THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2010-CP-40-4244

Melissa Anne York and Olga Joanne Cristy, ... Appellants,

v.

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

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RESPONDENTS' FINAL BRIEF

ATTORNEYS FOR RESPONDENT DODGELAND OF COLUMBIA, INC.

Steven W. Hamm
C. Jo Anne Wessinger Hill
RICHARDSON PLOWDEN & ROBINSON, P.A.
Post Office Drawer 7788
1900 Barnwell Street
Columbia, South Carolina 29202
(803) 771-4400
shamm@richardsonplowden.com
jhill@richardsonplowden.com

Rebecca Laffitte
J. Michael Montgomery
SOWELL GRAY STEPP & LAFFITTE, L.L.C.
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400
rlaffitte@sowellgray.com
mmontgomery@sowellgray.com

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

Steven W. Hamm
C. Jo Anne Wessinger Hill
RICHARDSON PLOWDEN & ROBINSON, P.A.
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile

Claude E. "Skip" Hardin, Jr.
HARDIN LAW FIRM, LLC
Post Office Box 23606
Columbia, South Carolina 29224
803-610-2644
803-610-2645 facsimile

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INTRODUCTION

The plaintiffs in this case seek to set aside arbitration provisions subject to the Federal Arbitration Act ("FAA") in order to challenge two automobile dealers that complied with the state requirements established by the General Assembly to charge closing fees to customers at the time of vehicle purchase. The issue of dealers charging closing fees is not new to judicial review in South Carolina. In fact, both the South Carolina Supreme Court and State Legislature have approved the use of closing fees in vehicle transactions. The two Plaintiffs in this lawsuit attempt to ignore the fact that state law authorizes a dealer to collect a "closing fee", a fee which the South Carolina Legislature explicitly authorized by statute in 2000,[1] and which was previously upheld in two South Carolina appellate cases.[2]

PROCEDURAL HISTORY AND FACTS

The plaintiffs, Melissa York and Olga Jones Cristy, commenced this action against the defendants by filing the Summons and Complaint in the Court of Common Pleas in Richland County on June 25, 2010. (Compl., R. pp. 25-32). An Amended Complaint was then filed on August 5, 2010. (Am. Compl., R. pp. 34-42). Plaintiffs seek damages, individually and for the benefit of others, for the allegedly illegal charging of administrative fees (hereinafter referred to as "closing fees") by the defendants with respect to the purchase of automobiles. (Am. Compl., R. pp. 34-42). As referenced in Paragraph 1 of the plaintiffs' Amended Complaint, this administrative fee is often

[1] S.C. Code Ann. § 37-2-307 (2002).

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

referred to as an "administrative fee," a "recording fee and processing fee," "closing fee," or a "dealer documentation and closing fee." (Am. Compl. ¶ 1, R. p. 34). These two plaintiffs brought actions against two defendant motor vehicle dealerships located in Richland County who do not have any connection or business relationship or nexus to either of the two separate motor vehicle transactions of the named plaintiffs conducted at different times and at separate business locations. (Am. Compl., R. pp. 34-42). Each Plaintiff alleges she purchased a vehicle from a single dealership – either Defendant Dodgeland or Defendant Hyundai – but not the purchase of a vehicle by an individual Plaintiff from both of the Defendants. (Am. Compl., R. pp. 34-42).

The plaintiffs' Amended Complaint sets forth various allegations with respect to the defendants' charging of closing fees. The Amended Complaint outlines general assertions with respect to the charging of closing fees in correlation with the advertised price of a vehicle. (Am. Compl. ¶¶ 8-22, R. pp. 35-38). Importantly, the plaintiffs acknowledge that in 2000, the South Carolina General Assembly enacted a statute, S.C. Code Ann. § 37-2-307 (2000), that allows a motor vehicle dealer to charge closing fees, provided the requirements of the statute are met. (Am. Compl. ¶¶ 23-24, R. p. 38). Section 37-2-307 is contained in the South Carolina Consumer Protection Code, and accordingly, the administration of the closing fee statute is under the direct authority and regulation by the South Carolina Department of Consumer Affairs. *See* S.C. Code Ann. § 37-6-101 *et. seq.*

The plaintiffs' allegations are twofold: (1) the defendants have not availed themselves of the statutory requirements of § 37-2-307; and (2) even if the defendants are charging closing fees in accordance with the Consumer Protection Code, the monetary

amount of the closing fee allegedly and unlawfully includes profit, as opposed to being limited for reimbursement for actual costs incurred by the defendants.[3]

Plaintiffs have alleged three causes of action: (1) violation of S.C. Code Ann. § 56-15-10 *et seq.*;[4] (2) declaratory judgment interpreting § 37-2-307; and (3) unjust enrichment. The allegations in support of the Dealers Act claim only relate to the charging of closing fees and simply restate the contentions previously asserted with respect to § 37-2-307. (Am. Compl. ¶¶ 31-40, R. pp. 39-40). Moreover, the plaintiffs merely identify one statutory provision of the Dealers Act, S.C. Code Ann. § 56-15-110, as providing a basis for this claim.[5] Section 56-15-110 is entitled "Suits for Damages" and although it provides for suits that may be brought on behalf of others and sets out specific relief that may be sought, this statute does not identify any conduct or provide any independent right of action based on alleged conduct of a defendant dealer transaction subject to the Dealers Act.

Further, the allegations against Dodgeland are based solely on a transaction between Dodgeland and the plaintiff, Melissa York. (Am. Compl. ¶14, R. p. 37). It is notable that, no part of the plaintiffs' Complaint or Amended Complaint provides the date of this transaction. Because this missing fact, which should be undisputed, Dodgeland is providing copies of the Buyers Orders for the plaintiff York's purchase of two vehicles

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[3] With regard to the allegations that closing fees charged by the defendants wrongfully include profit, the plaintiffs quote from a lower trial court Order of the Honorable Doyet A. Early, III, in a case that is not final and such order is appealable and not final at this time. It is the position of the Defendants that such Order does not control in this matter and that such Order ignores the specific statutory language enacted by the General Assembly in the Closing Fee statute, § 37-2-307, which does not reference or identify of any "cost" limitations. (Am. Compl. ¶ 13, R. pp. 36-37).

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

[5] Additionally, the plaintiffs assert that the defendants are motor vehicle dealers subject to the Dealers Act as defined in S.C. Code Ann. § 56-15-10(h). (Am. Compl. ¶¶ 31, 37, R. pp. 39-40).

on September 4, 2006. (Def. Memo In Sup. Mtn. Comp., Ex. A, R. pp. 145-46). The documents signed by Ms. York also contain an agreement to arbitrate which encompasses the disputed issues in this matter. (Def. Memo In Sup. Mtn. Comp., Ex. A, R. pp. 145-46).

