STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	Case No. 2017-CP-42-02072
	)	
	)	
Donald and Carlee Simmons	)	
	)	
Plaintiffs,	)	
v.	)	
	)	ORDER DENYING MOTIONS TO DISMISS
Benson Hyundai, LLC,	)	AND FOR COSTS
	)	
Defendant.	)	
	)	

I. INTRODUCTION

This Motion came before the Court on September 25, 2017. Defendant car dealer moved to dismiss this case to arbitration upon various grounds, all of which were opposed by the Plaintiffs. The Court has reviewed the various documents submitted by the parties in favor of their positions, the pleadings, and the Affidavits and incorporates them into this Order. For the reasons set forth below, Defendant's Motions are denied.

II. JURISDICTION

As a preliminary matter, Defendant argues that this Court lacks jurisdiction to determine arbitrability. However, our Supreme Court addressed this issue in *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. Sup. Ct. 2007). As in *Simpson*, Plaintiffs allege that the various sales and financing contracts are unconscionable and thus unenforceable:

> "[I]n this case, the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract between [buyer and seller]. Although the clause specifically stated that arbitration applied to issues involving "the validity and scope of this contract," [Buyer] 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. See S.C. Code Ann. § 15-48-20(a) (2005).

. . . .

> Furthermore, because [plaintiff] challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties actually agreed to arbitrate . . . . Accordingly, the trial court did not err in ruling on the issue of validity instead of submitting the issue itself to arbitration.

Simpson, 644 S.E.2d at 677.

This Court therefore finds that it has jurisdiction to rule on arbitrability.

III. FACTS

Plaintiffs are a husband and wife who traveled on July 26, 2016 to Benson Hyundai (the "Dealership") in Spartanburg. At the Dealership, numerous documents were presented to Plaintiffs regarding their purchase of a Hyundai Veloster. The Dealership's documents included two separate and contradictory sets of arbitration provisions. In addition, these two arbitration provisions each incorporated different documents with extensive sets of additional rules. These various arbitration documents use different fonts and appear to have been drafted using different forms.

According to Plaintiff Donald Simmons in his Affidavit, the documents were presented to Plaintiffs in a hurried fashion around midnight. The Simmons felt pressured because they were told that a substantial rebate worth several thousand dollars would expire, unless they purchased that night and that night only. Donald was told that the freestanding Benson arbitration provision only dealt with service work, such as oil changes or minor disputes such as whether a car was vacuumed properly. According to Simmons' Affidavit, other questions asked of the Finance Manager about the contracts were avoided or answered in vague ways.

After arriving back in Macon, Plaintiff was contacted by the Dealership, cursed at, and informed that he must pay more for the car than their current contract read. If he did not comply, the salesman would deny their loan.

Plaintiffs contend that the Defendant was attempting a yo-yo sale by forcing Plaintiffs to pay more money:

> "Yo-yo sales are unlawful in at least seven states and several other states have issued regulations and administrative interpretations to car dealers on the subject. Such transactions are fundamentally unfair because they give all of the power to the dealer, and none to the customer:
> On the one hand, once the customer drives the car off the lot, the consumer is locked into the sale. The dealer does not want the consumer to think about the deal overnight – it wants the deal closed on the spot while the consumer has just undergone hours of sales pressure.
> On the other hand, the dealer wants to retain its options when the consumer drives off the lot with the car. It does not want to be rushed into a hasty deal. It wants time for its personnel to review the profit margin, the consumer's credit rating, and the chances of selling the vehicle to someone else. It wants time to reflect on whether it can squeeze more out of the consumer or whether it is better off selling the vehicle to someone else.
> Usually, the dealer will want to hide the one-sided nature of the transaction. It does not want consumers to think that they can get out of a deal just because the dealer can. So the dealer will not disclose that the deal, from the dealer's point of view, is not final."

Singleton v. Stokes Motors, Inc., 358 S.C. 369, 380-81 (Sup. Ct. 2004).

IV. NO MEETING OF THE MINDS ABOUT ARBITRATION

(A) Contradictory rules

As a threshold matter, Plaintiffs contend that no meeting of the minds occurred, because several important arbitration clauses, rules, and agreements directly contradicted one another. Defendant takes the position that because Plaintiffs signed arbitration documents, there was a meeting of the minds regarding arbitration.

