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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable J. C. Nicholson, Jr. Circuit Court Judge

Civil Action No. 2017-CP-10-02148
Court of Appeals Case No. 2018-000171
Supreme Court Case No. 2021-000137

Cleo Sanders.....Respondent

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer USA Holdings, Inc., Isiah S. White, Danny Anderson and Patrick Bachrodt, Jr. ..... Defendants

Of whom, Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White are the.....Petitioners/Appellants

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION BY COUNSEL

Counsel for Petitioners certifies that the Court of Appeals ruled on Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* on January 21, 2021. (*See* Appendix ["App."] pp. 343-46). By Order dated February 11, 2021, this Court granted Petitioners' request for an extension to serve and file their Petition for Writ of Certiorari and Appendix until March 15, 2021. (*See* App. p. 347).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err and diverge from United States Supreme Court precedent that dictates the lens through which Sanders' arbitration challenge must be viewed?

2. Did the Court of Appeals err and diverge from this Court's precedent by failing to consider the language of the parties' delegation clause that broadly reserves for the arbitrator questions like the effect of an assignment on arbitrability?

3. Did the Court of Appeals err and depart from South Carolina law when it failed to enforce its exclusive jurisdiction over this dispute and find the Circuit Court was without jurisdiction to issue the discovery order?

STATEMENT OF THE CASE AND FACTS

This Petition arises out of Respondent Cleo Sanders' ("Sanders") financed purchase of a vehicle from Petitioners/Appellants Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram ("Hendrick") and Isiah S. White (collectively hereinafter "Petitioners"), which was effectuated by both parties signing a Retail Installment Sale Contract ("RISC") containing a conspicuous arbitration provision. (App. pp. 167; 232-37; 260-63 [R. pp. 42; 107-12; 135-38]). Sanders initiated this action on May 1, 2017 by filing a Summons and Complaint in the Court of Common Pleas against multiple defendants, including Petitioners. (App. pp. 161-78 [R. pp. 36-55]). Sanders alleged he was advised about some of the RISC provisions but signed the contract without reading it in its entirety. (App. p.

169 [R. p. 44]). Sanders also alleged Hendrick misrepresented Sanders' income to defendant Santander Consumer USA Holdings, Inc. ("Defendant Santander"), which Santander relied on in agreeing to purchase the contract from Hendrick. (App. pp. 169-70 [R. pp. 44-45]). Sanders alleged that as a result of the defendants' fraud and negligence, he had a monthly payment that he could not afford and that the car was repossessed by Defendant Santander on January 30, 2017. (App. p. 170 [R. p. 45]).

The RISC that Sanders executed in conjunction with his financed vehicle purchase contains a prominently-displayed arbitration provision, including all capitalized letters and bold-face type as to various provisions. (App. pp. 232-37; 260-63 [R. pp. 107-12; 135-38]). As set forth in the arbitration provision, Sanders agreed to arbitrate each of the claims asserted in this action, utilizing the AAA or other agreed-upon suitable arbitration administration organization. (App. pp. 237; 263 [R. pp. 112; 138]). The arbitration provision requires application of the Federal Arbitration Act (the "FAA") and specifically states, in pertinent part, the following:

ARBITRATION CLAUSE

PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS

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 CLASS MEMBER ON ANY CLASS 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 IN 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 Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors 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 contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. Arbitration shall be conducted by the American Arbitration Association, 1633 Broadway, 10th Floor, New York, New York, 10019 (www.adr.org), or any other organization that you choose subject to our approval. You may get a copy of the rules of these organizations by contracting the arbitration organization or visiting its website.

(App. pp. 237; 263 [R. pp. 112; 138]).

On July 12, 2017, Petitioners filed an Answer, asserting arbitration as one of its numerous defenses. (App. pp. 179-90 [R. pp. 54-65]). Thereafter on September 7, 2017, Petitioners filed a Motion to Stay and/or Dismiss and Compel Arbitration with memorandum and exhibits. (App. pp. 215-39 [R. pp. 90-114]). On October 11, 2017, Sanders filed a Motion to Compel Discovery asking the Court to order Petitioners to respond to discovery despite the pendency of their motion to compel arbitration. (App. pp. 275-302 [R. pp. 150-175]).

