

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Appellate Case No. 2017-000902

Daniel O'Shields And Roger W.
Whitley, A Partnership d/b/a O&W Cars,

Appellants

v.

Columbia Automotive Company,
LLC d/b/a Midlands Honda,

Respondent.

RECORD ON APPEAL

VOLUME IV OF V

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SC Court of Appeals

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¹ Respondent Columbia Automotive Company, LLC was referred to as "PSC Automotive" or "PSC Automotive Group" until April 15, 2016.

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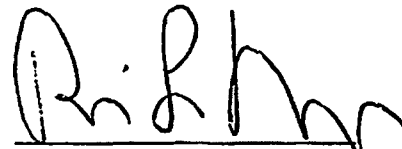
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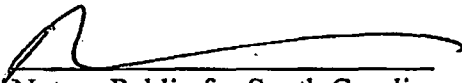
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Notice of Appeal, served 9-05-17	2158
Certificate of Counsel	2160

11. In the opinion of the undersigned, and based upon the activities described in his affidavit, the time so expended by Mr. Moskos was reasonable and appropriate to the circumstances. Also, in the opinion of the undersigned, in light of the nature, extent and difficulty of the legal services rendered, the professional standing of counsel, the contingency of compensation, the fees customarily charged in and around Columbia for similar services, and the results obtained a reasonably hourly rate for counsel's efforts would be no less \$400.00 an hour for time spent in prosecuting the case.

FURTHER AFFIANT SAYETH NOT.


Brian L. Boger

Sworn to before me on the
2 of May, 2016.


Notary Public for South Carolina
My Commission Expires: 7-12-2022



C. STEVEN MOSKOS, P.A.

Attorney and Counselor at Law

C. Steven Moskos
Board Certified Civil Trial Attorney
Board Certified Civil Pretrial Advocate
By the National Board of Trial Advocacy
Board Certified Circuit Court Mediator



4000 Faber Place Drive, Suite 300
North Charleston, SC 29405
Telephone: 843-763-5297
www.moskoslawfirm.com
csmoskos@earthlink.net

EXHIBIT 7

Attorney Time with Costs and Expenses

Daniel O'Shields and Roger W. Whitley a Partnership d/b/a O&W Cars v. Columbia Automotive Company, LLC d/b/a Midlands Honda

<u>Date:</u>	<u>Account Expenses:</u>	
02-03-11	Payment to SCDMV	\$ 26.00
02-03-11	Payment to Alabama Department of Revenue	\$ 15.00
02-03-11	Payment to GA DMV	\$ 8.00
02-03-11	Payment to NC DMV	\$ 11.00
02-14-11	Payment to NC DMV	\$ 11.00
01-14-13	Payment to Richland County Clerk of Court	\$ 150.00
01-22-13	Payment to SC Department of Insurance	\$ 10.00
09-26-13	Certified Mail Receipts (8)	\$ 55.25
11-19-13	Travel to Columbia 132 miles Deposition of Plaintiffs	\$ 72.60
05-07-14	Payment to Florida DMV	\$ 15.00
09-22-14	Richland County/Motions (5)	\$ 125.00
01-28-15	Meals during deposition	\$ 9.85
01-28-15	Travel 142 miles for 30b6 deposition of Defendant	\$ 78.10
02-25-15	Invoice from Creel Reporting (Greg Nalewaja)	\$1,234.30
03-11-15	SC DMV	\$ 6.00
04-02-15	Richland County Sheriff	\$ 30.00
04-10-15	Teri Sampson/Depos of Watkins and Austin	\$ 426.25
04-10-15	Travel 142 miles to Columbia to depose Austin and Watkins	\$ 78.10
04-23-15	Invoice from Every Word (Threat and Ferrell)	\$ 833.55
04-23-15	Travel 142 miles to Columbia to Threatt and Farrell	\$ 78.10
05-22-15	Payment to SW Process Service/Watkins	\$ 60.00
07-01-15	Payment to Fedex	\$ 34.44
07-02-15	Flight for Ecklund Deposition	\$ 386.70
07-02-15	Comfort Inn for Ecklund Deposition	\$ 93.34
07-03-15	Conference Room for Ecklund Deposition	\$ 125.00
07-02-15	Charleston Airport for parking	\$ 16.00
07-02-15	Meals during deposition travel	\$ 41.13
07-27-15	Enterprise/car rental for deposition	\$ 77.59

<u>Date:</u>	<u>Account Expenses:</u>	
07-28-15	Parking for ADESA 30b6 deposition	\$ 20.00
07-28-15	Mileage Round trip to Charlotte for ADESA deposition	\$ 246.95
08-04-15	Travel to Columbia for mediation	\$ 122.10
08-07-15	Certus for videotaped deposition of Joseph Guyer	\$1,247.82
08-07-15	Certus for videotaped deposition of Charles Ecklund	\$ 840.53
08-13-15	McAngus, Goudelock & Courie/ Mediation Invoice	\$ 522.50
04-04-16	Trial check for Brent Ferrell	\$ 31.80
04-04-16	Trial check for Randy Threatt	\$ 31.80
04-07-16	SWS Process for trial subpoena	\$ 85.00
04-07-16	James Ruopoli for service of trial subpoena	\$ 70.00
04-17-16	FedEx Office Printing Costs	\$ 85.47
04-17-16	Media Experts Group, LLC (trial media services)	\$1,153.90
04-17-16	Hampton Hotel during trial travel 04/17/16 - 04/21/16	\$ 474.28
04-17-16	Trial Duration Meal	\$ 17.96
04-18-16	Richland County Jury Roster	\$ 10.00
04-18-16	Meal during trial travel	\$
04-19-16	Meals during trial travel	\$ 18.05
04-20-16	Meals during trial travel	\$ 18.01
04-21-16	Meal during trial travel	\$ 25.45
04-21-16	Baymont Inn during trial travel 04/21/16 - 04/22/16	\$ 71.68
04-(17-22)-16	Travel to and from Richland for trial	\$ 156.20
04-28-16	Post Trial Motion Fee	\$ 25.00
04-29-16	Pack Brothers Collision Center, Inc.	\$ 5,484.82
TOTAL COSTS/EXPENSES.....		<u>\$ 14,866.62</u>

LAW OFFICE OF C STEVEN MOSKOS
ESCROW ACCOUNT
PH: 843-763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WACHOVIA
WACHOVIA BANK, N.A.
wachovia.com
CHARLESTON, SC 29407
67-776/532

5278

2/3/2011

PAY TO THE ORDER OF SCDMV

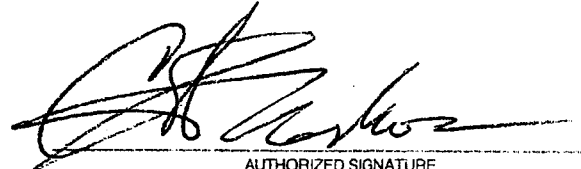
\$ **26.00

Twenty-Six and 00/100*****

SCDMV

DOLLARS

MEMO Roger Whitley Title History



AUTHORIZED SIGNATURE

⑈005278⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C STEVEN MOSKOS/ESCROW ACCOUNT
SCDMV

2/3/2011

5278

Title History - Roger Whitley

26.00

ESCROW ACCOUNT Roger Whitley Title History

26.00

LAW OFFICE OF C STEVEN MOSKOS/ESCROW ACCOUNT
SCDMV

2/3/2011

5278

Title History - Roger Whitley

26.00

ESCROW ACCOUNT Roger Whitley Title History

26.00

**LAW OFFICE OF C STEVEN MOSKOS
ESCROW ACCOUNT**

PH: 843-763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WACHOVIA
WACHOVIA BANK, N.A.
wachovia.com
CHARLESTON, SC 29407
67-776/532

5279

2/3/2011

PAY TO THE ORDER OF Alabama Dept. of Rev. - Motor Vehicle Div

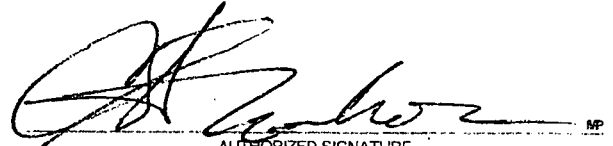
\$ **15.00

Fifteen and 00/100*****

DOLLARS

Alabama Dept. of Rev. - Motor Vehicle Div

MEMO Roger Whitley Title History


AUTHORIZED SIGNATURE

⑈005279⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C STEVEN MOSKOS/ESCROW ACCOUNT

Alabama Dept. of Rev. - Motor Vehicle Div

Title History

2/3/2011

5279

15.00

ESCROW ACCOUNT Roger Whitley Title History

15.00

LAW OFFICE OF C STEVEN MOSKOS/ESCROW ACCOUNT

Alabama Dept. of Rev. - Motor Vehicle Div

Title History

2/3/2011

5279

15.00

ESCROW ACCOUNT Roger Whitley Title History

15.00

**LAW OFFICE OF C STEVEN MOSKOS
ESCROW ACCOUNT**

PH: 843-763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WACHOVIA
WACHOVIA BANK, N.A.
wachovia.com
CHARLESTON, SC 29407
67-776/532

5280

2/3/2011

PAY TO THE
ORDER OF

Georgia Department of Motor Vehicles

**8.00

\$

Eight and 00/100*****

DOLLARS

Georgia Department of Motor Vehicles

MEMO Roger Whitley Title History


AUTHORIZED SIGNATURE

⑈005280⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C STEVEN MOSKOS/ESCROW ACCOUNT
Georgia Department of Motor Vehicles

Title History

2/3/2011

5280

8.00

ESCROW ACCOUNT Roger Whitley Title History

8.00

LAW OFFICE OF C STEVEN MOSKOS/ESCROW ACCOUNT
Georgia Department of Motor Vehicles

Title History

2/3/2011

5280

8.00

ESCROW ACCOUNT Roger Whitley Title History

8.00

**LAW OFFICE OF C STEVEN MOSKOS
ESCROW ACCOUNT**

PH: 843-763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WACHOVIA
WACHOVIA BANK, N.A.
wachovia.com
CHARLESTON, SC 29407
67-776/532

5281

2/3/2011

PAY TO THE ORDER OF North Carolina Division of Motor Vehicles

**11.00

\$

Eleven and 00/100*****

DOLLARS

North Carolina Division of Motor Vehicles

MEMO Roger Whitley


AUTHORIZED SIGNATURE

⑈005281⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C STEVEN MOSKOS/ESCROW ACCOUNT
North Carolina Division of Motor Vehicles

2/3/2011

5281

Title History

11.00

ESCROW ACCOUNT Roger Whitley

11.00

LAW OFFICE OF C STEVEN MOSKOS/ESCROW ACCOUNT
North Carolina Division of Motor Vehicles

2/3/2011

5281

Title History

11.00

ESCROW ACCOUNT Roger Whitley

11.00

STATE OF NORTH CAROLINA REGISTRATION CARD

NC DIVISION OF MOTOR VEHICLES RECEIPT OF FEES PAID

NC LIC NUMBER	PLT VALID THRU	INSPECTION DUE		
VEHICLE ID #				GROSS WT
MAKE/SERIES	TITLE #			EQUIP #
SHIPPING WEIGHT	STYLE	YEAR	FUEL	TOTAL FEE .00
CLASSIFICATION			VEHICLE BRAND	
CUSTOMER ID # OWNER 1 000020180370	CUSTOMER ID # OWNER 2			COUNTY

LAW OFFICE OF C STEVEN MOSKOS
Doc/Misc 10.00

907 02/14/2011 TIM089A

535 STINSON DR
CHARLESTON SC 29407-6289

TOTAL 10.00 CHCK

Please Fold Here

INSURANCE COMPANY AUTHORIZED IN NC

POLICY NUMBER

SIGNATURE

STATE OF NORTH CAROLINA REGISTRATION CARD

NC DIVISION OF MOTOR VEHICLES RECEIPT OF FEES PAID

NC LIC NUMBER	PLT VALID THRU	INSPECTION DUE		
VEHICLE ID #				GROSS WT
MAKE/SERIES	TITLE #			EQUIP #
SHIPPING WEIGHT	STYLE	YEAR	FUEL	TOTAL FEE .00
CLASSIFICATION			VEHICLE BRAND	
CUSTOMER ID # OWNER 1 000020180370	CUSTOMER ID # OWNER 2			COUNTY

LAW OFFICE OF C STEVEN MOSKOS
Doc/Misc 1.00

907 02/14/2011 TIM089A

LAW OFFICE OF C STEVEN MOSKOS

535 STINSON DR
CHARLESTON SC 29407-6289

TOTAL 1.00 CHCK

Please Fold Here

INSURANCE COMPANY AUTHORIZED IN NC

POLICY NUMBER

SIGNATURE

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5512

1/14/2013

PAY TO THE ORDER OF RICHLAND CTY CLERK OF COURT

\$ **150.00

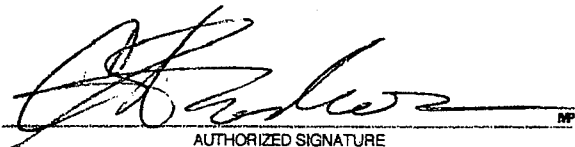
One Hundred Fifty and 00/100***** DOLLARS

RICHLAND CTY CLERK OF COURT

VOID AFTER 90 DAYS.

MEMO

Whitley v Midlands Honda Filing Fee


AUTHORIZED SIGNATURE

⑈005512⑈ ⑈053207766⑈ 2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5512

RICHLAND CTY CLERK OF COURT

Whitley v Midlands Honda Filing Fee

1/14/2013

150.00

ESCROW ACCOUNT Whitley v Midlands Honda Filing Fee

150.00

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5512

RICHLAND CTY CLERK OF COURT

Whitley v Midlands Honda Filing Fee

1/14/2013

150.00

ESCROW ACCOUNT Whitley v Midlands Honda Filing Fee

150.00

LAW OFFICE OF C. STEVEN MOSKOS

ESCROW ACCOUNT

PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5514

1/22/2013

PAY TO THE ORDER OF SC DEPT OF INSURANCE

\$***10.00

Ten and 00/100*****

DOLLARS

SC DEPT OF INSURANCE

VOID AFTER 90 DAYS.

