c)	\$ 6000.00		
e. Net Cash Trade-In (a plus d)	\$ 7000.00		
Amount of Finance Line or (if 0 is negative)	\$	N/A	
Down Payment (e, disclosed as \$0 if negative)	\$ 7000.00		
Unpaid Balance of Cash Price	\$	17685.00	
Paid to Public Officials: Filing Fees	\$	29.00	
Insurance Premiums	\$	N/A	
To: HIL HUBSON HYUNDAI	\$	289.00	
To: H&H GAP	\$	450.00	
To: N/A	\$	N/A	
To: N/A	\$	N/A	
To: N/A	\$	N/A	
To: N/A	\$	N/A	
Total Other Charges/Amounts Paid to Others	\$	778.00	
Less: Prepaid Charges	\$	N/A	
Amount Financed	\$	18463.00	

We may retain or receive a portion of this amount.

NOTICE TO BUYER

(1) Do not sign this Agreement before you read it or if it contains any blank spaces; (2) You are entitled to a completely filled-in copy of this Agreement; (3) Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the Credit Service Charge. BY SIGNING BELOW BUYER AGREES TO THE TERMS ON PAGES 1 AND 2 OF THIS CONTRACT AND ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT.

The Annual Percentage Rate may be negotiable with the Seller. The Seller may assign this Contract and retain its right to receive a part of the Finance Charge.

Buyer Olga Joanne Cristy Date 03/28/2000
Signature: _____ Date _____

Signature _____ Date _____

Seller: By _____

ADDITIONAL TERMS OF THIS CONTRACT AND SECURITY AGREEMENT

GENERAL TERMS: You have been given the opportunity to purchase the Vehicle and described services for the Cash Price or the Total Sale Price. The Total Sale Price is the total price of the Vehicle and any services if you buy them over time. You agreed to purchase the items over time. The Total Sale Price shown in the TRUTH IN LENDING DISCLOSURES assumed that all payments will be made as scheduled. The actual amount you will pay may be more or less depending on your payment record.

We do not intend to charge or collect, and you do not agree to pay, any credit service charge or fee, that is more than the maximum amount permitted for this sale by state or federal law. If you pay a credit service charge or fee that is contrary to this provision, we will, instead, apply it first to reduce the principal balance, and when the principal has been paid in full, refund it to you.

The law of South Carolina will govern this transaction. It is also governed by applicable federal law and regulations. In the event of a dispute, the exclusive forum, venue, and place of jurisdiction will be in South Carolina, unless otherwise required by law.

You understand and agree that some payments to third parties as a part of this Contract may involve money retained by us or paid back to us as commissions or other remuneration.

If any section or provision of this Contract is not enforceable, the other terms will remain part of this Contract.

NAME AND LOCATION: Your name and address indicated on page 1 are your exact legal name and your principal residence. You will provide us with at least 30 days' notice prior to changing your name or principal residence.

BALLOON PAYMENT: If any payment is more than twice as large as the average of earlier scheduled payments, you may refinance that payment when due without penalty. Your right is subject to the exceptions specified in S.C. Code Ann. § 37-2-405.

PREPAYMENT: You may prepay this Contract in full or in part at any time. Any partial prepayment will not excuse any later scheduled payments until you pay in full.

If a documentation fee has been collected and the loan is prepaid in full, or upon maturity by acceleration, this fee, or a portion thereof, may be refundable if the prepayment causes the recalculated APR to exceed the finance charge allowed by law.

A refund of any prepaid, unearned insurance premiums may be obtained from us or from the insurance company named in your policy or certificate of insurance.

OWNERSHIP AND DUTIES TOWARD PROPERTY: By giving us a security interest in the Property, you represent and agree to the following:

- A. Our security interest will not extend to consumer goods unless you acquire rights to them within 10 days after we enter into this Contract, or they are installed in or affixed to the Vehicle.
- B. You will defend our interests in the Property against claims made by anyone else. You will do whatever is necessary to keep our claim to the Property ahead of the claim of anyone else.
- C. The security interest you are giving us in the Property comes ahead of the claim of any other of your general or secured creditors. You agree to sign any additional documents or provide us with any additional information we may require to keep our claim to the Property ahead of the claim of anyone else. You will not do anything to change our interest in the Property.
- D. You will keep the Property in your possession in good condition and repair. You will use the Property for its intended and lawful purposes. Unless otherwise agreed in writing, the Property will be located at your address listed on page 1 of this Contract.
- E. You will not attempt to sell the Property (unless it is properly identified inventory) or otherwise transfer any rights in the Property to anyone else, without our prior written consent.
- F. You will pay all taxes and assessments on the Property as they become due.
- G. You will notify us of any loss or damage to the Property. You will provide us reasonable access to the Property for the purpose of inspection. Our entry and inspection must be accomplished lawfully, and without breaching the peace.

