THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2017-CP-42-02072

Donald and Carlee Simmons, ... Respondents,

v.

Benson Hyundai, LLC, ... Appellant.

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. THE CIRCUIT COURT WAS WITHIN ITS DISCRETION IN REFUSING TO RE-WRITE THE FOUR COMPLETELY DIFFERENT SETS OF ARBITRATION RULES BECAUSE THEY WERE SELF-CONTRADICTORY TO A POINT OF BEING USELESS, TOO COMPLEX FOR LAY CONSUMERS TO UNDERSTAND (WITH OR WITHOUT LEGAL ADVICE) AND INCLUDE RULES NOT AVAILABLE TO (OR DISCLOSED TO) CONSUMERS AT THE DEALERSHIP. THUS, THERE WAS NO MEETING OF THE MINDS AS TO THE ARBITRATION PROVISIONS.

II. THE COURT CORRECTLY FOUND THAT THE CONTRACTS WERE ILLUSORY BECAUSE ALTHOUGH RESPONDENTS APPEARED TO BE BOUND (BUT WERE NOT) BY THE SALE, FINANCE, AND ARBITRATION DOCUMENTS, IN FACT, APPELLANT WAS NOT BOUND, SUCH THAT NO MEETING OF THE MINDS TOOK PLACE BETWEEN RESPONDENTS AND APPELLANT.

III.THE COURT CORRECTLY FOUND THAT APPELLANT'S CONTRACTS WERE UNCONSCIONABLE BASED ON AN ANALYSIS OF THE FACTS, CONTRACT DOCUMENTS, AND CIRCUMSTANCES.

STATEMENT OF THE CASE

This is a consumer case in which Appellant dealer seeks to be awarded attorneys' fees and costs if successful in reversing the lower court's decision.

Appellant has correctly set forth the statement of the case. To the extent that jurisdiction has been omitted and the propriety of using affidavits at the hearing below is not addressed, Respondents address these issues now:

(1) Jurisdiction

Appellant argues that this Court lacks jurisdiction to determine arbitrability. However, our Supreme Court addressed this issue in *Simpson v. MSA of Myrtle Beach, Inc.*[1] As in *Simpson*, Respondents allege that the various sales and financing contracts are unconscionable and thus unenforceable:

> "[I]n this case, the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract between [buyer and seller]. Although the clause specifically stated that arbitration applied to issues involving "the validity and scope of this contract," [Buyer] challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. Under the UAA, the question of this clause's validity was for the court to decide. See S.C. Code Ann. § 15-48-20(a) (2005).
>
> . . . .
>
> Furthermore, because [plaintiff] challenged the validity of

[1] 373 S.C. 14 (Sup. Ct. 2007).

the entire arbitration clause on grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties actually agreed to arbitrate . . . . Accordingly, the Court did not err in ruling on the issue of validity instead of submitting the issue itself to arbitration.[2]

Respondents therefore contend that the Circuit Court had jurisdiction to rule on arbitrability.

(2) Use of affidavits and other case documents at motion hearing

Appellant claims that it was prejudiced by the Court's use of affidavits in arriving at its decisions and Appellant's request for an evidentiary hearing. Use of affidavits as a fact-finding tool is a proper way for a trial court to determine disputed facts in a preliminary dispute.[3] It is within the Court's discretion to do so. Respondents also note the following:

(a) Appellant itself specifically requested on Page 4 of its Motion to Stay that the Court entertain affidavits; (b) Appellant submitted and relied upon several affidavits and a Memorandum in its own favor to Judge Cole (while simultaneously at the same

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[2] *Id.* at 677.

[3] See *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 51-52 (Sup. Ct. 2016) (Kitteredge, J., dissenting) ("In support of its motion to compel arbitration [under the FAA], D.R. Horton submitted affidavits from several executives indicating that D.R. Horton is a Delaware corporation with its principal place of business in Texas. These affidavits further establish D.R. Horton is engaged in the residential construction business."); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 595 (Sup. Ct. (2001)) ("Appellants attempt to establish interstate commerce through several affidavits. Both the United States Supreme Court and this Court have relied on affidavits when determining whether a transaction involves interstate commerce [under the FAA]).

hearing attempting to bar Respondents' updated affidavit); (c) Appellant did not ask the Court for an evidentiary hearing until after the Motion to Stay was finished; and nor did Appellant object to the use of competing affidavits, until it filed Appellant's Initial Brief. There was no abuse of discretion on the Court's part under these facts.

STATEMENT OF THE FACTS

(1) INTRODUCTION TO A YO-YO SALE

This consumer case arises out of an unlawful and deceptive practice known as a Yo-Yo Deal or Yo-Yo Sale. Respondents contend that Appellant was attempting to perpetuate a classic illegal Yo-Yo-Sale by selling the Veloster to them the first night at one price, then attempting to reverse the deal the following morning to get a higher price.

Our Supreme Court has addressed this deceptive practice, as have the Federal Trade Commission,[4] Bureau of Consumer Affairs, and courts of several other States:

> "Yo-yo sales are unlawful in at least seven states and several other states have issued regulations and administrative interpretations to car dealers on the subject. Such transactions are fundamentally unfair because they give all of the power to the dealer, and none to the customer:
>
> On the one hand, once the customer drives the car off the lot, the consumer is locked into the sale. The dealer does not want the consumer to think about the deal overnight – it wants the deal closed on the spot while the consumer has just undergone hours of sales pressure. On the other hand, the dealer wants to retain its options

[4] *See* Lesley Fair, *Deal or No Deal? FTC Challenges Yo-Yo Financing Tactics* (Sept. 29, 2016) (Federal Trade Comm'n, Bureau of Consumer Protection, news release regarding FTC suit against Sage Auto Group in California for yo-yo tactics).

when the consumer drives off the lot with the car. It does not want to be rushed into a hasty deal. It wants time for its personnel to review the profit margin, the consumer's credit rating, and the chances of selling the vehicle to someone else. It wants time to reflect on whether it can squeeze more out of the consumer or whether it is better off selling the vehicle to someone else.