The Circuit Court heard the pending Motion to Compel Arbitration on November 16, 2017 (App. pp. 128-49 [R. pp. 3-24]), and denied it on January 10, 2018 (App. pp. 209-211 [R. pp. 84-86])(the "Arbitration Order"). In denying Petitioners' request to arbitrate, the Circuit Court found the "right to compel arbitration was extinguished when [the RISC] was assigned to [Defendant] Santander." (App. p. 211 [R. p. 86]). Although Defendant Santander had also moved to compel arbitration, Sanders orally moved to voluntarily dismiss Defendant Santander from the case (without prejudice) during a hearing on January 9, 2018, before the Court could rule on Defendant Santander's request to arbitrate. (App. pp. 156-59 [R. pp. 31-34]). The Circuit Court

granted Sanders' motion to dismiss Defendant Santander by order filed January 18, 2018. (App. p. 209 [R. p. 79]).

The Circuit Court also heard Sanders' Motion to Compel Discovery from Petitioners during the January 9, 2018 hearing. (App. pp. 152-56 [R. pp. 27-31]). Petitioners argued they could not engage in discovery because to do so potentially would waive the right to arbitration. (App. p. 154:3-155:7 [R. p. 29:3-30:7]).

On February 6, 2018, Petitioners timely filed a Notice of Appeal of the January 10, 2018 Arbitration Order. (App. pp. 303-10 [R. pp. 176-83]). While that appeal was pending, the Circuit Court filed an order on February 20, 2018, ruling on Sanders' Motion to Compel Discovery and ordering Petitioners to respond to discovery requests. (App. pp. 213-14 [R. pp. 88-89])(the "Discovery Order"). In the Discovery Order, the Circuit Court singled out Hendrick, finding it must respond to discovery because the Court denied its motion to compel arbitration but would "waive its position regarding arbitration by responding to said discovery." (App. pp. 213-14 [R. p. 88-89]). Petitioners then filed a second Notice of Appeal on March 21, 2018, appealing the Discovery Order. (App. pp. 311-17 [R. pp. 184-90]). The matters were joined into this consolidated appeal by Court Administration.

On October 21, 2020, the Court of Appeals issued an Opinion without oral argument and affirmed the judgment of the Circuit Court. *See* Op. No. 5779 (S.C. Ct. App. filed October 21, 2020). (App. pp. 321-25). Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on November 19, 2020 (App. pp. 326-342), which was denied on January 21, 2021 (App. pp. 343-46). After requesting and receiving a 20-day extension of time to file this Petition (App. p. 347), Petitioners now seek a writ of certiorari to review that decision.

ARGUMENT

Pursuant to Rule 242, SCACR, Petitioners respectfully petition this Court to issue a writ of certiorari to review and reverse the Court of Appeals' Opinion No. 5779 of October 21, 2020. The Court of Appeals erroneously affirmed the Circuit Court's (1) Arbitration Order denying Petitioners' motion to stay and compel arbitration and (2) Discovery Order compelling discovery and finding Petitioners would waive their right to arbitration by complying with the Discovery Order. (App. pp. 321-25).

Certiorari is warranted pursuant to Rule 242(b)(1), (3), and (5), SCACR, to review and reverse the Court of Appeals' Opinion regarding arbitration and the effect of contractual assignment on the contract's unchallenged arbitration provision with a delegation clause. Specifically, the Opinion: (1) conflicts with United States Supreme Court precedent dictating the lens through which arbitration challenges must be analyzed; and (2) conflicts with this Court's precedent by failing to consider the language of the parties' delegation clause that broadly reserves for the arbitrator questions like the effect of an assignment on arbitrability. By diverging from precedent established by the United States Supreme Court and this Court, the Court of Appeals' ruling creates a novel, bright-line rule that courts must find assignment of a contract containing an arbitration provision always extinguishes the assignor's right to enforce the arbitration provision, even if the arbitration provision reserves that question for determination by the arbitrator. Appeal from the denial of a motion to compel arbitration is subject to de novo review. *Simpson v. World Fin. Corp. of S.C.*, 367 S.C. 184, 187, 623 S.E.2d 877, 879 (Ct. App. 2005), *aff'd*, 373 S.C. 178, 644 S.E.2d 723 (2007). Moreover, the question of arbitrability of a claim is an issue for judicial determination, *unless the parties provide otherwise*. *Zabinski v.*

Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). That determination also is subject to de novo review. *Gissel v. Hart*, 382 S.C. 235, 676 S.E.2d 320, 323 (2009).

