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

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SC Court of Appeals

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

Donald and Carlee Simmons ..... Respondents,

v.

Benson Hyundai, LLC ..... Appellant.

APPELLANT'S FINAL REPLY BRIEF

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COUNTERSTATEMENT OF THE CASE

A. Jurisdiction

Appellant filed a Rule 12(b)(1) SCRCP Motion to Stay and Compel Arbitration because Respondents agreed to arbitrate any disputes with Appellant, therefore the lower court lacked jurisdiction over the underlying subject matter. (R. 53).[1] Any arguments Respondents make as to the validity, rather than the formation, of the sales and financing contracts must go to the arbitrator. *See Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, No. 2:18-cv-00151-DCN (D.S.C., January 29, 2019). A challenge to the formation of a container contract or the validity of an arbitration clause itself may be considered by the Court. *Id.*

B. Use of Affidavits

Appellant contends that the lower court's determinations, without an evidentiary hearing, that one affidavit is more credible than another is problematic, not that it was prejudiced by the Court's use of affidavits to the extent they establish uncontested facts. See *Castillo v. United States,* 34 F.3d 443, 446 (7th Cir.1994); *Franco v. United States,* 762 F.3d 761, 764–65 (8th Cir.2014); *Old Republic Ins. v. Pacific Fin. Servs.,* 301 F.3d 54, 57 (2d Cir.2002); *Bischoff v. Osceola County,* 222 F.3d 874, 882 (11th Cir. 2000). Appellant could not know that the lower court would make such a credibility finding until it issued its Order. Appellant then raised the issue in its Motion to Reconsider that these factual findings were error because there were contradictory affidavits. (R. 298-299).

COUNTERSTATEMENT OF THE FACTS

Respondents are attempting to introduce highly contested assertions not in the Record. Rule 210(h), SCACR limits appellate review to facts appearing in the Record on Appeal. The

[1] Respondents reference *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007); however, that case references only the South Carolina Arbitration Act, whereas the present case invokes the FAA,

Record demonstrates that Respondents agreed to purchase the Veloster for $26,691 and that Mrs. Simmons actually signed the Worksheet at that price. (R. 72). Due to a clerical error, the final Buyer's Order reflected the price as $19,600, a mistake in Respondents' favor in the amount of $7,091. (R. 73). This clerical error in no way is a "yo-yo" sale and Appellant agreed to absorb this mistake.

There is no testimony in the Record as to the reason Respondents came to purchase a car or as to any communications prior to July 26, 2016. There is also no evidence in the Record regarding events occurring after Respondents signed the paperwork for the conditional purchase of the Veloster,[2] making a protracted discussion of a yo-yo sale improper and irrelevant.

What is clearly in the Record is the fact that Mrs. Simmons signed the Retail Buyer's Order which provided, in part:

> . . . 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).

She also signed under the following statement:

> 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.[3] (R. 283).

Finally, she signed the Retail Buyer's Order right under the capitalized warning:

> CAUTION. IT IS IMPORTANT THAT YOU THOROUGHLY READ THE CONTRACT BEFORE YOU SIGN IT. (R. 284).

[2] Respondents refer to the Affidavit of Donald Simmons, however, it does not contain these allegations.

[3] Respondents also signed a Special Delivery Agreement where she agreed to return the car if credit approval was not obtained. (R. 75).

The Record indisputably demonstrates that the parties only entered into one agreement to arbitrate: the Stand-Alone Agreement. The RISC was never entered into because the condition precedent to formation was not met[4] and Appellant never signed the RISC.[5]

The Record also shows that Professor Simmons had blocked his credit score, was aware he had a prior bankruptcy, and was aware that Hyundai Motor Finance had declined financing and, therefore, could not be expected to accept payments for the Veloster. (R. 76-81).[6] Respondents have presented no evidence that alternative financing was secured. Because the RISC was never entered into, neither was the arbitration section contained within it. *See Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, No. 2:18-cv-00151-DCN * 15 (D.S.C., January 29, 2019)("[w]hen one has not manifested assent to the container contract, one cannot be bound by a single stitch of its text."). In contrast, the Stand-Alone Agreement did not contain a condition precedent and was signed by both parties.

The existence of a condition precedent does not make any of the agreements between the parties illusory. *See Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 613 S.E.2d 802 (Ct. App. 2005) (finding that although Brewer signed the RISC, it was never signed by Stokes Kia, because it was contingent upon finance approval, therefore the RISC was not enforceable against Stokes Kia). This transaction was like thousands of others, whether for the purchase of a car or a house, in which the sale is contingent upon finance approval. To accept Respondents' argument that such a transaction is illusory would turn contract law in South Carolina on its head.