Usually, the dealer will want to hide the one-sided nature of the transaction. It does not want consumers to think that they can get out of a deal just because the dealer can. So the dealer will not disclose that the deal, from the dealer's point of view, is not final."[5]

The courts of Ohio, upon whose decisions South Carolina's appellate courts have looked with favor in auto-fraud cases, also refer to this practice of requiring a customer to return a purchased vehicle and pay more money as "de-horsing," "collateral swap," and "trade-repurchase."[6]

Respondents submit that such improper practices are unconscionable on their face.

(2) <u>Meeting at Appellant's dealership giving rise to this dispute</u>

On or about July 26, 2016, Respondents went to Appellant's

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

[6] *See Smith v. General Motors Corp.*, 168 Ohio App. 3d 336 (Ohio App. 2006) (discussing these terms).

Hyundai Dealership in hopes of purchasing a car. Respondents planned to have a baby and needed a reliable car at an affordable price.

Respondent Donald Simmons is an artist and an assistant art professor at Middle Georgia State University. Respondent Carlee Simmons works in computer marketing there also. Neither is or has been employed in the automobile-sales industry.

On the other hand, all of Appellant's personnel[7] who submitted affidavits are either a manager or salesperson at Appellant's Hyundai dealership or its Benson Cadillac-Nissan, Inc. dealership. Unlike Appellant, there is no evidence that Respondents are familiar with arbitrations, contract interpretation, federal or state consumer law, the Federal Rules of Civil Procedure, or finance law.

Before driving to Benson, Respondents had done internet research to find a Hyundai Veloster at a good price. Appellant's salesman Robert Winecoff had called Respondent Donald Simmons and promised over the phone to match the price Respondents had gotten elsewhere for a Veloster.

Respondents met Winecoff at the dealership, and a credit check was done in Nathan Burden's office with Darryl Turner present. Mrs. Simmons' 833 score was exceptional (anything from 750 and above is considered "excellent" in the credit industry; between 700 and 749

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[7] Daryl Turner (Rec 278) (Salesman); Brian Perry (Rec 280) (Finance and Insurance Manager); Nate Burden (Rec 279) (New Car Sales Manager).

is considered "good") and higher than Mr. Simmons' score. Mr. Simmons had a prior bankruptcy, which was disclosed to the Dealership. Even so, his credit would be designated as "good."

Respondents then were taken into the office of Brian Perry, Finance and Insurance Manager, late that night who according to Respondents presented numerous contracts in a hurried fashion without giving Respondents time to read them closely. During contract negotiations, Benson's manager Nate Burden pressured them to sign, saying a substantial rebate would be available that night only[8]. The Retail Buyer's Order drafted by Appellant and presented to Respondents at the Dealership the night of the sale reflected the agreed-upon Manufacturer's Suggested Retail Price of $19,600. After discounts, a Saab trade-in, and other credits and deductions, only $10,043 remained to be financed.

Respondents could understand the dollar figures in the documents, but not being lawyers, Respondents did not understand many of the material legal aspects. For example, they were unaware what was meant by the Federal Rules of Civil Procedure, the AAA Consumer Arbitration Rules, the arbitration clause in the sales/financing document's documents, Benson's Rules, how arbitration worked, and what rights they were waiving.[9]

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[8] Rec 271 at Para B (Affidavit of Donald Simmons).

[9] Appellant argues that a person is not guaranteed a particular set of arbitration rules. This misunderstands the law of waiver. There must be a knowing and voluntary relinquishment of a known right, in this case, inter alia, the right to a jury. A person might not, for the sale of Appellant's argument, be entitled to a particular set of rules. However, in deciding to arbitrate or

As noted, a substantial down payment was made by the Simmonses: in addition to a trade-in of Mr. Simmons' Saab, Benson debited $1,000 directly from Respondents' bank account. Also a personal check for $2,800 was written to Benson. Those funds and the Saab were still in Benson's possession until recently. The Saab, debited down payment, and $2,800 are still in Appellant's possession.

Future payments via a bank check were made to Hyundai Motor Finance in care of Appellant. This they made every month, their first payment being August, 2017. Recently, Benson refused to accept further bank drafts and sent some of them back (approximately 12 months of the payments have not been returned).

The next morning, in classic yo-yo sale fashion, Respondents were contacted by the Dealership, told to tear up the contracts, and informed that the contracts (drafted by dealership managers experienced in financing auto sales) were invalid. On a later call, the manager became irate, began cursing at Mr. Simmons, called an "a**hole" and used words like "f**king" in an effort to pressure him. A repo man was later dispatched who confronted Mrs. Simmons

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not to arbitrate, a consumer is entitled to know *the specifics of the proposed rules* so that she may make an intelligent decision on waiver.

Respondents would argue that it is impossible as a matter of law for consumers to knowingly waive their rights without reasonable prior access to copies of the rules and incorporated rules by which he or she will be bound. In this day of caveat venditor, a seller is responsible for problems that consumers might encounter with a product. There is simply no evidence that copies of even half of this mass of contradictory rules were ever presented to Respondents.

while she was alone in her office at work.[10]

This litigation ensued.