Certiorari further is warranted pursuant to Rule 242(b)(3), SCACR, to review and reverse the Court of Appeals' Opinion affirming the Circuit Court's order compelling discovery and finding Petitioners would waive their right to arbitration by complying therewith, because the Opinion erred and departed from South Carolina law when it failed to enforce its exclusive jurisdiction over this dispute and find the Circuit Court lacked jurisdiction to issue the Discovery Order. A lower court's discovery rulings must be reversed if there has been "a clear abuse of discretion," which "occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016).

I. The Court of Appeals Erred and Diverged From United States Supreme Court Precedent That Dictates The Lens Through Which Sanders' Arbitration Challenge Must Be Viewed.

The Court of Appeals broke with United States Supreme Court precedent by failing to apply the appropriate lens through which all challenges to arbitration provisions governed by the FAA must be viewed. Under the FAA, courts must enforce arbitration agreements and must stay "any suit or proceeding" pending arbitration of "any issue referable to arbitration under an agreement in writing for such arbitration." 9 U.S.C. §§ 2 and 3.[1]

[1] The FAA's substantive provisions are to be enforced in state courts as well as in federal courts. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (resolving conflict between state law and the FAA by enforcing the arbitration clause and holding that the state law violated the Supremacy Clause); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 271-72 (1995). According to the Supreme Court:

> Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of

When a party challenges enforcement of an arbitration provision governed by the FAA – as Sanders has here[2] – the court must adjudicate such a challenge through the lens dictated by *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) and its progeny (the *Prima Paint* doctrine). This Court has adopted and broadly applies the *Prima Paint* doctrine. *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993)("We join the jurisdictions which have rejected limiting the holding in *Prima Paint*. We hold a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. . . . The arbitration clause is separable from the contract.").

The *Prima Paint* lens is an analytical sequence, as recently outlined by the Court of Appeals in *Doe v. TCSC, LLC*, 430 S.C. 602, 607-08, 846 S.E.2d 874, 876-77 (Ct. App. 2020): *First* the court must separate the arbitration provision from the rest of the contract, and *then* the court must determine if the challenge is to the arbitration provision itself. *See Doe*, 430 S.C. at 607-08, 846 S.E.2d at 876-77 (holding "the first task of a court is to separate the arbitration provision from the rest of the contract," and noting that "[t]his may seem odd, but it is the law, known as the *Prima Paint* doctrine.").[3] If – as here – the challenge concerns not the arbitration

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> federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Act.

Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983).

[2] South Carolina courts have held that "[u]nless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538 (2001). There is no dispute the arbitration provision at issue in this case invoked the FAA (App. p. 323 [Op. p. 3]) and involved interstate commerce (App. p. 323 n.1 [Op. p. 3 n.1]).

[3] *Doe* was decided after briefing was complete in the Court of Appeals and cited by Petitioners in their Petition for Rehearing and Suggestion for Rehearing *En Banc.* (App. p. 331 [Pet. Rehrg.

provision directly but rather "the contract as a whole . . . on a ground that directly affects the entire agreement," it is not "relevant to a court's determination whether the arbitration agreement at issue is enforceable," and is left for the arbitrator to decide. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70-72, 130 S. Ct. 2772, 2778-79, 177 L. Ed. 2d 403 (2010) (ultimately concluding that because the respondent challenged the validity of the contract as a whole, not the specific delegation provision, the decision of whether the entire agreement was unconscionable was for the arbitrator, not the court to decide). Justice Kittredge's dissenting opinion in *Smith v. D.R. Horton, Inc*., 417 S.C. 42, 52–53, 790 S.E.2d 1, 6 (2016), outlines well this required process:

> The United States Supreme Court has determined that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). Indeed, absent a "discreet challenge to the validity of the arbitration clause," federal law establishes that challenges to the validity of contractual provisions "are within the arbitrator's ken." *Preston*, 552 U.S. at 353–54, 128 S.Ct. 978.
>
> "[W]hen parties commit to arbitrate contractual disputes, it is a mainstay of the [FAA]'s substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved by the arbitrator in the first instance ...." *Nitro–Lift Techs., LLC v. Howard,* —— U.S. —— –, 133 S.Ct. 500, 503, 184 L.Ed.2d 328 (2012) (internal quotation marks omitted) (citing *Preston*, 552 U.S. at 349, 128 S.Ct. 978; *Prima Paint*, 388 U.S. at 403–04, 87 S.Ct. 1801). The permissible scope of the initial judicial inquiry is "highly circumscribed" and must relate "specifically to the arbitration clause." *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). If the arbitration provision is found to be valid (or is not challenged), then the validity of the remainder of the contract is for the arbitrator to decide. *Nitro–Lift*, 133 S.Ct. at 503. Moreover, "this arbitration law applies in state as well as federal courts." *Buckeye*, 546 U.S. at 446, 126 S.Ct. 1204. Simply put, courts—state or federal—may decide only the question of whether the parties validly agreed to arbitrate the dispute that has arisen; controversies as to the enforceability of any other

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p.6]). Notably, in *Doe,* "the arbitration provision is the entire contract," 430 S.C. at 608, 846 S.E2d at 877, enabling the Court of Appeals to consider whether the contract constituted a valid agreement to arbitrate consistent with arbitration principles of South Carolina and the federal courts.

> contractual provision(s)—including those which may be so objectionable as to undermine the contract in its entirety—are to be resolved by the arbitrator.

417 S.C. at 52–53, 790 S.E.2d at 6.

The Court of Appeals' Opinion, which acknowledges the Circuit Court's finding "the RISC was governed by the Federal Arbitration Act," (App. p. 323 [Op. p. 3]), fails to even mention – much less apply – the *Prima Paint* doctrine that governs when the FAA is invoked. The Court of Appeals never isolated the arbitration clause nor considered whether Sanders lodged a direct challenge to the arbitration provision. Instead, the Court of Appeals skipped ahead to the question of whether Petitioners can enforce the contract as a whole, finding first "the assignment extinguished [Petitioners/]Appellants' rights under the RSIC," and then extrapolating that Petitioners' arbitration rights were extinguished as well. (App. pp. 323-24 [Op. pp. 3-4]). This failure to heed the analytical sequence required by *Prima Paint* was error.

Had the Court of Appeals focused solely on the arbitration provision as required, it would have been apparent Sanders' challenge was directed to the contract as a whole – not the arbitration provision specifically. Although there was no dispute that a written arbitration agreement existed between the parties, as both Sanders and Hendrick were signatories thereto, (App. 322 [Op. p. 2]), Sanders claimed that as a result of the contract's assignment, Petitioners no longer could enforce any provision thereof (App. 323 [Op. p. 3]).[4] The scope of Sanders' challenge is critical, as he *expressly disavowed* any direct challenge to the arbitration provision itself:

- "Validity [of the arbitration clause] is not the issue" (App. 071 [R. Br. p. 19]);

[4] Although Sanders repeatedly asserted a contract did not exist, whether a contract was *assigned* versus whether a contract *exists* are two very different questions. There is no dispute that a contract containing an arbitration provision was signed by both parties, and Sanders made no arguments beyond assignment regarding the contract's validity or enforcement.

- "Sanders has never asserted that assignment of the contract invalidates the arbitration clause" (App. 071 [R. Br. p. 19] (claiming instead "Sanders' position is that [Petitioners/]Appellants simply cannot enforce the arbitration clause because [Petitioners/]Appellants' rights under the contract have been extinguished");
- "Sanders never argued and Judge Nicholson never ruled that [Petitioners/]Appellants' assignment of its contract rights invalidated the arbitration clause" (App. 073 [R. Br. p. 21]).

It is of no consequence to the *Prima Paint* analysis that Sanders' challenge to the contract on the basis of assignment might also impact the agreement to arbitrate: "[A]s in *Prima Paint* itself, where the alleged fraud that induced the whole contract equally induced the agreement to arbitrate which was part of that contract—we nonetheless require *the basis of challenge to be directed specifically to the agreement to arbitrate* before the court will intervene." *Rent-A-Center,* 561 U.S. at 71, 130 S.Ct. at 2778 (emphasis added).