MEMO

Service on Nationwide Mutual Insurance Co


AUTHORIZED SIGNATURE

⑈005514⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5514

SC DEPT OF INSURANCE

1/22/2013

Service on Nationwide Mutual Insurance Co

10.00

ESCROW ACCOUNT Service on Nationwide Mutual Insurance Co

10.00

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

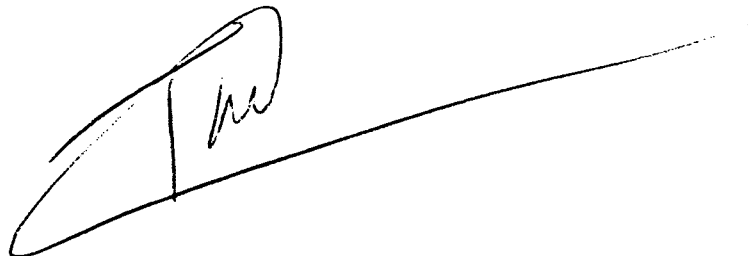
5514

SC DEPT OF INSURANCE

1/22/2013

Service on Nationwide Mutual Insurance Co

10.00



ESCROW ACCOUNT Service on Nationwide Mutual Insurance Co

10.00

7011 1570 0002 7347 9417

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$ 6.11	

Sent To *East Cooper Paint & Body Shop*
 Street, Apt. No., or PO Box No. *429 Broadway St.*
 City, State, ZIP+4[®] *Mr. Pleasant, SC 29464-2599*

PS Form 3800, August 2006 See Reverse for Instructions

7011 1570 0002 7347 9400

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
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OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$ 6.11	

Sent To *Stokes Honda North*
 Street, Apt. No., or PO Box No. *8650 Rivers Ave.*
 City, State, ZIP+4[®] *N. Charleston, SC 29405*

PS Form 3800, August 2006 See Reverse for Instructions

7011 1570 0002 7347 9424

U.S. Postal ServiceTM
CERTIFIED MAILTM RECEIPT
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For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$ 6.11	

Sent To *Honda Cars of Aiken*
 Street, Apt. No., or PO Box No. *550 Jefferson Davis Hwy.*
 City, State, ZIP+4[®] *Warrenville, SC 29851-3161*

PS Form 3800, August 2006 See Reverse for Instructions

7011 1570 0002 7347 9394

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Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$ 6.11	

Sent To *Hoover Chrysler Jeep*
 Street, Apt. No., or PO Box No. *195 Marymeade Dr.*
 City, State, ZIP+4[®] *Savannah, SC 29483*

PS Form 3800, August 2006 See Reverse for Instructions

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For delivery information visit our website at www.usps.com

OFFICIAL USE

Postage	\$	Postmark Here
Certified Fee		
Return Receipt Fee (Endorsement Required)		
Restricted Delivery Fee (Endorsement Required)		
Total Postage & Fees	\$ 6.11	

Sent To *Honda of Columbia*
 Street, Apt. No., or PO Box No. *4333 Sunset Blvd.*
 City, State, ZIP+4[®] *Lexington, SC 29072-9147*

7011 1570 0002 7347 9400

7010 4101 0291 0000 1263 4444

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Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$6.48

Postmark
Here

Sent To	Randy Threath
Street & Apt. No., or PO Box No.	6001 Two Notch Road
City, State, ZIP+4	Columbia, SC 29223

PS Form 3800, July 2014 See Reverse for Instructions

1390

7014 1266 1000 0281 4102

U.S. Postal Service™ CERTIFIED MAIL® RECEIPT Domestic Mail Only	
For delivery information, visit our website at www.usps.com ®.	
OFFICIAL USE	
Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 6.48
Postmark Here Whitley	
Sent To Brent Ferrell	
Street & Apt. No., or PO Box No. auto 1105	
City, State, ZIP+4	
PS Form 3800, July 2014 See Reverse for Instructions	

7011 3500 0000 9422

ce™
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Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$ 11.74

Postmark
Here

Sent To

Randy Threath

Street, Apt. No.;
or PO Box No.

City, State, ZIP+4

1391

C. STEVEN MOSKOS, PA
GENERAL ACCOUNT
4000 FABER PLACE DR., STE. 300
NORTH CHARLESTON, SC 29405

WELLS FARGO BANK, N.A.
www.wellsfargo.com
87-776/532

09629

5/7/2014

PAY TO THE ORDER OF Division of Motorist Services

\$ **15.00

Fifteen and 00/100*****

DOLLARS

Division of Motorist Services
Florida

VOID AFTER 90 DAYS.

MEMO

Title History Whitley


AUTHORIZED SIGNATURE

⑈009629⑈ ⑆053207766⑆2001004347119⑈

C. STEVEN MOSKOS, PA

09629

Division of Motorist Services
2525 - Client Trust Liability

5/7/2014

Title History Whitley for Civic

15.00

Checking-Wachovia Title History Whitley

15.00

C. STEVEN MOSKOS, PA

09629

Division of Motorist Services
2525 - Client Trust Liability

5/7/2014

Title History Whitley for Civic

15.00

Checking-Wachovia Title History Whitley

15.00

C. STEVEN MOSKOS, PA
GENERAL ACCOUNT
535 STINSON DRIVE
CHARLESTON, SC 29407

WACHOVIA BANK, N.A.
A Wells Fargo Bank
www.wachovia.com
67-776/532

9463

10/24/2013

PAY TO THE ORDER OF RICHLAND COUNTY CLERK OF COURT

\$**25.00

Twenty-Five and 00/100*****

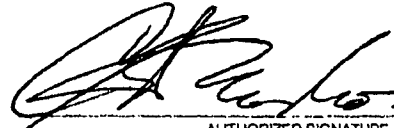
DOLLARS

RICHLAND COUNTY CLERK OF COURT

VOID AFTER 60 DAYS

MEMO

Motion fee - Mediation Extention - Whitley v Midland


AUTHORIZED SIGNATURE

⑈009463⑈ ⑆053207766⑆ 2001004347119⑈

C. STEVEN MOSKOS, PA/GENERAL ACCOUNT

9463

RICHLAND COUNTY CLERK OF COURT

10/24/2013

2525 - Client Trust Liability

Motion fee Re Mediation Extention - Whitley v Midlan

25.00

Checking-Wachovia Motion fee - Mediation Extention - Whitley v Midl

25.00

C. STEVEN MOSKOS, PA/GENERAL ACCOUNT

9463

RICHLAND COUNTY CLERK OF COURT

10/24/2013

2525 - Client Trust Liability

Motion fee Re Mediation Extention - Whitley v Midlan

25.00

Checking-Wachovia Motion fee - Mediation Extention - Whitley v Midl

25.00

C. STEVEN MOSKOS, PA
GENERAL ACCOUNT
535 STINSON DRIVE
CHARLESTON, SC 29407

WACHOVIA BANK, N.A.
A Wells Fargo Bank
www.wachovia.com
87-778/532

9485

11/26/2013

PAY TO THE ORDER OF RICHLAND COUNTY CLERK OF COURT

\$ **25.00

Twenty-Five and 00/100

DOLLARS

RICHLAND COUNTY CLERK OF COURT

VOID AFTER 90 DAYS

MEMO

Motion fee - Protective Order - Whitley v Midlands


AUTHORIZED SIGNATURE

⑈009485⑈ ⑆053207766⑆2001004347119⑈

C. STEVEN MOSKOS, PA/GENERAL ACCOUNT

9485

RICHLAND COUNTY CLERK OF COURT
2525 · Client Trust Liability

11/26/2013

Motion fee - Protective Order - Whitley v Midlands

25.00

Checking-Wachovia Motion fee - Protective Order - Whitley v Midland

25.00

C. STEVEN MOSKOS, PA/GENERAL ACCOUNT

9485

RICHLAND COUNTY CLERK OF COURT
2525 · Client Trust Liability

11/26/2013

Motion fee - Protective Order - Whitley v Midlands

25.00

Checking-Wachovia Motion fee - Protective Order - Whitley v Midland

25.00

C. STEVEN MOSKOS, PA
GENERAL ACCOUNT
4000 FABER PLACE DR., STE. 300
NORTH CHARLESTON, SC 29405

WELLS FARGO BANK, N.A.
www.wellsfargo.com
67-778/532

09587

3/27/2014

PAY TO THE ORDER OF RICHLAND COUNTY CLERK OF COURT

\$**25.00

Twenty-Five and 00/100*****

DOLLARS

RICHLAND COUNTY CLERK OF COURT

VOID AFTER 90 DAYS.

MEMO Motion fee - Motion to Compel- Whitley v Midlands


AUTHORIZED SIGNATURE

⑈009587⑈ ⑆053207766⑆2001004347119⑈

C. STEVEN MOSKOS, PA

09587

RICHLAND COUNTY CLERK OF COURT

3/27/2014

2525 - Client Trust Liability

Motion fee - Motion to Compel r - Whitley v Midlands

25.00

Checking-Wachovia Motion fee - Motion to Compel- Whitley v Midlan

25.00

C. STEVEN MOSKOS, PA

09587

RICHLAND COUNTY CLERK OF COURT

3/27/2014

2525 - Client Trust Liability

Motion fee - Motion to Compel r - Whitley v Midlands

25.00

Checking-Wachovia Motion fee - Motion to Compel- Whitley v Midlan

25.00

C. STEVEN MOSKOS, PA
GENERAL ACCOUNT
4000 FABER PLACE DR., STE. 300
NORTH CHARLESTON, SC 29405

WELLS FARGO BANK, N.A.
www.wellsfargo.com
67-778/532

09733

9/9/2014

PAY TO THE ORDER OF RICHLAND COUNTY CLERK OF COURT

\$ **25.00

Twenty-Five and 00/100*****

DOLLARS

RICHLAND COUNTY CLERK OF COURT

VOID AFTER 90 DAYS.

MEMO

Motion fee - Motion to for continuancel- Whitley v Mi


AUTHORIZED SIGNATURE

⑈009733⑈ ⑆053207766⑆2001004347119⑈

C. STEVEN MOSKOS, PA

09733

RICHLAND COUNTY CLERK OF COURT
2525 · Client Trust Liability

9/9/2014

Motion fee - Motion for Continuance - Whitley v Midla

25.00

Checking-Wachovia Motion fee - Motion to for continuancel- Whitley v

25.00

C. STEVEN MOSKOS, PA

09733

RICHLAND COUNTY CLERK OF COURT
2525 · Client Trust Liability

9/9/2014

Motion fee - Motion for Continuance - Whitley v Midla

25.00

Checking-Wachovia Motion fee - Motion to for continuancel- Whitley v

25.00

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5828

4/29/2016

PAY TO THE ORDER OF RICHLAND CTY CLERK OF COURT

\$ **25.00

Twenty-Five and 00/100*****

DOLLARS

RICHLAND CTY CLERK OF COURT

VOID AFTER 90 DAYS.

MEMO

Whitley v Midlands Honda Post Trial Motions Fee


AUTHORIZED SIGNATURE

⑈005828⑈ ⑆053207766⑆ 2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5828

RICHLAND CTY CLERK OF COURT

4/29/2016

Whitley v Midlands Honda Post Trial Motions Fee

25.00

ESCROW ACCOUNT Whitley v Midlands Honda Post Trial Motions Fe

25.00

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5828

RICHLAND CTY CLERK OF COURT

4/29/2016

Whitley v Midlands Honda Post Trial Motions Fee

25.00

ESCROW ACCOUNT Whitley v Midlands Honda Post Trial Motions Fe

25.00

* Customer Copy *

MIYO'S ON FOREST
3250 Forest Drive, Ste B
Columbia, SC 29206
(803) 743-9996

Date: 01/28/15
Time: 1:23 PM
Server: 114. eric N
Order: 660763
Description: TAB # 15

Card Type: Visa/MC
Card No: XXXXXXXXXXXX6052
Expires: XX/XX
Appr Code: 921351

Purchases: \$ 9.85

Tip: \$ _____

Total: \$ _____
MOSKOS/ C

I agree to pay the above total amount
according to the card issuer agreement.



CREEL COURT REPORTING, INC.
1230 Richland Street
Columbia, SC 29201
(803) 252-3445

2/25/2015

TAX NO. 57-1016805

INVOICE NO. 15-465

C. Steven Moskos, Esquire
C. Steven Moskos, P.A.
4000 Faber Place Drive, Suite 300
North Charleston, SC 29405

the Plaintiffs

RE: Daniel O'Shields and Roger W. Whitley, a
partnership d/b/a O&W Cars vs. PSC Automotive
Group d/b/a Midlands Honda and Nationwide Mutual
Insurance Company
C/A No. 13-CP-40-5319

0.00

ORIGINAL AND ONE COPY - Deposition(s) of:

0.00

Greg Nalewaja

1,004.00

Exhibits (41 pages)

12.30

Color Exhibits (12 pages)

18.00

Appearance Fee (6 hours)

175.00

Postage

25.00

Condensed Transcript/Key Word Index

0.00

We accept:



Total \$1,234.30

Payments/Credits \$0.00

Balance Due \$1,234.30

THANK YOU!

/at

(Please return copy with remittance)

Visit Us On the Web and Book Your Upcoming Depositions Online at www.creelreporting.com

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5722

3/11/2015

PAY TO THE ORDER OF SC Department of Motor Vehicles

\$ **6.00

Six and 00/100*****

DOLLARS

SC Department of Motor Vehicles

VOID AFTER 90 DAYS.

MEMO

Current Address for Nancy Watkins


AUTHORIZED SIGNATURE

⑈005722⑈ ⑆053207766⑆ 2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5722

SC Department of Motor Vehicles

3/11/2015

Current Address for Nancy Watkins

6.00

ESCROW ACCOUNT Current Address for Nancy Watkins

6.00

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5722

SC Department of Motor Vehicles

3/11/2015

Current Address for Nancy Watkins

6.00

ESCROW ACCOUNT Current Address for Nancy Watkins

6.00

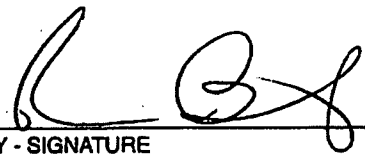
1	4	2	15	2010	506	Steven Mosko	30.00
PAGE NO.	MO.	DAY	YR.			NAME	AMOUNT

RECEIPT FOR CASH – RICHLAND COUNTY SOUTH CAROLINA

2020 HAMPTON STREET
 POST OFFICE BOX 192
 COLUMBIA, SOUTH CAROLINA 29202

492520

RETAIN THIS RECEIPT
 FOR YOUR RECORDS


 RECEIVED BY - SIGNATURE

APRIL 14, 2015

INVOICE NO.: 12593-TS

TO: C. STEVEN MOSKOS, ESQ.
4000 Faber Place Drive
Suite 300
North Charleston, SC 29405

=====

RE: O'SHIELDS VS. PSC
APRIL 10, 2015

ORIGINAL AND ONE COPY - PAPERLESS	
- SCOTT AUSTIN - 76 PAGES	285.00
- NANCY WATKINS - 23 PAGES	86.25
APPEARANCE FEE	55.00
EXHIBITS - 3 PAGES SCANNED	N/C
LITIGATION SUPPORT PACKAGE	N/C

	\$426.25

PLEASE REMIT AND MAKE PAYABLE TO:

TERI L. SAMPSON
P.O. BOX 61011
NORTH CHARLESTON, SC 29419
(843) 442-2753
teri.sampson@gmail.com
FED TAX ID NO.: 132-60-3115

THANK YOU!

- NET 30 DAYS -

FAST DUE

JUL 25 2015

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5768

9/8/2015

PAY TO THE ORDER OF TERI SAMPSON

\$ **426.25

Four Hundred Twenty-Six and 25/100*****

DOLLARS

TERI SAMPSON

VOID AFTER 90 DAYS.