With regard to Defendant Hyundai, Plaintiff Olga Cristy's[6] Complaint is based only on a single transaction with Jim Hudson Hyundai. It is again notable that the Plaintiff does not identify the date of purchase of a motor vehicle but also does not correctly name or identify the dealer from which she purchased a vehicle. The contract of sale identifies "Jim Hudson Cars, LLC d/b/a Jim Hudson Hyundai and was signed by Plaintiff Cristy. (Contract of Sale, Def. Memo In Sup. Mtn. Comp., Ex. C, R. p. 151). The Contract of Sale includes an arbitration agreement and as required by South Carolina law, notice of the arbitration provision as part of the negotiated agreement between the parties is provided in **ALL CAPS BOLD UNDERLINED** statement as follows

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

(Contract of Sale, Def. Memo In Sup. Mtn. Comp., Ex. C, R. p. 151).

The arbitration clause itself is found on the second page of the Contract of Sale but immediately above the signature line, there is further notice to Ms. Cristy related to the

[6] Ms. Cristy signed at least two separate agreements which each contain a separate Arbitration Agreement. These documents are the Contract of Sale between Jim Hudson Hyundai, Inc., d/b/a Jim Hudson Hyundai and the Retail Installment Contract and Security Agreement which provided the financing arrangements for Ms. Cristy's motor vehicle. (Contract of Sale, Def. Memo In Sup. Mtn. Comp., Ex. C, R. pp. 151-52; Retail Installment Contract and Security Agreement, R. pp. 302-05).

arbitration provision and other terms and conditions as well as an affirmation by her than she has read both sides of the contract:

> ☜ **SEE ADDITIONAL TERMS AND CONDITIONS ON OPPOSITE PAGE** ☞
>
> CUSTOMER HAS READ **BOTH SIDES** OF THIS CONTRACT AND ACKNOWLEDGES RECEIPT OF A COMPLETELY FILLED-IN COPY OF THIS CONTRACT.

(Contract of Sale, Def. Memo In Sup. Mtn. Comp., Ex. C, R. p. 151).

Plaintiff Cristy does not contest in her pleadings that she did not sign the Contract of Sale for her vehicle on the date it was purchased; however, she fails also to reference the arbitration agreements or clauses found in the Contract of Sale and in the Retail Installment Contract and Security Agreement.[7] (Contract of Sale, Def. Memo In Sup. Mtn. Comp., Ex. C, R. pp. 151-52; Retail Installment Contract and Security Agreement, R. pp. 302-05). The arbitration provisions in the Retail Installment Contract state that "[t]he Federal Arbitration Act (9 U.S.C. §1 *et. seq.*) governs this arbitration agreement and not any state law concerning arbitration, including state law arbitration rules and procedures." (Retail Installment Contract and Security Agreement, R. pp. 302-05).

The Plaintiffs' Amended Complaint essentially and completely ignores the elemental legal requirements of standing, joinder, and Rule 23 relating to class actions which poses significant problems for the Court and the litigants. (Am. Compl., R. pp. 34-42).

The Defendants filed multiple motions, which included motions to dismiss the action for lack of jurisdiction over the subject matter, to compel arbitration, for lack of

[7] Ms. Cristy financed her vehicle purchase through the dealership, Jim Hudson Hyundai, and thus, Defendant Hyundai further claims that this financing agreement and arbitration provision applies in this instance to which the seller is asserting as well since it is another express agreement to arbitrate that applies to the sale of the vehicle between Ms. Cristy and seller Jim Hudson Hyundai. (Retail Installment Contract and Security Agreement, R. pp. 302-05).

jurisdiction over the person, and for failure to state facts sufficient to constitute a cause of action, to sever, to strike, for a more definite statement, for a protective order, for costs and fees and other such relief. (Defs. Mtns. To Comp. Arb., R. pp. 43-73).

Judge Cooper initially heard oral argument on these motions on March 10, 2011 and on May 18, 2011, and he also requested continued arguments of the Respondents' Motions to Dismiss the Complaint. (Transcript for March 10, 2011 Hearing, R. pp. 162-219; Transcript for May 18, 2011 Hearing, R. pp. 220-73). After proposed Orders were provided to the Court by the parties and matter taken under advisement, the Court requested additional oral argument in the matter. Additional oral arguments were held on May 18, 2011. (Transcript for May 18, 2011 Hearing, R. pp. 220-73). The Court issued its Order dated June 10, 2011. (Order, R. pp. 3-19). In its Order, the trial court granted the motion to dismiss the action and compel arbitration, and determined it did not need to address the remaining issues which could be raised in the arbitration process. (Order, R. pp. 17-18). Thus, the parties were given two opportunities to present their positions at hearing before the trial court, as well as briefing those matters.

Following the receipt of the trial court's Order, the Appellants filed a Motion to Reconsider, Alter and Amend Judgment Pursuant to Rule 59(e) and For Rule 60(b) Relief from Judgment dated June 27, 2011. The trial court denied the Appellants' motions which ask for the Court to reconsider its rulings to compel arbitration and to dismiss the matter and issued an Order dated August 10, 2011. (Order, R. pp. 20-21). The Appellant's Motion was not served or provided to the Court in accordance with Rule 59(g), SCRCP. (Order, R. p. 20). Rule 59(g) is cited by the trial court in its Order dated August 10, 2011 in footnote 1. Rule 59(g), SCRCP, provides that: "[a] party filing a

written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." Rule 59(g), SCRCP. The official comments to Rule 59, SCRCP, indicate that subsection (g) was added "to help insure the judge is promptly notified that the motion has been filed." Gallagher v. Evert, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002). The failure to transmit a copy of the motion to the trial court implicates the tolling provision of Rule 203(b)(1), SCACR, concerning the time for filing an appeal.

On September 8, 2011, the Appellants filed their Notice of Appeal from the two Orders issued by the Honorable G. Thomas Cooper, Jr. of the trial court dated June 10, 2011 and August 10, 2011.