ARGUMENT

I. SELF-CONTRADICTORY RULES

THE CIRCUIT COURT WAS WITHIN ITS DISCRETION IN REFUSING TO RE-WRITE THE FOUR COMPLETELY DIFFERENT SETS OF ARBITRATION RULES BECAUSE THEY WERE SELF-CONTRADICTORY TO A POINT OF BEING USELESS, TOO COMPLEX FOR LAY CONSUMERS TO UNDERSTAND (WITH OR WITHOUT) LEGAL ADVICE, AND INCLUDE RULES NOT AVAILABLE TO (OR DISCLOSED TO) CONSUMERS AT THE DEALERSHIP. THUS, THERE WAS NO MEETING OF THE MINDS ON THE ARBITRATION PROVISION OR THE UNDERLYING CONTRACT ITSELF.

Appellant was not required to use multiple preprinted, boilerplate contracts in its dealings with arbitration transactions with consumers. However, Appellant chose to do so to suit its business ends and thus took a risk that, if not drafted in harmony with one another, the contractual provisions would negate, confuse, and void each other to the point that the contracts became incomprehensible. The contracts at issue in this case are textbook examples of how multiple boilerplate contracts can become so uncomprehensible that they are useless, unless a court writes new agreements for the parties.

A. THE ARBITRATION RULES

The four[11] sets of arbitration documents are as follows:

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[10] Rec 270 (Affidavit of Donald Simmons).

[11] That the documents are drafted by different authors and companies is clear. As an initial matter, even the forms used for Appellant's Retail Buyer's Orders are different from each another. One Retail Buyer's Order lists the seller as "Benson Cadillac-Nissan, Inc." A second Retail Buyer's Order lists "Benson Hyundai" as the seller. The forms are somewhat different in their layout also. A third document, known in the industry as a "Law

(i) Benson Arbitration Policies and Procedures[12] set of rules (also referred to as "Benson's Rules")

This is a lengthy, free-standing arbitration agreement in tiny font signed on the night of the sale. Benson Arbitration Policies and Procedures contradict the other arbitration procedures and rules, as will be shown below.

(ii) Sales/Financing/Arbitration Provisions[13]

This document, sometimes called a Law Contract, is a combination sale-and-financing document signed on the night of the sale, which includes the Truth in Lending Act disclosures. On the last page is a detailed Arbitration Provision, different from Benson Arbitration Policies and Procedures and setting forth a completely different arbitration procedure.

(iii) American Arbitration Association Consumer Arbitration Rules[14]

The AAA Consumer Arbitration Rules are incorporated by reference into the arbitration rules by the Sales/Financing/ Arbitration Provision. The AAA Consumer Arbitration Rules are not attached to the Appellant's Sales/Financing Arbitration Provisions

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Contract"; "financing agreement"; or "sales/financing agreement" is a preprinted financing and arbitration form from the Reynolds and Reynolds Company designated as FORM NO. 553-SC-ARB; arbitration rules are set forth on its back page.

Another form entitled BENSON ARBITRATION POLICIES AND PROCEDURES uses different fonts and layouts from the other documents and italics for headings.

[12] Rec 219-20 (Benson Arbitration Policies and Procedures).

[13] Rec 224 (Sales/Financing/Arbitration Provision).

[14] Rec 225-68 (AAA Consumer Arbitration Rules)

and apparently no hint is given to consumers where to find them.

(iv) Federal Rules of Civil Procedure

The entire Federal Rules of Civil Procedure are expressly incorporated into Benson's Arbitration Policies and Procedures. Although arbitration is supposed to be a quick and cost-effective means to resolve disputes with consumers, it is hard to see how any consumer could navigate the Federal Rules of Civil Procedure without spending some time in law school.

(B) Material contradictions between the arbitration rules.

Important contradictions are found in the various rules used by Benson. A few examples are as follows:

(i) Which disputes and parties are subject to arbitration?

All four arbitration provisions cover the parties and disputes subject to arbitration.

Using identical language, both Benson's Rules and the Sales/Financing Provisions specify the parties and disputes that shall be controlled by the arbitration agreements.

The Sales/Financing Arbitration Provisions gives itself broad, exclusive jurisdiction over the subject matter of the arbitration:

> "Any claim or dispute whether in contract, tort, statute, or otherwise [including arbitrability] between you and us or our employees, agents, successors, agents or assigns which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract, or any resulting transaction or relationship, (including any such relationship with third parties who do not sign this agreement) shall, at your or our election be resolved by neutral, binding arbitration and not a court action."

Despite similar board language of the Sales/Financing

Arbitration Provisions and the AAA rules, Benson's Rules[15] also provide exclusive jurisdiction over those same disputes and parties essentially uses identical language to the provisions in Benson's Sales/Financing Arbitration Provisions:[16]

> "Any claim or dispute whether in contract, tort, statute, or otherwise [including arbitrability] between [you] and [us] or our employees, agents, successors, agents or assigns which arises out of your credit application, purchase, or condition of this vehicle, this contract, or any resulting transaction or relationship, (including such relationship with third parties who do not read this agreement), shall at your or our election be subject to neutral binding arbitration and not by a court."[17]

Both arbitration clauses state that if part of the arbitration provisions are unenforceable, the remainder of the arbitration provision is enforceable.

(ii) Which rules control how the arbitration will be done?