DEFAULT: You will be in default on this Contract if any one of the following occurs (except as prohibited by law):

- A. You fail to make a payment as required by this Contract.
- B. The prospect of payment, performance, or realization of the Property is significantly impaired.

If you default, you agree to pay our reasonable attorneys' fees limited to 15% of the unpaid debt after default and referral, if we refer this contract to an attorney who is not a salaried employee of ours. You also agree to pay any other reasonable expenses and charges allowed by law.

If an event of default occurs as to any one of you, we may exercise our remedies against any or all of you.

REMEDIES: If you are in default on this Contract, we have, subject to any right to cure that you may exercise, all of the remedies provided by law and this Contract:

- A. We may require you to immediately pay us, subject to any refund required by law, the remaining unpaid balance of the amount financed, credit service charges and all other agreed charges.
- B. We may pay taxes, assessments, or other liens or make repairs to the Property if you have not done so. We are not required to do so. This amount will be due immediately. This amount will earn credit service charges from the date paid at the rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.
- C. We may require you to make the Property available to us at a place we designate that is reasonably convenient to you and us.
- D. We may immediately take possession of the Property by legal process or self-help, but in doing so we may not breach the peace or unlawfully enter onto your premises. We may then sell the Property and apply what we receive as provided by law to our reasonable expenses and then toward your obligations.

E. Except when prohibited by law, we may sue you for additional amounts if the proceeds of a sale do not pay all of the amounts you owe us.

By choosing any one or more of these remedies, we do not waive our right to later use another remedy. By deciding not to use any remedy, we do not give up our right to consider the event a default if it happens again.

You agree that if any notice is required to be given to you of an intended sale or transfer of the Property, notice is reasonable if mailed to your last known address, as reflected in our records, at least 10 days before the date of the intended sale or transfer (or such other period of time as is required by law).

RETURNED CHECK CHARGE: If you make any payment required by this Contract with a check that is dishonored, we may charge you a service charge of not more than \$30.

PROPERTY INSURANCE: You agree to buy property insurance on the Property, protecting against loss and physical damage and subject to a maximum deductible amount indicated in the PROPERTY INSURANCE section, or as we will otherwise require. You will name us as loss payee on any such policy. In the event of loss or damage to the Property, we may require additional security or assurances of payment before we allow insurance proceeds to be used to repair or replace the Property. You agree that if the insurance proceeds do not cover the amounts you still owe us, you will pay the difference. You may purchase or provide the insurance through any insurance company reasonably acceptable to us. You will keep the insurance in full force and effect until this Contract is paid in full.

If you fail to obtain or maintain this insurance, or name us as a loss payee, we may obtain insurance to protect our interest in the Property. This insurance may include coverages not required of you. This insurance may be written by a company other than one you would choose. It may be written at a rate higher than a rate you could obtain if you purchased the property insurance required by this Contract. We will add the premium for this insurance to the amount you owe us. Any amount we pay will be due immediately. This amount will earn credit service charges from the date paid at the rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.

CREDIT INSURANCE: CREDIT INSURANCE MAY NOT COVER THE AMOUNT DUE UNDER THIS CONTRACT. YOU SHOULD REVIEW YOUR POLICY OR CERTIFICATE TO DETERMINE THE EXACT AMOUNT OF COVERAGE.

OBLIGATIONS INDEPENDENT: Each person who signs this Contract agrees to pay this Contract according to its terms. This means the following:

- A. You must pay this Contract even if someone else has also signed it.
- B. We may release any co-buyer or guarantor and you will still be obligated to pay this Contract.
- C. We may release any security and you will still be obligated to pay this Contract.
- D. If we give up any of our rights, it will not affect your duty to pay this Contract.
- E. If we extend new credit or renew this Contract, it will not affect your duty to pay this Contract.

WARRANTY: Warranty information is provided to you separately.

WAIVER: To the extent permitted by law, you agree to give up your rights to require us to do certain things: Except for giving a required notice of right to cure for the failure to make a payment, we are not required to: (1) demand payment of amounts due; (2) give notice that amounts due have not been paid, or have not been paid in the appropriate amount, time or manner; or, (3) give notice that we intend to make, or are making, this Contract immediately due.

