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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2009-CP-18-00111

Diane R. Henderson Respondent,

v.

Summerville Ford-Mercury, Inc.
and Capital One Auto Finance, Inc.,

Of whom Summerville Ford-Mercury, Inc. is the Appellant.

RECORD ON APPEAL

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IN THE COURT OF COMMON PLEAS

**Diane R. Henderson f/k/a
Diane M. Reed,**

Civil Action No. 09-CP-18-111

Plaintiff,

ORDER GRANTING MOTION TO COMPEL ARBITRATION

V.

**Summerville Ford-Mercury, Inc.
and Capital One Auto Finance, Inc.,**

Defendants

This matter came before the court by way of Defendant Summerville Ford-Mercury, Inc.'s Motion to Compel Arbitration. Plaintiff alleges that she purchased a car from Defendant, and that Defendant failed to disclose to her that the car had previously been involved in an accident. Defendant argues that the buyer's order signed by the Plaintiff contains a valid arbitration clause, and that Plaintiff's dispute should be referred to mandatory arbitration pursuant to the Federal Arbitration Act [hereinafter the "FAA"].

A hearing on the matter was held on June 1, 2009. Counsel for all parties appeared at the hearing. After careful consideration of the arguments and submissions of the parties, the court grants Defendant's motion to compel arbitration for the reasons set forth below.

I. Governing Law

Courts have announced a strong federal policy favoring arbitration. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983); *Tritech Elect., Inc. v. Frank M. Hall Constr. Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct.App.

2000). Due regard must be given to this policy. *Volt Info. Sciences, Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76 (1989).

Section 2 of the FAA “applies to contracts ‘evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract.’” *Long v. Silver*, 248 F.3d 309, 315 (4th Cir.2001) (quoting 9 U.S.C. § 2). Pursuant to the FAA, a party may demand a stay of judicial proceedings pending exercise of a contractual right to have the subject matter of the action decided by arbitration. *Microstrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir.2001). This stay-of-litigation provision is mandatory. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir.2002).

II. Arbitration Is Appropriate.

In this case, arbitration is appropriate. The parties contracted for arbitration. Plaintiff signed a buyer’s order as part of her purchase transaction. The buyer’s order contained an arbitration clause.¹

Plaintiff’s claims fall within the scope of the clause. The clause provides that either party may demand arbitration of “any dispute” between the parties. The clause addresses any dispute, whether in contract, tort, or arising under a statute, which arises out of or in connection with Plaintiff’s credit application, the contract, or any resulting transaction or relationship between the parties.

Finally, the transaction involves interstate commerce. Plaintiff obtained financing for the purchase from Onyx Acceptance Corp, a California company. She made a down

¹ Plaintiff argues that the presence of a merger clause in the retail installment sales contract erases or eliminates all provisions of the buyer’s order. Plaintiff’s affidavit containing the installment sales contract was not served until one day prior to the scheduled hearing, and was therefore untimely. Rule 6(d), SCRCF. Even if the affidavit were considered, the court would reject Plaintiff’s argument. The buyer’s order and the retail installment sales contract are separate agreements which address different subjects. The buyer’s order is the sales contract, while the installment contract is the financing agreement. The merger clause on which Plaintiff relies provides only that the installment sales contract is the “[e]ntire agreement between you and us relating to *this* contract.” (emphasis added).

payment with a check drawn on the Bank of America, a federally chartered bank. Plaintiff purchased a GAP insurance policy from an insurance company located in San Diego, California. The contract required Plaintiff to maintain insurance on the car, and Plaintiff obtained her insurance from Nationwide, a North Carolina company. Moreover, the arbitration clause itself provides that it is governed by the FAA.

III. The Arbitration Clause Is Not Unconscionable.

Plaintiff argues that the arbitration clause should not be enforced because it is unconscionable. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007).² The arbitration clause in this case, however, is easily distinguished from the clause at issue in *Simpson*. Here, Plaintiff was asked to and did initial the buyer's order beneath the arbitration clause, indicating that the clause was brought to Plaintiff's attention. The clause specifically informs the Plaintiff where to obtain the applicable arbitration rules. In fact, the clause provides information on both the physical address and internet address of the arbitration forums where the rules can be requested.

Moreover, the terms of the arbitration clause are not so one-sided or oppressive that no reasonable person would agree to them. The arbitration clause does not preclude the Plaintiff from recovering attorney's fees or other statutory remedies. It does not preclude the Plaintiff from obtaining injunctive relief. The clause requires the Defendant to pay Plaintiff's arbitration filing fees, up to a maximum of \$1,500.

Plaintiff argues that the clause permits the Defendant to maintain self help remedies, while denying the same remedies to the Plaintiff. This is an argument based on lack of mutuality of remedy. Lack of mutuality of remedy does not render an arbitration

² The arbitration clause in *Simpson* was governed by the South Carolina Arbitration Act rather than the FAA.

agreement unenforceable.³ *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3rd Cir. 1999) (arbitration agreement need not equally bind each party to arbitration); *Doctor's Assoc., Inc. v. Distajo*, 66 F.3d 438, 451 (2nd Cir. 1995); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542-43, 542 S.E.2d 360, 365 (2001); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 398-402, 498 S.E.2d 898, 904-905 (Ct.App. 1998).

In any event, the arbitration clause does not lack mutuality of remedy. The clause expressly permits the Plaintiff to bring claims in the amount of \$2,500 or less against the Defendant in Magistrate's Court or small claims court *without* having to arbitrate. Plaintiff is also guaranteed rights which are not subject to mediation.

Plaintiff also asserts that the arbitration agreement is unconscionable because it precludes class actions. Plaintiff did not present any South Carolina authority for the proposition that a prohibition on class actions renders an arbitration agreement unconscionable. Moreover, while the arbitration clause in *Simpson* contained a prohibition on class actions, the court did not identify that provision as one which affected arbitration.

The Fourth Circuit, as well as a number of other federal courts, have ruled that an arbitration clause which precludes class action suits is not unconscionable. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814, 818-19 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3rd Cir. 2000).

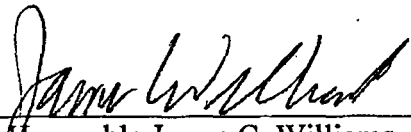
³ The *Simpson* court was not concerned that the arbitration agreement authorized self-help remedies for the dealer, but that the agreement provided such remedies would not be stayed pending the outcome of arbitration. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672. The agreement here does not contain such a provision.

The court concludes that the prohibition on class actions is not sufficient to render the arbitration agreement unconscionable.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that:

1. Defendant's motion to compel arbitration is GRANTED.
2. Plaintiff is ordered to arbitrate pursuant to the contract; and
3. This case is stayed pending arbitration.

IT IS SO ORDERED.


The Honorable James C. Williams, Jr.
Presiding Judge

June 21, 2009

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP1800111

CERTIFIED COPY
2012 JAN -6 PM 4:00

Diane R Henderson

Summerville Ford
Mercury Inc

Capital One Auto Fiance
Inc

Cheryl Graham
CLERK OF COURT
DORCHESTER COUNTY

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Steve Moskos

Attorney for: ☒ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED:

☒ See attached order; (formal order to follow)☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC JUDGE

Complete this form only when the judgment officer (the clerk or person authorized to enroll judgments) should be enrolled. There is no judgment information and no fee due on this form.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

<u>Edgar Dickson</u>	<u>2153</u>	<u>1/6/2012</u>
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on **6th day of January, 2012**, and a copy mailed first class or placed in the appropriate attorney's box on **6th day of January, 2012**, to attorneys of record or to parties (when appearing pro se) as follows:

C Steven Moskos C. Steven Moskos, PA 535 Stinson Drive
Charleston, SC 29407

Robert Lawrence Reibold Walker Martin & Reibold, LLC
P.O. Box 61140 Columbia, SC 29260
Robert A. Muckenfuss McGuire Woods LLP 100 North Tryon
Street, Suite 2900 Charlotte, NC 28202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Cheryl Graham - Clerk of Court

Court Reporter

vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140." A plain reading of the South Carolina Uniform Arbitration Act indicates that upon application of a party, the Court shall confirm an award if there are no grounds for vacating or modifying the same. The use of the word "shall" shows that confirmation by the Court is mandatory, not discretionary. Thompson ex rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 659 S.E.2d 171 (S.C.App. 2008) (The term "shall" in a statute means that the action is mandatory.); In re Care and Treatment of Miller, 385 S.C. 539, 685 S.E.2d 619 (S. C. App. 2009). The only time the court is not required to confirm the arbitration award is when a Party moves to vacate, modify or correct and award. The Defendant Summerville-Ford-Mercury, Inc. has not moved to vacate, modify, or correct the award. As a result, the Court now has the authority and the mandate to confirm the award.

Therefore, it is,

ORDERED, that the arbiter's award under the Plaintiff's Unfair Trade Practices Act claim in the amount of \$18,875.71 actual damages, \$45,200.00 in attorney's fees, and \$3,076.39 in costs is confirmed. It is further

ORDERED, that the Dorchester County clerk of court register the arbiter's award as a judgment in the Dorchester Clerk of Court's office. It is further

ORDERED, that upon filing this Order the Dorchester County clerk of court will mark this case as decided and paid in full.



AND IT IS SO ORDERED.



Edgar Warren Dickson
Judge First Judicial Circuit

December 19th
~~October~~ 11, 2011





American Arbitration Association
Dispute Resolution Services Worldwide

Southeast Case Management Center

February 18, 2011

2200 Century Parkway, Suite 300, Atlanta, GA 30345
telephone: 404-325-0101 facsimile: 404-325-8034
internet: <http://www.adr.org/>

VIA US MAIL ONLY

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9 Broad Street
Suite C
Charleston, SC 29401

Re: 31 434 00490 09
Diane R. Henderson f/k/a Diane M. Reed
and
Summerville Ford-Mercury, Inc.
and
Capital One Auto Finance, Inc.

Dear Parties:

Enclosed please find the hard copy of the Award for this matter, previously transmitted to you via fax on February 15, 2011. Please note that the physical case file will be destroyed fifteen (15) months after the date of this letter. In the normal course of our administration, the AAA may maintain certain documents in our electronic records system. Such electronic records are not routinely destroyed and do not constitute a complete case file.