(1) Benson's Arbitration Policies and Procedures

The various arbitration provisions conflict as to which rules apply. According to the first sentence of Benson's Rules, Benson's Rules apply: "Benson's Policies and Procedures are intended to provide the exclusive means of resolving all disputes, as defined

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[15] Rec 219 (Benson's Rule #2 (emphasis added)).

[16] Rec 219 (Benson's Rule #2 (emphasis added)).

[17] Rec 219 .
Benson's Rules in its Preamble also claim the same thing: "Benson's Policies and Procedures are intended to provide the exclusive means of resolving all Disputes, as defined below, which may arise between an individual and Benson." However, the Sales/Financing Arbitration Provision states that in any conflict between it and the arbitration organization's rules, the Sales/Financing Arbitration Provision controls. Finally, the AAA Consumer Rules provide that the AAA rules control in a conflict.

below, which may arise between an individual and Benson."[18]

(2) Federal Rules of Civil Procedure

However, Paragraph Six of Benson's Rules (emphasis added) adopts the entire Federal Rules of Civil Procedure as providing the rules: "The Federal Rules of Civil Procedure shall govern all arbitration proceedings. All powers, rights, and obligations afforded arbitrators or the parties under the applicable federal or state arbitration code which conflict with any provision in Benson's Arbitration Policies and Procedures are expressly waived to the extent permitted by law."[19]

(3) Sales/Financing Arbitration Provisions

The Sales/Financing Contract (Buyer's Order) Arbitration Provision sets forth numerous rules itself, some of which conflict with Benson's Rules.

(4) AAA Commercial Consumer Arbitration Rules

Also, the Sales/Financing Arbitration Provisions expressly incorporates the AAA Consumer Arbitration Rules which are supposed to control: "You may choose the American Arbitration Association to conduct the arbitration [but] any other organization [must be] subject to our approval. You may get a copy of the rules of an arbitration organization by contacting the organization or visiting its website."[20]

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[18] Rec 219 (Benson's Policies and Procedures, first sentence)

[19] Rec 219 (Benson's Policies and Procedures, first sentence)

[20] (Rec 230) AAA Consumer Arbitration Rule Introduction.

According to AAA Consumer Rule 1(a) (emphasis added), when parties have "provided for AAA's rules or AAA administration as part of their consumer agreement, they shall have been deemed to have agreed that the application of the AAA's rules [which] shall be an essential term of their consumer agreement." This, of course, conflicts with Benson's claim that Benson's Rules and the Federal Rules of Civil Procedure provide the arbitration rules. To make matters more confusing, the AAA has authority to dispense with its own Consumer Arbitration Rules.[21]

(iii) Which "neutral" administers the arbitration and acts as escrow agent?

It goes without saying that the administrator of an arbitration, or an escrow agent should be a neutral person unconnected with either party. However, according to Benson's Rules, Tony Benson himself administers the arbitration. Moreover, any person filing an arbitration against Appellant must pay the money to Tony Benson personally who will refund any unused portion as needed.

There is an obvious conflict in this arrangement and leads to the appearance of impropriety pursuant to the Sales/Financing Arbitration Provision. On the other hand, the AAA administers the arbitration, unless Benson will consent to allow another organization to do so.[22]

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[21] (Rec 233) AAA Consumer Arbitration Rule 1(a).

[22] (Rec 264) The case administrator is defined in the AAA Rules Glossary as follows:

Finally, according to AAA Consumer Rule 1(a), when parties have "provided for AAA's . . . administration as part of their consumer agreement (which Appellant has done), they shall have been deemed to have agreed that the application of the AAA's ... administration of the consumer arbitration shall be an essential term of their consumer agreement." Thus, each of the arbitration provisions provides for a different arbitrator, except for the Federal Rules of Civil Procedure, which do not address arbitration.

(iv) How is arbitration initiated?

According to Benson's Rules, notice must be given to the Administrator "Tony Benson" on a form supplied by Tony Benson. AAA Rule R-2(a) has a completely different procedure for initiating arbitration. The FRCP have their own rules on filing and serving an action.

(v) What are the filing fees?

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

The consumer must also submit a Request for Arbitration on a form supplied by Benson. The arbitration is void ("as if it had never been filed") if Benson is not paid the $250 five days after notice.

However, according to the AAA Consumer Rules adopted in the Sales/Financing Arbitration Provision, Benson must pay between

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

$1,700 and $2,200 filing fees, and $1,500 per arbitrator. AAA Consumer Arbitration Rules at Page 33. Payments are billed regularly.

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

According to Benson's Rules, Benson is liable for all of the consumers' costs, fees (other than attorneys' fees), and arbitration-related expenses. Benson's Rule 22(a)-(b),[23] a material benefit for the Respondents. Benson's Rules at 9 FILING OF LAWSUIT. Benson reserves to itself the right to pursue attorney's fees and costs if the case is dismissed to arbitration. However, if the consumer successfully avoids dismissal, Benson does not have to pay attorney's fees. This is a real threat to Respondents as Appellant in this action has asked for attorneys' fees and costs under the contract if this action is decided in the car dealer's favor. The Appellant has employed two attorneys on this dispute since its inception.

However, under the Sales/Financing Arbitration Provision, Benson's liability for such expenses and costs is capped. "We will pay your filing, administrative, service or case management fee and your arbitrator or hearing fee up to $5,000." *Id.* (emphasis added).

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

The Federal Rules of Civil Procedure do not directly address

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

arbitration fees or attorney's fees.