ARGUMENT

I. IN CHALLENGING THE RESPONDENTS' MOTION TO COMPEL ARBITRATION, THE APPELLANTS SOLELY ASSERTED THAT SUCH MOTION WAS NOT PROPER BEFORE THE COURT AS PART OF A RULE 12(B)(6) MOTION AND HAVE WAIVED ALL OTHER ARGUMENTS NOW RAISED IN THIS APPEAL

The Appellants' primary argument against the Respondents' Motion to Compel Arbitration is that the Respondents cannot make the motion under, or in conjunction with, Rule 12(b)(6), SCRCP, since it requires the trial court to review documents that are not submitted as part of the Appellants' Complaint or Amended Complaint even though the Appellants' allegations clearly used these same transactional documents signed by Appellant York when she purchased her vehicles from Respondent Dodgeland and by Appellant Cristy when she purchased her vehicle from Respondent Jim Hudson Hyundai. (Am. Compl. ¶¶ 14-15, R. p. 37). In paragraphs 14 and 15 of the Amended Complaint,

the Appellants allege and reference the buyer's order or invoice, retail installment contract and contact of sale in the following:

> 14. Defendant Dodgeland charged Plaintiff Melissa York a fee referred to as an "Admin Fee" (on the RISC) and a "Processing Fee" (on the dealer invoice) of $289.00. Upon information and belief, Defendant Dodge land's fee charged to Plaintiff York and other car purchasers was arbitrarily set and included dealer profit. Therefore, it was potentially misleading to consumers, and a violation of law.
>
> 15. Defendant Jim Hudson charged Plaintiff Olga Cristy a "Processing Fee" of $289.00. Upon information and belief, Defendant Jim Hudson's fee charged to Plaintiff Cristy and other car purchasers was arbitrarily set and included dealer profit. Therefore, it was potentially misleading to consumers, and a violation of law.

(Am. Compl. ¶¶ 14-15, R. p. 37). The Appellants state the exact dollar amount of the closing fee listed in the transaction documents that also disclose the arbitration agreement, and reference the manner in which the closing fee is referred to in these documents. (Am. Compl. ¶¶ 14-15, R. p. 37). Therefore, the Appellants' vehicle transaction documents had to be reviewed and used in preparation of the pleadings by the Appellants. There is no case law allowing a party to avoid an arbitration agreement simply because she chose not to reference it in her pleadings.

Secondly, the Appellants further claim that the Arbitration Agreements related to Appellant York do not have enough specificity of terms to be valid and enforced. (Transcript for May 18, 2011 Hearing, p. 32-35, R. pp. 251-54). This is not a valid or sustainable argument by the Appellants. Section 5 of the FAA does provide a manner in which the contracting parties shall enforce and proceed to arbitration. Section 5 of the FAA states:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; **but if no method be provided therein,** or if a method be

> provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy **the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator**.
>
> 9 U.S.C.§5 (emphasis added)

Finally, the Appellants' objections to the underlying arbitration agreements executed by the Appellants is that they are "unconscionable....They're not enforceable under Simpson and Herron." (Transcript for May 18, 2011 Hearing, p. 46, R. p. 265, lines 8-9). The Appellants went on to further state and clarify the crux of their argument against the Respondents' motion to compel arbitration upon questioning by the trial court as to why an arbitrator cannot make certain decisions regarding the scope of the Arbitration Agreement, any rules or procedures. "Like I said, if there were, in fact, enforceable arbitration agreements, then an arbitrator would be able to make those decisions, Your Honor." (Transcript for May 18, 2011 Hearing, p. 46, R. p. 265, lines 13-16). Thus, even the Appellants concede that an enforceable arbitration agreement exists in this matter which will allow each Appellant's issues to be addressed and handled by the arbitrator. Therefore, upon the lower court's finding of an enforceable agreement, the matters must be allowed to proceed to arbitration by the Appellants' own admission. The Appellants do not contend that they did not sign or enter into an arbitration agreement; only that they claim the arbitration agreements or provisions to be unenforceable.

A party is generally bound his oral concessions or statements to the Court made by counsel, to the trial, or made in his briefs. Thomas v. Dootson, 377 S.C. 293, 659 S.E.2d 253 (Ct. App. 2008) (citing Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) and Shorb v. Shorb, 372 S.C.623, 628 n.3, 643 S.E.2d 124, 127 n. 3 (Ct. App. 2007)). Here, the Appellants are bound by the arguments and positions presented to the lower court which does not dispute that an arbitration agreement was executed by the parties and further does acknowledge that the existence of agreement means that the arbitrator shall decide all issues related to arbitration, including arbitratability, scope, and all issues related to arbitration. (Transcript for May 18, 2011 Hearing, p. 46, R. p. 265, lines 13-16).

II. THE FEDERAL ARBITRATION ACT PREEMPTS STATE ARBITRATION LAW AND GOVERNS THE ARBITRATION AGREEMENTS ENTERED INTO BY THE PARTIES.

Both of the Appellants entered into Arbitration Agreements with the Respondent dealer from whom they purchased a car. Their respective and individual claims fall squarely within the scope and terms of their Arbitration Agreement. (Arbitration Agreement for Appellant York, R. pp. 145-46; Arbitration Agreements for Appellant Cristy, R. p. 151-52, R. pp. 302-305). These Agreements are of the type and scope that numerous courts have upheld. Accordingly, pursuant to the Federal Arbitration Act and applicable federal and South Carolina law, the trial court correctly determined that it should dismiss the Appellants' claims in the trial court and to compel arbitration before an arbitrator who is empowered to fully decide all issues and matters related to the Appellants' claims.

As the Respondents asserted and argued before the trial court, each of these underlying arbitration agreements provide that the Federal Arbitration Act applies and that "this is clearly an arbitration agreement that ...invokes a federal act" and that state law is preempted. (Transcript for May 18, 2011 Hearing, R. p. 230, lines 12-15). The Appellants do not deny entering into a contract of sale, buyer's order, and other transactional documents to purchase their respective vehicles in which they confirm by their signatures to have read, and/or agree to, all terms and conditions for the sale which included the arbitration agreement and provisions. (Arbitration Agreement for Appellant York, R. pp. 145-46; Arbitration Agreements for Appellant Cristy, R. p. 151-52, R. pp. 302-305).

A. **The Federal Arbitration Act Preempts State Law.**

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., applies to "contract[s] evidencing a transaction involving commerce," 9 U.S.C. § 2. A contract to purchase a vehicle clearly is a contract evidencing a transaction involving commerce. Thornton v. Trident Med. Ctr., L.L.C., ___ S.C. ___, 592 S.E.2d 50, 52 (Ct. App. 2003); *see also* MS Dealer Service Corp. v. Franklin, 177 F.3d 942 (11th Cir. 1999) (FAA applies to consumer's purchase of automobile); Stout v. Byrider, 50 F. Supp. 2d 733, 735 (N.D. Ohio 1999) (FAA governs in action by used car buyers against seller because "case concerns arbitration agreements involving transactions in interstate commerce"), aff'd, 228 F.3d 709 (6th Cir. 2000); Wolff Motor Co. v. White, 869 So.2d 1129, 1134 (Ala. 2003) ("[m]otor vehicles are 'the quintessential instrumentalities of modern interstate commerce'" and "a transaction involving the sale of an instrumentality of commerce . . . satisfies the FAA's 'involving commerce' test" (quoting United States v. Bishop, 66 F.3d

569, 588-90 (3d Cir. 1995)). Accordingly, the FAA governs the enforceability of the Arbitration Agreement and all questions concerning its scope.