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[4] *See Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct. App. 2015). Additionally, the Special Delivery Agreement, incorporated into the RISC, made it clear that there was a condition precedent. (R. 75).

[5] S.C. Code § 36-2-201 requires Appellant's signature:

> . . . a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing . . . signed by the party against whom enforcement is sought. . . .

[6] Respondents' statement regarding payments to Hyundai Motor Finance supports compelling arbitration. "To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012).

Professor Simmons' Affidavit states only that he did not know what the Federal Rules of Civil Procedure were and that he had not read the AAA rules. (R. 287). Respondent, a college professor, does not allege in his Affidavit that he was unfamiliar with the concept of arbitration or incapable of understanding the clear language that he was waiving his right to a jury trial. Mrs. Simmons, a computer expert at the college, did not present an Affidavit so her understanding of these matters is unknown.

ARGUMENTS

I. THERE ARE NO CONTRADICTORY RULES

A. Only the Stand-Alone Agreement Applies

Respondents focus heavily on the differences between the arbitration provisions of the Stand-Alone Agreement and the RISC but ignore the facts that the RISC is void. As stated earlier, the RISC was never formed because the condition precedent was not met and Appellant never signed it. Because the RISC was never formed, the arbitration section within the RISC was not applicable.[7] In contrast, the Stand-Alone Agreement is not subject to a condition precedent and was signed by both parties.

B. Either the Arbitration Agreement in the Stand-Alone Agreement or the RISC Applies, not Both

Alternatively, if somehow the RISC applies, it is clear that either the arbitration provisions of the Stand-Alone Agreement or the RISC apply, but not both, as each allows for modification.[8] This Court has found there are no inconsistencies when there is a modification to arbitration terms in a contract:

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[7] *See Berkeley Cnty. Sch. Dist. v. Hub Int'l Ltd.*, No. 2:18-cv-00151-DCN * 15 (D.S.C., January 29, 2019) (recognizing that "indicators of mutual assent, such as a party's signature, normally apply to the entire contract, not just an individual clause.") Appellant discusses this argument more fully in its Initial Brief in Section IV. A. 1.

[8] As set forth in Appellants' Initial Brief, the Stand-Alone Agreement should control. Even if the Court determined the RISC controlled, there are no inconsistencies.

> . . .[I]f the subsequently executed Installment Contract effectuated a valid modification to the arbitration terms of the Buyers Order, no inconsistencies existed.

York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 84, 749 S.E.2d 139, 148 (Ct. App. 2013).

C. There are No Inconsistencies Within the Stand-Alone Agreement

There are also no inconsistencies within the Stand-Alone Agreement. The parties have incorporated the Federal Rules of Civil Procedure, with the modifications provided in the Agreement. The Stand-Alone Agreement further eliminates any inconsistencies by providing that the Agreement will control if different from the Federal Rules of Civil Procedure. (R. 58). There is also no prejudice by the incorporation of the FAA into the Stand-Alone Agreement's contractual rules: the Agreement again states that it controls if there are any conflicts between its procedures and those of state or federal arbitration law. (R. 58).

D. There are No Unconscionable Terms

Several of Respondents' arguments, while couched in terms of inconsistency, appear to suggest that certain terms in the Stand-Alone Agreement are unconscionable. Appellant addresses the unconscionability arguments in Section III of this Brief, but will respond here to those allegations Respondents make in Section I of their Arguments.

1. Appointment of administrator

The appointment of Tony Benson as the Administrator under the Stand-Alone Agreement is not an inconsistency, nor does it present an impermissible conflict. 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 only fees charged are those of the arbitrator. Because the Administrator receives no

portion of the fees and has no say over how the fees are spent, there is no conflict. The Administrator has no further role once the arbitrator, or panel of arbitrators, is selected. (R. 60).[9]

2. Pursuit of attorney's fees

Paragraph 9 of the Stand-Alone Agreement provides either party the right to pursue attorney's fees if the other party brings an action in court rather than in arbitration. It is common for parties to agree that attorney's fees will be available to a party who successfully enforces a contract. Because the American Rule generally provides that each party pays its own fees, it is not unconscionable for the parties to mutually agree to provide for attorney's fees under a contract. Respondents are afforded the same right if Appellant brought suit against them.