By circumventing *Prima Paint,* the Court of Appeals created a blanket rule that any assignment of a contract containing an arbitration clause – regardless of the circumstances of the assignment, the language of the arbitration clause, or the details of the lawsuit – extinguishes the assignor's right to compel arbitration. To reach this decision, the Court of Appeals cited *HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc*., 590 F. Supp. 2d 677, 680 (D.N.J. 2008), a case from New Jersey decided prior to *Rent-A-Center* that may no longer be good law and regardless is distinguishable because its arbitration provision lacked a delegation clause. (App. 324 [Op. p. 4] (citing *id.* at 680)). This is not the law of South Carolina. Here, "an arbitration agreement that complies with the FAA and that exists within a contract to purchase or finance a vehicle preempts any state arbitration-specific law that would otherwise invalidate the arbitration

agreement." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 79, 749 S.E.2d 139, 145 (Ct. App. 2013).

The impact of the Court of Appeals' blanket pronouncement reaches across all types of contracts in the heavily-favored arena of arbitration. The Court of Appeals' failure to apply the proper lens when evaluating Sanders' challenge – which Sanders admits was addressed to the contract as a whole and not the arbitration provision specifically – was error and warrants review and reversal by this Court to ensure uniformity of decision in the courts of this State.

II. The Court of Appeals Erred and Diverged From This Court's Precedent By Failing To Consider The Language Of The Parties' Delegation Clause That Broadly Reserves For The Arbitrator Questions Like the Effect of an Assignment On Arbitrability.

Application of the *Prima Paint* doctrine is not the only road that should have led the Court of Appeals to defer to the arbitrator the question of whether Petitioners can enforce the contract post-assignment. The language of the arbitration provision itself should have led the Court of Appeals to that conclusion, as the parties expressly delegated to the arbitrator gateway questions of arbitrability like post-assignment enforceability:

> Any claim or dispute, whether in contract, tort, statute or otherwise (*including the interpretation and scope of this Arbitration Clause, and the arbitrability of this claim or dispute*) between you and us or our employees, agents, successors 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 contract) shall, *at your or our election, be resolved by neutral, binding arbitration and not by a court action*.

(App. pp. 237; 263 [R. pp. 112; 138] (emphasis added)).

The Opinion *never mentions* the language of the arbitration provision or its delegation clause, much less analyzes what issues were delegated to the arbitrator and whether enforceability and assignment issues were included therein. This failure to recognize and honor

the parties' contractual intent runs afoul of this Court's precedent, which reserves "[t]he question of the arbitrability of a claim . . . for judicial determination, ***unless the parties provide otherwise***." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 (emphasis added); *see also Rent-A-Ctr.*, 561 U.S. at 68–69, 130 S. Ct. at 2777 ("Parties can agree to arbitrate gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. . . . [A]rbitration is a matter of contract. An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.").

Curiously, although the Opinion frames the issue on appeal of post-assignment enforceability as a "determination[] of arbitrability" (App. 322-23 [Op. pp. 2-3]; *see also* App. 322 [Op. p. 3]("discussing the right of Petitioners "to have the issue of arbitrability decided by an arbitrator")), the Opinion never acknowledges the arbitration provision's delegation of arbitrability questions to the arbitrator. Instead, the Opinion commandeers that issue from the arbitrator and decides it alone – in direct contravention of the contractual delegation. (Op. p. 4). The Opinion cites *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012) for the applicable standard of review for a determination of arbitrability, but it does so without further analysis of that case. (App. 322-23 [Op. pp. 2-3]).