The FAA embodies "the strong federal policy in favor of enforcing arbitration agreements." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985). Keeping with this "liberal federal policy favoring arbitration agreements," the Supreme Court has mandated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). Indeed, "the parties' intentions 'are generously construed as to issues of arbitrability,' and any 'ambiguities as to the scope of the arbitration clause itself' must be 'resolved in favor of arbitration.'" Washington Square Secs., Inc. v. Aune, 385 F.3d 432, 436 (4th Cir. 2004) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 626 (1985) and Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 476 (1989)).[8]

B. Appellants' Allegations Squarely Fall Within the Scope of the Arbitration Agreement She Signed.

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

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

Arbitration Agreement that she signed as part of the respective motor vehicle transaction documents with her particular dealer.

Both Respondents allege in the Amended Complaint that the dealer she did business with engaged in a "common practice of presenting/advertising car prices in a misleading manner" because it allegedly "fails to include and/or adequately disclose 'administrative fee' in the advertised price of the car" and misleads buyers "that the set fee is mandatory fee, such as taxes and license fees." (Am. Compl. ¶¶ 10, 11, 16, 17, 19, R. pp. 35-37). The Appellants acknowledge that such fees are specifically authorized by S.C. Code Ann. § 37-2-307,[9] but each Appellant alleges that the Respondents did not comply with the statute, although, notably, the complaint fails to identify the specific basis of a state law violation. (Am. Compl. ¶¶ 10-11, 16-22, 29, R. pp. 35-38).

Each of these vehicle transaction allegations clearly falls under the claims that Ms. Cristy and Jim Hudson Hyundai and that Ms. York and Dodgeland respectively and individually agreed to arbitrate if any dispute arose between the parties. The Arbitration Agreements provide that "any and all disputes" between the dealer and purchaser relating to the vehicle are covered under the Agreement. (Arbitration Agreement with Appellant York, R. p. 146; Arbitration Agreement with Appellant Cristy, R. p. 152). Each Agreement expressly encompasses all subjects relating to its respective Appellants claims.

C. The Arbitration Clauses Should Be Enforced.

The Arbitration Agreement signed by these Appellants and the particular respective dealer that they individually did business with is unremarkable and of a type countless courts have upheld. Moreover, each respective agreement authorizes the

[9] (Am. Compl. ¶¶ 23-26, R. p. 38).

arbitrator to determine the validity of the agreement and to decide all issues of arbitrability.

The Dodgeland Arbitration Agreement signed by Ms. York provides that the "...arbitrator shall decide all issues of arbitrability." (Arbitration Agreement with Appellant York, R. p. 146). Whereas, the Agreement signed by Ms. Cristy in her transaction with Jim Hudson Hyundai provides that "... the validity of this arbitration clause ... shall be resolved by the binding arbitration by one arbitrator." (Arbitration Agreement with Appellant Cristy, R. p. 152).

D. Allegations Against Other Defendants Do Not Prevent Arbitration.

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

E. The Court Rightfully Dismissed All Judicial Proceedings Against the Defendants to Compel Arbitration So That The Claims May Be Presented In Arbitration

Pursuant to Section 3 of the FAA, any court of the United States must, at a minimum, stay judicial proceedings involving claims, like those here, that fall within the

arbitration provisions of written agreements. *See* 9 U.S.C. § 3; *see also* Moses H. Cone, 460 U.S. at 26 ("[S]tate courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act."). "Notwithstanding the terms of § 3, however, dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, 252 F.3d 707, 709-710 (4th Cir. 2001); *see also* Alford v. Dean Witter Reynolds, 975 F.2d 1161, 1164 (5th Cir. 1992) ("The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration."); Payton v. Nordstrom, Inc., 462 F.Supp.2d 706, 708 (M.D.N.C. 2006) ("[T]he Fourth Circuit has held that, despite the language of the FAA regarding a stay of arbitration, when all of the claims in a lawsuit are required to be arbitrated, dismissal, rather than a stay, is a proper remedy."). Because all of Appellants' claims against the dealership from whom she purchased a car must be resolved through arbitration, the Court correctly compelled her actions against Jim Hudson Hyundai and against Dodgeland respectively to arbitration; thereafter, the arbitrators shall decide all of other issues in accordance with their authority to specifically provide by the Arbitration Agreement.

III. THE TRIAL COURT PROPERLY COMPELLED ARBITRATION BY FIRST DETERMINING THE EXISTANCE OF AN ENFORCEABLE ARBITRATION AGREEMENT AS PROVIDED BY SIMPSON

Through the Appellants' own admissions through counsel at oral argument, an enforceable arbitration agreement shall be enforced by the arbitrator. (Transcript for May 18, 2011 Hearing, p. 46, R. p. 265, lines 12-16). However, the Appellants are claiming that the trial court failed to address the requirements of the Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 662 (2007), by not determining whether an

arbitration agreement existed in the first place. Id. at 23-24, 688. The record thoroughly demonstrates that the trial court reviewed the relevant language in the arbitration documents between Appellant York and Respondent Dodgeland and between Appellant Cristy and Respondent Jim Hudson Hyundai, as well as existing case law. (Transcripts of March 10, 2011 and May 18, 2011 Hearings, R. p. 169, line 25; R. p. 171, line 5; R. p. 182, lines 10-21; R. p. 230, lines 11-15; R. pp. 251-261; Arbitration Agreements, R. p. 146; R. p. 152; R. p. 305).

Arbitrability determinations are subject to *de novo* review. Wellman, Inc. v. Square D Co., 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App.2005). The circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003). In the case at hand, there is sufficient evidence presented by counsel in the documents and by oral argument to demonstrate that the trial court's Orders should be affirmed and the matter be directed to proceed to arbitration.