Sincerely,

Donyale Brazier

Donyale Brazier
Manager of ADR Services
678 686 6004
BrazierD@adr.org

Encl.

cc: David B. McCormack, Esq. via email only

DB/kai

000011

**AMERICAN ARBITRATION ASSOCIATION
Consumer Arbitration Tribunal**

In the Matter of the Arbitration between

Re: 31 434 00490 09

Diane R. Henderson f/k/a Diane M. Reed, hereinafter referred to as "Claimant"
and
Summerville Ford-Mercury, Inc.
and
Capital One Auto Finance, Inc., hereinafter referred to as "Respondents"

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties; and having been duly sworn and having duly heard the allegations and proofs of the parties, find and AWARD, as follows:

1. This matter was heard by the undersigned on January 12 and 13, 2011, in Charleston, South Carolina. The Claimant, Diane Henderson, was represented by Steven Moskos, Esquire. Respondent Summerville Ford Mercury, Inc. was represented by Robert Reibold. Respondent Capital One Auto Finance, Inc. was represented by Michael Gruenloh. Live testimony was presented by Ms. Henderson, Amanda Reed, Michael Karriker, Steve Antley, Stephen Puryear, Louis Abidi, John Disher and James Edwards (by telephone). In addition, both Claimant and Respondent Summerville Ford Mercury, Inc. introduced numerous exhibits. A post-arbitration telephone hearing was held on January 14, 2011, regarding certain legal issues. All counsel were present for that telephone hearing.
2. In her Complaint, Claimant alleged seven causes of action: 1) breach of contract; 2) negligence; 3) negligent misrepresentation; 4) constructive fraud; 5) fraud; 6) violation of the Motor Vehicle Dealers Act, S.C. Code § 56-15-10 et seq.; and 7) violation of the Unfair Trade Practices Act, S.C. Code § 39-5-10 et seq.
3. After consideration of all of the evidence presented at the arbitration hearing, argument of counsel and post-hearing submissions, I find as to each cause of action as follows:
 - a) Claimant's First Cause of Action for breach of contract, is denied in its entirety.
 - b) Claimant's Second Cause of Action, for negligence, is denied in its entirety.
 - c) Claimant's Third Cause of Action, for negligent misrepresentation, is denied in its entirety.
 - d) Claimant's Fourth Cause of Action, for constructive fraud, is denied in its entirety.
 - e) Claimant's Fifth Cause of Action, for fraud, is denied in its entirety.
 - f) As to Claimant's Sixth Cause of Action, for violation of the Motor Vehicle Dealers Act, S.C. Code § 56-15-10 et seq., I find in favor of Claimant against Respondent Summerville

Ford Mercury in the amount of Eight Thousand, Four Hundred Ninety Five and 00/100 Dollars (\$8,495.00).

Pursuant to S.C. Code § 56-15-110(1), that amount is doubled to Sixteen Thousand, Nine Hundred Ninety and 00/100 Dollars (\$16,990.00).

I also award Claimant attorneys' fees against Respondent Summerville Ford-Mercury, Inc. in the amount of Forty Five Thousand, Two Hundred and 00/100 Dollars (\$45,200.00), and costs in the amount of Three Thousand, Seventy Six and 39/100 Dollars (\$3,076.39).

I deny Claimant's claim for punitive damages under S.C. Code § 56-15-110(3).

g) As to Claimant's Seventh Cause of Action, for violation of the South Carolina Unfair Trade Practice Act, S.C. Code § 39-5-10 et seq., I find for the Claimant against Respondent Summerville Ford Mercury, Inc. in the amount of Eighteen Thousand, Eight Hundred Seventy Five and 71/100 Dollars (\$18,875.71).

I also award Claimant attorneys' fees against Respondent Summerville Ford-Mercury, Inc. in the amount of Forty Five Thousand, Two Hundred and 00/100 Dollars (\$45,200.00), and costs in the amount of Three Thousand, Seventy Six and 39/100 Dollars (\$3,076.39).

I deny Claimant's claim for treble damages.

4. Claimant shall elect one remedy from the findings in Paragraph 3, Sections (f) and (g) above and Respondent Summerville Ford Mercury, Inc. shall pay to Claimant the corresponding dollar amount for the one remedy selected by the Claimant.

The administrative filing fees and case service fees of the American Arbitration Association, totaling \$1,250.00, shall be borne by Summerville Ford-Mercury, Inc. The fees and expenses of the arbitrator, totaling \$7,422.43, shall be borne Summerville Ford-Mercury, Inc. Therefore, the Summerville Ford-Mercury, Inc shall reimburse the Diane R. Henderson f/k/a Diane M. Reed, the sum of \$375.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Diane R. Henderson f/k/a Diane M. Reed.

The above sums are to be paid on or before 60 days from the date of this Award.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

I, David B. McCormack, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

2/14/11
Date

David B. McCormack
David B. McCormack, Esq.

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

DIANE R. HENDERSON F/K/A

DIANE M. REED

Plaintiff

vs.

SUMMERVILLE FORD-MERCURY,
INC. AND CAPITAL ONE AUTO
FINANCE, INC.

Defendants

) IN THE COURT OF COMMON PLEAS
) FOR THE FIRST JUDICIAL CIRCUIT
) CASE NO. 09-CP-18- 111

COMPLAINT
(Jury Trial)

CERTIFIED COPY
2009 JAN 14 PM 4:55
Clerk of Court
DORCHESTER COUNTY

The Plaintiff, complaining of the Defendant, alleges the following:

1. That the Plaintiff, Diane R. Henderson, formerly known as Diane M. Reed, is a resident of Dorchester County, SC.
2. That the Defendant, Summerville Ford-Mercury, Inc. (hereinafter Summerville Ford) is a corporation organized and licensed under the laws of the State of South Carolina with its principle place of business in the County of Dorchester, State of South Carolina.
3. That the Defendant, Capital One Auto Finance, Inc., hereinafter Capital One, is a corporation organized and licensed in a state other than the State of South Carolina, but is doing business in the State of South Carolina.
4. That on or about August 4, 2004, Charleston Automotive Company sold a 2003 Jeep Grand Cherokee VIN # 1J4GX48S43C541931 to Michael Lee Karriker.
5. That on or about July 2, 2005, Mr. Karriker was involved in a wreck in the 2003 Jeep Grand Cherokee.

6. That Mr. Karriker had the 2003 Jeep Grand Cherokee repaired.
7. That on or about October 19, 2006, Mr. Karriker sold the 2003 Jeep Grand Cherokee to Summerville Ford.
8. That Mr. Karriker told the agents and employees at Summerville Ford that the 2003 Jeep Grand Cherokee had previously been wrecked.
9. That an agent and employee of Summerville Ford inspected the 2003 Jeep Grand Cherokee and determined that it had previously been wrecked.
10. That Summerville Ford reduced the amount it would give Mr. Karriker for the 2003 Jeep Grand Cherokee.
11. That after Summerville Ford purchased the 2003 Jeep Grand Cherokee, the Defendant Summerville Ford had the vehicle inspected by one of its mechanics.
12. That on or about October 25, 2006, Diane Henderson, went to Defendant Summerville Ford looking for a car.
13. That the Plaintiff told, the Defendant's agent and/or employee that she was looking for a Ford Explorer that cost no more than \$10,000.00.
14. That the Plaintiff told the Defendant's agent and/or employee that she was looking for something reliable, safe, and something that she can keep for a while, because she was purchasing this vehicle for her daughter's first vehicle.
15. That the Defendant's agent and/or employee told the Plaintiff that the dealership had a Jeep that had just came in.
16. That the Defendant's agent and/or employee told the Plaintiff that the subject vehicle was a one owner vehicle that had been traded in the day before, that the previous owner had all of the routine maintenance done to the Jeep, that he had

kept it meticulously maintained, that the Jeep had never been in an accident and that the vehicle was so clean when it was traded in that they did not even have to detail it.

17. That the Plaintiff and her daughter took the vehicle for a test drive.
18. That during the test drive the Plaintiff's daughter put the passenger window down while she was driving the vehicle.
19. That when the Plaintiff's daughter tried to put the window up, it would not go up.
20. That the Defendant's agent and/or employee told the Plaintiff's daughter and the Plaintiff that he would have the window fixed.
21. That the Defendant's agent and/or employee told the Plaintiff that the vehicle was \$3,000.00 more than she had previously said she wanted to pay.
22. That because of the representation made by the Defendant's website which said to "buy with confidence", the Plaintiff felt comfortable purchasing the vehicle from the Defendant.
23. That the Plaintiff also felt that because the salesman represented that the vehicle was a one owner vehicle, it had low mileage, it had never been in an accident, and it was well maintained, the difference in price would be okay.
24. That the Plaintiff purchased the 2003 Jeep Grand Cherokee VIN # 1J4GX48S43C541931 on October 25, 2006.
25. That the nature of the transaction required the Defendant to disclose that the vehicle had previously been wrecked as a previously wrecked vehicle may be unsafe to drive and/or is worth less than a non wrecked car.
26. That the nature of the transaction required the Defendant to disclose that the

vehicle had previously been a commercial vehicle as commercial vehicles may be less desirable than noncommercial vehicles and, therefore, worth less than noncommercial vehicles.

27. That the Defendant had a duty to disclose the prior wreck damage to the Plaintiff as it was in a better position to know the truth and, in fact, did know the truth about the vehicle.
28. That the Defendant had a duty to disclose that the vehicle was previously a rental car to the Plaintiff as it was in a better position to know the truth and, in fact, did know the truth about the vehicle.
29. That the circumstances of the transaction and the nature of the dealings between the Plaintiff and Defendant, as the one with superior knowledge of the vehicle, required the Defendant to disclose to the Plaintiff, the damaged condition of the vehicle and its prior use as a commercial vehicle.
30. That the Defendant was in a superior position to know the condition of the vehicle and the prior use of the vehicle than the Plaintiff.
31. That the Defendant's agent and/or employee told the Plaintiff and her daughter that since the vehicle had just come in they needed to have it detailed and to have the window fixed.
32. That the Defendant's agent and/or employee told the Plaintiff to come back the following day to take possession of the vehicle.
33. That when the Plaintiff along with her daughter went to the dealership to pick up the vehicle on October 26, 2006 at 3:30 PM, she was told by the Defendant's agent and/or employee that it had not come back from being detailed.

34. That the Plaintiff had to leave the Defendant's dealership at 6:00 PM so she left her daughter at the dealership to wait on the vehicle.
35. That when the vehicle was finally brought back to the dealership at approximately 7:30 PM the Plaintiff's daughter saw that the window was still not working and the Jeep did not appear to have been detailed.
36. That the Defendant's agent and/or employee told the Plaintiff that he would pick up the vehicle to have the window fixed the next day.
37. That the Defendant Summerville Ford had the window repaired on October 27, 2006.
38. That the Defendant Summerville Ford was again notified that the vehicle had been damaged in a wreck but it failed to inform the Plaintiff.
39. That approximately 6 to 8 weeks after purchasing the vehicle the Plaintiff's daughter started having problems with the vehicle.
40. That the Plaintiff has had numerous problems with the subject vehicle which include, but is not limited to, the transmission was slipping or otherwise not working properly, the O2 sensor malfunctioned, rear differential did not work properly, the catalytic converter had to be replaced, and the fuel pump failed.
41. That on or about March 19, 2008, while the Plaintiff's daughter was driving at night in the middle lane on Interstate 26, the subject vehicle started slowing down, the gauges died and the steering wheel locked.
42. That the Plaintiff's daughter was able to pull off to the shoulder of the road.
43. That the Plaintiff's daughter tried to restart the vehicle but it would not restart.
44. That when the Plaintiff's daughter tried to restart the Jeep, the gauges would turn

on but the vehicle would cut off after a few seconds.

