THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case No. 2017-CP-42-2072
Appellate Case No. 2019-000344

Donald and Carlee Simmons ..... Respondents,

v.

Benson Hyundai, LLC ..... Appellant.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

Appellant sought resolution of a dispute with Respondents by filing an Arbitration action on May 9, 2017. Respondents answered in Arbitration on June 12, 2017 and made a motion to dismiss. Respondents then filed a separate action in circuit court on June 14, 2017. Appellant filed a Motion to Stay and Compel Arbitration on August 9, 2017. The Court issued an Order on April 30, 2018 denying Appellant's Motion. Appellant filed a Motion to Reconsider on May 8, 2018. The Court denied the Motion by Order dated February 4, 2019. The Order was received on February 4, 2019 and this appeal was filed timely.

STATEMENT OF THE FACTS

Respondents Come to Appellant's Dealership

Respondent Donald Simmons is a Professor at Middle Georgia State University, who lives in Macon, Georgia. (R. 180). He was in the market for a new Hyundai Veloster, and made a thorough internet search for the best price for the car. (R. 25). He viewed Appellant's website, and saw a car he preferred. He then called Appellant to confirm it would match the lowest price he obtained from other Hyundai dealers. (R. 25).

After this assurance, he made a 7 p.m. appointment for July 26, 2016 and drove 215 miles (almost four hours) with his wife to purchase the car. Simmons changed his mind several times and Appellant's employees worked with him to find the right car. (R. 278). Respondent was not pressured to complete the sale quickly. In fact, Appellant's employees were willing to stay quite late to help him. (R. 278).

Since the Professor's credit was blocked, and his wife's was not, it was decided that the car would be put in both names. Respondents were careful about the transaction, spending a total of five hours purchasing the car and taking over 40 minutes to read the documents at issue before signing. (R. 278). Professor Simmons was a well-educated and well-informed consumer.

Respondents Entered into Conditional Sales and Financing Agreements

After finally selecting the new Hyundai Veloster they wished to purchase, Mrs. Simmons agreed on a purchase price of $26,691 and signed the initial Buyer's Order Worksheet. (R. 72). Obviously, this price was in line with what Appellant agreed to match during the earlier phone conversation. During the final document preparation, Appellant's Finance and Insurance Manager made an honest mistake, filling out the purchase price from another deal in place of the agreed price. This was a significant difference of $7,000 in Respondents' favor. (R. 72, 73). This resulted in Appellant offering a new car for less than it paid for it from the manufacturer. (R. 280). Instead of pointing out the mistake (which Respondents were aware since Mrs. Simmons signed a Worksheet for the higher price) (R. 72, 73), Respondents silently signed for the mistaken lower price.

Respondents requested Appellant to see if it could get them approved for a loan. (R. 26; R. 178). Professor Simmons had blocked his credit at the time of the purchase. Appellant was able to see the credit score of Mrs. Simmons, which was good. (R. 74). Professor Simmons did not disclose that he had gone through a recent bankruptcy. (R. 280).

It has been the standard in the industry for years that when financing is requested, the sale of the car is contingent upon approval by a third-party lender. The ability to drive the car during the conditional period allows the customer to take the car home, and streamlines the sales process. Respondents signed several documents making it crystal clear that the purchase was conditional:

1) The Retail Buyer's Order; (R. 283-284)
2) The Special Delivery Agreement; (R. 75)
3) The Retail Installment Sales Contract (RISC) with Hyundai Motor Finance (HMC) (R. 221-224); and
4) The Arbitration Agreement. (R. 57-62).

Appellant signed all of these documents except the RISC.

The Buyer's Order made it clear that the sale was conditional on approval of financing. (R. 283). Mrs. Simmons signed under the following statement in the Buyer's Order:

> This vehicle delivered subject to credit approval by Financial source and I authorize an investigation of my credit and employment history and the release of information about my credit experience.

(R. 283)

The Buyer's Order further provided:

> In the case of a credit sale, the Seller shall not be obligated to sell until a finance source approves this Order and agrees to purchase a retail installment contract between the Purchaser and the Seller based on this Order.

(R. 284). Mrs. Simmons also signed the Special Delivery Agreement, which reiterated that the purchase was conditioned upon financing approval. (R. 75).

Respondents signed the RISC, which contained an arbitration clause. The RISC provided it could be modified in writing, signed by both parties. (R. 222). Appellant did not sign because the condition precedent of loan approval by the lender had not yet occurred. (R. 222). Since the loan was never approved, Appellant never signed the RISC. (R. 222).

The Parties Entered into an Arbitration Agreement

Both parties also signed that night one entitled "Benson Arbitration Policies and Procedures," (the Stand-Alone Agreement) (R. 57-62) which stated, in italicized, capital letters on an 11 x 17 sheet of paper:

> *I AGREE TO ARBITRATE ANY DISPUTES AND UNDERSTAND THAT I AM GIVING UP MY RIGHT TO A JURY AND TO PARTICIPATE IN A CLASS OR GROUP ACTION.*

This was the last document signed by the parties. (R. 57). The Stand-Alone Agreement provides the rules for arbitration, either in the document itself or by reference, and clearly provides which rules will apply in case of any conflicts. (R. 58).