3. Submission of agreement for review

Respondents argue for the first time that Appellant was required to submit its arbitration agreements to the AAA for review 30 days before using it in a contract with the consumer. This issue was not raised before the lower court and should not be considered by this Court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

E. The Cases Cited by Respondents are not Applicable

There are no conflicting provisions in the present case. Respondents are aware that the RISC was never formed because the condition precedent was not met and it was not signed by Appellant. *See Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct. App. 2015). The Stand-Alone Agreement and the RISC clearly establish the applicable rules and how to resolve any potential procedural conflicts. Finally, because all provisions are mutual, Appellants do not

[9] This Court addressed a similar arbitration provision in *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). In that case the arbitrator was to be selected by Green Tree with the consent of the respondents. The trial court found this to be unconscionable because the "veto" power of the respondents was a "hollow right". This Court disagreed noting that respondents were protected by the FAA provision that allowed them to block Green Tree's selection of arbitrators by simply disagreeing. *Id.* 330 S.C. at 399. Respondents can likewise block Appellant's choice of arbitrator.

gain any advantage. Respondents' suggestion that Appellant is attempting to deceive them through its Arbitration Agreement, in order to gain an advantage, is disturbing. The cases cited by Respondents are clearly distinguishable.[10]

1. Basulto

Basulto v. Hialeah Automotive, 141 So.3d 1145 (Fla. 2014) does not involve a similar set of facts. The buyers in *Basulto* could not communicate in English and the documents that they signed were in English, some of which were blank when signed. Neither of the parties challenged the formation of any of the competing agreements; however, in the present case Appellant never entered into the RISC. Additionally, *Basulto* does not address modification. Respondents suggest that allowing both parties to pursue a small claim in magistrate's court, to avoid the higher cost of arbitration, creates a conflict similar to *Basulto* where one agreement appeared to require a non-jury trial in a court of law while another required arbitration. Respondents admit that both the Stand-Alone Agreement and RISC allow for magistrate actions as an exception within the arbitration agreements and not as a conflicting provision.

2. Ragab

Respondents overlook the fact that the arbitration agreements in the present case resolve any potential conflicts. In the authority cited by Respondents, 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." *Ragab v. Howard,* 841 F.3d 1134, 1138 (10th Cir., 2016) citing *Ex parte Palm Harbor Homes, Inc.*, 798 So.2d 656, 660 (Ala. 2001). Clearly,

[10] Respondents seem to suggest that Appellant engaged in a deceptive trade practice through its Arbitration Agreement. This issue also was not raised before the lower court. Respondents cite a Michigan Court of Appeals case in support of this argument. In *Michaels v. Amway Corp.*, 522 N.W.2d 703 (Mich. App., 1994) the plaintiffs alleged Amway failed to reveal the material fact that it could change the rules in its contract unilaterally under the reservation-of-rights provision. The Michigan Court of Appeals found only that summary judgment was not appropriate where the reservation-of-rights clause was ambiguous. It is disingenuous to suggest that the ruling in *Michaels* suggests Appellants have acted deceptively.

the contracts in this case provide the solution. Therefore, there was a meeting of the minds with respect to arbitration.

3. In re Toyota Motor Corp.

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

4. Barrett

The Supreme Judicial Court of Maine addressed the issue of ambiguity in determining whether the plaintiff's allegations fell within the scope of the arbitration agreement, not which rules would apply. *Barrett v. McDonald Investments, Inc.*, 870 A.2d 146 (Me., 2005).[11] There is no dispute in the present case that Respondents' allegations fall within the scope of either arbitration agreement. The procedural issues raised by Respondents are questions for the arbitrator to decide. *See Green Tree Financial Corp. v. Bazzle, et al., 539* U.S. 444, 452-453 (2003).

While general contract law requires that ambiguities be construed against the drafter, South Carolina courts have recognized the Supreme Court's mandate to "apply the ordinary tools of contract interpretation in construing an arbitration agreement, and resolve any ambiguities in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 117, 739 S.E.2d 209, 218 (2013), citing *Wachovia Bank Nat'l Assoc. v. Schmidt*, 445 F.3d 762, 767 n. 5 (4th Cir.2006).[12] In *Gove v.*

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[11] *Seifert v. US Home Corp.*, 750 So.2d 633 (Fla., 1999), cited by Respondents, similarly addressed only whether the terms of an arbitration provision for the sale of a house required a wrongful death action to be arbitrated.