45. That the Plaintiff's daughter called the Plaintiff who had the vehicle towed to Rick Hendrick Jeep for repairs.
46. That on or about April 29, 2008 the Plaintiff tried to trade the vehicle at Rick Hendrick Honda for another vehicle because she was having continual problems with the Jeep.
47. That an agent and/or employee asked the Plaintiff if the vehicle had ever been involved in a wreck.
48. That the Plaintiff told the Rick Hendrick employee that the vehicle had not been wrecked.
49. That the agent and/or employee of Rick Hendrick Honda showed the Plaintiff where the vehicle had been repaired and also showed her a CarFax report.
50. That Rick Hendrick would only give the Plaintiff an allowance of \$4,500.00 for the subject vehicle.
51. That the Plaintiff also found out that the vehicle was used as a commercial vehicle and that it had more than one (1) owner.
52. That the Plaintiff contacted the Defendant's Vice President and General Manager Louie Abidi to inform him of her findings.
53. That the Defendant Capital One Auto Finance, Inc. is a party to this action because it is the current holder of the Plaintiff's financing contract and is subject to all of the claims and defenses which the Plaintiff could bring against the Defendant Summerville Ford-Mercury, Inc. pursuant to contract and applicable law.
54. That the claims alleged against the Defendant Summerville Ford-Mercury, Inc.,

should be read as also being made against the Defendant Capital One Auto Finance, Inc.

55. That the Plaintiff has had to hire an attorney to represent her in this matter.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

56. That the Plaintiff repeats all previous paragraphs as if repeated herein verbatim.
57. That the Plaintiff entered into a contract with the Defendant for the purchase of a vehicle which was in good condition, safe and could be operated and used dependably in the State of South Carolina.
58. That the Defendant failed to sell to the Plaintiff a vehicle which was in good condition, safe and could be operated and used dependably in the State of South Carolina.
59. That as a result of the Defendant's breach of contract, the Plaintiff has been damaged in that she has incurred various repair bills, she has lost the benefit of the bargain they made with the Defendant, she has paid more for a vehicle than what it is worth, she has had to pay interest on the loan made by Capital One, and she has had to pay higher insurance for the car.
60. That as a result of the Defendant's breach of contract, the Plaintiff has suffered actual damages, together with the costs and disbursements of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence)

61. That the Plaintiff repeats all previous paragraphs as if repeated herein verbatim.
62. That the Defendant owed a duty to the Plaintiff in one or more of the following

particulars:

- a. To research the history of the subject vehicle prior to buying it;
- b. To inspect the subject vehicle prior to offering it to the Plaintiff;
- c. To repair any defects in the subject vehicle before offering it for sale;
- d. To inform its sales staff about previously wrecked vehicles being sold on the Defendant's lot;
- e. To notify the Plaintiff of material problems with the vehicle;
- f. To inform consumers of the true condition of the Defendant's vehicles;
- g. To inform consumers of the true warranties that come with the Defendant's vehicles;
- h. To do those things which a reasonable, prudent person would do under the circumstances then and there prevailing.

- 63. That the Defendant failed to perform one or more of the aforementioned duties.
- 64. That as a result of the Defendant's negligence, carelessness, recklessness, wilfulness, and wantonness, the Plaintiff have been damaged in that she has lost the benefit of her bargain with the Defendant, she has overpaid for the subject vehicle, she has incurred higher insurance payments, she has incurred higher property tax bills, and she has been embarrassed and humiliated.
- 65. That as a result of the Defendant's negligence, carelessness, recklessness, wilfulness, and wantonness, the Plaintiff has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A THIRD CAUSE OF ACTION
(NEGLIGENT MISREPRESENTATION)

- 66. That the Plaintiff repeats all previous paragraphs as if repeated herein verbatim.
- 67. That the Defendant made a false representations to the Plaintiff.
- 68. That the Defendant had a pecuniary interest in making the statements.
- 69. That the Defendant owed a duty of care to communicate truthful information to the Plaintiff.
- 70. That the Defendant breached that duty by failing to exercise due care.
- 71. That the Plaintiff justifiably relied on the Defendant's representations.
- 72. That the Plaintiff have incurred various repair bills, she has lost the benefit of the bargain they made with the Defendant, she has paid more for a vehicle than what it is worth, she has had to pay interest on the loan made by Capital One Auto Finance, and she has had to pay higher insurance for the car, she has been embarrassed and humiliated, she has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- 73. As a direct and proximate result, the Plaintiff were damaged, thereby entitling the Plaintiff to actual and punitive damages together with prejudgment interest, together with the costs and disbursements of this action.

FOR A FOURTH CAUSE OF ACTION
(Constructive Fraud)

- 74. That the Plaintiff repeats all previous paragraphs as if repeated herein verbatim.
- 75. That the Defendant's agents and employees failed to disclose material facts

regarding the vehicle to the Plaintiff.

76. That the Defendant's agents and employees made false representations of material fact to the Plaintiff.
77. That the Defendant knew or should have known that the representations which were made to the Plaintiff were false.
78. That the Plaintiff was unaware of the falsity of the representations and at the time the representations were made, the Plaintiff was unable to discover the falsity of the representations made by the Defendant's agent and employee.
79. That the Plaintiff had a right to rely and did rely upon the representations made by the Defendant's agent and employee.
80. That the Defendant had an obligation to inform the Plaintiff that the car had previously been wrecked and rebuilt.
81. That the Defendant failed to fulfill its obligations to the Plaintiff.
82. That as a result of the Defendant's constructive fraud, the Plaintiff has been damaged in that she have incurred various repair bills, she has lost the benefit of the bargain she made with the Defendant, she has paid more for a vehicle than what it is worth, she has had to pay interest on the loan made by Capital One Auto Finance, she has had to pay higher insurance for the car, she has been embarrassed and humiliated, she has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
83. That as a result of the Defendant's constructive fraud, the Plaintiff demands her actual damages, together with punitive damages, together with prejudgment

interest, together with the costs and disbursements of this action.

FOR A FIFTH CAUSE OF ACTION
(Fraud)

84. That the Plaintiff repeats all previous paragraphs as if repeated herein verbatim.
85. That the Defendant intended that the Plaintiff rely upon its misrepresentations of material fact concerning the condition of the vehicle.
86. That the Defendant's failure to disclose to the Plaintiff the condition of the car constitutes fraudulent concealment or nondisclosure of material facts regarding the transaction.
87. That as a result of the Defendant's fraud, the Plaintiff has been damaged in that she has incurred various repair bills, she has lost the benefit of the bargain she made with the Defendant, she has paid more for a vehicle than what it is worth, she has had to pay interest on the loan made by Capital One Auto Finance, she has had to pay higher insurance for the car, she has been embarrassed and humiliated, she has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
88. That as a result of the Defendant's fraud, the Plaintiff demands her actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

FOR A SIXTH CAUSE OF ACTION
(Regulation of Motor Vehicle Dealers Act)

89. That the Plaintiff repeats all previous paragraphs as if repeated herein verbatim.
90. That the Plaintiff were informed and believes that the malicious and deceptive acts

and practices of the Defendant constitute a violation of Section 56-15-10 et. seq. of the South Carolina Code of Laws 1976.

91. That as a result of the Defendant's deceptive acts and practices, the Plaintiff has been damaged in that she has incurred various repair bills, she has lost the benefit of the bargain she made with the Defendant, she has paid more for a vehicle than what it is worth, she has had to pay interest on the loan made by Capital One Auto Finance, she has had to pay higher insurance for the car, she has been embarrassed and humiliated, she has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
92. That as a result of the Defendant's violation of this State's Statutes dealing with the regulation of motor vehicle dealers, the Plaintiff demands that the Defendant pay two times her actual damages, together with punitive damages not to exceed three times the actual damages, together with attorney fees, together with the costs and disbursements of this action.

FOR A SEVENTH CAUSE OF ACTION
(UTPA Violation)

93. That the Plaintiff repeats all previous paragraphs as if repeated herein verbatim.
94. That the aforementioned acts and practices of the Defendant were unfair and deceptive.
95. That the aforementioned acts and practices of the Defendant are against the public interest and that these acts and practices are capable of repetition.
96. That the Defendant's actions were willful and wanton in that the Defendant knew or

should have known that its conduct was unfair and deceptive and, therefore, a violation of this State's statutes concerning unfair and deceptive acts and practices.

97. That as a result of the Defendant's violation of the Unfair Trade Practices Act, the Plaintiff has been damaged in that she has incurred various repair bills, she has lost the benefit of the bargain they made with the Defendant, she has paid more for a vehicle than what it is worth, she has had to pay interest on the loan made by Capital One Auto Finance, she has had to pay higher insurance for the car, she has been embarrassed and humiliated, she has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

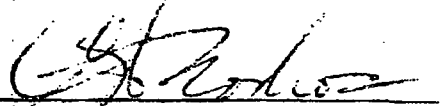
98. That as a result of the Defendant's violation of the Unfair Trade Practices Act, the Plaintiff is entitled to her actual damages, together with three (3) times her actual damages, together with attorney's fees, together with the costs and disbursements of this action.

WHEREFORE, the Plaintiff prays for judgment against the Defendant as follows:

- a. In the First Cause of Action for her actual damages together with the costs and disbursements of this action.
- b. In the Second Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- c. In the Third Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- d. In the Fourth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

- e. In the Fifth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- f. In the Sixth Cause of Action for two times the actual damages, together with punitive damages not to exceed three times the actual damages, together with attorney fees, together with the costs and disbursements of this action.
- g. In the Seventh Cause of Action for three (3) times her actual damages, together with attorney's fees, together with the costs and disbursements of this action.
- h. For such other and further relief as this Court deems just and proper.

C. STEVEN MOSKOS, P.A.
Attorney for the Plaintiff

BY: 

C. Steven Moskos
535 Stinson Dr
Charleston, SC 29407
Telephone: (843) 763-5297

Charleston, South Carolina
January 9, 2009

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Diane R. Henderson fka Diane M. Reed

☐ Plaintiff

v.