The Condition Precedent for the Sale was not met Because Respondents' Financing was Declined

Appellant allowed the couple to drive the new car home to Macon, Georgia. (R. 28). Respondents agreed in writing that they would return the car if financing was not approved. (R. 75). Following the contingent sale, Appellant discovered the next morning the $7,000 clerical error in Respondents' favor, and asked Respondents to acknowledge. (R. 280). They refused, so Appellant agreed to honor the lower price and sell the car at a significant loss. (R. 280).

HMC subsequently denied financing to the Respondents (Complaint ¶26, R. 32-33; R. 76-83); however, Respondents have refused to return the Veloster now for almost three years.[1] Appellant initiated an arbitration action as agreed to resolve the matter. Respondents answered and counterclaimed. (R. 90-122). Respondents then filed suit in circuit court despite their agreement to arbitrate.

ARGUMENT

I. STANDARD OF REVIEW

The determination whether a claim is subject to arbitration is subject to de novo review. *See Gissel v. Hart,* 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *See Aiken v. World Fin. Corp. of S.C.,* 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007). Anyone challenging the enforceability of an arbitration agreement bears the burden of proving the provision is unenforceable. *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

[1] The Order erroneously found that Appellant has possession of the car. (R. 14).

II. THE LOWER COURT OVERLOOKED THE STRONG PRESUMPTION IN FAVOR OF THE VALIDITY OF ARBITRATION AGREEMENTS (ISSUE I)

Arbitration is good for consumers. Its value lies in its greater efficiency, speed, and cost-effectiveness and the ability to choose "expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 559 U.S. 662, 685 (2010). By agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Due to the numerous benefits of arbitration, there is a strong presumption in favor of its validity and both federal and state laws favor them. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

Unless a court can say with positive assurance that the clause is not susceptible to an interpretation that covers the dispute, arbitration is required. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). The scope of the arbitration agreements is broad and it is undisputed that Respondents' causes of action are within its scope.[2] The parties contractually agreed that any dispute arising out of the purchase of the car would be subject to the Federal Arbitration Act. (R. 57). The sale of automobiles is considered commerce sufficient for the FAA to apply. *See Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990). The FAA preempts any state law regarding arbitration.

[2] As set forth below, Appellant contends that the Stand-Alone Agreement is the only applicable arbitration agreement. Where necessary, Appellant will refer to the arbitration clause of the Retail Installment Sales Contract as the RISC.

Respectfully, the lower court overlooked the strong presumption in favor of arbitration in not enforcing it.

III. THE LOWER COURT ERRED IN MAKING FINDINGS OF FACT NOT IN EVIDENCE AND BASED ON COMPETING AFFIDAVITS (ISSUES II AND III)

It was error for the lower court to make its findings of fact by choosing between conflicting affidavits without an evidentiary hearing. Several federal courts have found that a judge cannot take two affidavits which swear to opposite things and say, "I find one of the affidavits more credible than the other, and therefore I shall accept it as true." *Castillo v. United States,* 34 F.3d 443, 446 (7th Cir.1994). *See also Franco v. United States,* 762 F.3d 761, 764–65 (8th Cir.2014) (district court abused its discretion by determining that one affidavit was more credible than another without evidentiary hearing); *Old Republic Ins. v. Pacific Fin. Servs.,* 301 F.3d 54, 57 (2d Cir.2002) ("A defendant's sworn denial of receipt of service, however, rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing."); *Bischoff v. Osceola County,* 222 F.3d 874, 882 (11th Cir.2000) (district court erred by judging witness credibility without holding evidentiary hearing).

Appellant presented the Affidavits of Daryl Turner stating: "Mr. and Mrs. Simmons never indicated that it was too late in the evening for them to understand the negotiation process or any paperwork that they signed" (R. 278) and Brian Perry stating Respondents "took approximately 40 minutes to read the documents." (R. 181). Therefore, it was error for the lower court to find "[a]ccording to Plaintiff Donald Simmons in his Affidavit, the documents were presented to Plaintiffs in a hurried fashion around midnight." (R. 2).

The lower court ignored the Affidavit of Nate Burden in which he stated that the incentive for their vehicle was available until the end of the month and he would not have told them that it ended on July 26th (R. 279) in finding: "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," (R. 2).

Although there was a directly contradictory Affidavit by Appellant's Brian Perry (R. 281), the lower court also found, "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." (R. 2). Further, the Stand-Alone Agreement clearly states that it is not limited to issues involving the repair or servicing of the Veloster (the same is true of the arbitration section of the RISC). (R. 51; R. 57). Neither the RISC nor the Stand-Alone Agreement allow for oral modifications. A person who can read is bound to read an agreement before signing it. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001).