(vii) Pre-arbitration review of Benson's Rules for due process of arbitration clauses not done

Under the AAA Consumer Rules, Benson was required to submit its arbitration "clause" to the AAA for a review 30 days before using it in a contract with the consumer to ensure that the arbitration complies with due process.[24] (Respondents argue that this is a breach by Appellant of a contract for the benefit of Respondents, who are third-party beneficiaries.) AAA may decline to arbitrate if this preview of Benson's Rules is not complied with. A search of the AAA Consumer Clause Registry indicates Appellant has not registered its arbitration clause for due-process compliance.[25] The point, however, is whether there was a meeting of the minds: Respondents assert that the conflicting positions show no meeting of the minds transpired.

Benson's Rules do not require any similar gate-keeping procedure, nor does the Sales/Financing Arbitration Provision.

The Federal Rules of Civil Procedure do not address this matter.

(viii) Frivolous claims

The Respondents may be required to repay Benson for "frivolous" claims according to the Sales/Financing Arbitration

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[24] (Rec 240-41) AAA Consumer Rule 12.

[25] https://www.adr.org/simplefileandpay/faces/oracle/webcenter/portalapp/pages/clauseRegistry.jspx?_adf.ctrl-state=o1g71ro7z_13&_afrLoop=212958622968330&_afrWindowMode=0&_afrWindowId=o1g71ro7z_10#!

Provision or otherwise under applicable law.

Benson's Rule 22(c) requires a party to pay attorneys' fees and costs if the other party takes a position, asserts a defense, or asserts a claim "not substantially justified by the law or the facts."

(ix) Appeals

Arbitration appeals under the various arbitration schemes are handled differently according to various arbitration rules. The Sales/Financing Arbitration Provision states that appeals are governed by the FAA.

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

Also, the Federal Arbitration Act allows appeals directly to a court. 9 U.S.C. Code § 16 (2017).

AAA Consumer Rule 47 does not deal directly with appeals.

The Federal Rules of Civil Procedure do not control appeals which instead are controlled by the Federal Rules of Appellate Procedure.

(x) Discovery

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

For example, under Benson's Rules the arbitrator is given

discretion to order pre-hearing depositions (which are critical to Respondents in this case). However, pre-hearing depositions of third parties are typically not allowed by the FAA. *Comsat Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999) ("[W]e hold today that a federal court may not compel a third party to comply with an arbitrator's subpoena for prehearing discovery, absent a showing of special need or hardship.").[26]

The ability to depose witnesses is material in this case. BlueLink, the customer service arm of Hyundai, dealt extensively with Respondents and may have information of improprieties by Benson Hyundai. Respondents cannot compel BlueLink's employees to submit to a pre-hearing deposition under the FAA nor any of the other arbitration schemes presented by Appellant.

The AAA Consumer Rules provide for no depositions which are critical in this case.

The FRCP set forth a presumptive limit of 10 depositions. Benson's Rules limits parties to five depositions, but this is illusory as the FAA permits no pre-arbitration-hearing depositions. The Rule 30(b)(6) and other witnesses' depositions in this case will likely require more deponents than allowed under these rules.

(xi) How other courts have addressed these issues

If Benson wants to avoid arbitration, Respondents contend that Appellant must draft and present readable, understandable documents

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[26]*Accord Snyder v. Wilson*, Civil Action No. MJG-13-3595 (D. Md. 2014) (Memorandum and Order).

to consumers. This was not done. Benson's arbitration documents are on commercial forms and apparently drafted by different authors with no consultation between them.[27]

The result is a Frankenstein's monster of material contradictions, such that no meeting of the minds occurred to form a contract. Not only do the actual arbitration provisions/clauses on the faces of the Sales/Financing Provisions and Benson's Arbitration Policies and Procedures contradict one another, but they also adopt contradictory extrinsic rules. Other jurisdictions have found similarly:

The Florida Supreme Court in *Basulto v. Hialeah Automotive*, 141 So.3d 1145 (Fla. 2014)(Florida UTPA) addressed a similar scenario of contradictory documents:

> The [Trial] Court concludes as a matter of law that no valid agreement to arbitrate exists in this case. This conclusion is based on the Court's finding of fact that the various jury waiver and arbitration clauses which [the buyers] were required to sign were conflicting in their essential provisions and, taken together, provided for three separate and distinct means of dispute resolution. <u>One of</u>

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[27] *Huffman v. Sticky Fingers*, 2005 WL 5168737 (S.C. Com. Pl.) (Trial Order) ("As the drafter of the contract, [Sticky Fingers] was in the best position to prevent confusion in the contract's construction and should be the party to suffer from its shortcomings. *Williams v. Teran, Inc.*, 266 S.C. 55, 60, 221 S.E.2d 526, 529 (1976) (noting an ambiguity in an agreement must be resolved against its drafter); *Hooters of America v. Phillips*, 173 F.3d. 933, 938 (4th Cir. 1999) ("In determining whether a particular dispute can be compelled to arbitration, a Court conducts an inquiry into whether "a valid agreement to arbitrate exists between the parties.").

> the clauses at issue provided for jury waiver[28] and (presumably) trial in a court of law . Another provision required arbitration by a single arbitrator. Another provision required arbitration by a panel of three arbitrators. In addition the methods for selecting arbitrators were conflicting as well as what law or procedure would govern the arbitration proceeding. Each of the competing dispute resolution provisions at issue contemplates the enforcement of a different remedy whose terms and conditions are irreconcilable with the terms and conditions of each of the other conflicting provisions. This Court accordingly concludes as a matter of law that there was no meeting of the minds with respect to the terms by which the [the dealership] intended the parties to be bound. There is accordingly no valid agreement for this Court to enforce.