THIRD-PARTY AGREEMENT

By signing below you agree to give us a security interest in the Property described in the SALE section. You also agree to the terms of this Contract, including the WAIVER section above, except that you will not be liable for the payments it requires. Your interest in the Property may be used to satisfy the Buyer's obligation. You agree that we may renew, extend, change this Contract, or release any party or property without releasing you from this Contract. We may take these steps without notice or demand upon you.

You acknowledge receipt of a completed copy of this Contract.

Signature _____

Date _____

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

IF YOU ARE BUYING A USED VEHICLE, THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

PLEASE READ CAREFULLY! NOTICE OF ARBITRATION

If you agree to Arbitration you are giving up your right to go to court for claims and disputes arising from this Contract.

- You or we may choose to have any dispute between us decided by arbitration, and not by a court or by jury trial.
- If a dispute is arbitrated, you give up your right to join in as a class representative or class member on any class claim you may have against us, including any right to class arbitration.

In arbitration, discovery and rights to appeal are generally more limited than in a judicial proceeding, and other rights that

lawfully, and without breaching the peace.

DEFAULT: You will be in default on this Contract if any one of the following occurs (except as prohibited by law):

- You fail to make a payment as required by this Contract.
- The prospect of payment, performance, or realization of the Property is significantly impaired.
- If you default, you agree to pay our reasonable attorneys' fees limited to 35% of the unpaid debt after default and referral. If we refer this contract to an attorney who is not a salaried employee of ours, you also agree to pay any other reasonable expenses and charges allowed by law.

If an event of default occurs as to any one of you, we may exercise our remedies against any one of you.

REMEDIES: If you are in default on this Contract, we have, subject to any right to cure that you may exercise, all of the remedies provided by law and this Contract.

- We may require you to immediately pay us, subject to any refund required by law, the remaining unpaid balance of the amount financed, credit service charges and all other agreed charges.
- We may pay taxes, assessments, or other liens or make repairs to the Property if you have not done so. We are not required to do so. This amount will be due immediately. This amount will earn credit service charges from the date paid at the rate described in the PROMISE TO PAY AND PAYMENT TERMS section until paid in full.
- We may require you to make the Property available to us at a place we designate that is reasonably convenient to you and us.
- We may immediately take possession of the Property by legal process or self-help, but in doing so we may not breach the peace or unlawfully enter onto your premises. We may then sell the Property and apply what we receive as provided by law to our reasonable expenses and then toward your obligations.

THIRD PARTY AGREEMENT

By signing below you agree to give us a security interest in the Property described in the SALE section. You also agree to the terms of this Contract, including the WAIVER section above, except that you will not be liable for the payments it requires. Your interest in the Property may be used to satisfy the Buyer's obligation. You agree that we may renew, extend, change this Contract, or release any party or property without releasing you from this Contract. We may take these steps without notice or demand upon you.

You acknowledge receipt of a completed copy of this Contract.

Signature _____ Date _____

NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

IF YOU ARE BUYING A USED VEHICLE, THE INFORMATION YOU SEE ON THE WINDOW FORM FOR THIS VEHICLE IS PART OF THIS CONTRACT. INFORMATION ON THE WINDOW FORM OVERRIDES ANY CONTRARY PROVISIONS IN THE CONTRACT OF SALE.

PLEASE READ CAREFULLY! NOTICE OF ARBITRATION

If you agree to Arbitration you are giving up your right to go to court for claims and disputes arising from this Contract.

- You or we may choose to have any dispute between us decided by arbitration, and not by a court or by jury trial.
- If a dispute is arbitrated, you give up your right to join in as a class representative or class member on any class claim you may have against us, including any right to class arbitration.
- In arbitration, discovery and rights to appeal are generally more limited than in a judicial proceeding, and other rights that you and we would have in court may not be available.

ARBITRATION AGREEMENT: At your or our election, any claim or dispute in contract, tort, statute or otherwise between you and us or our employees, agents, successors or assigns that arises out of or relates to your credit application, this Contract or any resulting transaction or relationship, including those with third parties who do not sign this Contract, is to be decided by neutral, binding arbitration. The interpretation and scope of this arbitration agreement, including the arbitrability of a claim or dispute, is also to be decided by neutral, binding arbitration.

If you or we choose to arbitrate our claim or dispute, you and we agree that no trial by jury or other judicial proceeding take place. In addition, you agree not to participate as a class representative or class member on any class claim that you may have against us, including class arbitration. You and we also agree that any claim or dispute is to be heard and decided by one arbitrator only, only on an individual basis, and not as a class action.