Finally, the lower court may have found the RISC was the last document signed based on the Supplemental Affidavit of Donald Simmons. (R. 287). If so, the lower court again ignored the Affidavit testimony of Appellant's Manager, Brian Perry, that the Stand-Alone Agreement was signed after the RISC and Buyer's Order. (R. 181).

The lower court also found, with no evidence introduced, that "[a]fter 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." (R. 3). It was clearly an error for the lower court to make this unsupported finding. This finding is also contrary to the evidence in the Record: Respondents alleged in their Complaint that they had searched the internet and discussed the price of the Veloster prior to coming to the dealership. (R. 25, Complaint ¶ 4). The lower court also had before it the Buyer's Order Worksheet signed by Mrs. Simmons that showed that she had agreed to pay $7,000 more for the Veloster than the mistaken amount listed on the Buyer's Order. (R. 72, 73).

It was error for the lower court to make these findings and to base its conclusions regarding a meeting of the minds and unconscionability. Therefore, Appellant respectfully asks this Court to reverse the lower court's Order.

IV. THE LOWER COURT ERRED IN FINDING THERE WAS NO MEETING OF THE MINDS AS TO ARBITRATION (ISSUES V, VI, VII, AND VIII)

The lower court erred in finding that there was no meeting of the minds and that it would have to rewrite the arbitration agreement to create an understandable contract. The purpose of the Federal Arbitration Act "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and has been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The settled rules of South Carolina contract construction dictate that the Stand-Alone Agreement controls. To the extent any state law prohibits the agreement between the parties; it is preempted by the FAA. *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

A. Applicable Contract Construction

The question of whether parties agreed to arbitrate is resolved by application of state contract law. *Lorenzo v. Prime Commc'ns, L.P.*, 806 F.3d 777 (4th Cir. 2015). In reaching its determination that there was no meeting of the minds as to arbitration, the lower court failed to consider the issues of contract formation and modification.

1. Arbitration validity versus contract formation

Appellant filed a Rule 12(b)(1) SCRCP motion to stay the case and compel arbitration because Respondents agreed to arbitrate any disputes with Appellant. (R. 57). Parties may agree to delegate issues of arbitrability to the arbitrator while issues of contract formation are determined by the court.

Under the FAA there are two types of challenges that a party may make related to the validity of an arbitration clause contained within a larger document. *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444 (2006). The first is to the validity of the arbitration clause itself, and the second goes to the validity of the entire contract (the "container contract"[3]). *Id.* A challenge to the validity of the container contract must go to an arbitrator, because the arbitration clause within the container contract represents the parties' agreement to resolve the challenge through arbitration. *Id.* at 448-49.

However, a challenge to the validity of the arbitration clause itself may be considered by the court. *Id.* The court's ability to consider the arbitration clause separately from the container contract is known as the severability rule. *See, e.g., Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010). When a party challenges validity, the court may only look at the validity of the arbitration clause, not the validity of the container contract, as required by the severability rule. *Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, No. 2:18-cv-00151-DCN * 15 (D.S.C., January 29, 2019).

The issue of whether an arbitration clause is valid under § 2 of the FAA is a different issue from whether the parties ever formed an agreement to arbitrate. *Rent-A-Center*, 561 U.S. at 70 n.2; *see also Buckeye Check Cashing, Inc.*, 546 U.S. at 444 n.1. Appellant has challenged the contract formation of the RISC.

As Judge Norton noted recently when addressing the proper analysis of an arbitration clause in the context of contract formation:

> From a practical standpoint, it would be quite difficult to view the arbitration clause in isolation from the container contract when determining formation issues, because indicators of mutual assent, such as a party's signature, normally apply to the entire contract, not just an individual clause. Indeed, "[w]hen one has not manifested assent to the container contract, one cannot be bound by a single stitch of its text."

[3] *See Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, No. 2:18-cv-00151-DCN (D.S.C. January 29, 2019).

David Horton, *Arbitration about Arbitration*, 70 Stan. L. Rev. 363, 424 (2018) (citations omitted).

Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd., No. 2:18-cv-00151-DCN * 15 (D.S.C., January 29, 2019).

2. Conditions precedent

If a condition precedent to formation is not fulfilled, then there is no agreement and the contract is not binding. "In the law of contracts, conditions may relate to the existence of contracts or to the duty of immediate performance under them. Thus, there may be conditions to the formation of a contract, or conditions to performance of a contract." Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* vol. 13, § 38:4, 375 (4th ed., West 2000). If the condition precedent to formation is not met there is no contract. *See Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct. App. 2015) ("When the parties know that the execution and delivery of a written contract is a condition precedent to their being bound by that contract, the contract is simply not binding until the written agreement is executed and delivered, even if all of the terms have been agreed upon."); *Ex parte Payne*, 741 So.2d 398, 403 (Ala.1999) ("In negotiating a contract the parties may impose any condition precedent, the performance of which is essential before they become bound by the agreement; in other words, there may be a condition precedent to the existence of a contract." (internal quotation marks and citations omitted)); *Toland v. Kaliff*, 435 S.W.2d 260, 262 (Tex.Civ. App.1968) ("The parties to a contract may agree that it shall not become effective or binding until or unless some specified condition is performed or occurs, in which case there is no binding contract until such condition has been complied with." (internal quotation marks and citations omitted)).