However, Defendant misunderstands the difference between a mere desire to arbitrate and a legally enforceable contract to arbitrate. When material terms are missing, vague, or contradictory, a court must write or rewrite the contract. It is the policy of South Carolina that the parties, not a court, write contracts between private citizens.

This Court notes that Benson's sales and arbitration documents are adhesion contracts. They are on pre-printed commercial forms, possibly drafted by different authors at different times with no consultation between them. The result is a series of material contradictions between arbitration provisions on the adhesion forms such that no meeting of the minds on arbitration occurred. These were the Dealership's documents. It could have easily avoided this confusion by presenting Plaintiffs with a set of consistent, non-contradictory closing documents.

A fortiori, not only do the actual arbitration clauses on the Retail Installment Sales Contract and Benson's Arbitration Policies and Procedures contradict one another, but both also adopt additional contradictory extrinsic rules.

(B) The four arbitration provisions and rules

Benson's arbitration documents consist of four sets of rules:

(1) Benson Arbitration Policies and Procedures (free-standing agreement entitled "Benson's Rules")

(2) Federal Rules of Civil Procedure (incorporated by into arbitration by Benson's Rules)

(3) Arbitration Agreement in Retail Installment Sales Contract (page four of the Sales/Financing Agreement).

(4) AAA Consumer Arbitration Rules (incorporated into Retail Installment Sales Contract).

The four arbitration provisions conflict as to which rules shall apply.[1] Pursuant to the first sentence of Benson's Rules, only Benson's Rules apply: "Benson's Policies and Procedures are intended to provide the exclusive means of resolving all disputes, as defined below, which may arise between an individual and Benson."

However, Paragraph 6 of Benson's Rules (emphasis added) adopts the entire Federal Rules of Civil Procedure and states that they provide the rules: "The Federal Rules of Civil Procedure shall govern all arbitration proceedings." The Federal Rules of Civil Procedure contradict in numerous instances with Benson's Rules.

The Retail Installment Sales Contract has a different arbitration provision setting forth numerous rules, some of which conflict with Benson's Rules.

The Retail Installment Sales Contract also incorporates the AAA Consumer Arbitration Rules which purportedly are the sole rules regulating the arbitration (unless Benson gives its permission): "You may choose the American Arbitration Association to conduct the arbitration [but] any other organization [must be] subject to our

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[1] Defendant argues that the last document signed at the Dealership was the final arbitration agreement, which allegedly negates all prior arbitration provisions. Defendant submitted an Affidavit of Brian Perry who states that "the Arbitration Agreement is signed by the customer after the Buyer's Order and Retail Installment Contract." This appears to be a statement of his general practice rather than the specific procedure used on the night of the sale.

In contrast, Plaintiffs' rebuttal Affidavit shows the specific series of events occurring at the sale that night, namely that the last document signed was the Sales/Financing Agreement, which F&I Manager Perry folded, put the document into an envelope, and said "Let's run your card (for the down payment) and get you out of here."

approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website."

According to AAA Consumer Rule 1(a) (emphasis added), when parties have "provided for AAA's rules or AAA administration as part of their consumer agreement [as did Benson in this case via the Retail Installment Sales Contract], they shall have been deemed to have agreed that the application of the AAA's rules . . . shall be an essential term of their consumer agreement." This conflicts with Benson's claim that Benson's Rules and the Federal Rules of Civil Procedure provide the arbitration rules. To make matters more confusing, the AAA has authority to dispense with its own Consumer Arbitration Rules. See AAA Rule 1(e).

(C) Administration of the Arbitration

Possibly the most basic underlying rule of arbitration itself is that it will be conducted by a neutral administrator. However, pursuant to Benson's Rules, Tony Benson himself administers the arbitration. On the other hand, according to the Retail Installment Sales Contract's Arbitration Provision, the AAA administers the arbitration, unless Benson will consent to allow another organization to do so.[2]

Finally, pursuant to AAA Consumer Rule 1(a) (emphasis added), when parties have "provided for AAA's . . . administration as part of their consumer agreement, they shall have been deemed to have agreed that the application of the AAA's . . . administration of the consumer arbitration shall be an essential term of their

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[2] The case administrator is defined in the AAA Rules Glossary as follows:
"The Case Administrator is the AAA's employee assigned to handle the administrative aspects of the case. He or she does not decide the case. He or she manages the case's administrative steps, such as exchanging documents, matching schedules, and setting up hearings. The Case Administrator is the parties' contact point for almost all aspects of the case outside of any hearings."

consumer agreement."