Summerville Ford-Mercury, Inc. And Capital One

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2009-CP-18-111

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

C. Steven Moskos, Bar No.

Address:

phone: fax:

e-mail: other:

Defendant's Attorney:

Robert L. Reibold, Bar No. 9284

Address:

PO Box 61140, Columbia, SC 29260

phone: 803/454-0955 fax: 803/454-0956

e-mail: rreibold@walkerreibold.net other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Compel arbitration

Estimated Time Needed: 20 min Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

March 23, 2009

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

Date Received 3/26
Scanned
Reviewed

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

Diane R. Henderson f/k/a
Diane M. Reed,

Plaintiff,

v.

Summerville Ford-Mercury, Inc.
and Capital One Auto Finance, Inc.,

Defendants

IN THE COURT OF COMMON PLEAS

Civil Action No. 09-CP-18-111

NOTICE OF MOTION AND
TO COMPEL ARBITRATION

CERTIFIED COPY
2009 MAR 25 AM 10:25
Clerk Michael
CLERK OF COURT
DORCHESTER COUNTY

TO: C. STEVEN MOSKOS, ESQUIRE, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof or as soon thereafter as is convenient for the court, Defendant Summerville-Ford Mercury, Inc., will, pursuant to Rule 12, SCRPC, and the Federal Arbitration Act (9 U.S.C. § 1), move before the Presiding Judge of the Dorchester County Court of Common Pleas at the Dorchester County Courthouse for an order staying this action and compelling arbitration.

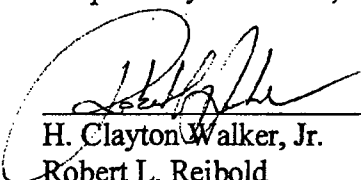
As grounds for this Motion, Defendant would show the court that:

1. Plaintiff and Defendant entered into a valid and binding contract to arbitrate any disputes between them.
2. The claims described in Plaintiff's Complaint fall within the scope of the arbitration agreement.
3. The contract involves interstate commerce and is governed by the Federal Arbitration Act.
4. Arbitration is therefore mandatory.

This motion is based upon applicable law, and the affidavit of Stanley Russell,
incorporated by reference herein.

Respectfully submitted,

March 23, 2009

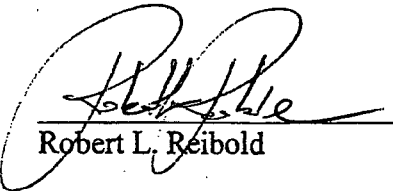


H. Clayton Walker, Jr.
Robert L. Reibold
WALKER || REIBOLD
Post Office Box 61140
Columbia, South Carolina 29260
(803) 454-0955

ATTORNEYS FOR DEFENDANT
SUMMERVILLE FORD

Certification

I certify that I contacted opposing counsel about the matters raised by this motion, but
received no response.



Robert L. Reibold

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

Diane R. Henderson f/k/a)
Diane M. Reed,)

Plaintiff,)

v.)

Summerville Ford-Mercury, Inc.)
and Capital One Auto Finance, Inc.,)

Defendants)

IN THE COURT OF COMMON PLEAS

Civil Action No. 09-CP-18-111

AFFIDAVIT OF STANLEY RUSSELL

CERTIFIED COPY
2009 MAR 25 AM 10:26
Clerk of Court
DORCHESTER COUNTY

PERSONALLY APPEARED before me the undersigned, who, first being duly sworn,
deposes and states as follows:

1. I am the sales manager of the Defendant Summerville Ford-Mercury, Inc. in the above-captioned case. I am familiar with the records of the business and have personal knowledge of the matters set forth herein. I am over 18 years of age and am not incompetent.
2. On October 25, 2006, Plaintiff Diane Henderson entered into a contract ("Contract") with Summerville Ford-Mercury, Inc. for the purchase of a used 2003 Jeep Grand Cherokee. A true and accurate copy of the Contract is attached hereto as Exhibit A.
3. The Contract contained an arbitration clause that required any claims, disputes, or controversies between the Plaintiff and the dealership to be settled by binding arbitration. The Contract specifically provided that it was governed by the Federal Arbitration Act.
4. The sale transaction involved interstate commerce in a number of ways, including, but not limited to the following:

a. Plaintiff's purchase was accomplished using financing obtained from Onyx Acceptance Corp., a finance company located in Sacramento, California. Credit applications and approvals were transmitted between the dealership and Onyx by telephone and fax;

b. Plaintiff made a down payment on the vehicle using a check drawn on Bank of America, a federally chartered bank. A true and correct copy of Plaintiff's check is attached hereto as Exhibit "B;"

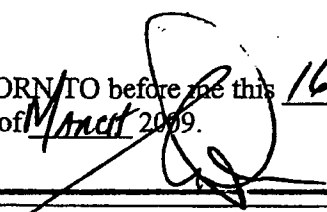
c. As part of the transaction, Plaintiff purchased an additional GAP insurance policy from an insurer located in San Diego, California. A true and correct copy of the GAP coverage addendum is attached hereto as Exhibit "C;" and

d. The Contract required Plaintiff to have and maintain insurance on the vehicle. Plaintiff's insurance was provided by Nationwide Mutual Insurance Company, located in North Carolina. A true and correct copy of Plaintiff's insurance card on her prior vehicle displaying her insurance information is attached hereto as Exhibit "D".

e. The Contract was for the purchase of an automobile which was manufactured outside of South Carolina and was foreseeably to be used to travel between various states.


Stanley Russell

SWORN TO before me this 16
day of March 2009.


Notary Public for South Carolina
My Commission Expires: 10/15/11

СОВЕТСКО-КАНАДСКИЕ ОТНОШЕНИЯ

DIANE R. HENDERSON
DENNIS A. HENDERSON
100 CHURCHILL CT
SUMMERVILLE, SC 29586-5100

06/10/08

\$250.00

Q. And

Two-headed paper, or
Bank of America


 Bulfinch Press
 110 West 11th Street
 New York, NY 10038
 Tel: 212 850 6640
 Fax: 212 850 6641
 Email: info@bulfinchpress.com
 Website: www.bulfinchpress.com

THE
NEW
YORK
PUBLIC
LIBRARY



Deficiency Waiver Addendum

FC-18971 04/05

CUSTOMER (BORROWER/LESSEE) INFORMATION

LAST NAME REED FIRST NAME DIANE MIDDLE INITIAL M
STREET ADDRESS 100 CHURCHILL CT APT#
CITY SUMMERVILLE STATE SC ZIP CODE 29485
HOME PHONE # (843)821-7045 BUS. PHONE (843)723-7591

COVERED VEHICLE INFORMATION

MANUFACTURER JEEP MODEL GRAND CHEROKEE YEAR 2003
VEHICLE ID NUMBER 1J4BX4BS43C541931

CHARGE TO CUSTOMER FOR DEFICIENCY WAIVER ADDENDUM \$ 599.00 ORIGINAL DATE OF CONTRACT 10/25/2006

INSTALLMENT SALES CONTRACT/BALLOON ☒ LEASE ☐ AMT. FINANCED/ADJ. CAPITALIZED COST \$ 13993.00 CONTRACT TERM IN MONTHS (MAX 84 MONTHS) 72 NEW VEHICLE ☐ USED VEHICLE ☒

CONTRACT APR % MSRP/NADA RETAIL \$ SUMMERVILLE FORD MERCURY INC. MILEAGE

DEALER # 9700 DORCHESTER RD. DEALERSHIP

STREET ADDRESS SUMMERVILLE STATE SC ZIP CODE 29485

CITY STATE ZIP CODE

ASSIGNEE ONYX ACCEPTANCE CORP. INSTALLMENT SALES CONTRACT / LEASE ACCT. #

STREET ADDRESS P.O. BOX 659026

CITY SACRAMENTO STATE CA ZIP CODE 95865

I (CUSTOMER), WHOSE SIGNATURE APPEARS BELOW, ACKNOWLEDGE THAT THE INFORMATION CONTAINED ABOVE IS, TO THE BEST OF MY KNOWLEDGE, TRUE. I HAVE READ THIS DEFICIENCY WAIVER ADDENDUM (ADDENDUM) IN ITS ENTIRETY, AND AGREE TO ALL OF THE PROVISIONS HEREIN. I UNDERSTAND I MAY OBTAIN GAP PROTECTION FROM AN ALTERNATE SOURCE. I UNDERSTAND I MAY CANCEL THIS ADDENDUM AT ANY POINT DURING THE ORIGINAL TERM OF THE INSTALLMENT SALES CONTRACT OR LEASE PRIOR TO TOTAL LOSS. I UNDERSTAND THAT A CANCELLATION REQUESTED WITHIN SIXTY (60) DAYS OF PURCHASE IS ELIGIBLE FOR A FULL REFUND. I UNDERSTAND THAT A CANCELLATION REQUEST RECEIVED AFTER SIXTY (60) DAYS OF PURCHASE WILL BE REFUNDED PRO-RATA, UNLESS OTHERWISE REQUIRED BY APPLICABLE STATE LAW.

☒ I WISH TO PURCHASE THE DEFICIENCY WAIVER ADDENDUM.
THE PURCHASE OF THE DEFICIENCY WAIVER ADDENDUM IS VOLUNTARY AND IS NOT REQUIRED TO OBTAIN CREDIT.
DATE 10/25/2006

DATE CUSTOMER'S SIGNATURE [Signature] DEALER'S SIGNATURE [Signature]

Notice: Customer will remain responsible for amounts due under Installment Sales Contract/Lease and not included in the Unpaid Net Balance as defined herein. Refer to the additional information on the back of this Addendum for complete details.

Waiver: Under this Addendum the Dealer/Assignee agrees to waive a portion of the Customer's indebtedness in the event of a Total Loss of the Vehicle as defined herein. Such portion shall equal the Unpaid Net Balance less the Actual Cash Value of the Vehicle both defined herein. Any primary insurance deductible amount in excess of \$1,000 and any indebtedness not waived under this Addendum remains the Customer's responsibility.

Eligibility: Maximum Amount Financed: The lesser of \$100,000 or 160% of MSRP/NADA Retail; Maximum Contract Term; 84 mos.; Maximum Vehicle Age: 10 years from the date of the Installment Sale Contract/Lease. This Addendum must be purchased at the time of execution of the Installment Sale Contract/Lease.

DECLARATION OF DEFICIENCY WAIVER ADDENDUM

☐ I DO NOT CHOOSE TO PURCHASE THE DEFICIENCY WAIVER ADDENDUM. I UNDERSTAND THAT BY NOT ACCEPTING THIS DEFICIENCY WAIVER ADDENDUM, I AM NOT ENTITLED TO ANY OF THE BENEFITS IN THE EVENT OF A TOTAL LOSS OF THE VEHICLE.