3. Necessity of signatures

Where the parties express such an intent, it is necessary for all parties to sign a contract to make it effective. *See Dean v. Dean*, 229 S.C. 430, 93 S.E.2d 206 (1956) (finding a contract modifying a will was not effective because it was not signed by all the parties.) The Court in *Dean* cites 17 C.J.S., Contracts:

> . . . The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all, it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides, or its manifest intent is, that it is not to be binding until signed. . . . § 62, p. 412.

Dean, 229 S.C. at 436, 93 S.E.2d at 209.

4. Contract modification

A written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract. *Florence City-County Airport Com'n v. Air Terminal Parking Co.*, 283 S.C. 337, 322 S.E.2d 471 (Ct. App. 1984).

B. The Lower Court Erroneously Found There Were Four Arbitration Agreements at Issue (Issue IV)

The lower court erroneously found that there were four arbitration provisions and rules at issue (R. 4-5) when in fact there was only one: the Stand-Alone Agreement.

It is common for arbitration provisions to reference the rules by which arbitration will be conducted. The Stand-Alone Agreement (the only arbitration agreement signed by both parties) incorporates the Federal Rules of Civil Procedure to the extent they are consistent with the Arbitration Policies. (R. 58). If the Federal Rules of Civil Procedure are inconsistent, they are waived to the extent allowed by law. (R. 58). Likewise, the RISC (not signed by both parties) if it

applied, incorporates the rules of the American Arbitration Association to the extent that they are not inconsistent. (R. 51). The rules are not separate arbitration agreements.

Therefore, there are only potentially two arbitration agreements at issue: the Stand-Alone Agreement with its rules and the arbitration clause in the RISC with its rules. Only one agreement was signed by all parties and, as set forth below, there is no conflict between these two documents.

C. The Lower Court Erred in Considering the Arbitration Clause of the RISC When the Condition Precedent was Never Met and Appellant Never Signed

Because Appellant alleged it never entered into the RISC (R. 319; R. 335), the lower court was required to analyze the RISC, with its arbitration clause, as a whole to determine if the contract was ever formed. The parties agreed in the Buyer's Order that there was no sale if a finance source did not approve the sale:

> In the case of a credit sale, the Seller shall not be obligated to sell until a finance source approves this Order and agrees to purchase a retail installment contract between the Purchaser and the Seller based on this Order. (R. 284).

This language would be clearly understood by Mrs. Simmons when she signed the Buyer's Order and Special Delivery Agreement. The clear intent of the parties was to treat the Buyer's Order and RISC as if they were never entered into if financing wasn't approved. The fact Respondents were allowed to drive the car home was a direct benefit to them, one provided to the hundreds of consumers who need to finance their purchases.

The parties' intent is further shown by the fact that Appellant did not sign the RISC container contract. (R. 222). The parties clearly intended for the RISC to be signed by all parties to be binding. It was not signed by Appellant since it was contingent on finance approval, and was, therefore, not binding. *See Dean, supra,* 229 S.C. at 436, 93 S.E. 2d at 412.

This issue was addressed in *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 613 S.E.2d 802 (Ct. App. 2005). Brewer desired to purchase a car and sought financing. He signed

both a Buyer's Order and an RISC. Although Brewer signed the RISC, it was never signed by Stokes Kia, because it was contingent upon finance approval. This Court found that because the document was not signed by Stokes Kia, it was not enforceable against it. *Id.* 364 S.C. at 449-450, 613 S.E.2d at 806, *citing S.C. Code Ann. § 36-2-201* (2004). The RISC in the present case is not enforceable against Appellant for the same reason.

Respondents' condition precedent of financial approval was necessary for contract formation. Because it was not met in the container contract, the RISC is not enforceable, including its arbitration clause. Therefore, only the Stand-Alone Agreement was entered into by the parties.

In contrast, the Stand-Alone Agreement contains all the requirements for a contract and was signed by both parties. It is therefore, the only applicable agreement regarding arbitration.

D. Contract Law Regarding Modification Dictates There is no Inconsistency

Alternatively, only if the Court determines that the parties entered into the RISC, or its arbitration clause, the arbitration provisions in the RISC and the Stand-Alone Agreement are not inconsistent as the documents make it clear that only one controls. In analyzing the two documents, the lower court failed to apply South Carolina law regarding contract modification.