The trial court determined that an arbitration agreement existed between the parties following its review of the documents and the oral arguments of counsel. (Order, R. p. 3-4). Moreover, the Appellants do not contest that: (1) she executed the Arbitration Agreement, (2) the Federal Arbitration Act ("FAA") applies to that agreement, and (3) her claims fall within the scope of the agreement. In fact, counsel for the Appellants stated in oral argument that if the agreements were enforceable that the arbitrator could decide all issues. (Transcript for May 18, 2011 Hearing, p. 46, R. p. 265, lines 13-16). Consequently, pursuant to the FAA, the Arbitration Agreements are valid and

enforceable, and the Appellants' claims must be arbitrated. 9 U.S.C. § 1 *et seq*; *see* Green Tree Fin. Corp. – Al. v. Randolph, 531 U.S. 79 (2000).

Arbitration agreements, like other contracts, are enforceable in accordance with their terms. Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The motor vehicle transactions in this case involve interstate commerce and are governed by the FAA. As the South Carolina Supreme Court stated in Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.21d 360, 364 (2001), state law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. Munoz, *supra* (citing Perry v. Thomas, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)). A state law that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies. Id. (citing Allied-Bruce, 513 U.S. at 281, 115 S.Ct. 834.) In this instant case, the lower court complied with the requirements of the FAA, and declined to not create an inequity between the arbitration agreements involved in the motor vehicle transactions with Appellant York and Appellant Cristy and any other arbitration agreement involving interstate commerce; thus, finding that the agreements are enforceable.

As this Court reaffirmed in Simpson v. MSA of Myrtle Beach, Inc., "parties are always free to contract away their rights." Id. 373 S.C. at 28, 644 S.E.2d at 633. This is no less true in the context of arbitration. Indeed, the "primary" purpose behind the FAA is "to ensure that private agreements to arbitrate are enforced according to their terms." Stolt-Nielsen S.A. v. AminalFeeds International Corp., 130 S.Ct. 1758, 2010 WL 1655826, at *11 (U.S. 2010). As the Respondents asserted in opposition to the

Appellants' motion for reconsideration, the Appellants' contentions that discovery must be permitted in every arbitration dispute over the validity of an arbitration clause is not supported by Simpson or any other precedent binding on this Court. Simpson requires that the trial court must determine if an arbitration agreement exists. Here, the Court fulfilled this role based upon its thorough review of the matters brought before the Court. The arbitrator will be responsible for addressing and applying any limitations established by Simpson or other rulings.

Parties generally may enter into agreements extinguishing or limiting statutory provisions that confer a right on one or both parties. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-32 (1991). Consistent with this contractual freedom, courts have long distinguished between a statutory right and a *non-waivable* statutory right. Courts across the country—including the Supreme Court of the United States—have concluded that absent a legislature's clear intention to preclude waiver, parties are free to waive their right to participate in a representative action.

The Supreme Court of the United States's decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), is directly on point. There, an employer moved to compel arbitration of an employee's lawsuit alleging that the employee's termination violated the Age Discrimination in Employment Act ("ADEA"). The employee opposed arbitration, arguing the arbitral forum did not adequately further the purposes of the ADEA because arbitration did not, *inter alia*, provide for a "class action." Although the ADEA explicitly provided a right to sue collectively, *see* 29 U.S.C. § 626(b) (referencing the remedies in 29 U.S.C. § 216 ("An action . . . may be maintained against any employer . . . by any one or more employees for and on behalf of himself or themselves and other

employees similarly situated:")), the Court ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of a class action:

> But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. at 32 (internal quotation omitted). Because nothing in the text or legislative history of the ADEA indicated that Congress intended to make the class action right non-waivable, the Gilmer Court compelled the parties to arbitration pursuant to their arbitration agreement.[10]

Numerous courts have echoed Gilmer's holding that providing a statutory right to pursue a class action does not create a non-waivable class action right. *See* Bowen v. First Family Fin. Servs., 233 F.3d 1331 (11th Cir. 2000), Johnson v. West Suburban Bank, 225 F.3d 366, 369 (3d Cir. 2000). The Fourth Circuit adopted this rationale in Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002).

Nothing in the Dealers Act states that the right to collective action is non-waivable. When interpreting a statute, this Court looks to the "plain language of the statute itself." King v. Am. Gen. Fin., Inc., 386 S.C. 82, 90, 687 S.E.2d 321 (2009) (internal quotation omitted). Here, this Court relied on § 56-15-130 to conclude that the collective action right was non-waivable, but § 56-15-130 will not bear that weight. Section 56-15-130 states that any contract "in *violation* of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." (emphasis added). That a contract waives a provision does not mean that the contract "violat[es]"

[10] That the ADEA was enacted "to further important social policies" did not change the Court's conclusion that arbitration was permissible despite the parties' inability to pursue claims on a class-wide basis. Id. at 27.

the provision. *See* Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (statutes "must receive a practical, reasonable, and fair interpretation"). Indeed, the South Carolina legislature recognizes that "waiver" and "violation" are two different things, having included both concepts in S.C. Code § 27-32-110: it "is a *violation* of this chapter . . . to . . . . include in a contract a provision purporting to *waive* a right or benefit provided for purchasers pursuant to this chapter." S.C. Code Ann. § 27-32-110(10) (emphasis added). By contrast, § 56-15-130 does not state that a waiver of a right provided by the Dealers Act constitutes a violation of the Act.

Moreover, an interpretation conflating "violate" with "waive" would openly ignore the plain language of the statute (since "violate" is not synonymous with "waive"), and lead to absurd results. *See* Lancaster County Bar Ass'n v. S.C. Comm. on Indigent Defense, 380 S.C. 219, 670 S.E.2d 371 (2008) (courts should avoid a statutory construction that would lead to an absurd result); McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). For example, § 56-15-110(1) grants a party the right to "sue . . . in the court of common pleas." Every arbitration agreement between a dealership and a customer waives the parties' right to sue in court under the Dealers Act. As a result, if "violate" means "waive," then any agreement to arbitrate under the Dealers Act would be unenforceable.[11] Yet this Court recognizes—as it must under the FAA—that agreements to arbitrate Dealers Act claims are enforceable. *See* Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394, 2010 WL 1541297, at *5 (2010) (finding Century BMW's arbitration agreement "enforceable," except for the class action waiver). Just as

[11] Indeed, if a "waiver" constitutes a "violation," then most agreements to arbitrate a civil damages claim under the FAA would "violate" the Seventh Amendment to the United States Constitution. U.S. Const. Amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

an agreement to arbitrate does not "violate" § 56-15-110(1), an agreement to waive a party's right to bring a class action does not "violate" § 56-15-110(2).[12]

Third, other provisions within the Dealers Act make clear that § 56-15-130 was not enacted to preclude waiver of all rights provided under the Act. *See* Higgins v. South Carolina, 307 S.C. 446, 449, 415 S.E.2d 799 (1992) ("In construing statutory language, the statute must be read as a whole . . . ."). The Dealers Act contains several subsections that specifically limit the types of provisions that can go into a contract. *See, e.g.,* S.C.