Id. (emphasis added).

In *Ragab v. Howard,*[29] the Tenth Circuit was confronted with a similar scenario under the FAA. In *Ragab,* the district judge refused to enforce multiple conflicting arbitration provisions citing contract law identical to that in South Carolina. The district court concluded that "the conflicting details in the multiple arbitration provisions indicate that there was no meeting of the minds with respect to arbitration."

The Tenth Circuit affirmed:

> "[T]he agreements contain conflicting arbitration provisions. Suffice it to say the conflicts involve (1) which rules will govern, (2) how the arbitrator will be selected, (3) the notice required to arbitrate, and (4) who would be entitled to attorneys' fees and on what

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

[29] 841 F.3d 1134 (10th Cir. 2016).

showing."[30]

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

Even if a buyer is educated and reads well, conflicting provisions can prevent him or her from understanding the document's meaning.[31]

Other contract-law concepts apply also. Ambiguities in a contract must be construed against the drafter. [32] In *Barrett v. McDonald Investments, Inc.*[33] the court addressed this issue in the context of an arbitration clause:

> In this retreat from our previously broad presumption in favor of arbitration, we join other courts that have favored interpreting ambiguous arbitration clauses against the drafter.[34] This holding does not affect the presumption favoring arbitrability when such provisions are actually negotiated, or when parties of equal bargaining power are involved. We merely hold that when a party drafts an agreement requiring arbitration, and offers it to individuals on a take-it-or-leave-it basis, the drafter bears the risk if its chosen language is

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[30] *Id.* at 1336.

[31] *See NAACP of Camden Cty. E. v. Foulke Mgmt. Corp.*, 24 A.3d 777, 794 (N.J. Super. Ct. App. Div. 2011) (cited in *Ragab*).

[32] *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). *See also Gove v. Career Sys. Dev. Corp.*, 689 F.3d 1 (1st Cir. 2012)("Because of the obligation under Maine law to construe ambiguities against the drafter of a contract, we conclude that Gove is not required to arbitrate her claims.").

[33] 2005 ME 43 (Sup. Ct.2005).

[34] *See, e.g., Seifert v. U.S. Home Corp.*, 750 So.2d 633, 641 (Fla. 1999) (citations omitted).

found to be ambiguous. Accordingly, although we reach our conclusion on different grounds than did the motion court, we affirm the court's denial of the motion to stay and compel arbitration . . . ."[35]

At best, Appellant's multiple arbitration clauses and related arbitration documents are misleading, even for a lawyer. At worse, they are deceptive,[36] ambiguous, and therefore, misleading and confusing.

This Court may interpret the purported contract documents de novo. Appellant should not be allowed to draft such documents, present them to consumers, and then try to gain an advantage. Causing customers to rely on such contract clauses, is an unfair and deceptive trade practice, regardless of whether it is in an arbitration clause or any other type of contract.[37]

II. ILLUSORY CONTRACTS

THE COURT CORRECTLY FOUND THAT THE CONTRACTS WERE ILLUSORY BECAUSE ALTHOUGH RESPONDENTS APPEARED TO BE BOUND (BUT WERE NOT) BY THE SALE, FINANCE, AND ARBITRATION DOCUMENTS, IN FACT, APPELLANT WAS NOT BOUND, SUCH THAT NO MEETING OF THE MINDS TOOK PLACE BETWEEN RESPONDENTS AND APPELLANT?

Appellant was not bound by the arbitration agreement, sales contract, or financing agreement. There is no mutual clause allowing Carlee Simmons to walk away from the contract if the

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[35] *Barrett*, 2005 ME 43 (Sup. Ct. 2005).

[36] *See Michaels v. Amway Corp.*, 206 Mich. App. 644, 651-52 (Mich. App. 1994)("Because the reservation-of-rights clause is ambiguous and, therefore, arguably misleading and confusing, plaintiffs have a justiciable claim that defendant engaged in an unfair and deceptive commercial practice by causing them to rely on the clause.").

[37] *See id.*

financing terms are unacceptable to her.

Because the documents are illusory, there is no underlying written agreement to enforce.[38] Therefore, only an oral agreement was reached to purchase the vehicle for the price agreed upon, with which Benson failed to comply.

More importantly, if there is no contract for sale, there is no valid arbitration agreement.[39] The contracts signed by Respondents were illusory because although Respondents thought they were bound, the contracts gave the dealership unrestricted discretion[40] to reject the purchase and the financing.[41]

The Special Delivery Agreement, executed with Respondent

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[38] *Wilson v. Willis*, Sup. Ct. Op. No. 27879 at Page 6 (S.C. 2019) (citing *Carr v. Main Carr Dev.*, LLC, 337 S.W.3d 489, 494 (Tex. App. 2011)); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) ("'Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate.'") (cited in *Wilson*, Sup. Ct. Op. No. 27879 at Page 6).

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

[40] As for why dealers prefer one lender over another, it is a common practice in the auto industry that certain lenders permit a kickback to dealers known as a "dealer reserve." When lenders permit dealer reserves, this means that they will allow the dealer to mark up the interest rate, with the additional higher amount going into the dealer's pocket as profit. This is not a legitimate reason to reject a proposed contract.