The parties indicated their intent in the RISC and Stand-Alone Agreement that they not be construed together except to the extent that one modifies the other. (R. 62; R. 222). Both the RISC and Appellant's Stand-Alone Agreement state that they can be modified by another writing, signed by both parties. (R. 62; R. 222). The lower court ignored the clear finding in *Dodgeland* that there are no inconsistencies when there is a modification to arbitration terms in a contract. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 84, 749 S.E.2d 139, 149 (Ct. App. 2013). The

lower court relied instead upon Florida[4], New Jersey[5], California District Court[6], and Tenth Circuit[7] cases. All of these cases are clearly distinguishable on their facts.

Only in the alternative, if this Court finds that the RISC is binding upon Appellant, Appellants contend the Stand-Alone Agreement was signed last and modifies the RISC. If the Court finds the RISC was binding and was the last signed document, the arbitration section in the RISC would apply. If the Court determines that the RISC is binding upon Appellant and cannot determine which document was signed last, the case should be remanded to the circuit court for an evidentiary hearing on this narrow issue.

V. IT IS FOR THE ARBITRATOR TO EVALUATE THE RULES OF THE ARBITRATION (ISSUE IX)

The rules of contract construction make clear that the Stand-Alone Agreement is the only controlling arbitration document; however, the lower court erroneously found that there was no meeting of the minds because there are contradictory rules as to arbitration. As set forth above, only the Stand-Alone Agreement is applicable. The Order also overlooks the fact that when the question is not whether the parties agreed to arbitrate a matter, but what kind of arbitration proceedings the parties agreed to, it is a matter of contract interpretation for the arbitrator to decide.

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[4] *Basulto v. Hialeah Automotive,* 141 So.3d 1145 (Fla. 2014). The facts of *Basulto* are clearly distinguishable. The buyers could not communicate in English and the documents that they signed were in English, some of which were blank when signed by the buyers. Neither of the parties in *Basulto* challenged the formation of any of the competing agreements, however, in the present case Appellant argues it never entered into the RISC. Additionally, *Basulto* does not address modification.

[5] *NAACP of Camden County East v. Foulke Mgmt. Corp.,* 24 A.3d 777 (N.J. Super. 2011). This case is distinguishable because the dealership signed all of the documents at issue. The court found that contract modification did not resolve the issue because only one of the three conflicting documents allowed for modification, leaving two competing documents. In the present case, both the RISC and Stand-Alone Agreement allow for modification.

[6] *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 838 F.Supp.2d 967 (C.D. Cal. 2012). The District Court found that arbitration had been waived as to most of the arbitration agreements and that it was not a party to the remaining arbitration agreements it sought to enforce. Toyota was not a party to the arbitration agreements, This is clearly distinguishable from the present case.

[7] *Ragab v. Howard,* 841 F.3d 1134 (10th Cir. 2016). The Tenth Circuit recognized that "courts have granted motions to compel despite the existence of conflicting arbitration provisions when the contracts themselves provide the solution." *Id.* at 1138 citing *Ex parte Palm Harbor Homes, Inc.*, 798 So.2d 656, 660 (Ala. 2001). In the present case, the contracts themselves provide the solution by allowing for modification.

See Green Tree Financial Corp. v. Bazzle, et al., *539* U.S. 444, 452-453 (2003). There is no dispute that the parties evidenced an intent to resolve any disputes between them by arbitration and not in court.

It is well settled that an arbitrator has jurisdiction to "adopt such procedures as are necessary to give effect to the parties' agreement" and that "'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively . . . for an arbitrator ... to decide." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685-86 (2010) (internal quotation marks omitted); *see also Dockser v. Schwartzberg*, 433 F.3d 421, 426-27 (4th Cir. 2006) (concluding the arbitrators had jurisdiction to determine the number of arbitrators that would hear the parties' dispute).

There is also no conflict between the Stand-Alone Agreement and the Federal Rues of Civil Procedure. Both the explicitly allow for flexibility in their application. FRCP 26(b)(2)(A) provides:

> . . . the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

Likewise, the Stand-Alone Agreement provides in Paragraph 18:

> The Arbitrator shall have the authority to order and enforce such discovery, by way of deposition, interrogatory, document production, independent medical examination, or otherwise (collectively referred to as "Information Requests"), as the Arbitrator considers necessary to a full and fair exploration of the issues in Dispute. (R. 60).

"There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). The lower court overlooked the fact that parties may "specify by contract the rules

under which that arbitration will be conducted." *Id.* at 479. The Fourth Circuit has made it clear that arbitration agreements are not unconscionable even when the costs, fees, and procedures are unknown. *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302 (4th Cir. 2001).

There is also no prejudice by the incorporation of the FAA into the Stand-Alone Agreement's contractual rules: it states that it controls if there are any conflicts between its procedures and those of state or federal arbitration law. (R. 58). Further, the FAA does not provide detailed procedures for conducting arbitration. For example, the FAA does not impose specific procedures regarding how notice of arbitration must be given in contracts. *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 577 S.E.2d 482 (Ct. App. 2003). The interplay between these rules is for an arbitrator to decide.