MEMO

Depo fee Whitley v Midlands - Austin, Watkins Inv 12


AUTHORIZED SIGNATURE

⑈005768⑈ ⑆053207766⑆ 2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5768

TERI SAMPSON

9/8/2015

Depo fee Whitley v Midlands - Austin, Watkins Inv 12

426.25

ESCROW ACCOUNT Depo fee Whitley v Midlands - Austin, Watkins In

426.25

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5768

TERI SAMPSON

9/8/2015

Depo fee Whitley v Midlands - Austin, Watkins Inv 12

426.25

ESCROW ACCOUNT Depo fee Whitley v Midlands - Austin, Watkins In

426.25

INVOICE



EveryWord, Inc. Real-time Reporting

C. Steven Moskos, Esquire
C. Steven Moskos, P.A.
4000 Faber Place Drive, Suite 300
North Charleston, SC 29405

Invoice No.	Invoice Date	Job No.
14256	5/6/2015	7842
Job Date	Case No.	
4/23/2015		
Case Name		
Daniel O'Shields et al. vs. PSC Automotovie Group, et al.		
Payment Terms		
Net 15		

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:

Brent Ferrell	117.00 Pages	462.15
Appearance Fee - First 4 hours	1.00	95.00
Waiting Fee	0.80	36.00
Read & Sign (includes Shipping & Handling)	1.00	25.00
UPS	1.00	10.00
Condensed Transcript & Index	1.00	0.00
Index on full size transcript	1.00	0.00
E-Transcript & PDF Emailed	1.00	0.00
Online access to docs at www.EveryWordInc.com	1.00	0.00

ORIGINAL AND 1 CERTIFIED COPY OF TRANSCRIPT OF:

Randy Threatt	52.00 Pages	205.40
Index on full size transcript	1.00	0.00
E-Transcript & PDF Emailed	1.00	0.00
Online access to docs at www.EveryWordInc.com	1.00	0.00

TOTAL DUE >>> **\$833.55**
AFTER 6/5/2015 PAY **\$871.06**

To access your calendar, invoices, transcripts and exhibits go to your online office at www.EveryWordInc.com and click on "client login."

Tax ID: 27-1166742

Please detach bottom portion and return with payment.

C. Steven Moskos, Esquire
C. Steven Moskos, P.A.
4000 Faber Place Drive, Suite 300
North Charleston, SC 29405

Invoice No. : 14256
Invoice Date : 5/6/2015
Total Due : \$ 833.55

Remit To: **EveryWord, Inc.**
P.O. Box 1459
Columbia, SC 29202

Job No. : 7842
BU ID : 1-EWI
Case No. :
Case Name : Daniel O'Shields et al. vs. PSC Automotovie Group, et al.

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5788

11/6/2015

PAY TO THE ORDER OF EveryWord, Inc.

\$ **833.55

Eight Hundred Thirty-Three and 55/100*****

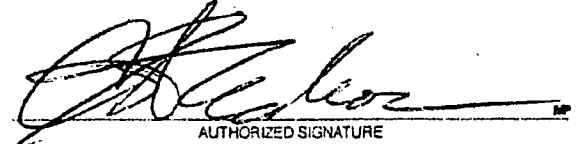
DOLLARS

EveryWord, Inc.

VOID AFTER 90 DAYS.

MEMO

Whitley v Midlands Honda Depo Inv 14256


AUTHORIZED SIGNATURE

⑈005788⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5788

EveryWord, Inc.

11/6/2015

Whitley v Midlands Honda Depo Inv 14256

833.55

ESCROW ACCOUNT Whitley v Midlands Honda Depo Inv 14256

833.55

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5788

EveryWord, Inc.

11/6/2015

Whitley v Midlands Honda Depo Inv 14256

833.55

ESCROW ACCOUNT Whitley v Midlands Honda Depo Inv 14256

833.55

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5737

5/22/2015

PAY TO THE ORDER OF SWSPProcess Service

\$**60.00

Sixty and 00/100

DOLLARS

SWSPProcess Service

VOID AFTER 90 DAYS.

MEMO

O'shields v PSC Automotive - Watkins


AUTHORIZED SIGNATURE

⑈005737⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT
SWSPProcess Service

5737

5/22/2015

Service of Process on Nancy Watkins

60.00

ESCROW ACCOUNT O'shields v PSC Automotive - Watkins

60.00

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT
SWSPProcess Service

5737

5/22/2015

Service of Process on Nancy Watkins

60.00

ESCROW ACCOUNT O'shields v PSC Automotive - Watkins

60.00



FedEx Office
873 Orleans Rd
Charleston, SC 29407-4843
(843) 571-4746

Order Date: 06/29/2015 Branch: 1572
Order Time: 16:19:08 Register: 08
Pickup Date: 06/29/2015
Pickup Time: 19:00
Team Member: Anthony C.

PICK UP ORDER

1572035ND1

Customer: Steven Moskos

Total Order	34.44
Total Paid Online	34.44
Sub-Total	0.00
Balance Due	0.00

PICK UP ORDER

1572035ND1

Thank you for visiting

FedEx Office
Make It. Print It. Pack It. Ship It.
fedex.com/office

Customer Copy

UNITED**eTicket Itinerary and Receipt**A STAR ALLIANCE MEMBER 

Day	Date	Flight	Depart	Time	Arrive	Time	Equip	Meal
Thu	02JUL15	UA6449W	Charleston, SC	4:52 PM	Chicago-OHare	6:08 PM	CRJ 700	Purchase
Operated by Skywest Airlines doing business as United Express								
Fri	03JUL15	US2192Q	Chicago-OHare	3:00 PM	Washington-Reagan Natl	6:00 PM	737-800	
Fri	03JUL15	US4456Q	Washington-Reagan Natl	7:45 PM	Charleston, SC	9:23 PM	ERJ 175	

MOSKOS/COSTASTEVEN**Confirmation Number: FX3X8D**

Party of 1	Seats	Ticket Number	Frequent Flyer
MOSKOS/COSTASTEVEN	20B/---/---	01676344303863	

Fare: 325.58 Tax: 61.12 Per Person: 386.70 eTicket Total: 386.70 Issue Date: June 16, 2015

Method of Payment: Visa XXXXXXXXXXXX1289

Fare Rules: Additional charges may apply for changes in addition to any fare rules listed.

This ticket shall expire one year from date of issue.



BEST WESTERN PLUS Sterling Hotel
242 E. Woodlawn Road
CHARLOTTE, NC 28217
Phone (704)525-5454 * Fax (704)525-5637

COSTA MOSKOS
308 Parkwood Estates
Charleston, SC 29407

Folio: 436457
Arrive: 7/27/2015
Depart: 7/28/2015
Today: 7/28/2015
#Guests: 1

Room 224
Reg#

BWR # 6006637490022340

BWR Tier BASE

Time Checked In 19:39:00

Room #	SH	Date	CD	Description	Amount	Balance
224	C	07/27/15	E	Room Rent	80.99	80.99
224	C	07/27/15	F	Sales Tax	5.87	86.86
224	C	07/27/15	F	Occupancy Tax	6.48	93.34

***** Total Due 93.34

Room Rent.. 80.99 Total Tax.... 12.35

INDEPENDENTLY OWNED AND OPERATED BY SUNRISE HOTEL & INV., LLC
Thank You

Signature _____

Each Best Western branded hotel is independently owned and operated.

June 1st, 2015



Comfort Inn O'Hare/Des Plaines
2175 E. Touhy Ave
Des Plaines, IL 60018
Phone: (847)635-1300 x 501 Fax: (847)635-7591
www.ohare-comfortinn.com

Meeting Room Contract

Law office of Steve Moskos
4000 Faber Place Drive, Suite 300
North Charleston, SC 29405
843-763-5297

The Comfort Inn O'Hare welcomes the opportunity of hosting your meeting at our hotel. The following is a copy of your meeting contract which specifies your meeting room fee and needs as well as listing other specifics of the hotel.

Date and Time: July 3rd, 2015 - 11am to 2pm

Meeting room set up: Executive Boardroom - 8ppl

Meeting room rental: \$125.00 plus tax(coffee/water included)

Additional Information :

Steve Moskos- Arrival July 2nd, 2015- \$99.99 rate- Conf # 402643250

Payment: (fill in credit card info)--- onfile

Agreement & Signatures:

If the above arrangements meet with your approval, please sign where indicated and return a copy of this agreement as soon as possible. We are currently holding your meeting room on a tentative block and we will need to have this contract returned to us signed within 72 hours to guarantee your meeting room. To cancel without penalty please give us 72 hour notice. If you have any questions, or if we can be of further assistance, please give us a call.

Sincerely,

Nichole Squires
Sales Manager

Dawn Carrington for
Steve Moskos
Client

CHARLESTON INT. AIRPORT
THANK YOU FOR VISITING

Receipt Number: H0031500007721
Ticket-Nr.: 70081517
In: 07/02/2015 15:29
Out: 07/03/2015 21:18
Duration: 1,05:47

Transient Parker \$ 16.00
Total: \$ 16.00
Validations: \$ 0.00
Balance Due: \$ 16.00
Credit Card \$ 16.00
Change \$ 0.00

HMSHOST
MACARONI GRILL
CHICAGO INTERNATIONAL AIRPORT

201713 Roberto

306/1 GST 1
5899
JUL03'15 1:28PM

DINE IN

**** SEAT 1 ****
1 SODA BAR M 3.39
FIRST RND SFTBEV
COKE ZERO
1 SLD CHIX FLRTINE 15.50
TAX 1.98 AMOUNT D 20.87

SUBTOTAL 18.89
TAX 1.98
AMOUNT DUE \$20.87

WE WANT TO HEAR YOUR FEEDBACK!
PLEASE CONTACT 1-877-672-7467
OR CUSTOMERSERVICE@HMSHOST.COM
TO SHARE YOUR EXPERIENCE.

GRATUITY NOT INCLUDED
PROPINA NO ESTA INCLUIDA
18% GRATUITY PARTY OF 6 OR MORE
18% DE PROPINA POR UN GRUPO DE 6
O MAS

HMSHOST
MACARONI GRILL
CHICAGO INTERNATIONAL AIRPORT
CHECK: 5899
TABLE: 306/1
SERVER: 201713 Roberto
DATE: JUL03'15 2:24PM
CARD TYPE: VISA
ACCT #: XXXXXXXXXXXXX1289
AUTH CODE:
COSTA S MOSKOS

TOTAL: 20.87

TIP: 3.50

TOTAL: 24.37

X
I AGREE TO PAY THE ABOVE AMOUNT
IN ACCORDANCE WITH THE CARD
ISSUER'S AGREEMENT:

EVAN S PLACE
1900 E. TOUHY
DES PLAINES IL 60018
847-297-7371

07/02/2015 17:46:11
Merchant ID: XXXXXXXXXXXX0121
Device ID: 1313
Terminal ID: PD04.

CREDIT CARD
VISA SALE

CARD # XXXXXXXXXXXXX6052
TRANS # 046
Batch #: 5
Approval Code: 649657
ACI Code: E
TRANS ID: 085184034640651
Entry Method: Swiped
Mode: Online

SALE AMOUNT \$16.76

TIP AMOUNT

TOTAL AMOUNT

ENTERPRISE LEASING COMPANY - SOUTHEAST, 2004 SAVANNAH HWY, CHARLESTON, SC 294076249 (843) 556-7889

RENTAL AGREEMENT

582738

REF#

1TY99Q

SUMMARY OF CHARGES**RENTER**

MOSKOS, COSTA

DATE & TIME OUT

07/27/2015 08:58 AM

DATE & TIME IN

07/29/2015 08:02 AM

BILLING CYCLE

24-HOUR

VEH #1 2015 HYUN ELAN 4SE

VIN# 5NPDH4AE8FH567953

LIC# 1BC5512

MILES DRIVEN 455

Charge Description	Date	Quantity	Per	Rate	Total
TIME & DISTANCE	07/27 - 07/29	2	DAY	\$35.98	\$71.96
REFUELING CHARGE	07/27 - 07/29				\$0.00
Subtotal:					\$71.96
DISCOUNT - CUSTOMER					
SATISFACTION - RATE AND MILEAGE	07/27 - 07/29			5%	(\$3.60)
Taxes & Surcharges					
SALES TAX	07/27 - 07/29			8.5%	\$5.81
SC RENTAL SURCHARGE	07/27 - 07/29			5%	\$3.42
Total Charges:					\$77.59

Total Amount Due**\$0.00****PAYMENT INFORMATION****AMOUNT PAID**

\$77.59

TYPE

Visa

CREDIT CARD NUMBER

xxxxxxxxxxxx1289 PENDING

039-075

KEEP THIS TICKET

This ticket MUST be presented to cashier on leaving parking area. Charges are for the use of Parking space only. This Company assumes no responsibility for loss through fire, theft, collision or otherwise to the car or contents.

**CARS PARKED OWNER RISK
LOCK YOUR CAR**



Toledo Ticket Co., Toledo, OH
www.toledoticket.com

3391 07/28 09:26 07/28 14:05 \$20.00 1289

Certus Deposition Services, LLC

70 West Madison Street, Suite 1400
Chicago, IL 60602
Phone: 877.634.3377
Fax: 312.754.9400

C. STEVEN MOSKOS, ESQ.
C. STEVEN MOSKOS, P.A.
4000 FABER PLACE DRIVE
SUITE 300
NORTH CHARLESTON, SC 29405

Invoice #10592

Date	Terms
08/07/2015	5% 10 Net 30

Assignment	Number	Staff	Order Shipped	Shipped Via
07/28/2015	410	PRODUCTIONS, INDIGO INC.		FEDEX
Billing Reference		Case		
		O'SHIELDS, ET AL vs. PSC AUTOMOTIVE GROUP, ET AL		

Description	Price	Qty	Amount
Original Transcript DEPOSITION - VIDEO of JOSEPH GUYER			
APPEARANCE FEE (2 HR MIN)	\$ 55.00	2.50	\$ 137.50
ASCII TRANSCRIPT		1.00	\$ 0.00
MINI-TRANSCRIPT		1.00	\$ 0.00
ORIGINAL TRANSCRIPT (99 Pages)	\$ 4.10	1.00	\$ 405.90
PTX FILE		1.00	\$ 0.00
SETUP & BREAKDOWN	\$ 100.00	1.00	\$ 100.00
SHIPPING - TRANSCRIPT	\$ 20.00	1.00	\$ 20.00
VIDEO ENCODED TO MPEG2 (DVD) (2.5 Hours)	\$ 70.00	1.00	\$ 175.00
VIDEO HOURLY ATTENDANCE (2 HR MIN) (1 Hour)	\$ 140.00	2.50	\$ 350.00
WORD INDEX		1.00	\$ 0.00
			\$ 1,188.40

Amount Due: \$ 1,188.40
Paid: \$ 0.00

Balance Due:	\$ 1,188.40
Payment Due:	09/06/2015

5% monthly surcharge added to all late invoices.: \$ 1,247.82

Payment Information:

Please make check payable to Certus Deposition Services, LLC or if you prefer, you can pay by credit card by calling 877.634.3377. Thank You

Tax ID - 46-5299590

Certus Deposition Services, LLC

70 West Madison Street, Suite 1400
Chicago, IL 60602
Phone: 877.634.3377
Fax: 312.754.9400

C. STEVEN MOSKOS, ESQ.
C. STEVEN MOSKOS, P.A.
4000 FABER PLACE DRIVE
SUITE 300
NORTH CHARLESTON, SC 29405

Invoice #10571

Date	Terms
07/27/2015	5% 10 Net 30

Assignment	Number	Staff	Order Shipped	Shipped Via
07/03/2015	380	LEVIDCO; RODRIGUEZ, MARLO	07/24/2015	FEDEX
Billing Reference		Case		
		O'SHIELDS, ET AL vs. PSC AUTOMOTIVE GROUP, ET AL		