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

Carlee Simmons' name on it (but signed neither by the Appellant nor Donald Simmons),[42] provides that "Seller will attempt to assign contract on terms satisfactory to Seller.[43] At Paragraph 2, it states that "[i]f seller does not receive approval from a financial source acceptable to Seller, Buyer agrees that upon notice, Buyer shall return the vehicle in good condition and without excess mileage and the sales transaction may be rescinded." [44] Note that there was no material clause allowing Respondents to walk away if the terms were not agreeable to them.

There must first be a written contract between the parties to buy or sell something before there is something to be arbitrated.[45] To decide if there is an agreement, courts resort to time-honored state contract-law principles.

In *Penn v. Ryans Family Steak Houses, Inc.*[46], the Seventh Circuit refused to enforce an arbitration clause in an illusory contract, described as one which "by its terms makes performance entirely optional with the promisor." An illusory contract cannot form the basis for a valid contract, because "a contract is

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[42] (Rec 269) (Special Delivery Agreement).

[43] (Rec 269) Special Delivery Agreement at Paragraph 1 (emphasis added)

[44] (Rec 269) *Id.* at Para 2 (emphasis added).

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

[46] 269 F.3d 753, 759 (7th Cir. 2001) (interpreting Indiana contact law essentially the same as in South Carolina).

unenforceable if it fails to obligate [one party] to do anything."

III. UNCONSCIONABILITY

THE COURT CORRECTLY FOUND THAT APPELLANT'S CONTRACTS WERE UNCONSCIONABLE BASED ON AN ANALYSIS OF THE FACTS, CONTRACT DOCUMENTS, AND CIRCUMSTANCES.

Even if the contract documents were decipherable and not illusory, they were unconscionable. In *Herron v. Century BMW,*[47] the South Carolina Supreme Court opined that "unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them."[48]

Applying the Supreme Court's analysis to the contracts at issue, the Benson contracts were ones of adhesion, and the Respondents had no part in drafting the documents.[49]

However, the fact that a contract is one of adhesion is merely the starting point in the analysis of unconscionability, keeping in mind, however, that our courts approach adhesion contracts between consumers and car dealers with considerable skepticism.[50]

Absence of a meaningful choice

Absence of meaningful choice on the part of one party

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[47] 387 S.C. 525 (2011).

[48] *Id.* at 532.

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

[50] *Id.*

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

(i) Relative disparity in the parties' bargaining power

As in *Herron*, there was "an inherent disparity in bargaining power between the parties, as this was a transaction between a consumer and an established commercial entity."

(ii) The parties' relative sophistication as to finance and contract law or arbitration

In *Simpson v. MSA of Myrtle Beach, Inc.*,[51] the Supreme Court noted that "we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter." Similarly, Respondents were without a lawyer at Benson's dealership, were unaware of the effect that waiving a jury trial would have,[52] and were being pressured to finalize the sale before

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[51] 373 S.C. 14, 27 (2007).

[52] There is substantial case law recognizing the disparity in bargaining power and sophistication between consumers and car dealers. For example, as a remedial statute, the Truth in Lending Act is designed to aid unsophisticated consumers who might be easily misled about the total costs of financing. *In re Wright*, 133 B.R. 704, 707 (Bankr. E.D. Pa. 1991). The Act should be construed liberally to ensure achievement of this goal. *Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257, 262 (3d Cir. 1975). The Truth in Lending Act's enforcement is through a system of "strict liability" favoring consumers. *Thomka v. A.Z. Chevrolet, Inc.*, 619 F.2d 246, 248 (3d Cir.1980). *See also In re Steinbrecher*, 110 B.R. 155, 161 (Bankr. E.D. Pa. 1990).

midnight. Moreover, it is highly unlikely that anyone at the dealership could explain the entirety of the Federal Rules of Civil Procedure to them, much less the four arbitration schemes.

Appellant notes repeatedly that Donald Simmons is a college professor. This is true. He is an artist and an assistant professor of art. He teaches art, not economics, finance-contract interpretation, or anything to do whatsoever with auto sales or finance. Respondents submit that only one of a thousand customers can interpret the contradictory and conflicting contractual documents drafted by Appellant, even if the AAA Rules or the Federal Rules of Civil Procedure were at the dealership to be read.

(iii) The nature of injuries suffered by the Respondents

The Respondents lost the use of the Saab, their money used as a down payment, and the use of the Hyundai. They also made monthly payments to Hyundai through Appellant since the vehicle was driven off the lot.[53]

As noted previously, in the days after Respondents left Appellant's dealership, Appellant's employees began calling and cursing Respondent, called him "a**hole," and used words like "f**king" in an effort to pressure him. A repo man was later sent who confronted Mrs. Simmons while she was alone in her office at work.[54] This Court should send a signal to Appellant that it will

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[53] Recently Benson asked that Respondents stop sending the checks, which has been done.

[54] Appellant argues that it took a loss and agreed to sell at the original lower price. This is incorrect. Benson continued to request more money and harass Respondents.

not condone such improper business practices, whether the customer is rich or poor, well-educated or uneducated.

(iv) Whether the Appellant is a substantial business concern

Benson owns and operates multiple car dealerships and has done so for many years.

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

The Respondents were presented with four different sets of arbitration rules at the dealership that night, which directly contradicted one another, along with several other documents, all of which were presented to them for the first time during the closing process. However, Respondents were never given copies of the AAA Consumer Rules or the Federal Rules of Civil Procedure.