(D) Initiation of the arbitration

According to Benson's Rules, notice must be given to the Administrator "Tony Benson" on a form supplied by Tony Benson. However, pursuant to the AAA Consumer Rule R(2)(a)(1), a different procedure is to be followed. The Federal Rules of Civil Procedure have a specific rule and case law controlling initiation of an action, which is a third procedure.

(E) Contradictory rules as to filing fees

According to Benson's Rule 10, the customer must pay a $250 filing fee to Tony Benson up front "to be applied against the cost of the arbitration" and any unused portion to be returned. Benson pays nothing up front, if it files for arbitration.

The consumer must also submit a Request for Arbitration on a form supplied by Tony Benson. The arbitration is void ("as if it had never been filed") if Benson is not paid the $250 five days after notice. The receipt and determination of these issues are presumably made by Tony Benson, supposedly acting as both a "neutral" and also a party pursuant to Benson's Arbitration Rules.

However, according to the AAA Consumer Rules, Benson should pay between $1,700 and $2,200 filing fees, and $1,500 per arbitrator. *See* AAA Consumer Arbitration Rules at Page 33.

(F) Who pays costs and expenses and in what amounts?

According to Benson's Rules, Benson is liable for all of the consumers' costs, fees (other than attorneys' fees), and arbitration-related expenses. *See* Benson's Rule 22(a)-(b),[3] which is a material benefit for the Plaintiffs.

However, under the Retail Installment Sales Contract's Arbitration Provision, Benson's liability for such expenses and

[3] However, the consumer "shall" pay all costs, expenses, court fees, attorney's fees, etc. if Benson prevails.

costs are capped. "We will pay your filing, administrative, service or case management fee and your arbitrator or hearing fee up to $5,000." Id. (emphasis added).

Under the third set of rules (i.e., the AAA Consumer Rules), "[Benson] shall pay the arbitrator's compensation unless the consumer, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation." AAA Consumer Rules at Page 33.

The Federal Rules of Civil Procedure do not address arbitration fees.

(G) Frivolous claims

The Plaintiffs may be required to repay Benson for "frivolous" claims according to the Retail Installment Sales Contract's Arbitration Provision. On the other hand, Benson's Rule 22(c) requires a party to pay attorneys' fees and costs if the other party takes a position, asserts a defense, or asserts a claim "not substantially justified by the law or the facts." The AAA allows attorney's fees and costs in accordance with the law." AAA Glossary.

(H) Appeals

The Retail Installment Sales Contract's Arbitration Provision states that appeals are governed by the FAA.

In contradiction, Benson's Rule 26 sets forth a different procedure in which an "appeal arbitrator" is chosen to hear the appeal, which necessarily involves increased costs and expenses. A second appeal may be taken to a court, but Benson's Rule 26 permits more limited grounds for appeal than the FAA.

The Federal Arbitration Act allows appeals directly to a court. 9 U.S.C. § 16 (2017).

AAA Consumer Rule 47 does not deal directly with appeals.

Finally, appeals are not controlled by the Federal Rules of Civil Procedure but instead by the Federal Rules of Appellate Procedure.

(I) Prejudice to Plaintiffs Regarding Limitations on Discovery

One critical aspect of these rules deals with discovery. Benson's Rule 18 provides for a discovery scheme, which conflicts with the AAA Consumer Rules, the Federal Rules of Civil Procedure, and the FAA.

Defendant incorporated the FAA in Benson's Rules. However, under federal law, pre-hearing depositions of third parties are generally disallowed under the FAA.[4] The ability to depose witnesses and subpoena documents from third parties and third party witnesses likely will be material in this case as Hyundai Motor Finance, which Benson alleges refused to fund the Plaintiffs' purchase of the Veloster, is located in El Dorado Hills, California.[5]

Under Benson's Rules, the arbitrator is given discretion to order pre-hearing depositions.

The AAA Consumer Rules provide for no depositions.

The FRCP set forth a presumptive limit of 10 depositions. Benson's Rules limits parties to five depositions, but this is illusory as the FAA permits no prehearing depositions.