DATE CUSTOMER'S SIGNATURE DEALER'S SIGNATURE

GAP Coverage
PO Box 23098
San Diego, CA 92183-3850
1-888-768-0100

FC-18971 04/05 PREVIOUS EDITIONS MAY NOT BE USED.

White - CUSTOMER

Yellow - GAP COVERAGE

Pink - DEALER

Blue - LENDER

000036

DEFINITIONS

For the purpose of this Deficiency Waiver Addendum (Addendum) the following terms shall mean:

Actual Cash Value means on the Date of Total Loss the retail value of the Vehicle as determined by the Customer's primary automobile physical damage carrier, including any tax and fee refunds applied, less any insurance carrier deductible up to \$1000, or the amount paid by a third party insurer. In the event of no primary carrier or third party insurer, Actual Cash Value means the retail value of the Vehicle as defined in National Automobile Dealers Association (N.A.D.A.) Official Used Car Guide.

Customer means the Borrower/Lessee of the Vehicle, as listed in the Addendum.

Date of Total Loss means the date on which the actual physical loss or damage occurred to the Vehicle. If such date is indeterminable, the Date of Total Loss shall be either the date established by the primary insurance carrier or the date the occurrence was reported to the police, whichever is earlier.

Delinquent Payments means any payment, as described in the Installment Sales Contract/Lease, which remains unpaid for a period of more than sixty (60) days after the original due date stated in the Installment Sales Contract/Lease.

Total Loss means a total or constructive total loss as defined by the Customer's primary automobile physical damage carrier. If no primary physical damage carrier exists, then a Total Loss shall mean when the repair cost due to the accident, excluding any diminution of value resulting from prior damages, exceeds the Actual Cash Value or, in the event of a theft, when the Vehicle has not been recovered after a minimum period of 30 days from the date of the original police theft report.

Unpaid Net Balance means the amount owed by the Customer to satisfy the outstanding Installment Sales Contract/Lease balance as of the Date of Loss subject to the following exclusions: any proceeds which may be recovered by cancelling any insurance coverages, service contracts and/or warranties, credit life, accident and health insurance or other cancelable items; any late charges, Delinquent Payments, deferred payments, uncollected service charges, refundable prepaid taxes and fees, disposition fees, termination fees, penalty fees, and unearned interest, rental charges, finance or lease charges.

Vehicle means the four-wheeled private passenger vehicle, van, pickup or light truck not to exceed 10,000 GVW, as listed in this Addendum.

TERMS AND CONDITIONS

- This Addendum is void for any Installment Sales Contract/Lease where the original term exceeds 84 months or if the Installment Sales Contract/Lease does not have uniform monthly repayment terms for the full period of the agreement, except in the case of a balloon contract. This Addendum is also void if the Installment Sales Contract/Lease or special finance offers waive or delay payment of principal and/or interest (other than Flex Buy).
- No benefit is provided for that portion of the Unpaid Net Balance that results from the amount financed/adjusted capitalized cost exceeding the lesser of \$100,000 or 150% of the Manufacturer's Suggested Retail Price (MSRP) for New Vehicles or 150% of N.A.D.A. Official Used Car Guide's "Retail" value for Used Vehicles, at the inception date of the Installment Sales Contract/Lease. These Installment Sales Contracts/Leases will not be disqualified, but the Unpaid Net Balance will be determined based on this maximum limit of the lesser of \$100,000 or 150%.
- This Addendum is not transferable, except, in the event the assigned Lender transfers its equity to another Lender.
- This Addendum is cancelable upon any of the following events: 1) by the Dealer/Assignee or the Customer at Installment Sales Contract/Lease early termination or default; 2) at Customer's request any time prior to Total Loss or prior to the original termination date of the Installment Sales Contract/Lease. Cancellation is subject to completion of the GAP Cancellation form at the originating dealer or by contacting GAP Coverage at the address on the front of this Addendum. Cancellation is effective on the date the cancellation form is received by GAP Coverage. Full cancellation of this Addendum is allowed within sixty (60) days of the effective date of the Installment Sales Contract/Lease. After sixty (60) days, refunds will be calculated on a Pro-Rata basis, unless otherwise required by applicable state law. In the event of Total Loss to the Vehicle or upon the original termination date of the Installment Sales Contract/Lease, this Addendum will be deemed as fully earned and therefore, no refund will be due.
- No benefit will be received under this Addendum after the original termination date of the Installment Sales Contract/Lease or in the event of refinancing or termination of the original Installment Sales Contract/Lease.
- Information provided by the Customer and Dealer on the front of this Addendum is subject to validation at time of loss notification. If inaccurate information is provided, this Addendum may be void.

EXCLUSIONS

The benefits of this Addendum do not apply to loss or damage:

- Resulting directly or indirectly from fraudulent acts by the Customer or any party acting on behalf of the Customer, due to legal confiscation of the Vehicle by a public official.
- Caused by an act where the Customer or any party acting on behalf of the Customer intentionally damages the Vehicle causing a Total Loss.
- To a Vehicle that is part of a fleet that is intended for use as a public or livery conveyance or to any Vehicle used for commercial purposes.
- To the Vehicle if it has a salvage title (or should have been issued a salvage title).
- Occurring to the Vehicle prior to the Date of Total Loss, or after repossession.

Loss Notification Procedures:

IN THE EVENT OF A TOTAL LOSS, the Customer must provide within 90 days of the primary carrier settlement to GAP Coverage at PO Box 23088 San Diego, CA 92193-3880, the following documentation before any benefit under this Addendum can be processed. Failure to provide this documentation within 90 days of the primary carrier settlement will VOID this Addendum.

- Complete documentation from the Customer's primary insurance company substantiating the date of and cause of Total Loss of the Vehicle, gross settlement amount, deductible, the net settlement amount, proof of payment and valuation of Vehicle. Should the Customer not have collectible physical damage insurance on the Date of Total Loss, it is the Customer's responsibility to advise GAP Coverage in writing within 90 days of the Date of Total Loss. A copy of the complete itemized estimate of damages to the vehicle from a body shop is required.
- Complete documentation from the Dealer/Assignee showing the payment history and exact Unpaid Net Balance as defined herein.
- Copy of this Addendum.
- Copy of Installment Sales Contract/Lease.
- Copy of the police report.
- Documentation showing refund amounts of any cancelable items purchased.

*FOR ARKANSAS PURCHASES: DEDUCTIBLE COVERAGE IS NOT PROVIDED.

STATE PROVISIONS:

ALL TERMS OF THIS ADDENDUM ARE SUBJECT TO STATE LAW.

KANSAS: IF GAP IS NOT INCLUDED IN THE FINANCE CHARGE, THEN THE EXCLUSIONS SECTION OUTLINED ABOVE IS REMOVED AND THE ONLY EXCLUSION IS DUE TO CUSTOMER'S FAILURE TO MAINTAIN PRIMARY CARRIER AUTOMOBILE COVERAGE ON THE VEHICLE DESCRIBED IN THIS ADDENDUM.

INDIANA: THIS GAP PROGRAM IS NOT ELIGIBLE FOR FINANCE AGREEMENTS WHERE LESS THAN 80% OF MSRP FOR A NEW VEHICLE OR NADA AVERAGE RETAIL VALUE FOR A USED VEHICLE IS FINANCED.

SOUTH CAROLINA INSURANCE IDENTIFICATION CARD

Company
Number
23787

NATIONWIDE MUTUAL
INSURANCE COMPANY
4401 CREEDMOOR ROAD
RALEIGH NC 27612-3814

Policy Number
81 39 K 701752

Effective Date
JUL 11, 2006

Expiration Date
JAN 11, 2007

DIANE M REED
100 CHURCHILL COURT
SUMMERVILLE, SC
29485-5454



Year
2004

Make/Model
HOND PILOT EX

Vehicle Identification Number
2HKYF18654H621277

For questions about your insurance, call your Nationwide
agent, CRAIG R BROWN AGENCY INC 843-873-8815
To report a claim, from anywhere in the country, just call
TOLL FREE 1-800-421-3533

SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES DRIVER'S LICENSE

REED, DIANE M
100 CHURCHILL CT
SUMMERVILLE SC 294853454

DL#: 003342572
Expires: 03-20-2011

Class: D Hgt: 5-04 Wgt: 176
Sex: F DOB: 03-20-1956
Issued: 02-21-2008 - 18205 R 1

Diane M Reed



Endorsement A

For

000038

CERTIFICATE OF SERVICE

I, Harriet B. Green, Legal Assistant at Walker & Reibold, LLC, do hereby certify that a copy of the foregoing **Defendant Summerville Ford-Mercury, Inc.'s Motion to Compel Arbitration** has been served upon the following counsel of record this 23rd day of March 2009 by mailing a copy of same in the United States mail, first-class postage prepaid, addressed as follows.

C. Steven Moskos, Esq.
535 Stinson Drive
Charleston, SC 29407

Robert Muckenfuss, Esq.
McQuire Woods
100 Tryon Street
Charlotte, NC 28202

Chief Clerk
CLERK OF COURT
DORCHESTER COUNTY
2009 MAR 25 AM 10:26
CERTIFIED COPY

Harriet B. Green

Harriet B. Green

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

DIANE R. HENDERSON F/K/A DIANE M.
REED

☒ Plaintiff

vs.

SUMMERVILLE FORD-MERCURY, INC.
AND CAPITAL ONE AUTO FINANCE, INC.

☐ Defendant

check box above indicating submitting party

) IN THE ☒ COURT OF COMMON PLEAS

) ☐ FAMILY COURT

) CASE NO: 09-CP-18-111

) MOTION INFORMATION FORM

) AND COVER SHEET

name, S.C. Bar no. and address of plaintiff's attorney

C. Steven Moskos, S.C. Bar #7938

535 Stinson Drive
Charleston, SC 29407

telephone: (843) 763-5297

e-mail: csmoskos@earthlink.net

fax: (843) 266-1925

other:

name, S.C. Bar no. and address of defendant's attorney

Robert Reibold

P. O. Box 61140
Columbia, SC 29260

telephone: 803-454-0955

e-mail:

fax:

other:

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion: Motion to Confirm Arbitration Award

Estimated Time Needed: 15Minutes

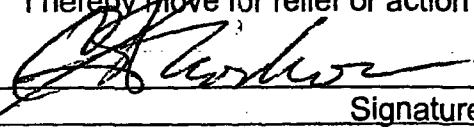
Court Reporter Needed: Yes

SECTION II: Motion Type

☒ Written motion attached

☐ Form Motion - -

I hereby move for relief or action by the court as set forth in the attached proposed order.