The lower court's Order seems to suggest the Stand-Alone Agreement is unconscionable both because it imposes some mutual restraints on the parties regarding discovery and because it imposes less restraint than may otherwise be imposed by the FAA. In particular, the lower court notes that there may be limitations on Respondents ability to depose HMC, located in California. (R. 9). This finding ignores the fact that all rules of procedure impose certain constraints on the parties. For example, Rule 45(b)(2), SCRCP limits the Court's subpoena power to persons or entities located within South Carolina and Rule 45(c)(3)(A)(ii) would require the Court to quash any subpoena requiring a non-party to travel more than 50 miles from the county where that person resides, is employed, or regularly conducts business. Therefore, Respondents' ability to depose HMC is constrained under South Carolina state law and Respondents are not prejudiced by any such constraint. The lower court erroneously found that no discovery is available under the FAA. The Order also ignores the fact that the Stand-Alone Agreement clearly states its rules will apply if there are any conflicts; therefore, the provision allowing for five depositions is not illusory.

The parties are required to arbitrate these matters and then, after arbitration, either party may challenge the procedures if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999).

VI. THE ARBITRATION AGREEMENTS ARE NOT ILLUSORY (ISSUE X)

A. *Singleton v. Stokes Motors, Inc.* is Inapplicable

South Carolina law recognizes the validity of arbitration agreements as separate from their container contracts, as stated above. Therefore, the lower court erred in finding that the arbitration agreements are illusory because the Buyer's Order was conditioned on finance approval. The lower court's Order states:

> If there is no contract, there is no valid arbitration agreement. 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. (R. 11).

It has long been standard in the industry that customers who finance their purchases are allowed to enter into conditional purchase agreements. Affirming the lower court's Order puts this long standing procedure in jeopardy. The lower court cites *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (2004) to support its position. However, this case is distinguishable. In *Singleton* the Buyer's Order did not contain language making delivery of the car conditional upon the customer obtaining financing while a conditional bailment agreement did. This conflict in the documents led to the result.

The undisputed facts of this case are that both the Buyer's Order and Special Delivery Agreement were conditioned on finance approval. Therefore, this case is just like *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 613 S.E.2d 802 (Ct. App. 2005). In *Brewer*, this Court upheld a condition precedent contract where both the Buyer's Order and the conditional bailment depended on financing approval. South Carolina's appellate courts clearly do not find such

agreements to be illusory; finding otherwise would prevent hundreds of South Carolina purchasers who seek financing from driving their cars home while awaiting approval.

B. The Lower Court did not Find the Arbitration Agreements Illusory, Only the Buyer's Order

The lower court erred in finding the arbitration agreements are illusory because the Buyer's Order was conditioned upon finance approval. This is not sufficient to render the arbitration agreements illusory because arbitration agreements are separable from the agreements in which they are contained. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 440 (2006). It would be an even greater stretch to find that the wholly separate Stand-Alone Agreement was illusory based on the Buyer's Order. The lower court was required to separately find that the parties were not mutually bound by the Stand-Alone Agreement or by the arbitration clause in the RISC, if that contract was formed. It did not do so, and could not, because the obligations are mutual.

C. The Lower Court Improperly Relied on Distinguishable, Non-Binding Cases

The lower court erroneously cites *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001) and *Floss* v. *Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) in support of its findings. In both *Penn* and *Floss* the employees did not enter into arbitration agreements with their employers, but rather a third-party who lacked the mutuality of obligation necessary to make the arbitration agreements enforceable. These non-precedential cases are easily distinguishable because the courts found that the arbitration agreements themselves were illusory. This is in sharp contrast to the present case in which Respondents entered into the Stand-Alone Agreement with Appellant, not a third party, and there is mutuality of obligation: both gave up their right to go to court. Both Appellant and Respondents were obligated to arbitrate any dispute.

In *Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 1999), also cited by the lower court, Poole was asked to sign a covenant not to compete after she was already an at-will employee. This Court found there was no consideration to support the covenant because the promise of continued employment was illusory since Poole remained an at-will employee. In the present case, both Respondents and Appellant have a mutual, non-illusory obligation to give up their right to go to court and instead arbitrate any claims they may have against one another. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996) (valuable consideration for a contract may consist of some forbearance given).

Therefore, in the present case, it was error for the lower court to find the arbitration agreement was illusory.

VII. THE STAND-ALONE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE (ISSUES XI AND XII)

Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable. Unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, the contract should be enforced. *See Gladden v. Boykin*, 402 S.C. 140, 145, 739 SE2d 882, 884 (2013).

Obviously, Professor Simmons and his wife, a Web Consultant Strategist at Middle Georgia College, had excellent reading abilities. They scoured the internet for the best deal and drove over 200 miles to make the deal. They took over 5 hours to purchase the car and 40 minutes to read the documents. They collectively signed the Stand-Alone Agreement four times, clearly consenting to arbitration. There is no evidence of gross unreasonableness to support the finding that they did not consent to the Stand-Alone Agreement.