Pearson is not only instructive on the standard of review; it is factually instructive. *Pearson* also involved the question of whether one party to the litigation had the right to compel arbitration even though the contract containing the arbitration clause did not clearly bestow that right. 400 S.C. at 286, 733 S.E.2d at 599. In *Pearson,* the party compelling arbitration was not a signatory to the contract containing the arbitration clause yet still had the right to compel; here,

the party compelling arbitration is a signatory to the contract but assigned the contract thereafter. 400 S.C. at 286, 733 S.E.2d at 599. *Pearson* supports Petitioners' arguments for two reasons: (1) *Pearson* recognizes that the right to compel arbitration may exist even when a party lacks the general right to enforce the contract (or other provisions of the contract) containing the arbitration provision; and (2) the Court in *Pearson* substantively addressed the question of arbitrability, but it did so in the absence of an arbitration clause like the one at issue here that ***specifically delegates*** any determinations about arbitrability ***to the arbitrator***. *Compare Pearson*, 400 S.C. at 285, 733 S.E.2d at 599 ("Any controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement or the relationship between the parties hereto shall be resolved by binding arbitration") *with* (App. pp. 237; 263 [R. pp. 112; 138] ("Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, ***and the arbitrability of the claim or dispute***) . . . shall . . . be resolved by neutral, binding arbitration and not by a court action. . .)).

The distinction between the arbitration provision at issue in *Pearson* and the one at issue in this case – the existence of a delegation clause – is the Opinion's foundational error when addressing the issue of post-assignment enforceability. The Opinion characterizes the issue as an "arbitrability" determination but proceeds to decide it (like *Pearson*) even though the parties in this case delegated arbitrability determinations to the arbitrator. Because here the "parties have . . . provided otherwise," "[t]he question of the arbitrability of a claim" is not "an issue for judicial determination." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118.

The Court of Appeals erred and diverged from this Court's precedent by failing to recognize that parties to an arbitration agreement have the right to craft terms as they wish (just as parties to any other contract are entitled to do) including terms dictating the forum for

arbitrability determinations. The Opinion demotes arbitration agreements to a sub-contract class, treats the delegation clause as if it does not exist, and effectively creates a carte-blanche prohibition on the contractual reservation of issues for an arbitrator to decide without court intervention (including the effect of a purported assignment on the right to compel arbitration).

Other courts have held that a post-assignment enforcement challenge to arbitration is, in fact, a question of arbitrability, but the Court of Appeals' Opinion overlooked those as well. For example, in *AT&T v. United Computer Systems*, No. 94-56755, No. 95-55015, 1996 U.S. App. LEXIS 28484, at *6-7 (9th Cir. Oct. 30, 1996), the Ninth Circuit Court of Appeals addressed the precise issue, wherein it stated:

> We reject AT&T's contention that the issue of [defendant's] standing to compel arbitration is not subject to arbitration. Paragraph 33 of the licensing agreement provides: "Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration[.]" This expansive language requires AT&T to submit to arbitration any dispute concerning the substantive provisions of the agreement, including a dispute regarding an assignment under Paragraph 13 of the agreement.
>
> AT&T argues that the issue on appeal is about who should decide whether the assignment was valid-- the courts or the arbitrators. However, the actual question here is not *who* decides the assignment issue, but whether the matter of assignment is within the scope of the arbitration agreement. As the Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1990) notes, when the question is whether the arbitration agreement includes a particular *merits-related dispute*, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." 115 S. Ct. at 1924 (quoting *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)). *Here Paragraph 33's broad and expansive language requires AT&T to submit the assignment issue to arbitration and the court did not err in remanding this issue to arbitration.*

Id. (emphasis added); *see also Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 860 F.2d 1420, 1424 (7th Cir. 1988) ("Procedural issues, including the standing of a party to the arbitration, the *res judicata* effect of a prior arbitration award and the timeliness of filing a grievance, are for the arbitrator, so long as the *subject matter* of the dispute is within the