[12] The South Carolina Supreme Court addressed the right of a party to enter into an arbitration agreement in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). The Court found the decedent's sister lacked authority to sign the arbitration agreements in answering the question of whether she was equitably estopped to deny the enforceability of the arbitration agreement. The defendants premised their equitable estoppel argument on their

Career Sys. Dev. Corp., 689 F.3d 1 (1st Cir., 2012), CSD did not argue the federal policy, but instead confined itself to arguments of contract interpretation under Maine law. It is therefore, inapplicable to the present case where Appellant asserts the FAA.

II. THERE ARE NO ILLUSORY CONTRACTS IN THE PRESENT CASE

Respondents mischaracterize the nature of the contracts in the present case. The conditional sales contract and financing agreement are not illusory. Rather, these contracts contained a condition precedent that was not met. Such conditional agreements have been recognized by this Court as enforceable. *See Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 613 S.E.2d 802 (Ct. App. 2005).[13] Likewise, the Special Delivery Agreement is not an illusory contract, it was incorporated into the RISC and simply memorialized the condition precedent contained in the Buyer's Order. Respondents' argument would make every contract with a condition precedent illusory, impacting not only the car business, but real estate transactions as well.

A. The Arbitration Agreements Must be Evaluated Separately

Even if the Respondents could show that the Buyer's Order or RISC were illusory, they ignore the fact that the Arbitration Agreement must be evaluated separately from these documents, even if contained in the contract itself. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). The parties separately agreed to arbitrate any disputes among them regardless of whether the conditions precedent for the sale and financing of the Veloster were met.

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contention that the two documents had merged. The court found that by their own terms, the contracts indicated an intent that merger did not apply and if there was any ambiguity it would be construed against the drafter. These facts are not applicable to the present case.

[13] *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (2004) is inapplicable. 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. In the present case all documents contained the conditional language. The Court also determined the dealership could easily cure the unfairness by explaining in the sales agreement that the sale is conditional upon the buyer obtaining financing. This is exactly what Appellant did.

B. The Cases Cited by Respondents are not Applicable

Respondents' arguments are not supported by the cases they cite, many of which involved nonparties to an arbitration agreement. In the present case, all parties were signatories to the Stand-Alone Agreement and agreed to be bound by it. In *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) (neither of which are South Carolina law) the plaintiffs did not enter into arbitration agreements with their employers, but rather with a third-party who lacked the mutuality of obligation necessary to make the arbitration agreements enforceable.

The recent case of *Wilson v. Willis*, Op. No. 27879 (S.C. April 10, 2019) likewise addresses the issue of when a nonsignatory is bound by an arbitration agreement. The defendants sought enforcement of an arbitration clause contained in a contract they entered into with a third party. Plaintiffs were never aware of the existence of the contract until they brought suit. The South Carolina Supreme Court found in that case that equitable estoppel should not be applied to compel the nonsignatory plaintiffs to arbitrate. *Id.*

Respondents also cite a case in which a covenant not to compete was determined to be illusory because the employee was already an employee-at-will. *Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 525 S.E.2d 898 (Ct. App. 1999). There was no separate arbitration agreement at issue in *Poole*. In the present case, there has been no evidence that the Stand-Alone Agreement entered into by the parties is illusory.

Finally, Respondents are simply wrong when they argue that "there must first be a written contract between the parties to buy or sell something before there is something to be arbitrated." (Respondent's Brief, p. 27) *AT& T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643 (1986), cited by Respondents, does not stand for this proposition. Rather it cites the general rule

that arbitration is a matter of contract. *Id.* at 648. The parties have an agreement to arbitrate separate and apart from their conditional agreement for the sale of the Veloster. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 440 (2006).

The parties entered into a mutually binding Stand-Alone Agreement. Therefore, this Court should find that the Agreement is not illusory and compel arbitration.

III. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE

A. Respondents had a Meaningful Choice

The South Carolina Supreme Court has stated that "only in rare circumstances has an appellate court invalidated a contract on the basis of unconscionability." *Maybank v. BB&T Corp.*, 416 S.C. 541, 575, 787 S.E.2d 498, 516 (2016). 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." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).[14] Unlike the Truth in Lending Act, arbitration agreements are not remedial in nature as suggested by Respondents, and are to be viewed by the courts on the same footing as other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). "[I]nequality of bargaining power alone will not invalidate an arbitration agreement." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 n.5 (2001).[15]

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[14] There is no evidence in the Record that the Stand-Alone Agreement or RISC are adhesion contracts. 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). No such evidence was presented. Even if this Court were to find the Agreement was a contract of adhesion, it would not be unconscionable *per se. Id.*

[15] Respondents may not have had legal counsel present, but they were not prevented by the contract from seeking counsel. *See Lackey, supra.* This Court recognized that "form contracts serve a very useful purpose on commerce." *Id.* 330 S.C. at 395.