 Signature of attorney for Plaintiff

3/25/11
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$25.00

☐ EXEMPT:

☐ Rule to Show Cause in Child or Spousal Support

(check reason)

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status

☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act

☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication

☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or reduced to writing from motion made in open court per judge's instructions. Name of Court Reporter:

☐ Other:

000040

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE: _____

CODE: _____

Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____

(print name)

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED - AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA)

COUNTY OF DORCHESTER)

DIANE R. HENDERSON F/K/A DIANE)
M. REED)

Plaintiff)

vs.)

SUMMERVILLE FORD-MERCURY,)
INC. AND CAPITAL ONE AUTO)
FINANCE, INC.)

Defendants)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE NO. 09-CP-18-111

**PLAINTIFF'S MOTION TO CONFIRM
THE ARBITRATION AWARD**

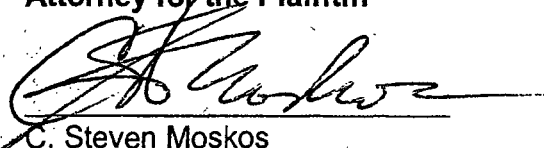
**TO: ROBERT REIBOLD, ESQ., ATTORNEY FOR THE DEFENDANT SUMMERVILLE
FORD-MERCURY, INC. AND MIKE GRUENLOH, ESQ.: ATTORNEY FOR THE
DEFENDANT, CAPITAL ONE AUTO FINANCE, INC:**

PLEASE TAKE NOTICE that the Plaintiff, through her undersigned attorney, will move before the Presiding Judge for the Court of Common Pleas for Dorchester County, in the Dorchester County Courthouse on the 10th day after service hereof, or at such other time and place as is convenient to the Court and counsel, for an Order of the Court, confirming the award of the arbitrator in this matter. The reason for this motion is that after due diligence on the Plaintiff's part, Defendant has failed to agree to a Consent Order regarding this issue.

SIGNATURE ON THE NEXT PAGE

C. STEVEN MOSKOS, P.A.
Attorney for the Plaintiff

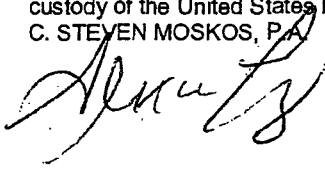
BY:


C. Steven Moskos
535 Stinson Drive
Charleston, SC 29407
Telephone: (843) 763-5297

Charleston, South Carolina
March 25, 2011

Certificate of Service

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 25 day of March, 2011.
C. STEVEN MOSKOS, P.A.



**AMERICAN ARBITRATION ASSOCIATION
Consumer Arbitration Tribunal**

In the Matter of the Arbitration between

Re: 31 434 00490 09

Diane R. Henderson f/k/a Diane M. Reed, hereinafter referred to as "Claimant"
and
Summerville Ford-Mercury, Inc.
and
Capital One Auto Finance, Inc., hereinafter referred to as "Respondents"

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn and having duly heard the allegations and proofs of the parties, find and AWARD, as follows:

1. This matter was heard by the undersigned on January 12 and 13, 2011, in Charleston, South Carolina. The Claimant, Diane Henderson, was represented by Steven Moskos, Esquire. Respondent Summerville Ford Mercury, Inc. was represented by Robert Reibold. Respondent Capital One Auto Finance, Inc. was represented by Michael Gruenloh. Live testimony was presented by Ms. Henderson, Amanda Reed, Michael Karriker, Steve Antley, Stephen Puryear, Louis Abidi, John Disher and James Edwards (by telephone). In addition, both Claimant and Respondent Summerville Ford Mercury, Inc. introduced numerous exhibits. A post-arbitration telephone hearing was held on January 14, 2011, regarding certain legal issues. All counsel were present for that telephone hearing.
2. In her Complaint, Claimant alleged seven causes of action: 1) breach of contract; 2) negligence; 3) negligent misrepresentation; 4) constructive fraud; 5) fraud; 6) violation of the Motor Vehicle Dealers Act, S.C. Code § 56-15-10 et seq.; and 7) violation of the Unfair Trade Practices Act, S.C. Code § 39-5-10 et seq.
3. After consideration of all of the evidence presented at the arbitration hearing, argument of counsel and post-hearing submissions, I find as to each cause of action as follows:
 - a) Claimant's First Cause of Action for breach of contract, is denied in its entirety.
 - b) Claimant's Second Cause of Action, for negligence, is denied in its entirety.
 - c) Claimant's Third Cause of Action, for negligent misrepresentation, is denied in its entirety.
 - d) Claimant's Fourth Cause of Action, for constructive fraud, is denied in its entirety.
 - e) Claimant's Fifth Cause of Action, for fraud, is denied in its entirety.
 - f) As to Claimant's Sixth Cause of Action, for violation of the Motor Vehicle Dealers Act, S.C. Code § 56-15-10 et seq., I find in favor of Claimant against Respondent Summerville

Ford Mercury in the amount of Eight Thousand, Four Hundred Ninety Five and 00/100 Dollars (\$8,495.00).

Pursuant to S.C. Code § 56-15-110(1), that amount is doubled to Sixteen Thousand, Nine Hundred Ninety and 00/100 Dollars (\$16,990.00).

I also award Claimant attorneys' fees against Respondent Summerville Ford-Mercury, Inc. in the amount of Forty Five Thousand, Two Hundred and 00/100 Dollars (\$45,200.00), and costs in the amount of Three Thousand, Seventy Six and 39/100 Dollars (\$3,076.39).

I deny Claimant's claim for punitive damages under S.C. Code § 56-15-110(3).

- g) As to Claimant's Seventh Cause of Action, for violation of the South Carolina Unfair Trade Practice Act, S.C. Code § 39-5-10 et seq., I find for the Claimant against Respondent Summerville Ford Mercury, Inc. in the amount of Eighteen Thousand, Eight Hundred Seventy Five and 71/100 Dollars (\$18,875.71).

I also award Claimant attorneys' fees against Respondent Summerville Ford-Mercury, Inc. in the amount of Forty Five Thousand, Two Hundred and 00/100 Dollars (\$45,200.00), and costs in the amount of Three Thousand, Seventy Six and 39/100 Dollars (\$3,076.39).

I deny Claimant's claim for treble damages.

4. Claimant shall elect one remedy from the findings in Paragraph 3, Sections (f) and (g) above and Respondent Summerville Ford Mercury, Inc. shall pay to Claimant the corresponding dollar amount for the one remedy selected by the Claimant.

The administrative filing fees and case service fees of the American Arbitration Association, totaling \$1,250.00, shall be borne by Summerville Ford-Mercury, Inc. The fees and expenses of the arbitrator, totaling \$7,422.43, shall be borne Summerville Ford-Mercury, Inc. Therefore, the Summerville Ford-Mercury, Inc shall reimburse the Diane R. Henderson f/k/a Diane M. Reed, the sum of \$375.00, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Diane R. Henderson f/k/a Diane M. Reed.

The above sums are to be paid on or before 60 days from the date of this Award.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby, denied.

I, David B. McCormack, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

2/14/11
Date

David B. McCormack
David B. McCormack, Esq.

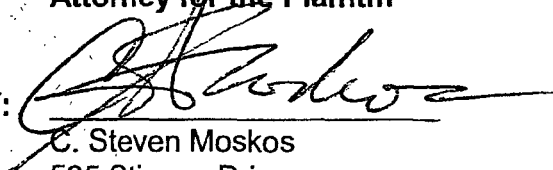
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIRST JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 09-CP-18-111
	)	
DIANE R. HENDERSON F/K/A DIANE	)	
M. REED	)	
	)	
	)	BRIEF IN SUPPORT OF
Plaintiff	)	PLAINTIFF'S MOTION TO CONFIRM
	)	THE ARBITRATION AWARD
vs.	)	
	)	
SUMMERVILLE FORD-MERCURY,	)	
INC. AND CAPITAL ONE AUTO	)	
FINANCE, INC.	)	
	)	
	)	
<u>Defendant</u>	)	

This matter was filed with the Dorchester Court on January 14, 2009. The Defendant Summerville-Ford-Mercury, Inc. moved to compel this matter to arbitration. The Court filed its Order compelling this matter to arbitration on June 10, 2009. This matter was heard before an arbitrator on January 12 and 13, 2011. On February 14, 2011, the arbitrator issued an award in favor of the Plaintiff on her Unfair Trade Practices Act claim in the amount of \$18,875.71 and her Dealers Act claim in the amount of \$16,990.00. The arbiter also awarded the Ms. Henderson \$45,200.00 in attorney's fees and \$3,076.39. (See Attached Exhibit 1.) The Plaintiff elected her remedy under the UTPA. Ms. Henderson now seeks to have the Court confirm this award in her favor.

SC Code § 15-48-120 states, "Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 15-48-130 and 15-48-140." The Defendant has not moved to vacate, modify, or correct the award. Thus, the Court now has authority to confirm the award.

Ms. Henderson, therefore, requests the Court confirm the Award of the Arbitrator so the Clerk of Court may enroll the decision as a judgment against the Defendant.

C. STEVEN MOSKOS, P.A.
Attorney for the Plaintiff

BY: 

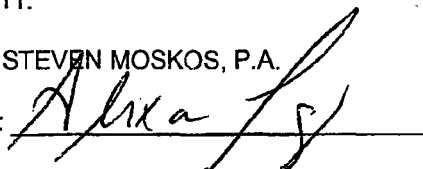
C. Steven Moskos
535 Stinson Drive
Charleston, SC 29407
Telephone: (843) 763-5297

Charleston, South Carolina
March 25, 2011

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper, properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 25 day of March, 2011.

C. STEVEN MOSKOS, P.A.

By: 

is,

Ordered that the Award of the Arbitrator in the above case is confirmed by the Court.

It is further,

Ordered that the Clerk of Court for Dorchester County shall enroll the Award of the Arbitrator as a judgment against the Defendant.

AND IT IS SO ORDERED.

Edgar W. Dickson
Chief Administrative Judge First Judicial Circuit

St. George, South Carolina
_____, 2011

I SO MOVE:

C. Steven Moskos
Attorney for Diane R. Henderson

I CONSENT:

Robert Reibold
Attorney for Summerville Ford-Mercury,
Inc.