Description	Price	Qty	Amount
Original Transcript DEPOSITION - VIDEO of CHARLES ECKLUND			
APPEARANCE FEE (2 HR MIN)	\$ 55.00	2.00	\$ 110.00
ASCII TRANSCRIPT		1.00	\$ 0.00
MINI-TRANSCRIPT		1.00	\$ 0.00
ORIGINAL TRANSCRIPT (55 Pages)	\$ 4.10	1.00	\$ 225.50
PTX FILE		1.00	\$ 0.00
SETUP & BREAKDOWN	\$ 100.00	1.00	\$ 100.00
SHIPPING - TRANSCRIPT	\$ 15.00	1.00	\$ 15.00
VIDEO ENCODED TO MPEG2 (DVD) (1 Hour)	\$ 70.00	1.00	\$ 70.00
VIDEO HOURLY ATTENDANCE (2 HR MIN) (1 Hour)	\$ 140.00	2.00	\$ 280.00
WORD INDEX		1.00	\$ 0.00
			\$ 800.50

Amount Due: \$ 800.50
Paid: \$ 0.00

Balance Due:	\$ 800.50
Payment Due:	08/26/2015

5% monthly surcharge added to all late invoices.: \$ 840.53

Payment Information:

Please make check payable to Certus Deposition Services, LLC or if you prefer, you can pay by credit card by calling 877.634.3377. Thank You

Tax ID - 46-5299590

McAngus Goudelock & Courie, LLC

Post Office Box 12519, Capitol Station
Columbia, South Carolina 29211-2519

www.mgclaw.com

(803) 779-2300

Tax ID No. 57-1016548

C. Steven Moskos
C. Steven Moskos, P.A.
4000 Faber Place Drive, Suite 300
Charleston, South Carolina 29405

8/13/2015
Account No : 20202.15034
Statement No : 551047

Daniel O'Shields and Roger W. Whitley A Partnership D/B/A
O&W Cars v. PSC Automotive Group D/B/A Midlands Honda,
Nationwide Mutual Insurance Company

Claim Number: unknown

Final Bill

Professional Fees

			Hours
7/28/2015	TEL	Read and analyze written correspondence from Steve Moskos; Read and analyze written correspondence from Clay Walker; prepare confirmation letter and agreement to mediate; Prepare and analyze correspondence to Steve Moskos and Clay Walker	0.50
8/3/2015	TEL	Review mediation statement submitted by counsel for defendant	0.40
8/3/2015	TEL	Read and analyze written correspondence from Steve Moskos; review plaintiffs mediation statement and exhibits	0.30
8/4/2015	TEL	Prepare for mediation	0.20
8/4/2015	TEL	Attend mediation	2.40

Sub-total Fees: 1,045.00

Recapitulation

Thomas E. Lydon	Partner	3.80	hours at \$275.00 /hr	1,045.00
		Total hours: <u>3.80</u>	Total Fees:	<u>1,045.00</u>

Total Current Billing: 1,045.00

C. Steven Moskos - Please Pay 50% - \$522.50

H. Clayton Walker, Jr. - Please Pay 50% - \$522.50

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5824

4/4/2016

PAY TO THE ORDER OF Brent Ferrell

\$ **31.80

Thirty-One and 80/100*****

DOLLARS

Brent Ferrell

VOID AFTER 90 DAYS.

MEMO

Subpoena Fee Whitley v Midlands Honda

AUTHORIZED SIGNATURE

005824 053207766 2001004346958

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5824

Brent Ferrell

4/4/2016

Subpoena Fee Whitley v Midlands Honda

31.80

ESCROW ACCOUNT Subpoena Fee Whitley v Midlands Honda

31.80

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5824

Brent Ferrell

4/4/2016

Subpoena Fee Whitley v Midlands Honda

31.80

ESCROW ACCOUNT Subpoena Fee Whitley v Midlands Honda

31.80

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
67-776/532

5823

4/4/2016

PAY TO THE ORDER OF Randy Threatt

\$ **31.80

Thirty-One and 80/100*****

DOLLARS

Randy Threatt

VOID AFTER 90 DAYS.

MEMO

Subpoena Fee Whitley v Midlands Honda

AUTHORIZED SIGNATURE

⑈005823⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5823

Randy Threatt

4/4/2016

Subpoena Fee Whitley v Midlands Honda

31.80

ESCROW ACCOUNT Subpoena Fee Whitley v Midlands Honda

31.80

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

5823

Randy Threatt

4/4/2016

Subpoena Fee Whitley v Midlands Honda

31.80

ESCROW ACCOUNT Subpoena Fee Whitley v Midlands Honda

31.80

C. STEVEN MOSKOS, P.A.

SWSPROCESS SERVICE

STEVEN W. SMITH
701 GERVAIS STREET SUITE 150-006
COLUMBIA, SC 29201

4/7/2016

Daniel O'Shellds, etal

VS.

PSC Automotive Group, etal

FILE NO..

Brent Ferrell
Randy Threätt

55
30

TOTAL

85.

THANK YOU FOR YOUR BUSINESS !!

INVOICE

James F. Ruopoli, III
P.O. Box 151
Mt. Pleasant, SC 29464
(843) 813-0200

TO: C.Steven Moskos, P.A.
4000 Faber Place Drive, Ste 300
N. Charleston, SC 29405

Line Item	Description	Hours	Mileage	Rate	Amount
1	Private legal process svc Re: Nationwide - 04/07/16	3 9:45a-12:45p	30 mi	25/hr +Mil	\$70.00
Detail	• MP to N Chas • N Chas to WA • WA to Downtown • DT to WA • WA to N Chas				

SUBTOTAL: \$ 70.00

TAX: 0

TOTAL: \$ 70.00

disc
9/12



FedEx Office is your destination
for printing and shipping.

873 Orleans Rd
Charleston, SC 29407-4843
Tel: (843) 571-4746

4/17/2016 11:35:23 AM EST
Team Member: Paula G.
Customer: Steve Moskos

SALE

Combine 32lb	Qty 1	27.55
CLR 1S on 32# Wht	83 @	0.3319 T
000224 Reg. Price	0.69	
Price per piece	27.55	
Regular Total	57.27	
Discounts	29.72	

Sch 1	Qty 1	3.97
BW Print Per SqFt	11 @	0.3609 T
000286 Reg. Price	0.75	
Price per piece	3.97	
Regular Total	8.25	
Discounts	4.28	

Sch 2	Qty 1	3.25
BW Print Per SqFt	9 @	0.3611 T
000286 Reg. Price	0.75	
Price per piece	3.25	
Regular Total	6.75	
Discounts	3.50	

Sch 3	Qty 1	31.38
Matte Paper/SqFt	9 @	3.4867 T
001450 Reg. Price	7.25	
Price per piece	31.38	
Regular Total	65.25	
Discounts	33.87	

BW Print Per SqFt 11 @ 0.3609 T
000286 Reg. Price 0.75

Price per piece 3.97
Regular Total 8.25
Discounts 4.28

Page from 1 Qty 1 4.32

BW 36x48 Print 1 @ 4.3200 T
000279 Reg. Price 9.00

Price per piece 4.32
Regular Total 9.00
Discounts 4.68

Page From 2 Qty 1 4.33

BW 36x48 Print 1 @ 4.3300 T
000279 Reg. Price 9.00

Price per piece 4.33
Regular Total 9.00
Discounts 4.67

Sub-Total 78.77
Tax 6.70
Deposit 0.00

Total 85.47

Visa (S) 85.47

Account: 1289
Auth: 04744D (A)

Total Tender 85.47
Change Due 0.00

Total Discounts 85.00



[Handwritten signature]

Media Experts Group, LLC
PO Box 210574
Columbia SC 29221

EDIA EXPERTS GROUP

C. Steven Moskos
4000 Faber Place Dr., Suite 300 N
North Charleston 29405

Invoice # 4091
Invoice Date April 17, 2016
Balance Due (USD) **\$1,153.90**

Task	Time Entry Notes	Rate	Hours	Line Total
Edit HD	Prepare for Trial. Edit video depositions for trial. 4/12	150.00	2.5	375.00
Trial Prep	Setup Courtroom equipment 4/18	150.00	0.5	75.00
Edit HD	Edit and check video deposition Ecklund 4/18	150.00	1.5	225.00
Trial	Work in Courtroom one hour charge per day. (no charge for equipment) 4/19, 4/20, 4/21	150.00	3	450.00

Item	Description	Unit Cost	Quantity	Line Total
Sync Trans	Sync Digital Transcript Reimbursement (see attached inv.)	28.90	1	28.90

Total 1,153.90
Amount Paid 0.00
Balance Due (USD) **\$1,153.90**

Terms

Payment due upon receipt

1094 CHRIS DRIVE
WEST COLUMBIA, SC 29169
TELEPHONE 803-791-8940 FAX 803.739.2291

MOSKOS, C. STEVEN

401/KSTY
4/17/2016 3:00:00PM
4/21/2016

1/0
\$106.82

RATE PLAN L-H1P
HH# 280568892 BLUE
AL
BONUS AL CAR

Confirmation: 87008296

4/21/2016 PAGE 1

4/17/2016	1724676	GUEST ROOM	\$106.82
4/17/2016	1724676	STATE TAX	\$6.41
4/17/2016	1724676	COUNTY BED TAX	\$5.34
4/18/2016	1724891	GUEST ROOM	\$106.82
4/18/2016	1724891	STATE TAX	\$6.41
4/18/2016	1724891	COUNTY BED TAX	\$5.34
4/19/2016	1725129	GUEST ROOM	\$106.82
4/19/2016	1725129	STATE TAX	\$6.41
4/19/2016	1725129	COUNTY BED TAX	\$5.34
4/20/2016	1725365	GUEST ROOM	\$106.82
4/20/2016	1725365	STATE TAX	\$6.41
4/20/2016	1725365	COUNTY BED TAX	\$5.34

WILL BE SETTLED TO VS *1289 \$474.28
EFFECTIVE BALANCE OF \$0.00

ESTIMATED CURRENCY TOTAL

You have earned approximately 4272 Hilton HHonors points for this stay. Hilton HHonors(R) stays are posted within 72 hours of checkout. To check your earnings or book your next stay at more than 3,900 hotels and resorts in 91 countries, please visit HHono

445484 A

1094 CHRIS DRIVE
WEST COLUMBIA, SC 29169
TELEPHONE 803-791-8940 FAX 803.739.2291

MOSKOS, C. STEVEN

401/KSTY
4/17/2016 3:00:00PM
4/21/2016

1/0
\$106.82

RATE PLAN L-H1P
HH# 280568892 BLUE
AL
BONUS AL CAR

Confirmation: 87008296

4/21/2016 PAGE 2

Hampton hotels are all over the world. Find us in Canada, Costa Rica, Ecuador, Germany, India, Mexico, Poland, Turkey, United Kingdom, and United States of America. Coming soon in Italy and Romania.

445484 A

Grecian Gardens

2312 Sunset Blvd

West Columbia, SC

(803) 794-7552

29th Anniversary

Date: Apr 17 '16 08:51PM

Card type: Visa/M.C.

Acct #: XXXXXXXXXXXX5969

Card Entry: SWIPED

Trans Type: PURCHASE

Auth Code: 355682

Check: 1232

Table: 1/1

Server: 1103 Donna Wa

Subtotal: 14.96

Tip 3.00

Total

Keep for your records

CUSTOMER COPY

Richland County Common Pleas

Clerk : Jeanette W. McBride
Richland County Judicial Center
Columbia, SC 29201
(803) 576-1999

Received From: copy

Date : 4/18/2016

Paying for: copy,

RECEIPT # 206789

Clerk: METTSB

Payment Type: Cash

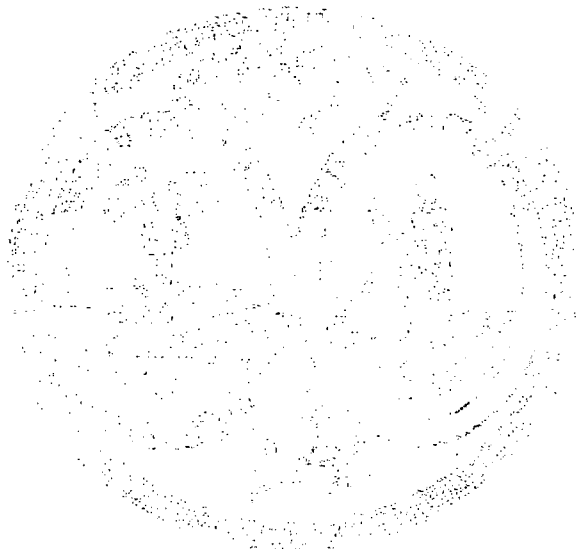
\$10.00

Reference #

Total Paid

10.00

Comment:



ATLANTA BREAD

108 Sunset Court
Columbia, SC
(803) 791-1150 tel.
(803) 791-1181 fax.

Date: 4/19/2016 6:38:09 PM
Card Type: VISA
Acct #: xxxxxxxx5969
Exp Date: xxxx
Auth Code: 204871
Reference: 00000127
Check: 244
Table:
Server: 6 csr 6

AMOUNT : \$8.55

X- 

C MOSKOS

I AGREE TO PAY ABOVE TOTAL AMOUNT
ACCORDING TO CARD ISSUER AGREEMENT
(MERCHANT AGREEMENT IF CREDIT VOUCHER)

*** GUEST COPY ***

IKES PLACE
1701 MAIN ST
COLUMBIA, SC 29201

04/19/2016

13:25:50

CREDIT CARD

VISA SALE

CARD # XXXXXXXXXXXX5969
INVOICE 0009
SEQ #: 0007
Batch #: 000716
Approval Code: 235345
Entry Method: Swiped
Mode: Online

SALE AMOUNT \$9.50

THANK YOU FOR YOUR BUSINESS!
(803) 779-1109

CUSTOMER COPY

Grecian Gardens

2312 Sunset Blvd
West Columbia, SC
(803) 794-7552

29th Anniversary

Date: Apr 20 '16 05:52PM

Card Type: Visa/M.C.

Acct #: XXXXXXXXXXXX5969

Card Entry: SWIPED

Trans Type: PURCHASE

Auth Code: 247108

Check: 3136

Check IN: PW

Server: 5998 Cashier

Subtotal: 11.76

Tip

Total

Keep for your records

CUSTOMER COPY

IKES PLACE
1701 MAIN ST
COLUMBIA, SC 29201

04/20/2016

12:47:40

CREDIT CARD

VISA SALE

CARD #	XXXXXXXXXXXX5969
INVOICE	0017
SEQ #:	0017
Batch #:	000717
Approval Code:	911505
Entry Method:	Swiped
Mode:	Online

SALE AMOUNT \$6.25

THANK YOU FOR YOUR BUSINESS!