The lower court states several times in its Order that the arbitration agreements are contracts of adhesion. There is no evidence in the record that the Stand-Alone Agreement in the present case is an adhesion contract. To establish adhesion, a party must demonstrate both that the terms are non-negotiable *and* that the contracting party is unwilling to waive enforcement in order to deal. *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). There is no evidence in the Record that Respondents asked for a waiver or that Appellant refused.

Even if this Court were to find the Stand-Alone Agreement was a contract of adhesion, it would not be unconscionable *per se. Id.* Unconscionability requires a greater showing than merely that the contract is one of adhesion. *Id.* A contract provision is not unconscionable unless a court finds both an "absence of meaningful choice on the part of one party due to the one-sided contract provisions" and "terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.*, 330 S.C. at 395, 498 S.E.2d at 902.

A. Respondents had a Meaningful Choice

Respondents had a meaningful choice. Absence of meaningful choice speaks to the fundamental fairness of the bargaining process in entering into the contract. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). The court must consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, the nature of the injuries suffered by the Respondents, whether the Respondents are a substantial business concern, whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause. *Id.* As set forth, these factors all indicate Respondents had a meaningful choice.

The lower court erred in finding that the Respondents lacked meaningful choice because they were not provided with copies of the AAA Rules or the Federal Rules of Civil Procedure. An

arbitration agreement does not have to spell out all of its rules and provisions in order to be enforceable. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000). It is common practice to reference the relevant rules for arbitration and provide the website or other method by which the party can access the rules.

1. The parties' bargaining power does not show a lack of meaningful choice

While there is some inherent disparity in bargaining power between the parties, as this was a transaction between consumers and a commercial entity, Respondents were not required to enter into the conditional agreement for the Veloster. Further, there is no evidence in the record that the Professor and the Web Consultant Specialist could not negotiate regarding the Arbitration Agreement after five hours deciding on the car and 40 minutes of review.

2. The parties' relative sophistication and the conspicuousness of the arbitration agreement supports a finding of meaningful choice

The lower court erred in finding that Respondents were not sophisticated enough to understand that they were agreeing to arbitration and waiving their right to a jury trial. Both Respondents are employed by Middle Georgia State University. (R. 178-180). Mrs. Simmons is a Web Consultant Strategist and Mr. Simmons is an Assistant Professor. (R. 178-180). Both Respondents therefore possessed the business judgment necessary to make them aware of the implications of the Stand-Alone Agreement. They reviewed and voluntarily signed the Stand-Alone Agreement collectively four times (and the RISC), indicating that they were in agreement to arbitrate. The lower court's analogy between the Truth in Lending Act and arbitration is inapposite. The FAA is not a remedial statute designed to aid consumers.

Any lack of sophistication on the part of the Respondents does not overcome the fairness of the terms of the Stand-Alone Agreement itself. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C.

531, 541, 542 S.E.2d 360, 365 n.5 (2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement."). "[A] party signing a written contract has a duty 'to inform himself of its contents before executing it . . . and in the absence of fraud or overreaching he will not be allowed to impeach the effect of the instrument by showing that he was ignorant of its contents or failed to read it.'" *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 306 (4th Cir. 2001). Furthermore, ("[T]he law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents simply from reading the document."). *Towles v. United Healthcare Corp.*, 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct.App.1999).

It is undisputed that the Stand-Alone Agreement was conspicuous (and likewise the arbitration section of the RISC). (R. 57-62; R. 224). The Stand-Alone Agreement does not have to spell out all of its rules and provisions in order to be enforceable. *See Green Tree Fin. Corp. – Ala. v. Randolph*, *supra.* 531 U.S. 79 at 89-92 (holding that an arbitration agreement's failure to designate a particular controlling arbitration association, which resulted in a silence with respect to costs and fees, did not render the agreement unenforceable).

3. The nature of the injuries

Respondents' injuries are small as they have kept the car almost three years since they took conditional delivery even after they learned they did not have financing. (R. 76-83). Respondents' allegations that they are injured because they have sent checks to the dealership made out to HMC are disingenuous. It is undisputed that HMC has declined their financing. (R. 76-84). Therefore, the Respondents knew that their checks could not be cashed.

4. There was no surprise

The lower court erred in finding Respondents were surprised by either of the arbitration agreements. The Stand-Alone Agreement is an over-sized document, which Respondents were asked to separately sign, which they did four times collectively.

If the Court somehow finds that the RISC was binding, Respondents signed immediately below the following statement on the RISC:

> **You agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You acknowledge that you have read both sides of this contract, including the arbitration provision on the reverse side, before signing below. You confirm that you received a completely filled-in copy when you signed it.** (R. 128).