(vi) The conspicuousness of the clause

One of Benson's arbitration provisions was in a freestanding document and in that sense was conspicuous, though its tiny font was difficult to read.[54] The Sales/Financing Arbitration Provisions were on page four (the back of the Sales/Financing Agreement). They were inconspicuous.[55] However, they were given no copies of the AAA Rules to review before signing, nor of the Federal Rules of Civil Procedure. Having not been given copies of the AAA Rules or Federal Rules of Civil Procedure for reading before signing, there could be no knowing and voluntary waiver of known rights, namely

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[54] *See* Rec 219-220 (Benson's Rules).

[55] See Rec 219-220 (Benson's Rules).

the right to try the case before a jury and its importance, or the ability to subpoena out-of-state documents and witnesses. *Spoone v. State*, 379 S.C. 138 (Sup. Ct. 2008) ("However,... a waiver will be held effective only if it is knowing and voluntary.").

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

In *Simpson*, the Supreme Court noted an improper clause allowing the dealer to litigate and dispose of the claim, even while arbitration is pending. Those type clauses are found in Appellant's contracts.[56]

As in *Simpson*, Benson has inserted rules allowing it to repossess the car, try the case in small claims court, litigate a set-off, or seek injunctive relief. Thus, in many cases (Benson's Rule 3, for example), Benson may completely litigate the dispute, obtain a judgment, and re-sell the car before arbitration is completed. Moreover, a magistrate's jurisdiction ends at the border of her county and cannot issue subpoenas out of state, as will likely be needed in this case.

Similarly, under the Sales/Financing Arbitration Provision at its last paragraph, Benson may repo the vehicle, sue, litigate a deficiency judgment, and file an action to recover the vehicle

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[56] The clause in *Simpson* reads as follows: "Nothing in this contract shall require the Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Consumer in connection with the purchase or lease of any vehicle and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration." *Simpson*, 373 S.C. 14 at 31 (Sup. Ct. 2007).

before or simultaneously with arbitration. These are, in reality, dealers' remedies.

(viii) Possibility of a severance of the arbitration clause

Our Supreme Court has held that "severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause . . . . Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties, the District of Columbia Circuit recently cautioned, 'If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.' Similarly, . . . it is not the function of the court to rewrite contracts for parties."[57]

Severance in this case would be unworkable and contrary to public policy. Fairness dictates that the Appellants not be allowed to insert improper provisions in a contract to scare off lawsuits or bind non-signatory third persons, then come to the court to ask for help in enforcing it.[58]

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

[58] *See Simpson*, 373 S.C. 14 (2007) (citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter")).

(ix) Unforeseeable and outrageous acts

The Appellant's actions constituted a Yo-Yo deal and involved false statements, misrepresentations, and unlawful pressure on Respondents. Their wrongful actions were outrageous and not reasonably foreseeable "in the context of normal business dealings."[59] The Respondents submit that the Court should not allow the Appellant to shield its torts behind an arbitration clause and avoid a jury trial on the issues.

> Our opinion in *Aiken* unequivocally provides that although these types of uncivilized acts often arise in the course of performance of contracts containing arbitration clauses, South Carolina courts will not interpret arbitration clauses to apply to such acts which are outrageous and unforeseen.[60]

(x) Oppressive and outrageous acts

Further regarding unconscionability, the one-sided nature of the terms has been discussed above. Tony Benson's appointment of himself as arbitration administrator and escrow agent, the $250 initial filing fee Respondents must pay (but not Appellant), the requirement of a request for arbitration from Respondents on Benson's special form, Benson's requirement that the $250 filing fee be paid only five days after notice or the claim is void, exceptions to the arbitration rules allowing the dealer to proceed with out-of-court remedies, and multiple provisions requiring Respondents to pay attorneys' fees and costs are all examples.

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[59] *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007). *See Parsons et al. v. John Wieland Homes*, 418 S.C. 1 (Sup. Ct. 2016).

[60] *Chassereau*, 373 S.C. 168.

Moreover, Respondents will be unable to litigate their claims effectively because they cannot notice Rule 30(b)(6) depositions or subpoena out-of-state witnesses, such as those at Bluelink.

As noted above, Benson's Rules at 9 FILING OF LAWSUIT reserves to itself the right to pursue attorney's fees and costs if the case is dismissed to arbitration. However, if the consumer successfully avoids dismissal, Benson does not have to pay attorney's fees under this contract provision. This is a real threat to Respondents as Appellant has asked in this action for attorneys' fees and costs under the contract, if this action is decided in the Appellant's favor. The Appellant has employed two attorneys on this dispute since its inception.

(xi) Contract provisions against public policy

The South Carolina courts have expressly pointed out that they will not tolerate contracts that violate public policy.

The South Carolina Supreme Court has dealt with violations of public policy by refusing to enforce consumer contracts such as the Magnuson-Moss Warranty Act. That Act bars arbitration. 15 U.S.C. §§ 2301-12. "[Our courts] will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution."[61] In *Simpson*, the Supreme Court held that "[t]he fact that Simpson did not ever bring a claim under the MMWA is irrelevant to our conclusion that the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of

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[61] *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 33 (Sup. Ct. 2007).

public policy. Accordingly, we hold that this provision of the arbitration clause is an unconscionable and unenforceable violation."

Respondents also contend that the contradictory and one-sided provisions violate public policy in this consumer case.

IV. CONCLUSION

For the reasons given above, Respondents ask that this Court deny Appellant's appeal and affirm the lower court on any ground in the record, and thus permit this case to continue before a jury.

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Charleston, South Carolina

Dated: July 8, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

Case No. 2017-CP-42-02072

Donald and Carlee Simmons, Respondents

v.

Benson Hyundai, LLC, Appellant.

CERTIFICATE OF COUNSEL

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

July 9, 2019

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