(803) 779-1109

CUSTOMER COPY

RUBY TUESDAY

RT5026

Columbia, SC 29209

Credit Card Voucher

Date: Apr 21 '16 07:53PM
Card Type: Visa
Acct #: XXXXXXXXXXXX1289
Card Entry: SWIPED
Trans Type: PURCHASE
Trans Key: III002020423096
Auth Code: 00704D
Check: 3362
Table: 306/1
Server: 1004 Mensa J
COSTA MOSKOS

Subtotal: 20.45

Gratuity: 5.00

Total: 25.45

Signature

GUEST COPY

(Please retain for your records)

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BAYMONT COLUMBIA

240 EAST EXCHANGE BLVD

COLUMBIA, SC 29209 US

Phone: (803) 695-0666

Fax: (803) 695-0566

Email: INFO@BAYMONTFJ.COM

Printed: 4/22/2016 8:12:42 AM

Folio (Detailed)

Name:	MOSKOS, COSTA	Confirmation Number:	49646763
		Account Number:	157-577903
Address:	308 PARKWOOD ESTATES DRIVE CHARLESTON, SC 29407 US		
Room:	317	Room Type:	NK1, 1 KING BED NON
Rate Plan:	RACK	Daily Rate:	\$64.00 + \$7.68 Tax
Arrival:	4/21/2016 (Thu)	Departure:	4/22/2016 (Fri)
		Nights:	1
		GTD:	VI - VISA
			XXXX XXXX XXXX 1289

Room Rate:

4/21/2016 (Thu) - 4/21/2016 (Thu) \$64.00 + \$7.68 Tax per night.

Date	Code	Description	Amount	Balance
4/21/2016	RM	ROOM CHARGE	\$64.00	\$64.00
4/21/2016	TAX1	SALES TAX	\$3.20	\$67.20
4/21/2016	TAX2	OCC TAX	\$1.28	\$68.48
4/21/2016	TAX3	TRANSPORTATION TAX	\$0.64	\$69.12
4/21/2016	TAX4	COUNTY TAX	\$0.64	\$69.76
4/21/2016	TAX5	TOURISM TAX	\$1.92	\$71.68
4/22/2016	VI	VISA	(\$71.68)	\$0.00
		XXXX XXXX XXXX 1289		

Summary

Room	Tax	F&B	Other	CC	Cash	DB
\$64.00	\$7.68	\$0.00	\$0.00	(\$71.68)	\$0.00	\$0.00

By signing below, I agree to these terms and conditions.

Guest Signature:

(1) Regardless of charge instructions, the undersigned acknowledges the above as personal indebtedness. (2) This property is privately owned and management reserves the right to refuse services to any one, and will not be responsible for injury or accidents to guests or loss of money, jewelry or any personal valuables of any kind.

"We or our affiliates may contact you about goods and services unless you call 888-946-4283 or write to Opt Out/Privacy, Wyndham Hotel Group, LLC, 22 Sylvan Way, Parsippany, NJ 07054 to opt out. View our website about privacy."

LAW OFFICE OF C. STEVEN MOSKOS
ESCROW ACCOUNT
PH: (843) 763-5297
535 STINSON DRIVE
CHARLESTON, SC 29407

WELLS FARGO BANK, N.A.
SOUTH CAROLINA
www.wellsfargo.com
87-776/532

5828

4/29/2016

PAY TO THE ORDER OF RICHLAND CTY CLERK OF COURT

\$ **25.00

Twenty-Five and 00/100*****

DOLLARS

RICHLAND CTY CLERK OF COURT

VOID AFTER 90 DAYS.

MEMO

Whitley v Midlands Honda Post Trial Motions Fee


AUTHORIZED SIGNATURE

⑈005828⑈ ⑆053207766⑆2001004346958⑈

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

RICHLAND CTY CLERK OF COURT

4/29/2016

Whitley v Midlands Honda Post Trial Motions Fee

25.00

ESCROW ACCOUNT Whitley v Midlands Honda Post Trial Motions Fe

25.00

LAW OFFICE OF C. STEVEN MOSKOS/ ESCROW ACCOUNT

RICHLAND CTY CLERK OF COURT

4/29/2016

Whitley v Midlands Honda Post Trial Motions Fee

25.00

ESCROW ACCOUNT Whitley v Midlands Honda Post Trial Motions Fe

25.00

Due upon receipt



6116 W. WILKINSON BLVD BELMONT, NC 28012
Phone 704-825-9271 Fax 704-825-0045
www.packbrotherscollisioncenter.com

Date: APRIL 29, 2016

WHITLEY/ NON DISCLOSURE	HONDA	CIVIC	RO# WC

DESCRIPTION	UNIT PRICE	LINE TOTAL
TEARDOWN INSPECTION & EVALUATION OF VEHICLE WITH ATTORNEY CONSULTANT	40 HRS @ \$75 AN HOUR	3000.00
TRAVEL TIME	\$2 A MILE / 97 MILES ONE WAY 194 MILES TOTAL	388.00
EXPERT WITNESS / BRIAN ALLEN	\$250 AN HOUR/ 7 HOURS	1750.00
NC STATE LAW REQUIRES US TO COLLECT TAX ON ALL LABOR, PAINT & MATERIALS AND TOWING TAX	6.75%	346.82

TOTAL AMOUNT DUE

\$ 5484.82

Please make all checks payable to Pack Brothers Collision Center, INC
Thanks for your Business!

C Steven Moskos

From: Cothran, Ralph F. Jr., Law Clerk (James R. White)
<rcothranlc@sccourts.org>
Sent: Wednesday, May 18, 2016 10:44 AM
To: csmoskos@earthlink.net; cwalker@walkerreibold.net
Subject: 2013-CP-40-0319

Good morning,

Judge Cothran has decided to grant the Defendant's Motion to Require Election of Remedies. Accordingly, Plaintiff has until 5:00 p.m. on Monday, May 23, to make an election. If you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Best,

Ryan

J. Ryan White
Law Clerk to the Honorable R. Ferrell Cothran, Jr.
Circuit Judge of the Third Judicial Circuit
P.O. Box 32
Manning, SC 29102
OFFICE: (803) 435-2450

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

|                             |   |                                |
|-----------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA     | ) | IN THE COURT OF COMMON PLEAS   |
|                             | ) | FOR THE FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND          | ) | CASE NO. 13-CP-40-0319         |
|                             | ) |                                |
| DANIEL O'SHIELDS AND ROGER  | ) |                                |
| W. WHITLEY A PARTNERSHIP    | ) |                                |
| D/B/A O&W CARS              | ) | <b>PLAINTIFFS' ELECTION</b>    |
|                             | ) | <b>OF REMEDIES</b>             |
| Plaintiffs                  | ) |                                |
|                             | ) |                                |
| vs.                         | ) |                                |
|                             | ) |                                |
| COLUMBIA AUTOMOTIVE         | ) |                                |
| COMPANY, LLC D/B/A MIDLANDS | ) |                                |
| HONDA                       | ) |                                |
|                             | ) |                                |
| Defendant                   | ) |                                |

On May 18, 2016, Plaintiffs' counsel received the following in an email from Ryan White, Judge Cothran's law clerk, "Judge Cothran has decided to grant the Defendant's Motion to Require Election of Remedies. Accordingly, Plaintiff has until 5:00 p.m. on Monday, May 23, to make an election. If you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter."

Plaintiffs are requesting by separate motion that the Court reconsider its decision that Plaintiffs must elect a remedy. Plaintiffs are also requesting via that motion that if they are to be required to elect, that election not be required at this time.

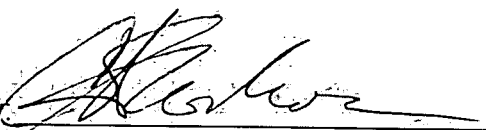
N.C.G.S. § 1D-20 states, "A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages." (Emphasis added.) Therefore, there is no need to elect a remedy until the Court is ready to enter judgment. We are not at that stage yet. The Court still has a number of motions to decide which may impact Plaintiffs' decision on which claim(s) to

elect. If election is to be required, Plaintiffs would request the Court postpone the election requirement until Plaintiffs are fully informed of their potential recoveries.

Should the Court nevertheless require an election at this time, Plaintiffs assert they are permitted under United Laboratories, Inc. v. Kuykendall, 437 S.E.2d 374, 335 N.C. 183 (1993) and Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010) to elect among the various remedies of the verdict so long as their election is not a double or inconsistent recovery.

If the Court does require an election now, Plaintiffs elect actual damages under their fraud verdict, punitive damages under their fraud verdict, and attorney's fees under their North Carolina unfair trade practices cause of action.

**C. STEVEN MOSKOS, P.A.**  
**Attorney for the Plaintiffs**

By: 

C. Steven Moskos  
4000 Faber Place Drive, Suite 300  
N. Charleston, SC 29407  
Telephone: (843) 763-5297  
Email: csmoskos@earthlink.net

Charleston, South Carolina  
May 23, 2016



**C Steven Moskos**

---

**From:** C Steven Moskos <csmoskos@earthlink.net>  
**Sent:** Monday, May 23, 2016 5:09 PM  
**To:** 'Cothran, Ralph F. Jr., Law Clerk (James R. White)';  
'cwalker@walkerreibold.net'  
**Subject:** RE: 2013-CP-40-0319  
**Attachments:** Election of Remedies.pdf

Ryan,

As instructed, please find attached Plaintiffs' election of remedies.

Steve

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
North Charleston, SC 29405  
843-763-5297 Office

---

**From:** Cothran, Ralph F. Jr., Law Clerk (James R. White) [mailto:rcothranlc@sccourts.org]  
**Sent:** Wednesday, May 18, 2016 10:44 AM  
**To:** csmoskos@earthlink.net; cwalker@walkerreibold.net  
**Subject:** 2013-CP-40-0319

Good morning,

Judge Cothran has decided to grant the Defendant's Motion to Require Election of Remedies. Accordingly, Plaintiff has until 5:00 p.m. on Monday, May 23, to make an election. If you have any questions, please do not hesitate to contact me. Thank you for your attention to this matter.

Best,

Ryan

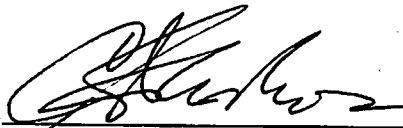
J. Ryan White  
Law Clerk to the Honorable R. Ferrell Cothran, Jr.  
Circuit Judge of the Third Judicial Circuit  
P.O. Box 32  
Manning, SC 29102  
OFFICE: (803) 435-2450



Plaintiffs request the Court withdraw its ruling regarding Defendant's motion to elect a remedy until Plaintiffs may present the Court with their arguments opposing election and until the Court has ruled on the various post-trial motions.

The undersigned hereby certifies and affirms in accordance with Rule 11 of the South Carolina Rules of Civil Procedure that Plaintiffs's counsel has consulted with Defendant's counsel, however, Defendant will not consent to this motion.

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

By:   
C. Steven Moskos  
4000 Faber Place Drive, Suite 300  
N. Charleston, SC 29407  
Telephone: (843) 763-5297

RICHLAND COUNTY  
FILED  
2016 MAY 26 AM 11:08  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

Charleston, South Carolina  
5/23, 2016

Certificate of Service

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 23 day of May, 2016.

C. STEVEN MOSKOS, P.A.

By: 

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
Daniel O'Shields and Roger W. )  
Whitley, A Partnership d/b/a )  
O&W Cars, )  
 )  
Plaintiffs )  
 )  
v. )  
 )  
Columbia Automotive, LLC d/b/a )  
Midlands Honda, )  
 )  
 )  
Defendants )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

DEFENDANT'S RESPONSE TO  
PLAINTIFFS' ELECTION OF  
REMEDIES

Plaintiffs submitted their election of remedies to the Court via email on the evening of May 23, 2016.<sup>1</sup> Plaintiffs attempted to make the following election:

1. Actual damages for fraud;
2. Punitive damages for fraud; and
3. Attorney's fees under the North Carolina Unfair Trade Practices Act.

This election is not permissible under North Carolina law. Aside from the question of whether Plaintiffs are entitled to *any* award of fees under North Carolina's Unfair Trade Practices Act, which is very much in doubt, North Carolina does not permit Plaintiffs to elect *both* punitive damages and attorney's fees under the unfair trade practices statute. Plaintiffs must choose between punitive damages and recovery of any kind, including attorney's fees, under the unfair trade practices claim.

---

<sup>1</sup> Plaintiff's election refers to a separate motion to reconsider the Court's ruling on election of remedies. Defendant has not yet received this motion, and will reply as appropriate at a later time.

North Carolina common law historically required plaintiffs to elect between remedies under the unfair trade practices statute or remedies under common law. As Justice Meyer explained in *United Laboratories, Inc. v. Kuykendall*, 437 S.E.2d 374 (N.C. 1993):

[h]eretofore, it has been the practice in this state to require the plaintiff to recover either the Chapter 75 statutory group of remedies (trebled compensatory damages and discretionary attorney's fees) *or* the group of remedies available in the common law claim (compensatory and punitive damages).

*Id.* at 382 (Meyer, J., dissenting) (emphasis in original). The majority opinion in *United Laboratories* abandoned this long-standing common law, and allowed plaintiffs to elect both common law remedies and statutory attorney's fees for unfair trade practices. *Id.* at 381. The *United Laboratories* decision was issued on December 3, 1993.

North Carolina's legislature enacted N.C.G.S. § 1D-20 less than two years later in reaction to this decision. This statute provides that:

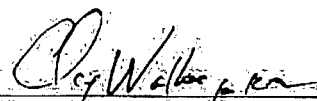
[a] claimant must elect, prior to judgment, between punitive damages and *any other remedy* pursuant to another statute that provides for multiple damages.

N.C.G.S. § 1D-20 (emphasis added). The plain language of this statute requires that in cases in which a plaintiff recovers both punitive damages and a verdict under a statute which awards multiple damages, as does North Carolina's Unfair Trade Practices Act, the plaintiff must choose between the punitive damages award and any and all statutory remedies, which include attorney's fees. The effect of this statute was to invalidate *United Laboratories* and restore the prior common law rule prohibiting recovery of both punitive damages and remedies, including attorney's fees, under statutes which carry multiple damages. The statute became effective on January 1, 1996, and continues in effect today.

As a result, Plaintiffs must elect between punitive damages and any and all recovery

under the North Carolina Unfair Trade Practices Act, including attorney's fees.

Respectfully submitted,



H. Clayton Walker, Jr.

WALKER | REIBOLD

Post Office Box 61140

Columbia, SC 29260

(803) 454-0955

(803) 454-0956/facsimile

cwalker@walkerreibold.net

May 27, 2016

ATTORNEY FOR DEFENDANT

|                               |   |                                   |
|-------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS      |
|                               | ) | FOR THE FIFTH JUDICIAL CIRCUIT    |
| COUNTY OF RICHLAND            | ) | CASE NO. 13-CP-40-0319            |
|                               | ) |                                   |
| DANIEL O'SHIELDS AND ROGER W. | ) |                                   |
| WHITLEY A PARTNERSHIP D/B/A   | ) |                                   |
| O&W CARS                      | ) |                                   |
|                               | ) |                                   |
|                               | ) | <b>PLAINTIFFS' BRIEF OPPOSING</b> |
|                               | ) | <b>DEFENDANT'S MOTION TO</b>      |
| Plaintiffs)                   | ) | <b>ENFORCE NORTH CAROLINA'S</b>   |
|                               | ) | <b>PUNITIVE DAMAGES CAP</b>       |
|                               | ) |                                   |
| vs.                           | ) |                                   |
|                               | ) |                                   |
| COLUMBIA AUTOMOTIVE           | ) |                                   |
| COMPANY, LLC D/B/A MIDLANDS   | ) |                                   |
| HONDA                         | ) |                                   |
|                               | ) |                                   |
|                               | ) |                                   |
| Defendant)                    | ) |                                   |

RICHLAND COUNTY  
 FILED  
 2016 JUL 25 AM 8:40  
 JACARETTE W. MCERINOS  
 C.P. & G.S.