Respondents' arguments that they lacked meaningful choice are not supported by the Record. Both Respondents are employed at Middle Georgia State University as an Assistant Professor and Web Consultant, positions that require a certain level of sophistication. There is no evidence in the Record that Respondents were unaware of the effect of waiving a jury trial.

Respondents claim the Arbitration Agreement was difficult to read, and therefore, not conspicuous, even though it was a freestanding 11x17 document. The arbitration section contained in the RISC (which is not applicable) is not located on page 4 of the document, but rather on the back of a single sheet of paper. The document is printed on ledger size paper and when copied for use in the litigation, each side of the document was copied onto two pages. Respondents also signed on the front of the RISC immediately below the following statement in bold:

> **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. 222).

Respondents received the Stand-Alone Agreement and were provided ample opportunity to review the documents. They claim there was an element of surprise because they never received copies of the AAA rules or the Federal Rules of Civil Procedure; however, they were made aware that the rules were incorporated into the documents and they could have requested to see a copy. The Stand-Alone Agreement does not become inconspicuous because some of its provisions are available elsewhere. 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.

B. There Were no Oppressive Terms that no Reasonable Person Would Sign

The Stand-Alone Agreement does not preclude the arbitrator from awarding mandatory statutory remedies and it does not incorporate a lack of mutuality of remedies. Provisions exist for Appellant to advance the majority of the arbitrator fees and to preserve certain self-help remedies for *both* parties. This Court has found similar provisions not to be unconscionable. *See York v. Dodgeland of Columbia, Inc.,* 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013)

Respondents are attempting to insert matters that were not presented to the lower court. There is no evidence in the Record to support Respondents' arguments regarding events that occurred after they signed the paperwork for the conditional sale.

Respondents are disingenuous in arguing the facts of this case are like those in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) regarding the availability of remedies to the parties. In the present action, both parties retained the right to self-help remedies or to seek remedies in small claims court. (R. 57, ¶3). *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* in which only the dealership retained the right to pursue remedies outside of arbitration. Additionally, the arbitrator will apply the governing substantive law in making any award; therefore, Respondents will have all remedies available to them, unlike *Simpson*, where no punitive, double or treble damages were allowed. (R. 57, ¶5.b.).

IV. THE OUTRAGEOUS ACTS EXCEPTION MAY NO LONGER BE APPLICABLE

Respondents argue that Appellant's actions are outrageous and not reasonably foreseeable and, therefore, not subject to arbitration. Two Justices of the South Carolina Supreme Court made it clear in *Parsons v. Homes*, 418 S.C. 1, 791 S.E.2d 128 (2016) that the outrageous torts exception

no longer viable after *AT&T Mobility, L.L.C. v. Concepcion,* 563 U.S. 333, 343 (2011). The Justices reiterated their position that courts must place arbitration agreements "on equal footing with all other contracts." *Parsons,* 418 S.C. at 10, 791 S.E.2d at 132. Because the outrageous torts exception is not a general contract principle, but instead one that has been applied only to arbitration clauses, the Justices found the exception inconsistent with *Concepcion* and its supporting federal jurisprudence and overruled previous cases that had applied the exception. *Id.*

V. THE ARBITRATION AGREEMENTS DO NOT CONTAIN CONTRACT PROVISIONS THAT ARE AGAINST PUBLIC POLICY

Respondents rely upon *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) to argue again for the first time that an arbitration agreement that is broad enough to cover the Magnuson-Moss Warranty Act ("MMWA") is against public policy.[16] The *Simpson* opinion precedes both *Concepcion, supra* in which the United States Supreme Court made clear that the FAA preempts state holdings that invalidate the parties' agreement to arbitrate, and *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), in which the Supreme Court emphasized that the creation of a statutory right of action does not preclude the availability of binding arbitration.