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[12] South Carolina's adoption of the Rules of Civil Procedure and 1985 Act No. 100 § 3 precludes Appellants' attempt to utilize Section 56-15-110(2) to avoid the substantive requirements of standing or the procedural requirements of the South Carolina Rules of Civil Procedure, particularly Rule 23. The fact that the two statutes, Sections 56-15-110(2) and 15-5-50, were substantially the same demonstrates that Section 56-15-110(2) was intended merely to allow a representative action at a time when civil procedure rules did not contain such a provision. Section 56-15-110(2) did not (and could not) reference Rule 23, SCRCP, because it did not exist at the time. Rather, Section 56-15-110(2) simply echoed the now-repealed Section 15-5-50 allowing for class actions. More importantly, because South Carolina established that the Rules of Civil Procedure preempt conflicting procedural rules, Plaintiffs are foreclosed from using § 56-15-110(2) to circumvent procedural requirements. Consequently, Appellants cannot use the statute to establish standing.

Even before the enactment of Section 37-2-307, the appellate courts of South Carolina have held that Rule 23, SCRCP, applied. The first reported case in South Carolina implicating closing fees is Gardner v. Newsome Chevrolet-Buick, Inc., 304 S.C. 328, 404 S.E.2d 200 (1991). In this case, a single plaintiff attempted to bring a class action lawsuit against a single dealership in Kershaw County, alleging that a $99.50 charge identified as a "closing fee" on the sales contract constituted an unfair or deceptive practice pursuant to S.C. Code Ann. 56-15-30 (2006), a provision of the Regulation of Manufacturers, Distributors and Dealers Act (Dealers Act). The trial court held the plaintiff had satisfied all requirements of Rule 23, SCRCP, except the "amount in controversy" requirement.

The only issue addressed by the Supreme Court was whether the fee met the "amount in controversy" requirement of Rule 23(a)(5), SCRCP. This rule requires each class member's claim to exceed $100. The Supreme Court held the requirement was met because a prevailing plaintiff is entitled to double his actual damages pursuant to S.C. Code Ann. § 56-15-110 of the Dealers Act. Thus, the amount awarded to a prevailing plaintiff in this instance would be $199, satisfying the requirement. The Court further held that attorney's fees and punitive damages would not be considered in calculating the amount in controversy. The Court remanded the cases for further proceedings. Gardner, 304 S.C. at 330-31, 404 S.E.2d at 201-02. It is Respondents' understanding, upon information and belief, that the case later was settled for a nominal amount. *See also*, Fanning v. Fritz's Pontiac Cadillac Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996); Ferguson v. Charleston Lincoln Mercury, 349 S.C. 558, 564 S.E..2d 94 (2002) (The Supreme Court Supreme Court in Fanning indicated that a closing fee is a lawful component of the negotiated cash price of a vehicle); and (Defs. Memo. In Sup. Of Mtn. Dism., Ex. B., R. pp. 147-50.).

Code Ann. §56-15-40(3)(k) (precluding manufacturer from requiring a motor vehicle dealer "to assent to a release [or] waiver . . . which would relieve any person from liability imposed by this Chapter), (i) (precluding manufacturer from preventing a dealer from selling or transferring his interest), (h) (precluding manufacturer from preventing a dealer from changing the capital structure of his dealership); S.C. Code Ann. §56-15-40(4)(a) (dealer cannot require new motor vehicle buyer to also purchase special features not already installed on the vehicle when received by the dealer); S.C. Code Ann. §56-15-70 (manufacturer cannot impose unreasonable restrictions on motor vehicle dealer regarding right to renew, transfer, etc.), S.C. Code Ann. §56-15-140 (venue must be in South Carolina for any action brought under the Dealers Act). By enacting § 56-15-130, the legislature provided an enforcement mechanism to ensure compliance with these limitations: any contractual provision that contravenes these specific requirements "violat[es]" the Act and therefore, is unenforceable. Unlike the above provisions, § 56-15-110(2) does not specifically prohibit a party from waiving its right to pursue a collective action. Thus, there is nothing to prohibit the trial court from recognizing the existence and directing the enforcement of an enforceable arbitration agreement under the Dealer's Act.

IV. OTHER GROUNDS EXIST FOR THE LOWER COURT TO DISMISS THE ACTION AGAINST THE RESPONDENTS WHO ARE REGULATED BY THE SC DEPARTMENT OF CONSUMER AFFAIRS WHICH APPROVED THE CLOSING FEES AT ISSUE IN THE MATTER

Pursuant to Rule 12(b)(1) and (2), SCRCP, the Respondents moved to dismiss or, challenge the lower court's authority to have authority over the subject matter or jurisdiction on multiple grounds due to the existence of the arbitration agreements and provisions executed as part of the underlying motor vehicle transaction; thus, the motions

to compel the matters to arbitration were also made by the Respondents. (Defs. Mtn. to Comp., R. p. 43, R. p. 58). "The question of subject matter jurisdiction is a question of law for the court." Chew v. Newsome Chevrolet, Inc., 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993) (citing Bargesser v. Coleman Co., 230 S.C. 562, 96 S.E.2d 825 (1957)). The proper procedure for raising a lack of jurisdiction is for a party to file a motion to dismiss. Posey v. Proper Mold & Engineering, Inc., 378 S.C. 210, 217, 661 S.E.2d 395, 399 (Ct. App. 2008).

As the South Carolina Court of Appeals recently held in Hammer v. Hammer, ___ S.E.2d ___, 2012 WL 2016462 (S.C.App.), subject matter jurisdiction can be raised at any time and by any means. Further, the lower court is compelled by Rule 12(h)(3), SCRCP, to dismiss the case when it lacks subject matter jurisdiction. Rule 12(h), SCRCP ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the case." Here, the Respondents specifically asserted the lack of jurisdiction, claiming that the FAA applied to govern the arbitration agreements and to preempt state law and that the arbitrators are empowered with the authority to decide all issues related to arbitration, including scope, arbitrability, statute of limitations and all claims asserted by the Appellants. Therefore, the trial court properly dismissed the matter and compelled arbitration so that the claims of the Appellants could be made in arbitration.

V. THE LOWER COURT'S RULING CORRECTLY UPHELD THE PROVISIONS OF THE UNDERLYING ARBITRATION AGREEMENTS GOVERNED BY THE FAA SO THAT ARBITRATION MAY PROCEED AS CONTRACTED BETWEEN THE PARTIES CONSISTENT WITH THE UNITED STATES'S RECENT DECISION IN STOLT-NIELSEN S.A. V. ANIMALFEEDS INTERNATIONAL CORP.