arbitration clause.") (emphasis in original)). Other courts have considered the strong presumption in favor of arbitration when analyzing standing arguments and questions of arbitrability. *See e.g.*, *CVD Equip. Corp. v. Dev. Specialists, Inc.*, No.CV 11062-VCG, 2015 WL 4506052, at *1 (Del. Ch. July 23, 2015)(holding that standing and jurisdictional questions are questions of scope, and that questions of scope, including whether the arbitration provision was drafted broadly enough to include disputes arising from the contract brought not by a signatory to that contract, but by an assignee of that signatory pursuant to an assignment for the benefit of creditors, are questions of substantive arbitrability which were agreed upon to be decided by the arbitrator); *Oakwood Acceptance Corp. v. Hobbs*, 789 So. 2d 847, 851-52 (Ala. 2001); (refusing to decide the plaintiffs' argument that the defendant did not have standing in light of an assignment and holding that courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so and concluding that based on the arbitration clause, whether assignee has standing to enforce the arbitration agreement between plaintiffs and assignor is a question that must be decided by the arbitrator). The arbitration clause here is even broader than the one at issue in *AT&T*, wherein the court found that the assignment issue was one solely for the arbitrator. Yet here, the Court of Appeals never considered the language of the arbitration provision or the delegation clause or whether the contractual language constrained it from considering the impact of assignment. The Court of Appeals never considered or evaluated the language of the arbitration provision in any respect.

As a final note, the Opinion's disregard of the parties' chosen contractual terms permits plaintiffs like Sanders to base theories of liability on the contract containing the arbitration clause ***while at the same time*** denying the defendant-assignor, who also agreed to those contractual terms, from presenting to the arbitrator its position regarding standing to compel arbitration vis a

vis the effect of an assignment. In other words, the Opinion gives plaintiffs permission to use a contract as both a sword and a shield against an assignor, while at the same time tying both hands behind the assignor's back.[5] The Opinion leaves no room for nuance – for analysis of the contractual language chosen, the terms of the assignment, the relationship of the parties to the assignment, potential third-party beneficiary status, or any number of issues which normally would be considered in the context of standing and assignment under a contract. Review and reversal is warranted to correct these errors.

III. The Court of Appeals Erred And Departed From South Carolina Law When It Failed To Enforce Its Exclusive Jurisdiction Over This Dispute And Find The Circuit Court Was Without Jurisdiction to Issue the Discovery Order.

The February 20, 2018 Circuit Court Discovery Order – issued nearly ***two weeks after*** the February 6, 2018 filing of Petitioners' Notice of Appeal – was void because the Circuit Court lacked jurisdiction to issue it. The Court of Appeals erred by failing to assert its exclusive

[5] Under the FAA, "[a] party aggrieved by the alleged failure . . . or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. Courts have held that when a plaintiff sues under a contract but then attempts to avoid the arbitration clause within the contract, an aggrieved party may compel arbitration. *See, e.g.*, *Contec Corp. v. Remote Sol. Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (holding that a signatory to an arbitration agreement "is estopped from avoiding arbitration with a non-signatory when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed"); *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration Int'l., Inc.*, 198 F.3d 88 (2nd Cir. 1999) (court implies that assignor could compel arbitration); *Lachmar v. Trunkline LNG Co.,* 753 F.2d 8 (2d Cir. 1985) (accepts, without deciding, that assignor may participate in arbitration); *Tenneco Resins, Inc. v. Davy Int'l, A.G.,* 770 F.2d 416, 417, 422 (5th Cir. 1985) (same); *Stations W., Ltd. Liab. Co. v. Pinnacle Bank of Or*., No. 06-1419-KI, 2007 U.S. Dist. LEXIS 30666, at *8-9 (D. Or. Apr. 23, 2007) ("Since plaintiff alleges a claim against Pinnacle for breach of contract while at the same time disclaiming the arbitration provision in that very contract, Pinnacle qualifies as "[a] party aggrieved" and may compel arbitration."); *Vainqueur Corp. v. Lamborn & Co.,* 305 F. Supp. 1007 (D.N.Y. 1969) ("When there is a specific written agreement to arbitrate any dispute that may arise out of an agreement, and one of the parties to that agreement fails to comply with its terms, the other party is entitled to an order compelling arbitration even if that party has irrevocably assigned its rights under the agreement.").

appellate jurisdiction and by finding instead "the circuit court did not lack subject matter jurisdiction" to issue a post-appeal order affecting matters on appeal. (App. p. 325 [Op. p. 5]).