I CONSENT:

Mike Gruenloh
Attorney for Capital One Auto Finance, Inc

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

DIANE R. HENDERSON,
PLAINTIFF

versus

SUMMERVILLE FORD-MERCURY, INC.,
AND CAPITAL ONE AUTO FINANCE,
INC.,
DEFENDANTS

CASE NO. 2009-CP-18-111

)
) MOTION TO COMPEL
) ARBITRATION
) TRANSCRIPT OF RECORD

)
) DATE:

) JUNE 1, 2009
)
)

BEFORE:

HONORABLE JAMES WILLIAMS, PRESIDING JUDGE

APPEARANCES:

C. STEVEN MOSKOS, ESQUIRE
ATTORNEY FOR THE PLAINTIFF

ROBERT REIBOLD, ESQUIRE
ATTORNEY FOR THE DEFENDANTS

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

1 DATE:

2 JUNE 1, 2009

3 THE COURT: Henderson versus Summerville Ford-Mercury.

4 MR. REIBOLD: Your Honor, I have - - -

5 THE COURT: Yes, sir.

6 MR. REIBOLD: --- some things for you.

7 THE COURT: Alright, Motion to Compel Arbitration.
8 I'll be glad to hear you.

9 MR. REIBOLD: Yes, sir, Your Honor, Bob Reibold here
10 for the dealer, Summerville Ford.

11 ARGUMENT BY MR. REIBOLD:

12 This case involves the sale of a used car. The
13 plaintiff claims that she was not told the car had
14 previously been wrecked before she bought the car. There
15 are two contracts in this case, there are the buyer's order,
16 which is the contract of sale, and then there's the
17 financing document, which is the retail installment sales
18 contract. The buyer's order is signed by the plaintiff.
19 The Buyer's Order is attached as Exhibit A, to the Affidavit
20 of Stanley Russell, which should be in the file. I have a
21 copy if you don't have it. I had to shrink the buyer's
22 order to get it as an exhibit so I have a copy, I typed out
23 a copy of the arbitration clause, and I'd like to hand it up
24 to you.

25 THE COURT: Yes, sir. Alright, go ahead.

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

DIANE R. HENDERSON, F/K/A
DIANE REED,

PLAINTIFF

versus

SUMMERVILLE FORD-MERCURY, INC.,

DEFENDANT

CASE NO. 2009-CP-18-111

)
) MOTION TO CONFIRM
) ARBITRATION AWARD

)
) TRANSCRIPT OF RECORD

)
) DATE:

)
) AUGUST 1, 2011

BEFORE:

HONORABLE EDGAR W. DICKSON, PRESIDING JUDGE

APPEARANCES:

C. STEVEN MOSKOS, ESQUIRE

ATTORNEY AT LAW

FOR THE PLAINTIFF

ROBERT LAWRENCE REIBOLD, ESQUIRE

ATTORNEY AT LAW

FOR THE DEFENDANT

HARRY A. WALKER (MRS.)
COURT REPORTER, FIRST JUDICIAL CIRCUIT
POST OFFICE BOX 127
ROWESVILLE, SOUTH CAROLINA 29133

I N D E X

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ARGUMENT BY MR. REIBOLD	6
ARGUMENT IN REPLY BY MR. MOSKOS	11
ARGUMENT IN REPLY BY MR. REIBOLD	14

E X H I B I T S

NONE

1 DATE:

2 AUGUST 1, 2011

3 THE COURT: Alright, Ms. Harry Dot, this is Case Number
4 2009-CP-18-111, Diane Henderson, Plaintiff, versus
5 Summerville Ford, and this is the plaintiffs's Motion to
6 Confirm the Arbitration Award. Is that correct? And you
7 are Mr. Moskos?

8 MR. MOSKOS: Yes, sir.

9 THE COURT: Okay. Alright, Mr. Moskos, let me hear
10 from you.

11 ARGUMENT BY MR. MOSKOS:

12 MR. MOSKOS: Yes, sir, I represent Diane Henderson. We
13 originally brought a suit in the Court of Common Pleas in, I
14 believe it was January, Two thousand nine. The defendant
15 moved to compel arbitration, and Judge Williams ordered this
16 case to go to arbitration, and I believe the date of that
17 Order is June Ten, Two thousand nine. The case proceeded to
18 arbitration and was heard by David McCormick on January
19 Twelve and Thirteenth of Two thousand eleven. Mr.
20 McCormick, the arbitrator, issued his Order awarding damages
21 to Ms. Henderson. That Order was February Fourteen, Two
22 thousand eleven, and during that, or in that Order he found
23 for my client on her unfair trade practices claim the amount
24 of Eighteen thousand eight hundred and seventy-five Dollars
25 and Seventy-one Cents. And she had a Dealer's Act claim

1 under Title Fifty-six in the amount of Sixteen thousand, or
2 he awarded her Sixteen thousand nine hundred and ninety
3 Dollars. He also awarded her Forty-five thousand two
4 hundred Dollars in attorney's fees, and Three thousand
5 seventy-six Dollars and Thirty-nine Cents in costs.

6 I communicated with Mr. Reibold about a consent Order
7 confirming the arbitrator's award, Summerville ford refused
8 to sign the Order. I filed a motion. Basically what it --
9 or I filed a motion to confirm the Order.

10 There are two matters here that basically mandate
11 filing, or the Court confirming the arbitrator's award. The
12 first is under the South Carolina Arbitration Act Fifteen
13 Forty-eight One twenty, the says, "Upon application of a
14 party the Court shall confirm an award unless within the
15 time limits hereinafter imposed grounds are urged for
16 vacating or modifying or correcting the award," in which
17 case you proceed under different sections. The defendant
18 has not asked that the Court vacate, modify or correct the
19 award. Therefore, there is no limitation on the Court
20 confirming the award. In fact, it's mandated that it shall
21 confirm the award.

22 Additionally, the Court, or excuse me, the matter was
23 stayed by Judge Williams' prior Order. As a result, the
24 Clerk's office still has this matter as a pending matter and
25 it needs to be disposed of. Otherwise it just remains in

1 the pending matter. The Court has the authority and right
2 to administer its docket as it sees fit, and the proper way
3 to dispose of the case is to confirm the arbitrator's award.
4 The defendant is urging that the Court dismiss the case with
5 prejudice, this would reflect in the Court's records the
6 incorrect disposition of the case. In other words, it would
7 mislead anybody that would come later to look at this case,
8 they would assume that the case had been settled as opposed
9 to having an actual award issued in the case. The defendant
10 argues that the case, this issue is moot because they've
11 already paid the award.

12 THE COURT: They have already paid it?

13 MR. MOSKOS: They have already paid. The problem that
14 they have is, they use cases out of Massachusetts which deal
15 with the statute that somehow the Court is able to multiple
16 some award two or three times, I think, after an
17 arbitration, it really was a kind of an unusual statute.
18 But the bottom line is, the Court needs to, in the case it
19 needs to -- the statute says the way to do it is to confirm
20 the award, and that's what we are asking the Court to do.

21 THE COURT: Confirm the award and then mark the
22 judgement as satisfied?

23 MR. MOSKOS: It can do that or we can issue the
24 Satisfaction of Judgement ourselves.

25 THE COURT: Okay. Alright, yes, sir.

1 the Arbitration Act is to create a judgement which can then...
2 go be enforced. They want to give the arbitration, a
3 successful claimant the same rights to enforce a judgement
4 as if he or she had been in Court to start with. And that
5 purpose cannot be affected here. The judgement has already
6 been paid, there's no point in enrolling a judgement because
7 it can't be used. And what he's asking you to do is take an
8 action that is not necessary. There's no existing
9 controversy. And this is a Constitutional issue. It
10 doesn't matter what the Arbitration Act says, if the issue
11 is moot the Court should not rule on it. He recites the
12 South Carolina Arbitration Act which is irrelevant because
13 we moved to compel arbitration under the Federal Arbitration
14 Act, and that's the statute under which arbitration was
15 ultimately granted.

16 THE COURT: Okay. And Mr. Reibold, let me just make
17 sure I've got this straight. Apparently, at some time this
18 case was filed here in the State Court?

19 MR. REIBOLD: This case was filed here, yes, sir.

20 THE COURT: It didn't get removed to Federal Court, did
21 it?

22 MR. REIBOLD: It did not get removed, it got --
23 arbitration was compelled pursuant to the Federal
24 Arbitration Act.

25 THE COURT: Okay.

1 MR. REIBOLD: Thank you, Your Honor.

2 THE COURT: And your name, please, sir?

3 MR. REIBOLD: My name is Rob Reibold.

4 THE COURT: Mr. Reibold. Okay, yes, sir.

5 ARGUMENT BY MR. REIBOLD:

6 MR. REIBOLD: Briefly, I think it's important to point
7 out we paid the judgement almost immediately. In fact, we
8 paid more money. Mr. Moskos sent us back money because we
9 paid too much.

10 THE COURT: And he sent it back?

11 MR. REIBOLD: He sent it back. He was ...

12 THE COURT: Mr. Moskos, I'm impressed. Thank you.

13 MR. MOSKOS: I told him the numbers weren't right
14 before he sent me the check, and I sent the money back.

15 THE COURT: Okay. Alright.

16 MR. REIBOLD: But the fact of the matter the judgement
17 was paid almost immediately, within weeks of the
18 arbitrator's decision.

19 THE COURT: Alright, sir.

20 MR. REIBOLD: And I did cite a Massachusetts case in my
21 Return, I had Wyoming cases. The jurisdiction that issued
22 the opinions is not determinative because I also cited a
23 South Carolina case. A case is moot when judgement, if
24 rendered, would have no further effect on an existing
25 controversy. And the purpose of enrolling a judgement under

1 MR. REIBOLD: Because it involved interstate commerce.

2 THE COURT: Okay. But it was, but it was, that was an
3 Order of this Court?.

4 MR. REIBOLD: Yes, Judge Williams issued that Order.

5 THE COURT: By Judge Williams. Okay. Okay. And
6 Summerville Ford had requested that, is that correct, the
7 arbitration?

8 MR. REIBOLD: Pursuant to the Federal Arbitration Act
9 we requested arbitration.

10 THE COURT: Okay. So, you got the arbitration award
11 and then you immediately paid it?

12 MR. REIBOLD: Yes, sir.

13 THE COURT: Okay. And now you just, you don't want
14 that judgement reflected in the judgement rolls of the
15 County?

16 MR. REIBOLD: Well, Your Honor, there's two things, - -

17
18 THE COURT: Yeah.

19 MR. REIBOLD: --- Number One, I do agree that as a
20 record keeping matter something has to happen with this
21 case. And I think that dismissal under Forty-one, A, is the
22 appropriate resolution for this. My point is, the whole
23 thing is a fruitless exercise. The only reason there could
24 possibly be to put this judgement on the record is to make
25 sure my client has a bad name in the public record, because

1 the judgement will never be executed, can never be executed.
2 He's asking you to do something that will have no effect on
3 the matter to the parties. And Constitutionally, I don't
4 think the Court is permitted to take an action in those
5 circumstances.

6 And like I said, I submitted a Return, I have Wyoming
7 cases here. Obviously, this issue's never been decided in
8 South Carolina. If you'd like to see one of those I can
9 hand those up, but the basic point here is that the only
10 reason to do this is so that my client has a bad name in a
11 public record. The judgement can't be executed on, it's
12 already been paid, it will not affect anything between the
13 parties to this case in any manner. Therefore, I think the
14 action is moot, and the Court should not act upon it. I do
15 agree that the case needs to be dismissed, and that's a
16 record keeping matter.