A. *Stolt-Nielsen S.A. v. Animalfeeds International Corp.* Holds that an Arbitration Agreement Governed by the FAA Precludes Class Arbitration Absent A Specific Agreement To Do So.

The trial court correctly and appropriately held that the underlying agreements between the Appellants and Respondents allow for the parties to enter into an arbitration agreement. In this instance, the trial court found that the underlying arbitration agreements that are governed by the FAA are enforceable, controlled by the FAA, exempt from South Carolina law, and compelled individual arbitration consistent with Stolt-Nielsen S.A. v. Animalfeeds International Corp.

In Stolt-Nielsen, the Supreme Court of the United States held that the FAA[13] embodies a federal policy precisely to the contrary – precluding class arbitration unless the parties affirmatively agreed to arbitrate on a class basis. The FAA clearly preempts South Carolina law, as this Court construed it. *See, e.g.,* Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 611, 586 S.E.2d 581 (2003) ("the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate"); Blanton v. Stathos, 351 S.C. 534, 539, 570 S.E.2d 565 (Ct. App. 2002) ("The

[13] The Appellants do not dispute that the FAA governs the arbitration agreement; indeed the Agreement says so expressly. (Arbitration Agreement for Appellant York, R. pp. 145-46; Arbitration Agreements for Appellant Cristy, R. p. 151-52, R. pp. 302-305). The FAA and the United States Supreme Court decisions interpreting it bind this Court. *See* Zabinski v. Bright Acres Assocs., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001); South Carolina v. Yetter, 192 S.C. 1, 5 S.E.2d 291 (1939) (State courts look to decisions of the United States Supreme Court in determining issues involving a federal question); U.S. v. Gilbert, 345 U.S. 361, 363 (1953) ("the meaning of a federal statute is for [the United States Supreme Court] to decide"); *see also* Atlantic Coast Line R.R. Co. v. Wannamaker Chem. Co., 216 S.C. 226, 233, 57 S.E.2d 311 (1950) (South Carolina Supreme Court bound by the terms of the Interstate Commerce Act "and the decisions of the United States Supreme Court construing same").

FAA preempts state laws that invalidate the parties' agreement to arbitrate."); Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 400, 540 S.E.2d 864 (Ct. App. 2000) ("FAA preempts conflicting state arbitration law").

In Stolt-Nielsen, plaintiffs sought to pursue a class action in arbitration against various shipping companies. Stolt-Nielsen, 2010 WL 1655826 at *4. The parties agreed that their arbitration clause was "silent" on the issue of class arbitration. Id. The arbitration panel held that the arbitration clause allowed for class arbitration. The United States Supreme Court disagreed, holding that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding all parties to the pertinent arbitration provision agreed to arbitrate on a class basis. Id. at *13.

The Court held that under the FAA courts and arbitrators must "give effect to the contractual rights and expectations of the parties." Id. at *11. The parties' "intentions control," and they are "generally free to structure their arbitration agreements as they see fit." Id. at *11-12. Therefore, the parties may agree to limit the issues arbitrated and may agree to the rules under which an arbitration will proceed. Id. at 12. Additionally, "parties may specify *with whom* they choose to arbitrate their disputes." Id. (citing EEOC v. Waffle House, Inc., 534 U. S. 279, 289 (2002)). Under the FAA it "falls to courts and arbitrators to give effect to these contractual limitations." Id. When doing so, "courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." Id.

The Supreme Court therefore concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding

that the party *agreed* to do so." Id. at *13 (emphasis in original). The Court found that the "differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-arbitration constitutes consent to resolve their disputes in class proceedings." Id. Because the parties had reached "no agreement" on the issue of class arbitration, the parties could not "be compelled to submit their dispute to class arbitration." Id.

If a party cannot be compelled to class arbitration absent an agreement to arbitrate as a class, a fortiori the FAA preempts any public policy requiring class arbitration even where the parties agreed *not* to arbitrate as a class. *See* Toler's Cove Homeowners Ass'n, 355 S.C. at 605, 611. Indeed, after Stolt-Nielsen, class action waivers are superfluous because courts and arbitrators cannot compel class arbitration unless parties affirmatively agree to that procedure. Stolt-Nielsen, 2010 WL 1655826, at *13.

The Stolt-Nielsen decision mandates that the trial court's Order Compelling Arbitration be upheld as it directed Ms. York and Ms. Cristy each to arbitrate her claim on an individual basis as the agreement requires. Indeed, there are more compelling reasons to reject class arbitration here than in Stolt-Nielsen. Whereas the parties in Stolt-Nielsen reached "no agreement" on the issue of class arbitration, here, the parties expressly agreed *not* to arbitrate on a class basis. As a result, if class arbitration is precluded where the arbitration agreement is silent on the issue, then certainly a court cannot compel class arbitration where the parties explicitly agreed *not* to arbitrate on a class basis.

B. Under *Stolt-Nielsen*, Class Arbitration Is Impermissible Because Absent Class Members Would Not Be Bound To a Result.

Given the Supreme Court's holding in Stolt-Nielsen that a party cannot be compelled to class arbitration absent an agreement, sending the Respondent dealers and the absent class members into class arbitration (i) would violate due process by seeking to compel the absent class members into class proceedings against their will, and (ii) would violate Respondents' due process rights by compelling them to defend a representative action where the absent class members would not be bound to a result in the Respondents' favor.

One of the most basic expected benefits of arbitration is that it will lead to a "mutual, final and definite award." 9 U.S.C. § 10(a)(4). From the Respondents' perspective, the principal advantage of a class action is finality—obtaining a judgment that will bind the entire class. *See, e.g.,* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 805 (1985) ("Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound."); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402-03 (1980) (avoiding inconsistent judgments is a principal protection that class actions afford defendants). Such finality cannot be achieved without ensuring adequate due process protections for absent class members. Shutts, 472 U.S. at 811-12 ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection."). Compelling absent class members to a class arbitration to which they did not agree would deny the members due process and confront Respondents with the prospect of class litigation without the assurance of finality.

Where, as here, Appellants and absent class members have not agreed to arbitrate as a class, *Stolt-Nielsen* precludes an adjudicator (whether a judge or an arbitrator) from compelling them into class arbitration. Moreover, because the absent class members expressly agreed not to participate in a class arbitration, the members could cite *Stolt-Nielsen* for the proposition that they cannot be bound by an award resulting from an arbitration proceeding to which they never agreed.[14] *See* Volt Info. Scis., v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 479 (1989) (arbitration "is a matter of consent, not coercion."). Indeed, because a party cannot be compelled to class arbitration absent an agreement to do so, and none of the absent class members agreed to arbitrate as a class, a court or arbitrator would lack any basis to a class-wide arbitral award or settlement *res judicata* effect. Compelling Respondent Hudson or Respondent Dodgeland to a class arbitration would thus deprive it of the certainty that, if it wins or settles the case, all of the absent class members would be bound by the outcome.