Defendant wrongfully seeks to reduce Plaintiffs' punitive damages award of \$2,381,888.00 to \$250,000.00.

**1. SOUTH CAROLINA'S PUNITIVE DAMAGES STATUTE APPLIES TO THIS CASE.**

Plaintiffs agree with the Court that Lister v. NationsBank of Delaware, N.A., 329 SC 133, 494 SE 2d 449 (Ct. App. 1997) applies to this case and that South Carolina's punitive damages procedures apply to this action.

Under S.C. Code Ann. §15-32-530(C), if the Court determines that "at the time of injury the defendant had an intent to harm and determines that the defendant's conduct did in fact harm the claimant", then "there shall be no cap on punitive damages". Randy Threatt, Defendant's former general manager, testified that he knew the car had been "clipped" because Mr. Ecklund had told him about it. Mr. Threatt also knew the car was unsafe as Ms. Ecklund left a message stating such. (Exhibit 70 attached.) Defendant's attorney announced in open court, in front of the jury, that Defendant knew the car had been damaged and Defendant sold the Civic at the auction without disclosure. Mr. Threatt

and Brent Farrell, Defendant's former used car manager, testified that the car was sent to the red light sale because that is how Midlands Honda disposed of problem cars, they knew it was against the law to sell dangerous cars, they knew about the North Carolina Damage Disclosure Act, they knew the auction required dealers to complete the North Carolina Damage Disclosure form, they knew dealers bought cars to resell to consumers, and they claimed to believe that they did not have to disclose the damage to the auction bidders. From their actions and their testimony, it is apparent they believed auction bidders would not notice the damage to the car until it was too late to do anything about it.

Even though the North Carolina Damage Disclosure Form, the auction rules and the North Carolina common law required disclosure of the dangerous condition of the Civic, Mr. Threatt, Mr. Farrell, and Mr. Nalawaja<sup>1</sup>, Defendant's current general manager, testified that it was up to the bidders at the auction to discover the prior wreck damage, not that it was incumbent on Defendant to disclose the damage. These and the other facts presented to the jury, show Defendant intended to sell the vehicle to an unsuspecting buyer, to the buyer's detriment, allowing Defendant to avoid any loss.

The jury found for Plaintiffs regarding all the damages they presented. The jury determined that Plaintiffs are the ones that were hurt by Defendant's intentional acts.

Since Plaintiffs meet the criteria of S.C. Code Ann. §15-32-530(C), the South Carolina punitive damages cap should not apply and Plaintiffs' punitive damages judgment should remain at \$2,381,888.00.

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<sup>1</sup> Before being the general manager of Midlands Honda, Mr. Nalawaja was the general manager of Midlands Honda's sister dealership in North Carolina. Mr. Nalawaja knew the legal requirements to sell cars in North Carolina.



**2. IF THE COURT DETERMINES THAT DEFENDANT DID NOT HAVE AN INTENT TO HARM THEN PLAINTIFFS ARE ENTITLED TO \$2,000,000.00 IN PUNITIVE DAMAGES.**

Should the Court determine that S.C. Code Ann. §15-32-530(C) does not apply, then the Court should enter a punitive judgment award in the amount of \$2,000,000.00.

Under S.C. Code Ann. §15-32-530(A), Plaintiffs are entitled to "the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars." Three times the compensatory damages (\$6,645) multiplied by three Plaintiffs equals \$59,805.00.

Since the jury's verdict was greater than \$500,000.00, S.C. Code Ann. §15-32-530(B)(1) directs the Court to determine if "the wrongful conduct proven under this section was motivated primarily by unreasonable financial gain" and if "the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the defendant".

In this case, Mr. Threatt told Mr. Farrell to send the car to the auction. Obviously, Midlands Honda wanted to gain as much money as it could. Most telling was Mr. Threatt's statement when asked if he had the Civic inspected prior to sending it to the auction. He responded, "why would you incur that expense when you're getting rid of the car?". Mr. Nalawaja, Defendant's current general manager, also testified to the Dealer Recap sheets showing how Defendant made a profit in its transactions with the Civic by selling this car as a certified pre-owned car, forcing Mr. Ecklund to trade the Civic instead of giving him back his money, and then selling the car again for a slight loss at the auction. Midlands Honda never lost any money in dealing with this car.

The uncontested evidence was that the Civic was dangerous and should not be on the road. Brian Allen testified that "clipping" a car is not a permissible way to repair a car. He testified that the car was not repaired pursuant to Honda's specifications, that the welds were subpar as if someone was learning how to weld by working on this car, that in some places the frame of the car had not been welded together, and that in some places the cut metal was not even touching the metal on the other side of the cut. Mr. Allen further testified that the car was unsafe, that it would not respond as Honda had designed it, and that, depending on the nature of the crash, the occupants of this car could be severely injured or killed.

Midlands Honda admitted at trial that it knew the car had been "clipped". It produced in discovery a note from when Ms. Ecklund called Midlands Honda about the damage. (Trial Exhibit 70.) The note reads, "She said it was 2 cars welded together and its not safe." The back side of the note states, "fix=total" and "while Civic partly welded/glued back end can't be repaired because of previous work". When Mr. Ecklund came to Columbia, he discussed the car's condition with Mr. Threatt. After Mr. Ecklund was forced to trade the Civic, Mr. Threatt, the general manager, ordered Mr. Farrell, the used car manager, to sell the car at the auction. Mr. Threatt, knowing he was selling a dangerous car, turned a blind eye to the damage.

Midlands Honda's management perpetuated its wrongful conduct when Mr. Whitley demanded his money back. Mr. Whitley informed Mr. Farrell that he had purchased the Civic through the auction. He gave Mr. Farrell the vehicle identification number and he told Mr. Farrell the car was unsafe. Mr. Farrell said he would investigate the matter and get back to Mr. Whitley. Again, management knew about the problem. It did not want to get

stuck with this car, so it ignored Mr. Whitley.

Having met the standard under §15-32-530(B)(1), Plaintiffs are entitled to punitive damages "of four times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of two million dollars." Four times the compensatory damages (\$6,645) multiplied by three Plaintiffs equals \$79,740.

If the Court will not confirm the jury's punitive damages verdict in the amount of \$2,381,888.00, Plaintiffs request the Court rule the punitive damages judgment is two million dollars.

**3. AT THE VERY LEAST, PLAINTIFFS ARE ENTITLED TO \$500,000.00 EACH IN PUNITIVE DAMAGES.**

Each Plaintiff made a claim against Midlands Honda. (See Complaint caption filed January 17, 2013, Amended Complaint Caption filed May 9, 2013, Second Amended Complaint filed on or about April 19, and the Complaints ¶¶ 1-4 attached to each.) Their claims were brought at the same time for judicial economy and to satisfy the purposes of the South Carolina Rules of Civil Procedure regarding joinder of parties. Had they not been, each Plaintiff could have pursued their own individual case and received a punitive damages verdict in his/its individual case.

If the Court determines that Defendant was not "motivated primarily by unreasonable financial gain" or that "the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, was known or approved by the managing agent, director, officer, or the person responsible for making policy decisions on behalf of the Defendant", then each Plaintiff is entitled to \$500,000 under S.C. Code Ann. §15-32-530(A).

**4. THE NORTH CAROLINA ACT PERMITS THE THREE PLAINTIFFS TO EACH RECOVER THE MAXIMUM AMOUNT OF PUNITIVE DAMAGES.**

Should the Court determine that the North Carolina punitive damages procedure applies, then each Plaintiff is entitled to \$250,000.00. Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1 (2004) (finding Plaintiffs may receive the full amount of punitive damages when their cases are tried together); see Bagley v. Shortt, 261 Ga. 762, 410 SE 2d 738 (1991) (noting the same where the court concluded, based upon a similar interpretation of a statute limiting punitive damages, that such interpretation "would encourage the splitting of causes of action with sophistry and quibble"). There are three Plaintiffs, Mr. Whitley, Mr. O'SHIELDS, and O&W Cars, a partnership. Therefore, the punitive damages judgment against Midlands Honda should be \$250,000.00 in favor of each Plaintiff.

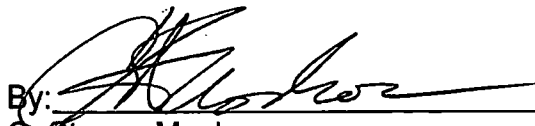
As noted in Section 3 above, each Plaintiff made a claim against Midlands Honda. (Complaint ¶¶ 1-4.) Their claims were brought at the same time for judicial economy and to satisfy the purposes of the South Carolina Rules of Civil Procedure regarding joinder of parties. Had they not been, each Plaintiff could have pursued their own individual case and received a punitive damages verdict in his/its individual case.

Providing each Plaintiff with a punitive damages judgment also furthers the interests of justice by fully implementing North Carolina's punitive damages statute. Even from a cursory reading, it is apparent the act is designed to punish egregious acts and to deter others from committing similar acts. North Carolina does not take the imposition of punitive damages lightly. To receive a punitive damages verdict, Plaintiffs must prove to 12 men and women by clear and convincing evidence that a Defendant committed egregious acts. If a Plaintiff can meet this high burden, the Court should impose maximum sanctions

against those who fraudulently, maliciously, willfully or wantonly commit those egregious acts. Imposing the maximum sanctions also serves to send a warning to deter others who may be thinking about committing similarly egregious acts. These purposes should not be subverted by a narrow reading of the punitive damages Act.

Should the Court determine that North Carolina law applies to the punitive damages verdict, the Court should find that each Plaintiff, Mr. Whitley, Mr. O'Shields, and O&W Cars, a partnership, should receive a punitive damages verdict of \$250,000.00 for a total of \$750,000.00.

**C. STEVEN MOSKOS, P.A.**  
**Attorney for the Plaintiffs**

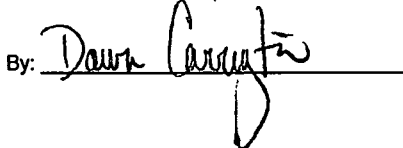
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Charleston, South Carolina  
July 20, 2016

Certificate of Service

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 20th day of July, 2016.

C. STEVEN MOSKOS, P.A.

By: 

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

DANIEL O'SHIELDS AND ROGER  
W. WHITLEY A PARTNERSHIP  
D/B/A O&W CARS

Plaintiffs

vs.

COLUMBIA AUTOMOTIVE  
COMPANY, LLC D/B/A MIDLANDS  
HONDA

Defendant

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT  
) CASE NO. 13-CP-40-0319  
)

**PLAINTIFFS' BRIEF REGARDING  
DEFENDANT'S RESPONSE TO  
PLAINTIFFS' ELECTION OF REMEDIES**

RICHLAND COUNTY  
FILED  
2016 JUL 25 AM 8:40  
JEANETTE W. MERRITT  
C.C.P. & G.S.

Defendant argues United Laboratories, Inc. v. Kuykendall, 437 S.E.2d 374, 335 N.C. 183 (1993) has been overturned by N.C. Gen. Stat. §1D-20 Election of extracompensatory remedies. This would be news to the North Carolina courts and to the Chief Justice of the Supreme Court of South Carolina.

Shepard's Citations lists but one citation to Kuykendall in South Carolina, now-Chief Justice Pleicones' concurrence in Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 64, 691 S.E.2d 135, 157 (2010) (Pleicones, J., concurring)—fifteen years after Defendant maintains Kuykendall was overturned—and he cited it for precisely the proposition that Defendant maintains it does not now stand for.

Moreover, Chief Justice Pleicones properly stated North Carolina law. Defendant's response to Plaintiffs' election of remedies reflects a misunderstanding of North Carolina law. While Defendant acknowledges United Laboratories, Inc. v. Kuykendall, 437 S.E.2d 374, 335 N.C. 183 (1993), it extrapolates from the passage of N.C.G.S. §1D-20 2 years

later that there must be some connection between the two. Defendant has not provided any authority for this position other than the timing of these two events. It is more likely that North Carolina enacted N.C.G.S. §1D-20 in response to Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) and BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996). Haslip would have started the move towards limiting punitive damages legislatively and Gore would have been used as an example by proponents of tort reform as an example of run away verdicts as it was working its way through the legal system.

Regardless, North Carolina law resolves Defendant's concerns in Plaintiffs' favor. In Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1 (2004), the Court held that a statute that is clear and unambiguous must be construed using its plain meaning. Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). "But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." Id. at 209, 388 S.E.2d at 136-37. It also held that it does not read segments of a statute in isolation. Rather, it construes statutes *in pari materia*, giving effect, if possible, to every provision. Dockery v. Hocutt, 357 N.C. 210, 219, 581 SE 2d 431, 437 (2003).

In Rhyne, Kmart, like Defendant here, tried to isolate one particular portion of the punitive damages statute. The Court declined to use that method of statutory construction. A strong indication that N.C.G.S. §1D-20 has not overturned United Laboratories, Inc. is its heading which reads "Election of extracompensatory remedies". Extracompensatory remedies are punitive damages. Attorneys fees are considered costs under North Carolina law. Therefore, by their very nature, attorney's fees are excluded from N.C.G.S. §1D-20.

Furthermore, North Carolina courts have continued to use United Laboratories, Inc.

after 1996. See Broussard v. Meineke Discount Muffler Shops, Inc., 958 F. Supp. 1087 (W.D.N.C., 1997); Blankenship v. Town and Country Ford, Inc., 622 S.E.2d 638, 174 N.C. App. 764 (Ct. App. 2005).

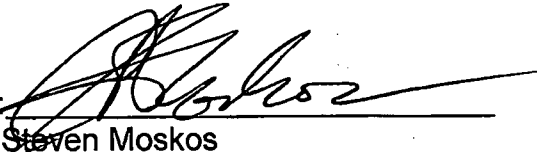
In Brown v. King, 166 N.C.App. 267, 601 S.E.2d 296 (N.C. App., 2004), King appealed "judgments entered after trial by jury, which awarded \$95,000 in punitive damages and \$34,381.90 in attorney fees to plaintiff for breach of fiduciary duty." King argued "that the court erred in awarding attorney fees pursuant to N.C. Gen. Stat. § 75-16.1 when the plaintiff had elected to seek punitive damages and an equitable remedy." The Court disagreed holding, "'Since [attorney fees and punitive damages] serve different interests and are not based on the same conduct, there is no double redress for a single wrong, and plaintiff is not required to elect between them to prevent duplicitous recovery.' United Labs. v. Kuykendall, 335 N.C. 183, 193, 437 S.E.2d 374, 380 (1993)." The Court went on to quote Kuykendall extensively regarding election of remedies and the purposes behind awarding punitive damages and attorney's fees. The Court then held, "Here, plaintiff was properly awarded both attorney fees and punitive damages based on the necessary findings by the court and jury. Affirmed." Brown, 166 N.C. App. at 272, (N.C. App. 2004).

Since United Laboratories, Inc. v. Kuykendall is still the law in North Carolina, Plaintiffs are permitted to elect actual and punitive damages under the jury's fraud verdict and attorneys fees under North Carolina's UTPA.