The Fourth Circuit has not addressed the issue directly but recognized that courts have divided on the question. *Seney v. Rent-A-Center, Inc.*, 738 F.3d 631, 635 (4th Cir. 2013).[17] The Middle District of North Carolina has agreed with the Fifth and Eleventh Circuits and found the

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[16] The basis for additional sustaining grounds must appear in the Record. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-420, 526 S.E.2d 716, 723 (2000).

[17] In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Supreme Court instructed courts to evaluate the arbitrability of statutory rights in light of the liberal "federal policy favoring arbitration." *Id.* at 226. The Fourth Circuit recognized that the Federal Trade Commission did not employ a pre-arbitration presumption in interpreting the MMWA. *Seney v. Rent-A-Center, Inc.*, 738 F.3d 631, 635 (4th Cir. 2013). If that interpretation is reasonable, it would control. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984). The Fourth Circuit noted "[t]he way in which Chevron squares with McMahon . . . is uncertain, and courts have divided on the question." *Seney*, 738 F.3d at 635. The Fourth Circuit did not reach the issue because the Seney's warranty was in a lease rather than a sales agreement, and therefore fell outside the FTC regulations. *See also Gibson v. Toyota Motor Sales, U.S.A.,Inc.*, No. 4:17-577-RMG * n.3 (D. S.C., September 26, 2017) (recognizing "whether courts should defer to the FTC's opinion that the Magnuson-Moss Warranty Act prohibits pre-dispute binding arbitration of written warranty claims is a disputed question").

MMWA does not preclude binding pre-dispute arbitration of claims pursuant to a valid written arbitration agreement absent proof of other grounds in law or equity preventing it. *Krusch v. TAMKO Bldg. Prods.*, 34 F. Supp. 3d 584, 590 (M.D.N.C. 2014). The Fifth Circuit found "the text, legislative history, and purpose of the MMWA do not evince a congressional intent to bar arbitration of MMWA written warranty claims." *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 478 (5th Cir. 2002). The *Walton* court further found the MMWA does not prohibit warrantors from requiring consumers to submit to binding arbitration. *Id.* at 479. The Eleventh Circuit has also concluded the MMWA did not prohibit binding arbitration. *Davis v. Southern Energy Homes*, 305 F.3d 1268 (11th Cir. 2002). The *Davis* court held the MMWA's "provision for a judicial forum does not preclude enforcement of a binding arbitration agreement under the FAA." *Id.* at 1279.

Although the Ninth Circuit rejected the Fifth and Eleventh Circuits' reasoning in *Kolev v. Euromoaters West/The Auto Gallery*, 658 F.3d 1024 (9th Cir, 2011), the Ninth Circuit later withdrew its opinion (*Kolev v. Euromoaters West/The Auto Gallery*, 676 F.3d 867 (9th Cir. 2012)). *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012) (addressing the Credit Repair Organization Act) followed the first decision in *Kolev*. The Supreme Court held:

> It is utterly commonplace for statutes that create civil causes of action to describe the details of those causes of action, including the relief available, in the context of a court suit. If the mere formulation of the cause of action in this standard fashion were sufficient to establish the "contrary congressional command" overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law.

565 U.S. at 100-101 (internal citations omitted).

Application of the FAA would not result in an inherent conflict with the MMWA's underlying purposes. Therefore, this Court should uphold the liberal federal policy favoring arbitration and compel arbitration. Alternatively, if this Court were to find such a provision

unconscionable, the Stand-Alone Agreement contains a severance provision and the requirement for a claim under the MMWA to go to binding arbitration can be severed.

CONCLUSION

Respondents are educated customers who sought out Appellant for the purchase of a car. They agreed to two fundamental terms before driving the Veloster from Appellant's dealership: 1) the transaction was conditioned on approval of financing by a third-party lender; and 2) the parties would arbitrate any dispute among them.

The parties never entered into the RISC, or the arbitration section contained within, because the condition precedent of financing approval was never met. Additionally, Appellant never signed the RISC, further indicating that the contract was never formed. In contrast, all parties signed the Stand-Alone Arbitration Agreement, which did not contain a condition precedent.

Respondents had a meaningful choice in entering into the Stand-Alone Agreement. It clearly provides which procedural rules apply and to the extent there is a procedural question, it is for the arbitrator to decide. The Stand-Alone Agreement does not preclude the arbitrator from awarding mandatory statutory remedies and it does not incorporate a lack of mutuality of remedies. Therefore, Arbitration is required.

Respectfully submitted,

Date 8/14/19

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

9 July, 2019

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