For the arbitration, you or we may choose one of the following arbitration organizations with its applicable rules: the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), or JAMS, 235 Peachtree St., NE, 600 North Tower, Atlanta, GA 30303 (www.jamsadr.com). You can get a copy of the rules of these arbitration organizations by contacting the respective organization directly or by visiting their respective websites.

The arbitration hearing will be carried out in the federal district where you reside, unless you and we agree otherwise. If arbitration begins, we would advance your filing, administration, service or case management fee, and your arbitrator or hearing fee all up to a total maximum of \$1,500. Unless the arbitrator

awards them to a party, each party is responsible for the fees of its attorney(s), experts, witnesses, and any other fees and costs of arbitration, including any amount we have advanced.

The arbitrator will be a lawyer or a former judge. In making an award, the arbitrator shall follow governing substantive law. The arbitrator has the authority to order specific performance, monetary damages, and punitive damages or to provide any relief allowed by applicable law. Other than the grounds for review under the Federal Arbitration Act, the arbitration award is final and binding on all parties. Any court having jurisdiction may enforce the arbitrator's award.

You and we retain rights to self-help remedies and to seek remedies in small claims court for claims or disputes within that court's jurisdiction, unless those claims or disputes are transferred, removed, or appealed to a different court. You and we retain rights to take measures that do not involve a court or arbitration. These measures include, but are not limited to, selling off against a deposit account, repossessing property, and foreclosing on property. You or we may obtain a temporary court order necessary to prevent harm until the arbitration is completed. By exercising any retained rights or by taking measures that do not involve a court or arbitration, neither you nor we waive the right to arbitrate any claim or dispute.

The Federal Arbitration Act (9 U.S.C. § 1 et seq.) governs this arbitration agreement and not any state law concerning arbitration, including state law arbitration rules and procedures. This arbitration agreement survives any termination, payoff or transfer of this Contract. Except for the waivers of class action rights, if any part of this arbitration agreement is found to be unenforceable, the remainder is enforceable.

By signing this Contract you and we understand and agree to be bound by its terms, and expressly waive our rights to trial by jury and judicial process, and review, except as allowed by law.

CAUTION: It is important that you read this arbitration agreement thoroughly before you sign this Contract. By signing it, you are accepting that you have read and understand this arbitration agreement, and have received a copy of it. If you do not understand something in this arbitration agreement, do not sign this Contract; instead ask your lawyer.

ASSIGNMENT BY SELLER

Seller sells and assigns this Retail Installment Contract and Security Agreement, (Contract), to the Assignee, its successors and assigns, including all its rights, title and interest in this Contract, and any guarantee executed in connection with this Contract. Seller gives Assignee full power, either in its own name or in Seller's name, to take all legal or other actions which Seller could have taken under this Contract. (SEPARATE AGREEMENT: If this Assignment is made "under the terms of a separate agreement" as indicated on page 1, the terms of this assignment are described in a separate writing(s) and not as provided below.)

Seller warrants:

- This Contract represents a sale by Seller to Buyer on a time price basis and not on a cash basis.
- The statements contained in this Contract are true and correct.
- The down payment was made by the Buyer in the manner stated on page 1 of this Contract and, except for the application of any manufacturer's rebate, no part of the down payment was loaned or paid to the Buyer by Seller or Seller's representatives.
- This sale was completed in accordance with all applicable federal and state laws and regulations.
- This Contract is valid and enforceable in accordance with its terms.
- The names and signatures on this Contract are not forged, fictitious or assumed, and are true and correct.
- This Contract is vested in the Seller free of all liens, is not subject to any claims or defenses of the Buyer, and may be sold or assigned by the Seller.
- A completely filled-in copy of this Contract was delivered to the Buyer at the time of execution.
- The Vehicle has been delivered to the Buyer in good condition and has been accepted by Buyer.
- Seller has or will perfect a security interest in the Property in favor of the Assignee.

If any of these warranties is breached or untrue, Seller will, upon Assignee's demand, purchase this Contract from Assignee. The purchase shall be in cash in the amount of the unpaid balance (including credit service charges) plus the costs and expenses of Assignee, including attorneys' fees.

Seller will indemnify Assignee for any loss sustained by it because of judicial set-off or as the result of a recovery made against Assignee as a result of a claim or defense Buyer has against Seller.