As a result, compelling Respondent Hudson or Respondent Dodgeland to arbitrate in a class arbitration would violate absent class members' due process rights and eliminate the Respondents' ability to achieve finality in arbitration. For these reasons, the Court should affirm the trial court's Order compelling an individual arbitration.

[14] Even were absent class members given the ability to opt out of a class (which the Circuit Court has shown no intention of providing), that would not remedy this concern. Stolt-Nielsen held that "silence" could not constitute "consent to resolve [a] dispute in class proceedings." Id. at *14. As a result, an absent class member's failure to opt out—presumably by remaining silent—does not mean, as a matter of law, that he or she "agreed to authorize class arbitration." Id. That is particularly true here because the absent class members expressly agreed *not* to arbitrate as a class.

VI. RESPONDENTS RENEW THEIR MOTION TO DISMISS APPELLANTS' APPEAL AS FILED BEFORE THIS COURT AND BELIEVE THE APPEAL SHOULD BE DISMISSED.

By reference in this filing, the Respondents renew the motion to dismiss the Appellants' appeal and incorporate by reference all arguments, positions, and cited law made in the Respondents' Motion to Dismiss and Memorandum in Support of Motion to Dismiss Appellants' Appeal of an Interlocutory Order Compelling Arbitration (dated March 22, 2012) and Respondents' Reply in Support of its Motion to Dismiss (dated April 10, 2012). The Appellants' appeal is improper because the Circuit Court's granting of motions to compel arbitration and to dismiss the underlying complaint so that the arbitration may proceed in accordance with the terms of the underlying arbitration agreement and is not immediately appealable. This appeal is interlocutory. The present appeal is not authorized to proceed either by the law of State of South Carolina or by the terms of the FAA and should be dismissed.

The FAA contains provisions whose literal reading suggests that courts must order parties to arbitrate their disputes when it determines that an arbitration agreement binds the parties. *See* 9 U.S.C.A. §4. The relevant part of Section 4 of the FAA reads:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition ... for an order directing that such arbitration proceed in the manner provided for in such agreement.... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, **the court shall make an order directing the parties to proceed to arbitration** in accordance with the terms of the agreement.

Id. (emphasis added). Consistent with the provisions of the FAA, the Fourth Circuit has held that "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitratable." Choice Hotels Int 'l, Inc. v. BSR Tropicana Resort, Inc., 252

F.3d 707, 709-10 (4th Cir. 2001). In this instant case, the Appellants' claims are fully arbitratable by the arbitrator. Even before the lower court, the Appellants did not provide any reason why their claims outlined in the Complaint could not be fully examined by the arbitrator. Whether or not to dismiss or to stay an action so that arbitration of the underlying claims between the parties can be determined by an arbitrator in accordance to the contractual agreement between the parties does not end the Appellants' claims, but merely transfers the Appellants' to the correct jurisdiction with the authority to hear and determine their claims.

For these reasons, the appeal should be dismissed and the matter allowed to proceed to arbitration as compelled in the interest of justice.

CONCLUSION

For the reasons stated above, the Court should affirm the trial court's Order to dismiss and compel arbitration in order for the matter to proceed to arbitration and allow the arbitrator to hear the issues related to arbitration as conceded by the Appellants in oral argument before the lower court on May 18, 2011.

Signature Page to Follow

Respectfully submitted this 21st day of December, 2012,

RICHARDSON PLOWDEN & ROBINSON, P.A.

By: _____
Steven W. Hamm
shamm@richardsonplowden.com
C. Jo Anne Wessinger Hill
jhill@richardsonplowden.com
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile

HARDIN LAW FIRM, LLC
Claude E. "Skip" Hardin, Jr.
Post Office Box 23606
Columbia, South Carolina 29224
803-610-2644
803-610-2645 facsimile

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

RICHARDSON PLOWDEN & ROBINSON, P.A.

By: _____
Steven W. Hamm
C. Jo Anne Wessinger Hill
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile

SOWELL GRAY STEPP & LAFFITTE, L.L.C

By: _____
Rebecca Laffitte
rlaffitte@sowellgray.com
J. Michael Montgomery
mmontgomery@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

ATTORNEYS FOR DEFENDANT, DODGELAND OF COLUMBIA, INC.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2010-CP-40-4244

Melissa Anne York and Olga Joanne Cristy, ... Appellants,

v.

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

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CERTIFICATE OF COUNSEL

The undersigned hereby certify that Respondents' Final Brief complies with Rule 211(b), SCACR.

RICHARDSON PLOWDEN & ROBINSON, P.A.

By:
Steven W. Hamm
shamm@richardsonplowden.com
C. Jo Anne Wessinger Hill
jhill@richardsonplowden.com
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile

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

RICHARDSON PLOWDEN & ROBINSON, P.A.

By:
Steven W. Hamm
C. Jo Anne Wessinger Hill
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile

ATTORNEYS FOR DEFENDANT, DODGELAND OF COLUMBIA, INC.

HARDIN LAW FIRM, LLC
Claude E. "Skip" Hardin, Jr.
Post Office Box 23606
Columbia, South Carolina 29224
803-610-2644
803-610-2645 facsimile

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

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

By: _____
Rebecca Laffitte
rlaffitte@sowellgray.com
J. Michael Montgomery
mmontgomery@sowellgray.com
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

ATTORNEYS FOR DEFENDANT, DODGELAND OF COLUMBIA, INC.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Circuit Court Case No. 2010-CP-40-4244

Melissa Anne York and Olga Joanne Cristy, ... Appellants,

v.

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

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PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Respondent, Dodgeland of Columbia, Inc., do hereby certify that I have served all counsel in this action with a copy of the Respondents' Final Brief by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

Susan F. Campbell, Esquire
McGowan Hood & Felder, LLC
1517 Hampton Street
Columbia, South Carolina 29201

William A. McKinnon, Esquire
McGowan Hood & Felder, LLC
1539 Healthcare Drive
Rock Hill, South Carolina 29732

Patrick E. Knie, Esquire
Patrick E. Knie, P.A.
250 Magnolia Street
Spartanburg, South Carolina 29306

Carenn N. Moore

Carenn N. Moore
Legal Assistant

December 21, 2012