(J) Law Regarding Conflicting Arbitration Provisions

The Florida Supreme Court in *Basulto v. Hialeah Auto.*, No. SC09-2358 (Fla. Sup. Ct. 2014) (Florida UTPA) addressed a similar scenario of contradictory documents:

> The [Trial] Court concludes as a matter of law that no valid agreement arbitrate exists in

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[4] *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999) ("[W]e hold today that a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship."). *Accord Snyder v. Wilson*, Civil Action No. MJG-13-3595 (D. Md. 2014) (Memorandum and Order).

[5] *See* Defendant's Motion to Stay and Compel Arbitration at Exhibit B (correspondence from Hyundai Motor Finance to Plaintiff refusing loan).

> this case. This conclusion is based on the Court's finding of fact that the various jury waiver and arbitration clauses which [the buyers] were required to sign were conflicting in their essential provisions and, taken together, provided for three separate and distinct means of dispute resolution. One of the clauses at issue provided for jury waiver[6] and (presumably) trial in a court of law. Another provision required arbitration by a single arbitrator. Another provision required arbitration by a panel of three arbitrators. In addition the methods for selecting arbitrators were conflicting as well as what law or procedure would govern the arbitration proceeding. Each of the competing dispute resolution provisions at issue contemplates the enforcement of a different remedy whose terms and conditions are irreconcilable with the terms and conditions of each of the other conflicting provisions. This Court accordingly concludes as a matter of law that there was no meeting of the minds with respect to the terms by which the [the dealership] intended the parties to be bound. There is accordingly no valid agreement for this Court to enforce.

Id. (emphasis added).

In *Ragab v. Howard,*[7] the Tenth Circuit was confronted with a similar scenario under the FAA. In *Ragab,* the district judge refused to enforce multiple conflicting arbitration provisions. The district court concluded that "the conflicting details in the multiple arbitration provisions indicate that there was no meeting of the minds with respect to arbitration."

The Tenth Circuit affirmed:

"[t]he agreements contain conflicting arbitration

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[6] Benson's Arbitration Policies and Procedures provides for a trial in small claims court. The Sales/Financing Arbitration provision does so also. AAA Consumer Rules do not allow a jury waiver.

[7] 841 F.3d 1134 (10th Cir. 2016).

> provisions. Suffice it to say the conflicts involve (1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys' fees and on what showing."[8]

In support, the Tenth Circuit also cited *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F. Supp. 2d 967, 992 (C.D. Cal. 2012) and *Basulto*.

See also NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 24 A.3d 777, 794 (N.J. Super. Ct. App. Div. 2011) (cited in *Ragab*) (even if a buyer is educated and reads well, conflicting provisions can prevent him or her from understanding the document's meaning).

V. ILLUSORY CONTRACTS

Even had there been a meeting of the minds, the contracts and arbitration clauses were illusory and thus unenforceable.

If there is no contract, there is no valid arbitration agreement.[9] The contracts signed by Plaintiffs were illusory because although Plaintiffs thought they were bound, the contracts gave the Dealership unrestricted discretion to reject the purchase and the financing.[10]

The Special Delivery Agreement, executed by Plaintiffs (but

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[8] *Id.* F.3d at 1336.

[9] *Penn v. Ryans Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001) (citations omitted). *See also Floss v. Ryan's Family Steak Houses*, Inc., 211 F.3d 306, 315-16 (6th Cir. 2000) (finding arbitration clauses in illusory employment contracts unenforceable under Tennessee and Kentucky law).

[10] *Accord Singleton v. Stokes Motors, Inc.*, 358 S.C. 369 (Sup. Ct. 2004). *Cf. Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 2000) ("The promise of continued employment was illusory because even though Poole signed the covenant, Incentives retained the right to discharge her at any time.").

not the Defendant), *see* Plaintiff's Memorandum in Opposition to Motion to Stay and Compel Arbitration, Exhibit F (emphasis added), provides that "Seller will attempt to assign contract on terms satisfactory to Seller.[11] At Paragraph 2, it states that "[i]f seller does not receive approval from a financial source acceptable to Seller, Buyer agrees that upon notice, Buyer shall return the vehicle in good condition and without excess mileage and the sales transaction may be rescinded."[12]

There must be an agreement to arbitrate.[13] To decide if there is an agreement, courts resort to time-honored state contract-law principles.