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**C. STEVEN MOSKOS, P.A.**  
**Attorney for the Plaintiffs**

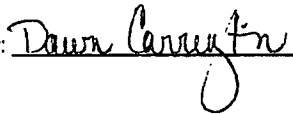
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Charleston, South Carolina  
July 20, 2016

**Certificate of Service**

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 20th day of July, 2016.

C. STEVEN MOSKOS, P.A.

By:   
Dawn Carrington

IN THE COURT OF COMMON PLEAS

) FOR THE FIFTH JUDICIAL CIRCUIT

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2016 JUL 25 AM 8:40  
FILED  
RICHLAND COUNTY  
JEANETTE W. McBRIDE  
C.C.P. & G.S.

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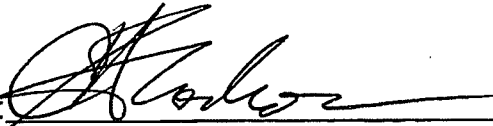
Fraud under N.C.G.S. § 1D-15 is simply one of the aggravating factors that has to be proven for punitive damages to be awarded. The jury could have also found willful and wanton conduct or fraudulent conduct was committed by Defendant permitting an award of punitive damages under Plaintiffs' negligent misrepresentation cause of action.

Plaintiffs also object to Defendants' efforts to force Plaintiffs to elect a remedy before the Court rules on the various post trial motions. Plaintiffs should be made aware of the amounts from which they can choose before they are forced to elect. Defendant seeks to have Plaintiffs guess which potential recovery the Court will allow. That way, Defendant has a chance that Plaintiffs' guess will be wrong resulting in a lower amount it has to pay or possibly making an appeal easier. This is shown in Defendant's Response to Plaintiffs' Election of Remedies dated May 27, 2016 wherein Defendant now objects to Plaintiffs' election of actual and punitive damages for fraud and attorney's fees under the North Carolina UTPA. This objection is without merit and is dealt with in a separate brief.

On May 18, 2016, Plaintiffs' counsel received the following in an email from Ryan White, Judge Cothran's law clerk, "Judge Cothran has decided to grant the Defendant's Motion to Require Election of Remedies. Accordingly, Plaintiff has until 5:00 p.m. on Monday, May 23, to make an election." Pursuant to that order, Plaintiffs have submitted their election. Plaintiffs have also moved for reconsideration of that Order until such time as the Court rules on the various motions so Plaintiffs can make an informed decision regarding the remedies available to them.

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**C. STEVEN MOSKOS, P.A.**  
**Attorney for the Plaintiffs**

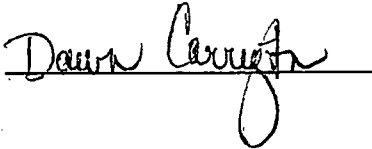
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C. STEVEN MOSKOS, P.A.

By: 

COUNTY OF RICHLAND

**DANIEL O'SHIELDS AND ROGER  
W. WHITLEY A PARTNERSHIP  
D/B/A O&W CARS**

## Plaintiffs

**VS.**

COLUMBIA AUTOMOTIVE  
COMPANY, LLC D/B/A MIDLANDS  
HONDA

Defendant

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT  
) CASE NO. 13-CP-40-0319

**PLAINTIFFS' BRIEF OPPOSING  
DEFENDANT'S MOTION FOR SETOFF  
OR RECOUPMENT**

RICHLAND COUNTY  
 FILED  
 25 JUL 25 PM 8:40  
 SETOFF  
 JENNIFER W. HARRIS  
 C.C.P. & G.S.

Defendant erroneously moves “pursuant to S.C. Code Ann. §15-38-50(1) and South Carolina common law” for a set-off of unrelated amounts allegedly paid by Nationwide Mutual Insurance Company to reduce the judgment to be entered against Defendant. This motion should be denied.

Nationwide was a Defendant in this action. Plaintiffs sued Nationwide under South Carolina law asserting that Nationwide had failed to follow South Carolina law in the way it titled the 2003 Honda Civic after it was wrecked, not for representations made when the Civic was purchased by Plaintiffs. During discovery, Plaintiffs realized they would not be able to prove their case against Nationwide as Nationwide's documentation indicated that it had complied with South Carolina law.

Plaintiffs resolved their dispute with Nationwide by way of a confidential release. Plaintiffs cannot breach this confidentiality agreement without suffering a penalty. Plaintiffs assert that money paid by Nationwide, if any, would have compensated Plaintiffs for

expenses unrelated to the damages caused by Defendant, would have dealt with expenses under South Carolina substantive law, and/or were not associated with Plaintiffs' injuries caused by or claims against Defendant under North Carolina substantive law.

## 1. NORTH CAROLINA LAW

A set-off is substantive law. Therefore, North Carolina law applies. Defendant asserts S.C. Code Ann. §15-38-50(1) applies here. The corresponding North Carolina Act is N.C.G.S. § 1B-4. Defendant, however, has failed to move for a set-off under North Carolina law. Therefore, it has waived its right, if any, to a set-off.

Furthermore, Defendant is not entitled to a set-off because the elements of the South Carolina claims made against Nationwide<sup>1</sup> for concealing the salvage nature of the Civic are different than the elements of the North Carolina claims made against Defendant<sup>2</sup>

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<sup>1</sup> Negligence, Fraud and SCUTPA. Negligence against Midlands Honda was dismissed pursuant to a directed verdict motion so this claim is irrelevant.

Elements of Fraud in South Carolina - (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010). Non-disclosure becomes fraudulent concealment when a "party to a transaction 1) conceals some material fact 2) within his own knowledge, 3) which it is his duty to disclose". Lawson v. Citizens and Southern Nat. Bank of S. C., 193 S.E.2d 124, 259 S.C. 477 (S.C., 1972).

Elements of South Carolina's UTPA - (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010).

<sup>2</sup> Breach of Contract, Negligence, Negligent Misrepresentations, Constructive Fraud, Fraud and NCUTPA.

Elements of Fraud in North Carolina - (1) a representation relating to some material past or existing fact; (2) that was false; (3) that when he made it defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that the defendant made the false representation with the intention that it should be acted on by the plaintiff; (5) that the plaintiff reasonably relied upon the representation and acted upon it; and (6) that the plaintiff suffered injury. Odum v. Little Rock & I-85 Corp., 299 N.C. 86, 91-92, 261 S.E.2d 99, 103 (1980) (citation omitted).

Elements of North Carolina's UTPA - North Carolina's UTPA claim is different than South Carolina's as the judge decides as a matter of law if the alleged conduct constitutes an unfair trade practice. The jury decides (1) whether the acts occurred, (2) in or affected commerce (issue of commerce), (3) whether these

for affirmatively misrepresenting the car. The claims made were not the same and thus, not subject to a set-off.

Even if the claims made against Nationwide and Midlands Honda were made under North Carolina law, Midlands Honda is not entitled to a set-off as money paid by Nationwide, if any, was not for any underlying claim proven against Defendant since Plaintiffs could not prove their claims against Nationwide. At best, if Nationwide paid money to Plaintiffs, it would be a collateral source which could not be used as a set-off. The purpose of the collateral source rule is to "exclude[ ] evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured Plaintiff." Kaminsky v. Sebile, 140 N.C.App. 71, 77, 535 S.E.2d 109, 113 (2000) (quoting Badgett v. Davis, 104 N.C.App. 760, 764, 411 S.E.2d 200, 203 (1991)). "The policy behind the rule is to prevent a tortfeasor from 'reduc[ing] his own liability for damages by the amount of compensation the injured party receives from an independent source.'" Id. (quoting Fisher v. Thompson, 50 N.C. App. 724, 731, 275 S.E.2d 507, 513 (1981)). This rule is intended to prevent the tortfeasor from receiving a windfall when a portion of the plaintiff's damages have been paid by a collateral source. Wilson v. Burch Farms, Inc., 627 S.E.2d 249, 176 N.C.App. 629 (N.C. App. 2006). Defendant is not entitled to a set off.

## **2. SOUTH CAROLINA LAW**

Even if South Carolina law applied, Defendant would still not be entitled to a setoff.

First, Plaintiffs could not prove their case against Nationwide. The documents

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acts had an impact on plaintiff (issue of proximate cause), and (4) the amount of damages (issue of damages). N.C.G.S. § 75-1.1.

provided by Nationwide indicated that it followed South Carolina law in titling the Civic in its name after it was wrecked. Nationwide was required by S.C. Code Ann. §56-19-480 to acquire a salvage title if the cost of repair was 75% or of the value of the Civic. The estimate to repair the Civic was \$10,388.10. (Trial Exhibit 11 attached hereto.) Nationwide valued the Civic at \$14,100.00 when it bought the car from Ms. Gaskins. Thus, the Civic was damaged 73.6% of its value. Plaintiffs could not have prevailed at trial. Thus, if Nationwide paid any money to resolve Plaintiffs' claims, that payment would be for something other than the same injury as required by S.C. Code Ann. §15-38-50(1).

Second, S.C. Code Ann. § 15-38-50 states when a release is given to two or more persons who are liable in tort for the same injury, the settlement "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it." S.C. Code Ann. § 15-38-50(1) (2005). Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. Hawkins v. Pathology Associates, 330 S.C. 92, 113, 498 S.E.2d 395, 406-07 (S.C. App., 1998). Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (S.C. App., 2012). The reduction in the judgment must be from a settlement for the same cause of action. Ward v. Epting, 290 S.C. 547, 351 S.E.2d 867 (Ct. App. 1986) (refusing to apply settlement for pain and suffering cause of action to judgment in wrongful death action); Hawkins v. Pathology Associates, 330 S.C. 92, 498 S.E.2d 395 (S.C. App., 1998); Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015). In this case, Plaintiffs sued Nationwide under a South Carolina negligence theory. The Court dismissed Plaintiffs North Carolina negligence



claim against Midlands. Thus, if Nationwide paid any money under a negligence claim, that money would not be for the same cause of action and injury. Defendant, as the moving party, has the burden to show that Nationwide is a joint tortfeasor and that any money received by Plaintiffs was for the same claim. Defendant has failed to do so.

As stated, Plaintiffs' claims against Nationwide were South Carolina claims, not North Carolina claims as were made against Midlands Honda. At the beginning of the case, Defendant chose North Carolina law when it filed its motion to dismiss, forcing Plaintiffs to amend their Complaint to assert only North Carolina claims against Defendant. Plaintiffs continued to pursue their South Carolina claims against Nationwide.

At the trial, the Court dismissed Plaintiffs' negligence claim so that cannot be the basis for a setoff. In North Carolina, the causes of action for fraud and for unfair trade practices have different elements than their South Carolina counterparts. Since the claims and injuries to Plaintiffs were different, Defendant is not entitled to a set-off.

Third, under South Carolina law, any money received from Nationwide would also be considered a collateral source not subject to an offset. According to the collateral source rule, a wrongdoer should not receive a windfall simply because the injured party received compensation from an independent source. Rattenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989). Moreover, this rule has been liberally applied in South Carolina to preclude the reduction of damages. See Otis Elevator v. Hardin Constr. Co., 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); Rattenni, 298 S.C. at 277, 379 S.E.2d at 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967) (tortfeasor's liability for damages not

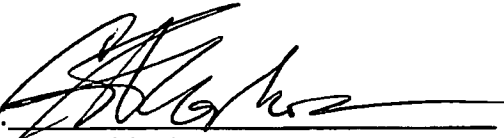
reduced by disability payments from employer). To qualify as a collateral source, the source must be "wholly independent of the wrongdoer." Citizens and S. Nat'l Bank of South Carolina v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995); Atkinson v. Orkin Exterminating Co., Inc., 361 S.C. 156, 604 S.E.2d 385 (2004). Nationwide is not associated with Midland's Honda. It is a totally separate entity and never had any dealings with Midlands Honda prior to this action. Nationwide's duties arose out of South Carolina's titling statutes. Midlands Honda's duties arose out of North Carolina statutes, North Carolina common law, and the North Carolina auction rules. Defendant and Nationwide are independent corporations. Thus, the court should consider Nationwide a collateral source of funds, if any were paid.

Furthermore, Defendant would only be allowed a setoff after the Court determines the final amount of the actual and punitive damages. Smith v. Widener, 397 S.C. 468, 724 S.E.2d 188 (S.C. App. 2012). From a public policy view, any setoff should only come after multiplying any verdict or after the punitive damages issues are resolved as this "is more likely to effectuate the purposes behind" the unfair trade practices act and common law fraud. Ameripride L's inen & Apparel Services, Inc. v. Eat Well, Inc., 65 Mass. App. Ct. 63, 836 N.E.2d 1116 (Mass Ct App 2005). North Carolina takes the same position. Washburn v. Vandiver, 93 N.C. App. 657, 379 S.E.2d 65 (1989.)

Because of the confidential resolution between Plaintiffs and Nationwide, Plaintiffs are not able to discuss fully how the resolution of their claims with Nationwide does not affect the jury's verdict against Defendant. Should the Court order the production of the agreement between Plaintiffs and Nationwide, Plaintiffs request the Court conduct an *in camera* review of the agreement to maintain the integrity of the confidential resolution and

to avoid any potential action by Nationwide against Plaintiffs for the breach of the confidentiality agreement. Were the agreement to be ordered to be produced, Plaintiffs also request the opportunity to address this matter more fully after the Court's *in camera* review.

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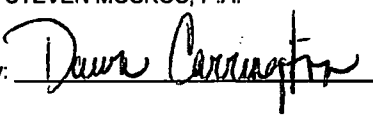
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Charleston, South Carolina  
July 20, 2016

Certificate of Service

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 20 day of July, 2016.

C. STEVEN MOSKOS, P.A.

By: 

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
  
DANIEL O'SHIELDS AND ROGER  
W. WHITLEY A PARTNERSHIP  
D/B/A O&W CARS  
  
Plaintiffs  
  
vs.  
  
COLUMBIA AUTOMOTIVE  
COMPANY, LLC D/B/A MIDLANDS  
HONDA  
  
Defendant

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT  
) CASE NO. 13-CP-40-0319  
)

) **PLAINTIFFS' BRIEF OPPOSING**  
) **DEFENDANT'S MOTION FOR**  
) **JUDGMENT NOTWITHSTANDING THE**  
) **VERDICT, OR, IN THE ALTERNATIVE, A**  
) **NEW TRIAL, OR A NEW TRIAL NISI**  
) **REMITTITUR**

RICHLAND COUNTY  
FILED  
JUL 25 AM 8:38  
JANET T. W. MCBRIDE  
C.C.P. & G.S.

To aid the Court in reviewing Plaintiffs' arguments opposing Defendant's Motion for Judgment Notwithstanding the Verdict, a New Trial, or a New Trial Nisi Remittitur, Plaintiffs have prepared the following table of contents.

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## **FACTS**

This bifurcated trial was before the Court from April 18 through April 22, 2016. Plaintiffs and Defendant moved for directed verdicts at the conclusion of the first stage of the trial. The Court granted Plaintiffs' directed verdict motion as to Defendant's third, fourth, sixth, seventh, eighth, and thirteenth defenses. The Court also granted Plaintiffs' directed verdict motion as to liability on their breach of contract claim.