Seller waives notice of the acceptance of this Assignment, notice of non-payment or non-performance and notice of any other remedies available to Assignee. Assignee may, without notice to Seller, and without affecting the liability of Seller under this Assignment, compound or release any rights against, and grant extensions of time for payment to be made, to Buyer and any other person obligated under this Contract.

UNLESS OTHERWISE INDICATED ON PAGE 1, THIS ASSIGNMENT IS WITHOUT RECOURSE.

WITH RECOURSE: If this Assignment is made "with recourse" as indicated on page 1, Assignee takes this Assignment with certain rights of recourse against Seller. Seller agrees that if the Buyer defaults on any obligation of payment or performance under this Contract, Seller will, upon demand, repurchase this Contract for the amount of the unpaid balance, including finance charges, due at that time.

From: Cooper, G. Thomas Law Clerk (Brett H. Bayne) [mailto:GCooperLC@sccourts.org]
Sent: Monday, August 22, 2011 8:45 AM
To: JoAnne Wessinger Hill
Subject: RE: Civil Action No. 2010-CP-40-4244 (York/Cristy v. Dodgeland, Hudson et al)

Ms. Hill,

Yes it should have. That is a typo. I will check with Judge Cooper on it but, as it is only a footnote, I do not believe it will require correction.

Brett H. Bayne
Law Clerk to The Honorable G. Thomas Cooper, Jr.
Fifth Judicial Circuit
1701 Main Street
Post Office Box 192
Columbia, SC 29202
Office: 803-576-1742
Fax: 803-576-1741
GCooperLC@sccourts.org

From: JoAnne Wessinger Hill [mailto:JWessingerHill@RichardsonPlowden.com]
Sent: Wednesday, August 17, 2011 5:38 PM
To: Cooper, G. Thomas Law Clerk (Brett H. Bayne)
Subject: RE: Civil Action No. 2010-CP-40-4244 (York/Cristy v. Dodgeland, Hudson et al)

Mr. Bayne:

We received the Order Denying the Motion to Reconsider, Alter or Amend dated August 10, 2011 (it is attached). I have a question about footnote number 1. It references the "Defendant's Motion to Reconsider". Should it have meant the "Plaintiffs' Motion to Reconsider" which was referenced on the first paragraph above in the Order as the Defendants did not make the motion? If so, how is the best way to get it corrected for the record?

Thank you for your consideration and attention to this matter.

Jo Anne Wessinger Hill

HOME	VCARD	BIO	LOCATION
			
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Richardson Plowden & Robinson, P.A. 1900 Barnwell Street Columbia, SC 29201 Tel: 803.576.3714 Fax: 803.779.0016 www.RichardsonPlowden.com			

NO OTHER COPY OF THIS INFORMATION TO BE RELEASED OR DISCLOSED TO ANY OTHER PARTY WITHOUT THE WRITTEN CONSENT OF THE FIRM. ANY SUCH RELEASE OR DISCLOSURE SHALL BE AT THE RISK OF THE PARTY REQUESTING SUCH RELEASE OR DISCLOSURE. THE FIRM ASSUMES NO LIABILITY FOR ANY SUCH RELEASE OR DISCLOSURE. THE FIRM ASSUMES NO LIABILITY FOR ANY SUCH RELEASE OR DISCLOSURE.

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CERTIFICATE OF COUNSEL

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



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Attorneys for Appellants

December 5, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-40-4244

Melissa Anne York and
Olga Joanne Cristy,

Appellants,

v.

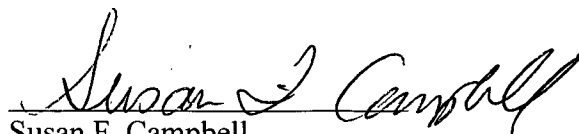
Dodgeland of Columbia, Inc.
and Jim Hudson Automotive
Group, and Jim Hudson
Superstore, a/k/a Jim Hudson
Hyundai,

Respondents.

PROOF OF SERVICE

I certify that I have served the **Record on Appeal** on Dodgeland of Columbia, Inc. and Jim Hudson Automotive Group, and Jim Hudson Superstore, a/k/a Jim Hudson Hyundai by sending two spiral bound copies by US Mail, postage prepaid to their attorneys of record, Steven W. Hamm, and C. Jo Anne Wessinger Hill at their office at 1900 Barnwell Street, Columbia, South Carolina, 29201-3061, on December 5, 2012.

December 6, 2012



Susan F. Campbell
McGowan Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201
(803) 779-0100

RECEIVED

DEC 06 2012

SC Court of Appeals

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Attorneys for Appellants