In Penn v. Ryans Family Steak Houses, Inc., 269 F.3d 753, 759 (7th Cir. 2001) (interpreting Indiana contact law essentially the same as in South Carolina), the Seventh Circuit refused to enforce an arbitration clause in an illusory contract, described as one which "by its terms makes performance entirely optional with the promisor." An illusory contract cannot form the basis for a valid contract, because "a contract is unenforceable if it fails to obligate [one party] to do anything."

VI. UNCONSCIONABILITY

In *Herron v. Century BMW*,[14] our Supreme Court opined that "unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable

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[11] Special Delivery Agreement at Paragraph 1 (emphasis added).

[12] *Id.* at Para 2 (emphasis added).

[13] *AT & T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

[14] 387 S.C. 525 (2011).

person would make them and no fair and honest person would accept them."[15]

Applying the Supreme Court's definition to the contracts at issue, the Benson contract was one such oppressive contract of adhesion presented in final form, and the Plaintiffs had no part in drafting the documents.[16] However, the fact that a contract is one of adhesion is merely the starting point in the analysis of unconscionability, keeping in mind that courts approach adhesion contract between consumers and car dealers with considerable skepticism.[17]

(A) Absence of a meaningful choice

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. In determining whether there is an absence of a meaningful choice, courts consider certain factors. A discussion of each factor is made below:

(i) The relative disparity in the parties' bargaining power

As in *Herron*, there was "an inherent disparity in bargaining power between the parties, as this was a transaction between a consumer and a commercial entity." Plaintiffs are consumers who are starting out as a family and are not wealthy.

(ii) The parties' relative sophistication

In *Simpson v. MSA of Myrtle Beach, Inc.*,[18] the Supreme Court noted that "we also acknowledge Simpson's claim that she did not

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[15] *Id.* at 532.

[16] *Herron v. Century BMW*, 387 S.C. 525, 532 (2010) ("We agree with the trial court that this is an adhesion contract. This was a contract on a standard form, presented on a take-it-or-leave-it basis.").

[17] *Id.*

[18] 373 S.C. 14, 27 (2007).

possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter."

Plaintiffs were without a lawyer at Benson's dealership, were unaware of the effect that waiving a jury trial would have,[19] and were being pressured to finalize the sale. Moreover, it is unreasonable to assume that while being pressured to sign a contract "this night only" lest Plaintiffs lose a large discount, that they could understand the various contradictory arbitration provisions and the Federal Rules of Civil Procedure, the study of which takes a year in law school.[20]

(iii) The nature of the injuries suffered by the Plaintiff

The Plaintiffs have lost the use of the Saab, their Hyundai, and their money used as a down payment, all of which is in Benson's possession. They also have made monthly payments to Hyundai through Benson since the vehicle was driven off the lot, which have not been deposited by Defendant.

(iv) Whether the defendant is a substantial business concern

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[19] There is substantial case law recognizing the disparity in bargaining power and sophistication between consumers and car dealers. For example, as a remedial statute, the Truth in Lending Act is designed to aid unsophisticated consumers who might be easily misled about the total costs of financing. *In re Wright*, 133 B.R. 704, 707 (Bankr. E.D. Pa. 1991). The Truth in Lending Act's enforcement is through a system of "strict liability favoring consumers. *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 248 (3d Cir. 1980).

[20] Plaintiff Donald Simmons teaches art at Middle Georgia State University and Mrs. Simmons is on the staff in the Office of Marketing and Communications there also. However, there is no evidence that they are experienced in contract, arbitration, tort, or consumer law. As with every auto dealer in South Carolina, Defendant was required to take a mandatory, formal pre-licensing course to learn the applicable laws, the proper way to document sales transactions, and how to sell vehicles ethically according to South Carolina law.

Benson is a dealership selling new vehicles for Hyundai Motor Company and financing such vehicles through Hyundai Motor Finance.

(v) Whether there is an element of surprise in the inclusion of the challenged clause

The Plaintiffs were presented with the arbitration document along with several other documents, all of which they saw for the first time during the closing process shortly before midnight.

(vi) The conspicuousness of the clause

Benson's own arbitration clause was in a freestanding document and in that sense was conspicuous. *See* Exhibit C. The Retail Sales and Financing Arbitration Provision was on page four (the back of the Retail Installment Sales Contract). They were given no copies of the AAA rules, Exhibit E, or the Rules of Civil Procedure, according to Mr. Simmons.