17 THE COURT: Alright, sir. And Mr. Reibold, you
18 mentioned earlier that the only reason to record this was
19 to, when somebody wouldn't pay the arbitration amount, is
20 that correct?

21 MR. REIBOLD: Yeah, the purpose, and I have authority
22 on that, too, the purpose for enrolling, or for having the
23 judgement confirmed is so that the arbitration claimant who
24 has not been in Court can use judicial remedies to enforce
25 and collect the judgement.

1 THE COURT: And what's your authority on that, just so
2 I'll have it?

3 MR. REIBOLD: The Return I filed cites, and it should
4 be in the file - - -

5 THE COURT: Hold on one second, let me make sure I've
6 got your Return.

7 MR. REIBOLD: I cite the three cases, again, a few of
8 them are under the Federal Arbitration Act as opposed to the
9 South Carolina Arbitration Act.

10 THE COURT: Hold on a second. I'm just -- as a matter
11 of fact to show you, I filed, let's see -- oh, opposition,
12 yeah, I've got that one. Okay, I'm sorry.

13 MR. REIBOLD: And I was able to find three cases which
14 actually addressed what the purpose of confirming the award
15 was. One is a Colorado case, one's a Massachusetts case,
16 and one's a Wyoming case. All of those say that the reason
17 that arbitration awards are confirmed is to that there's a
18 judgement which can be enforced. I can take it to the
19 Sheriff and have an execution, or I can have some sort of
20 proceedings. That's the reason that you would have, you
21 have a judgement enrolled from an arbitration proceeding.
22 But that purpose can't be satisfied here because we've paid
23 it. We paid it immediately, and there's no point in
24 enrolling the judgement to allow the Sheriff to go collect
25 on the judgement.

1 THE COURT: Alright. Anything else?

2 MR. REIBOLD: No, thank you.

3 THE COURT: Okay. Mr. Moskos?

4 ARGUMENT IN REPLY BY MR. MOSKOS:

5 MR. MOSKOS: Just very briefly, Your Honor, I would say
6 that there are a number of reasons to confirm the award.
7 One is, obviously, the docketing of the Clerk's office needs
8 to be taken care of.

9 The second thing is, it is imperative that the Court
10 system reflect the truth of what is going on in our
11 community. We've got plenty of problems with the
12 legislative and executive branch, we don't need any problems
13 with the judicial branch not reflecting what is going on.
14 What Mr. Reibold is requesting is the Court to dismiss under
15 Rule Forty-one for it to reflect this as dismissed under
16 Rule Forty-one, which is either voluntary dismissal, an
17 involuntary dismissal, a non-suit or something like that,
18 which is clearly not the case here. The Court should be
19 reflecting what's going on in the community truthfully. And
20 to show the community what really is going on you have to
21 show that the arbitrator found in favor of Ms. Henderson.

22 The second thing is, you know, it is kind of important
23 for other plaintiffs who may come along to be able to say to
24 the next Court, hey, this is not the only time that these
25 folks have been found guilty of unfair or deceptive acts and

1 practices. As the Court knows, under the Unfair Trade
2 Practice Act plaintiffs are required to show the capacity to
3 repeat, and the capacity to repeat can be shown either by
4 the policies of the company which allow for repetition of
5 the events or by showing that they actually happened before.
6 And here is an example that other people in the community
7 can use. Now, what does that do for us? Well, you know,
8 some people may say, well, that helps plaintiffs go out and
9 sue people. But you know what else it does? It puts
10 Summerville For on notice that it can't do these actions,
11 and that now it has to change its behavior or else this is
12 going to come back to haunt them. It serves the purpose of
13 making sure that they aren't out cheating people, selling
14 rebuilt wrecked vehicles, damaged vehicles, problem vehicles
15 without proper disclosure. And we think that the Court
16 should reflect accurately the disposition of this case.

17 THE COURT: Before you sit down, Mr. Moskos, any number
18 of cases that get settled and like that we get E-mails from
19 the parties saying, the case has been settled, and they get
20 dismissed and we don't put anything in there about the
21 amount of money or anything like that, and there's no,
22 there's nothing in the record that reflects how much money
23 it was settled for or anything like that, even when they're
24 not sealed records or when anybody wants any kind of
25 privacy.

1 MR. MOSKOS: Yes, sir.

2 THE COURT: So, why wouldn't we just treat it just like
3 that?

4 MR. MOSKOS: Well, this isn't a settlement.

5 THE COURT: Right.

6 MR. MOSKOS: This is not, I mean, the defendant had
7 plenty of opportunity to settle the case if they wanted to.
8 Instead it chose to have its day in a secret hearing. It
9 decided that it wanted to force this matter into a private
10 office to be settled by an arbitrator, which is not out in
11 the public. The public doesn't get to know about it. But
12 the matter still needs to be reflected to the Court so that
13 the Court can show how the case is being disposed of. If it
14 had settled I believe you're absolutely right, there
15 wouldn't have been any reflection in the record. But then
16 again, the defendant would be able to say, hey, we don't
17 admit any liability, you can't use that other case, because
18 it was never a disposition. In this situation there is a
19 disposition, there's a final outcome issued by the
20 arbitrator and that needs to be reflected properly in the
21 Court's records.

22 THE COURT: Okay. So, mediation you could treat just
23 as a settlement and not report it, but an arbitration,
24 because it was, it was, it has to reach a decision, you
25 would report it. Is that your distinction? Sometimes, I

1 mean, sometimes accident cases go to mediation.

2 MR. MOSKOS: Yes.

3 THE COURT: And you don't report the mediation, it
4 would be like a settlement, is that correct?

5 MR. MOSKOS: Mediation would be a settlement, yes.

6 THE COURT: Okay. Okay. But the arbitration, since it
7 was like a -- since someone had to -- a third party had to
8 make a decision, it should be reported, is your ...

9 MR. MOSKOS: I mean, it's just like a non-jury trial.

10 THE COURT: Okay. Alright. Thank you, sir.

11 Yes, sir, Mr. Reibold.

12 MR. REIBOLD: Thank you, Your Honor.

13 THE COURT: Yes, sir.

14 MR. REIBOLD: And I'll try to be brief.

15 ARGUMENT IN REPLY BY MR. REIBOLD:

16 MR. REIBOLD: The first thing, I want to make sure the
17 record is clear, we did attempt to settle. I made
18 settlement offers that were not responded to. I repeated
19 asked for a demand, it was never given, and I was told ...

20 THE COURT: And you know, I, I know 'all had to go back
21 and forth on that, so that's not going to affect my, my
22 decision here.

23 MR. REIBOLD: Alright, I'll move on.

24 THE COURT: Yes, sir.

25 MR. REIBOLD: What I'm hearing from Mr. Moskos is two

1 things. One, the reason he wants this done is to protect
2 the rights of future people who might want to sue
3 Summerville Ford. That's what I'm hearing, that future
4 people might be able to come back and use this entry of
5 judgement to sue Summerville Ford. Well, those people
6 aren't here today. Mr. Moskos represents his client, whose
7 case cannot be affected by what the relief he's asking for.
8 And the concerns about future claims under the Unfair Trade
9 Practice Act, those can be resolved easily through standard
10 discovery. This case will be listed, pleadings have been
11 filed, people can be deposed about what happened, all of
12 this information can be found out. And in fact, Mr. Moskos
13 routinely asks for every law suit that you've been involved
14 in when he files these claims. So, there's no element of
15 secrecy here, and what's happening is, the only reason to do
16 this is so the people can sue Summerville Ford later and
17 Summerville Ford has a bad name. But it can't affect Ms.
18 Henderson, and that's the reason you shouldn't do it.

19 THE COURT: Alright. Well, thank y'all for giving me a
20 little something interesting to think about for a while. I
21 appreciate it. Okay?

22 Thank y'all. I'll get back with y'all and tell you
23 what I'm going to do with this. Okay? Thank y'all.

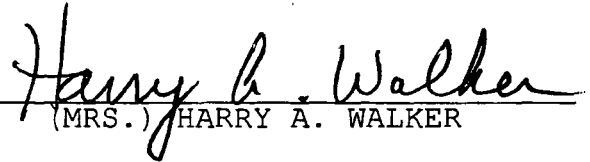
24 END OF THIS TRANSCRIPT.

CERTIFICATE

I, the undersigned, Mrs. Harry A. Walker, of
Rowesville, South Carolina, Official Court Reporter for the
First Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate, and
complete transcript of record of all the proceedings had and
evidence introduced in the captioned cause, relative to
appeal, in the Court of Common Pleas for Dorchester County,
South Carolina, on the First day of August, 2011.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

DATE: April 30, 2012


(MRS.) HARRY A. WALKER

AGREEMENT TO ARBITRATE DISPUTES

The following Agreement to Arbitrate Disputes can significantly affect your in any dispute with us. Please read it carefully before signing this Contact.

1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER ON ANY CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN A LAWSUIT AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

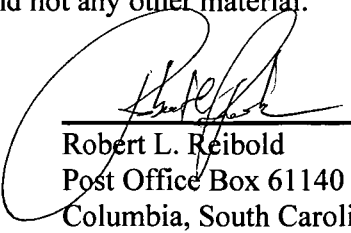
Any claim or dispute, whether in contract, tort, statute, or otherwise (including the interpretation and scope of this clause, and arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise out of or relate to your credit application, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding and not by a court action, unless otherwise provided herein. Any claim or dispute is to be arbitrated by a single arbitrator or an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You or we may choose one of the following arbitration organizations and its applicable rules: The American Arbitration Association, 35 Madison Ave., Floor 10, New York, NY 100717 www.adr.org or the National Arbitration Forum, P.O. Box 50191, Minneapolis, MN 55405 www.arb-forum.com. You may obtain a copy of the rules of these organizations by contacting the arbitration organization or visiting its website. Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The Arbitration hearing shall be conducted in the federal district in which you reside, we will pay your filing, service or case management fee and your arbitrator or hearing fee up to a maximum of \$1,500. We shall also pay an additional amount of such fees that the arbitrator determines we must pay in order to make this Agreement to Arbitrate Disputes enforceable. Each party shall be responsible for its attorney, expert and other fees, unless awarded by the arbitrator under applicable law. The arbitrator's award shall be final and binding on all parties, except that the losing party may request a new arbitration under the rules of the arbitration organization by a three party panel. If any provisions under this Arbitration Clause, other than the waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. The Agreement to Arbitrate Disputes, and any arbitration conducted hereunder, shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*)

You and we further retain any rights to self-help remedies, such as repossession. You and we further retain the right to seek individual remedies in small claims court for

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

2/1, 2013



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