Both the South Carolina Appellate Court Rules and interpreting precedent make clear that upon the filing of a Notice of Appeal, all matters affected by that appeal are automatically stayed and the Circuit Court no longer has jurisdiction to adjudicate. *See Jackson v. Speed*, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997) (finding that service of a notice of appeal divests the lower court of jurisdiction over the order appealed, except for matters *not* affected by the appeal). Rule 241(a), SCACR, imposes an automatic stay over matters decided by the order on appeal:

> As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the trial judge, appellate court, or judge or justice thereof. The lower court retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 205, SCACR, expressly grants this Court exclusive jurisdiction over the appeal, leaving the Circuit Court without jurisdiction to determine anything affected by the appeal while the appeal is pending. Under Rule 205 and the last sentence of the above-quoted portion of Rule 241, the lower court may not act or issue orders that impact an issue on appeal. *Arnal v. Fraser*, 371 S.C. 512, 518-19, 641 S.E.2d 419, 422 (2007).

The Opinion erred by neither citing nor enforcing Rules 205 and 241, SCACR, which mandate a finding the Circuit Court was without power to issue the Discovery Order. There can be no question the Discovery Order intruded on the issue on appeal: It made the incredible determination that Hendrick must respond to discovery because the Court denied its motion to compel arbitration and then affirmatively held that Hendrick (and only Hendrick) would "waive its position regarding arbitration by responding to said discovery." (App. pp. 213-14 [R. p. 88-

89]). The Discovery Order did not just inadvertently impact matters on appeal. By ordering compliance and then finding Hendrick would waive the very right it was in the process of appealing if it complied, the Discovery Order ***was expressly entered*** to impact matters over which the Court of Appeals had exclusive jurisdiction. This is the case-in-point why lower courts are divested of jurisdiction to adjudicate any matters that might impact the issues on appeal to the Court of Appeals and this Court. *See Wingate v. Wingate*, 289 S.C. 574, 347 S.E.2d 878 (1986) (because alimony was an issue on appeal from the divorce decree, our supreme court had exclusive jurisdiction over the alimony issue, and the family court was without jurisdiction to change the amount of alimony during the pending appeal).[6]

The Court of Appeals' refusal to enforce its exclusive jurisdiction forced an impossible result in this instance: the initial order compelling Petitioners to respond to discovery (to which Petitioners did not initially respond in order to avoid substantially utilizing the litigation machinery) triggers an alleged waiver of Petitioners' right to compel arbitration even though the adjudication of that right was already before this Court for decision. Lower courts cannot be permitted to issue discovery orders undermining a litigant's right to compel arbitration when that very issue is on appeal, as it forces litigants into a Hobson's Choice of potential waiver however

[6] This case cannot be parsed into compartments: The Circuit Court's January 10, 2018 Arbitration Order encompasses the parties' entire dispute. The Motion to Compel Arbitration impacts the Circuit Court's foundational jurisdiction to adjudicate ***any*** dispute between the parties, and they have agreed to arbitrate all disputes. There can be no question that the February 6, 2018 Notice of Appeal divested the Circuit Court of jurisdiction to make any additional determinations regarding Petitioners in this case, which should be in arbitration and not in the Circuit Court in the first instance. Indeed, the development and exchange information and "discovery" in an arbitration is vastly different from formal discovery in circuit court, and forcing Petitioners to engage in discovery while appealing their right to arbitration would essentially force waiver.

they proceed.[7] For this additional reason, review and reversal is warranted to protect the jurisdiction of appellate courts.

CONCLUSION

For all of the reasons set forth herein, Petitioners respectfully petition this Court to issue a writ of certiorari to review and reverse the Court of Appeals' Opinion No. 5779 of October 21, 2020.

Respectfully submitted,

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[7] And regardless, there was no waiver here under South Carolina law. *Compare Toler's Cove Homeowners Assoc., Inc. v. Trident Constr., Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003) (holding thirteen month period did not demonstrate waiver of the right to seek arbitration when discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions"); *Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) (holding a thirteen month period did not demonstrate waiver when "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.,* 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001) (finding period of less than eight months did not establish waiver where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories") *with Deloitte & Touche, LLP v. Unisys Corp.,* 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half year period where the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" demonstrated waiver of the right to compel arbitration); *Evans v. Accent Manufactured Homes, Inc*., 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (finding nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver); *Liberty Builders v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (finding waiver after two-and-a-half year period when the parties sought assistance from the court on approximately forty occasions).

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