(vii) Dealer's remedies not stayed pending outcome of arbitration

In *Simpson*, the supreme court noted a clause allowing the dealer to litigate and dispose of the claim, even while arbitration is pending.[21]

As in *Simpson*, Benson's Arbitration Rule 3 allows many creditor's remedies. It permits Benson to repossess the car, try the case in small claims court, litigate a set-off, or seek injunctive relief. Thus, in many cases, Benson may completely deal with the dispute and obtain a judgment before arbitration is completed.

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[21] The clause in *Simpson* read as follows: "Nothing in this contract shall require the Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Consumer 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." *Simpson*, 644 S.E.2d 663, 672 (Supreme Court 2007).

Similarly, under the Retail Installment Sales Contract Arbitration Provision in the last paragraph, Benson may repossess the vehicle, sue, litigate a deficiency judgment, and file an action to recover the vehicle before or simultaneously with arbitration.

(viii) Severance

"[S]everability is not always an appropriate remedy for an unconscionable provision in an arbitration clause . . . . Although, 'a critical consideration in assessing severability is giving effect to the intent of the contracting parties,' the D.C. Circuit . . . cautioned, 'If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.' Similarly, . . . it is not the function of the [South Carolina courts] to rewrite contracts for parties."[22]

Severance in this case would be unworkable and contrary to public policy. Fairness dictates that the Defendants not be allowed to insert improper provisions in a contract that ward off lawsuits or bind non-signatory third persons, then come to the court to ask for help in enforcing it.[23]

(ix) Oppressive One-Sided Terms

Further regarding unconscionability, the one-sided nature of the arbitration terms in this illusory contract has been discussed

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[22] *Simpson* (citing *Lewis v. Premium Inv. Corp.*, 351 S.C. 167 (2002)).

[23] *See Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 673 (2007) (citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter").

above. Tony Benson's appointment of himself as arbitration Administrator, the $250 initial filing fee Plaintiffs must pay (but not Benson), the requirement of a request for arbitration from Plaintiffs on Benson's special form, Benson's requirement that the $250 filing fee be paid only five days after notice or the claim is void, exceptions to the arbitration rules allowing the dealer to proceed out of court, and multiple provisions requiring Plaintiffs to pay attorneys' fees and costs are examples of the oppressive, one-sided nature of these terms.

VII. ORDER

Defendant's Motions are denied. The Court finds several bases why the arbitration provisions are unenforceable.

First, the numerous provisions in the arbitration provisions (and incorporated documents) mentioned above directly contradict one another such that there was no meeting of the minds. This Court would be required to rewrite the documents to create a new, clear, and understandable contract, which it declines to do. Defendant is in the business of contracting with consumers such as Plaintiffs. It could easily have presented clear, consistent, understandable documents to Plaintiffs, but failed to do so.

Second, there is prejudice to Plaintiffs as Defendant has incorporated the Federal Arbitration Act into the contractual rules. Thus, Plaintiffs are unable to do pretrial depositions or subpoenas. As to discovery of Hyundai Motor Finance and any other out-of-state entities, the arbitration contracts provide no authority to compel discovery of out-of-state businesses or persons.

Third, Defendant's Special Delivery Agreement makes the entire contractual arrangement subject to Dealer's unfettered discretion, and thus illusory.

Fourth, the contractual agreements are unconscionable for the reasons discussed above. They carry terms so oppressive that no

reasonable person would make them and no fair and honest person would accept them. They are paradigm examples of adhesion contracts on preprinted forms using one-sided language and giving no meaningful choice as to the terms. The Court further notes that the rules in Benson's Arbitration Agreement making Tony Benson Arbitration Administrator is per-se improper; an Arbitration Administrator must be a neutral, otherwise consumer trust is eroded.

For these reasons, the Court denies Defendant's Motions and remands this case to the jury roster. The Court makes no ruling on whether this case involves a "yo-yo deal" as described in *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 380-81 (Sup. Ct. 2004), and the parties are free to contest this issue at trial.

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Circuit Judge J. Derham Cole

_____, South Carolina

_____, 2017

Spartanburg Common Pleas

Case Caption: Donald Simmons , plaintiff, et al VS Benson Hyundai Llc

Case Number: 2017CP4202072

Type: Order/Other

IT IS SO ORDERED!

s/J. Derham Cole 2053