As set forth in Section III. above, the lower court erred in finding that Respondents did not have adequate time to consider the arbitration agreements or were misled regarding the scope of the Stand-Alone Agreement. Further, the scope of the arbitration agreements was clearly stated in writing. "[O]ne cannot complain of fraud in the misrepresentation of the content of a written instrument when the truth could have been ascertained by reading the instrument...."[8]

B. There are no Oppressive One-Sided Terms

Because Respondents cannot show a lack of meaningful choice, the Court does not need to address the issue of oppressive terms, as both are needed to find a contract provision unconscionable. Even if this Court were to find a lack of meaningful choice, there are no "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668

[8] *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 289, 328 S.E.2d 916, 918 (Ct.App.1985) (quoting *Guy v. Nat'l. Old Line Ins. Co.*, 252 S.C. 47, 51, 164 S.E.2d 905, 906 (1968)).

(2007). Further, the Stand-Alone Agreement contains a severance clause that permits severance of any portion of the Agreement later found to be unenforceable. (R. 62).

1. The Arbitration administrator

The stand-alone Agreement designates Tony Benson as the "Arbitration Administrator." (R. 59). The Administrator serves only a clerical role in: receiving the initial Request for Arbitration and filing fee, receiving the Response to the Request for Arbitration, and indicating Appellant's choice of arbitrator. (R. 58-60). The FAA does not require the use of an arbitration association and this provision merely sets out the process for initiating arbitration. The designation of Tony Benson as the Arbitration Administrator does not give an unconscionable advantage over Respondents that would make the terms of the Stand-Alone Agreement oppressive.

The Administrator does not have unequal power regarding the selection of an arbitrator. If Respondents do not agree with the arbitrator proposed, they select their own arbitrator and the two arbitrators select a third to comprise a panel. Then each would strike one, leaving the one not struck. The Administrator has no further role once the arbitrator, or panel of arbitrators, is selected. (R. 60, ¶14.c).

2. Requirement that the $250 filing fee be paid within five days after notice

The lower court cites as examples of unconscionable terms the fact that the arbitration fee has to be paid within 5 days and Appellant provides a form for making an arbitration request. (R. 17). This finding ignores the fact that a plaintiff has to pay a filing fee in state court at the very time of filing and is required to use the Civil Cover Sheet or other forms required by the court. Certainly, these requirements are not oppressive.

3. The Agreement provides for mutual terms

Both parties are subject to the same terms in the Stand-Alone Agreement (or the RISC), thus there is no lack of mutuality of remedy. Either party can choose arbitration. (R. 57). Both parties retain the right to self-help remedies or to seek remedies in small claims court. (R. 57, ¶3). The arbitrator will apply the governing substantive law in making any award; therefore, Respondents will have all remedies otherwise available to them. (R. 57, ¶5.b).

The lower court erred in finding there is a lack of mutuality in the Stand-Alone Agreement when both parties retain certain remedies outside of court, including self-help remedies and filing a claim in magistrate's court. (R. 57). *See Dodgeland of Columbia, Inc., supra.* 406 S.C. at 90, 749 S.E.2d, at 151 (recognizing the preservation of self-help remedies for both parties as demonstrating the terms of the agreement were not one-sided). This is distinguishable from *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), in which only the dealership retained the right to pursue remedies outside of arbitration.

The lower court improperly found that only Respondents would have to pay a filing fee under the Stand-Alone Agreement. (R. 17). Either party who initiates a claim for arbitration is required to pay the fee under the Agreement. (R. 58, ¶10). In fact, Appellant has already initiated arbitration and paid the fee. (R. 63). Appellant agrees to front the costs for the arbitrator beyond the initial $250, which amount is only paid by the customer if the customer initiates the arbitration. (R. 62, ¶22). Under either Arbitration Agreement it is clear that Appellant and not Respondent bears the greater share of administrative costs. (R. 62; R. 258). Likewise, the potential imposition of attorneys' fees and costs is mutual following the initial filing fee. Respondents have the opportunity to recover costs if they are the prevailing party, an opportunity not available under all

causes of action in state court. (R. 62, ¶22). The allowance of these fees and costs is not unconscionable, as such a cause of action is also available in state court.

CONCLUSION

These highly educated consumers had a meeting of the minds with Appellant when: (1) they agreed that they would only enter into a purchase of the Veloster with a $7,000 windfall if the condition precedent of financing approval by HMC was met; and (2) they agreed to arbitrate any disputes among them. Respondents broke both of these promises by retaining possession of the Veloster for almost three years after financing was declined and by suing Appellant in state court.

The lower court failed to apply South Carolina contract construction to find that only the Stand-Alone Arbitration Agreement was applicable. Because Respondents' causes of action clearly fall within the scope of the Arbitration Agreement, any disputes regarding arbitration procedures are a matter for the arbitrator and not the court.

Finally, the Stand-Alone Agreement is not unconscionable or illusory. These educated consumers spent five hours at the dealership, more than enough time to carefully consider the paperwork. The obligations under the Stand-Alone Agreement are mutual, and in fact tend to favor the Respondents as to cost and expanded opportunities for discovery and appellate review. Therefore, this Court should reverse the lower court's order and find that arbitration is required under the Stand-Alone Agreement.

Respectfully submitted,

Date 8 July 19

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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