On April 21, the Court directed a verdict against Plaintiffs on their negligence claim citing North Carolina's economic loss rule. The Court denied Defendant's directed verdict motion based on the economic loss rule as to Plaintiffs' fraud, negligent misrepresentation, and North Carolina Unfair Trade Practices Act claims. Defendant withdrew its directed verdict motion regarding the punitive damages' issue of agency and vicarious liability (Directed Verdict Transcript (DV Tr.) 58:1-62:7) based on the power of attorney (Exhibit 46) signed by Randy Threatt in favor of the ADESA Auto Auction.

The Court did not entertain any arguments regarding punitive damages after the first stage of the trial.

On April 22, 2016, the punitive damages stage of the trial was conducted. Plaintiffs presented evidence by calling Mr. Nalawaja, Defendant's general manager, as a witness. Defendant then presented evidence by examining Mr. Nalawaja. Plaintiffs then closed their case. Defendant did not renew any of its previous directed verdict motions nor did it make a directed verdict motion regarding punitive damages at the close of all the evidence at the end of the second stage of the trial.

- 1. DEFENDANT'S MOTION FOR JNOV IS INAPPROPRIATE AND SHOULD BE DENIED.**

Rule 50(b) SCRPC states, "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict..."

"When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006). Moreover, only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion. In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001); Gov't Emps. Ins. Co. v. Mackey, 260 S.C. 306, 195 S.E.2d 830 (1973). A motion for a JNOV is merely a renewal of the directed verdict motion. Wright, 372 S.C. at 20, 640 S.E.2d at 496; . RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012). See McEntire v. Mooregard Exterminating Servs., Inc., 353 S.C. 629, 632, 578 S.E.2d 746, 747 (Ct. App. 2003) (stating a directed verdict motion is a prerequisite to a motion for JNOV or a new trial motion on the ground the evidence does not support the verdict).

When ruling on a JNOV motion, a trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Freeman v. J.L.H. Investments, LP, 414 S.C. 362, 778 S.E.2d 902 (2015). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). The trial judge must

deny motions for directed verdict or judgment notwithstanding the verdict "when the evidence yields more than one inference or its inference is in doubt." Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999); Wright v. Hiester Constr. Co., 389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2010).

The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).

When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Reiland v. Southland Equip. Serv. Inc., 330 S.C. 617, 500 S.E. 2d 145 (Ct. App. 1998).

**a. Defendant did not comply with Rule 50 SCRPC.**

The Court should deny Defendant's motion for JNOV as Defendant failed to renew its directed verdict motion "at the close of all the evidence" on April 22. Strict compliance with the rule is required. See, e.g., RFT Mgmt. Co. v. Tinsely & Adams, L.L.P., 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) ("When a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV" (quoting Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006))); Henderson v. St. Francis Cmty. Hosp., 295 S.C. 441, 369 S.E.2d 652 (Ct. App. 1988) (holding that Rule 50(b) is strictly applied), overruled on other grounds by 303 S.C. 177, 399 S.E.2d 767 (1990); cf. State v. Bailey, 368 S.C. 39, 43 n.4, 626 S.E.2d 898, 900 n.4 (Ct. App. 2006) (stating, "[i]f a defendant presents evidence after the denial of his directed verdict motion



at the close of the State's case, he must make another directed verdict motion at the close of all evidence in order to appeal the sufficiency to the evidence"). Stephens v. CSX Transp., Inc., 415 S.C. 182, 781 S.E.2d 534 (2015).

At the close of the first stage of the trial, Defendant moved for a directed verdict on Plaintiffs' claims for negligence, negligent misrepresentation, and that portion of Plaintiffs' UTPA and fraud claims which were based on the duties set forth in the auction's terms and conditions which contain the arbitration matrix. Defendant presented additional evidence during the second stage of the trial. Defendant did not renew its directed verdict motions at the conclusion of the second stage of the trial. Since, Defendant failed to renew its motions "at the close of all the evidence", the motions are waived. Therefore, Defendant's motion for JNOV should be denied.

**b. Defendant's Post-Trial Motion raises new issues which are not preserved for review.**

During the directed verdict motions on Wednesday April 20<sup>th</sup>, Defendant claimed it was "not alleged to have been liable for an improper conduct by the auction agent who committed the sole act of negligence." (DV Tr. 58:4-6). Defendant, for the first time, argued that the complaint was silent on the issue of agency and that the auction did not have the authority to complete the North Carolina Damage Disclosure form. Plaintiffs argued that Mr. Threatt and Mr. Farrell, both managers, participated in and condoned Defendant's wrongdoing of selling a dangerous, "clipped" car at the auction, putting into motion the events that harmed Plaintiffs. Additionally, Plaintiffs argued that the Power of Attorney signed by Mr. Threatt in favor of the auction was the appropriate authority to bind Defendant. Plaintiffs also reminded the Court of ADESA's testimony through Mr. Guyer

regarding the power of attorney.

GUYER 30(b)(6), JOSEPH RICHARD, (Pages 13:22 to 14:23)

13

22

23 Q. All right. Can you read the first  
24 paragraph for us. This is -- it looks like a fax  
25 of maybe a photocopy of something so it didn't come

14

1 out very well. Would you please read that first  
2 paragraph for us.

3 A. The undersigned and its subsidiaries  
4 hereby duly appoint ADESA Corporation located at  
5 13085 Hamilton Crossing Boulevard, Carmel, Indiana  
6 46032 or any of its subsidiaries, ADESA, through  
7 its authorized employees and agents to act as our  
8 attorney in fact to sign all papers and documents  
9 that may be necessary pertaining to the sale and  
10 subsequent transfer of the vehicle consigned by the  
11 undersigned to ADESA for its auction of the  
12 vehicles or permitting to the purchase of vehicles  
13 by the undersigned including, without limitation,  
14 any title, title transfer document, reassignment of  
15 odometer disclosure statements as required by  
16 federal law.

17 Q. And the Exhibit Number 45, who signed  
18 that?

19 A. It appears to be the signature of Randall  
20 Threath.

21 Q. And he was representing Midlands Honda at  
22 the time?

23 A. That's my understanding.

At the conclusion of Plaintiffs' argument on this issue, Defendant withdrew its directed verdict motion. (DV Tr. 62:1-6)<sup>1</sup>. Defendant did not renew its motion "at the

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<sup>1</sup> 1 MR. REIBOLD: Your Honor, with respect as I now  
2 understand it is his theory is that Midland's is  
3 responsible for the actions of it's agent appointed  
4 through the power of attorney. That's not in the complaint  
5 but I think that's probably appropriately raised. I'll  
6 withdraw our motion on a directed verdict on that ground.

conclusion of all the evidence". Since the issue was not preserved, Defendant has waived this issue. Therefore, Defendant's JNOV motion must be denied.

Additionally, during its directed verdict motion (DV Tr. 20:11-14) and in heading 1B of Defendant's Motion for JNOV (page 2), Defendant claimed it was entitled to judgment as to Plaintiffs' negligent misrepresentation, UTPA, and fraud claims "to the extent they stem from any alleged failure to follow the auction rules".

21 MR. REIBOLD: Our motion is not very close to what  
22 he's described. It's a much narrower motion. I am not  
23 standing before you saying the Economic Loss Rule bars a  
24 claim based upon North Carolina's Damage Disclosure  
25 Statute. I'm saying the economic loss rule bars a claim  
-24-

1 based upon the auction rules. Those are totally separate.  
2 If you were to grant my motion you would not be dismissing  
3 any claim in its entirety. You would only be dismissing  
4 that portion of the claim which is based upon the Auction  
5 Rules.

(DV Tr. 23:21-24:5)(Emphasis added). See also id., 20:11-14 (similar).

Defendant's new claim, in the text of its motion, asks that these verdicts be overturned in their entirety. This new claim directly contradicts Defendant's position presented during its directed verdict motion. Defendant is not allowed to expand its motion now. It has waived any right to request that the entire claims be dismissed.

**2. THE ECONOMIC LOSS RULE DOES NOT APPLY TO THIS CASE SO  
DEFENDANT'S MOTION FOR JNOV SHOULD BE DENIED.**

- a. Defendant's liability arises out of duties owed prior to entering into a contract.**

North Carolina's economic loss rule only prohibits a tort action against a promisor for his simple failure to perform his contract obligations. North Carolina State Ports

Authority v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 240 S.E.2d 345 (N.C. 1978). Cf. Spillman v. American Homes, 108 N.C.App. 63, 65, 422 S.E.2d 740, 741-42 (1992) ("a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.") Reece v. Homette Corp., 110 N.C.App. 462, 429 S.E.2d 768 (N.C. App. 1993).

"For a party to pursue a tort claim stemming from a contract, a plaintiff 'must allege a duty owed him by [a] defendant separate and distinct from any duty owed under a contract.'" LRP Hotels of Carolina, LLC, v. Westfield Insurance Company, 2014 WL 5581049 (EDNC 2014);<sup>2</sup> see Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (N.C. 1985) (violation of North Carolina Uniform Residential Building Code is negligence per se and actionable. The economic loss rule does not apply.) The same is true in South Carolina. In Kennedy v. Columbia Lumber and Mfg. Co., Inc., 384 S.E.2d 730, 299 S.C. 335 (1988), the Court held that the "economic loss" rule applies where duties are created solely by contract.

Ultimately, the question is, from where does the duty owed by the Defendant arise?

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<sup>2</sup> This rule was reiterated just last year in Medfusion, Inc. v. Allscripts Healthcare Solutions, Inc., 2015 WL 1455680 (Superior Court of North Carolina 2015). This case is an unpublished opinion and it is questionable whether it can be considered at all. (N.C. R. App. P. Rule 30(e)(3).) Defendant, however, presented this case to the court during the trial. It seeks to use this unreported case and others in support of its motions. Plaintiffs simply direct the Court's attention to paragraph 40 of the opinion which reads "In order to give rise to a tort claim in the context of a contractual relationship, 'a plaintiff must allege a duty owed him by the Defendant separate and distinct from any duty owed under a contract.'" Id., at \*8 (quoting Gregory Woods Prods. v. Advanced Sawmill Mach. Equip., Inc., 2007 US Dist. LEXIS 46245, at\*25 (W.D.N.C. 2007)).

The test is not when the duty becomes actionable, it is when the duty arose. In the present case, Defendant owed five non-contractual duties to Plaintiffs. First, Defendant owed a duty to disclose under the North Carolina damage disclosure statute, N.C.G.S. §20-71.4. Second, it owed a duty to disclose truthfully the condition of the vehicle pursuant to the ADESA Auto Auction rules. Third, it had a common-law duty not to affirmatively misrepresent the vehicle. Fourth, it had a duty to inspect the Civic. Fifth, it had a duty to disclose the results of its inspection to a potential buyer, the prior wreck damage, and the dangerous repairs made to the Civic. Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 477 S.E.2d 86 (Ct. App. 1996).

Defendant has failed to provide the Court a single case that shows a North Carolina Court dismissing a claim based on a duty that arose prior to a contract, as listed in the prior paragraph, or that was based on an independent duty owed by a party to the contract. Since Plaintiffs' claims arise from separate independent duties that arose prior to any contract between the Parties, the economic loss rule does not apply and Defendant's JNOV motion should be denied.

**b. Even if the economic loss rule applied the verdicts would still stand.**

First, Defendant has waived its right to move for JNOV when it failed to move for a directed verdict at the close of all the evidence.

Second, during its directed verdict motion, Defendant claimed the auction's terms and conditions constituted the contract that brings the economic loss rule into play. As noted above, Defendant limited its directed verdict motion to the application of the economic loss rule to those parts of Plaintiffs' tort claims related to the auction's terms and conditions.

For the economic loss rule to be relevant in this case, Defendant must prove that the auction's terms and conditions played the principal, if not the only, reason for the jury's verdict. The form provided to the jury for the actual damages verdicts, however, is general in nature. The special interrogatories relate only to the North Carolina damage disclosure Act. Because of the number of duties from different sources, it is impossible to know what the jury viewed as the dominate factor, if any, in its decision. Defendant has failed to present any evidence that the auction's terms and conditions were a contract between the Parties<sup>3</sup> or that any part of the verdict was based on the auction rules which were admitted into evidence without objection. Since it has not met its burden, Defendant's motion for JNOV should be denied.

Third, as noted above, Defendant's topic paragraph claims the application of the economic loss rule bars Plaintiffs' negligent misrepresentation, UTPA violations, and fraud "to the extent they stem from any alleged failure to follow the auction rules". Defendant then asserts it is entitled to a directed verdict under the economic loss rule on all three claims in their entirety. Defendant cannot be allowed now to expand its claim nor to directly contradict the position it advocated at trial.

Fourth, under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury free from error, the verdict will not be reversed. Gold Kist, Inc. v. C & S Nat'l Bank, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct.

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<sup>3</sup> The Auction Terms and Conditions start with:  
In consideration of ADESA Corporation, on behalf of it auction subsidiaries ("ADESA") allowing an automobile dealer or an automobile dealer's Authorized Representative(s)...to purchase and sell motor vehicles at ADESA's auction facilities..., Dealer, as purchaser or seller, as applicable, agrees to the following terms and conditions....:

App.1985); Cole v. Raut, 663 S.E.2d 30, 378 S.C. 398 (2008). Defendant failed to make a directed verdict regarding the duties imposed by the North Carolina Damage Disclosure statute and the common-law regarding its duties to inspect, disclose, and to make truthful affirmative representations. It has also ignored these duties in its motion for JNOV. Since Defendant has not moved for a directed verdict or JNOV on these claims, the jury's verdict must be upheld.

Fifth, Defendant now makes a motion to dismiss Plaintiffs' punitive and enhanced damages claims even though Defendant did not make a directed verdict motion regarding these issues during the trial. Its motion regarding these issues has been waived.

- c. Defendant erroneously relies on the doctrine of vicarious liability to attempt to escape responsibility for its managers' participation in and condonation of the aggravating factors warranting punitive damages.**

As stated above, Defendant withdrew its directed verdict motion related to this issue. (DV Tr. 62:1-6). Having done so, this issue is not properly before the court on a motion for JNOV.

During the directed verdict motion, Defendant argued that the auction agent "committed the sole act of negligence". (DV Tr. 58:4-6). Defendant did not plead sole negligence of a third party as an affirmative defense in its answer. Therefore, this defense has been waived. Rule 8(c) SCRCP.

Even if Defendant could raise this issue, it is not a basis for a JNOV motion.

Defendant's motion is based on N.C.G.S. §1D-15 which states:

(c) Punitive damages shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person participated in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, in the case of a corporation, the officers, directors, or

managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages.

Defendant, in this motion and in its other post-trial motions, states it is entitled to judgment in its favor because an officer, director, or manager did not sign the North Carolina damage disclosure form. This is not the standard. The statute specifically states that punitive damages cannot be imposed solely on the basis of vicarious liability. The plain meaning of the statute is that Plaintiffs only have to present evidence that the "managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages". Thus, if the managers had knowledge the events were happening, participated in making the plans that constitute fraudulent conduct, participated in carrying out the plans that constitute the fraudulent conduct, condoned the fraudulent activity, or learned of the events afterwards and condoned an agent's bad acts, then Defendant is subject to a punitive damages verdict.

In this case, Defendant's managers directed that the car be sent to the auction, knew they did not relay all the information about the dangerous nature of the car, and knew that the North Carolina damage disclosure statement and the sales receipt would have to be completed by its attorney-in-fact, the auto auction. Defendant's managers participated in this fraudulent conduct by hiding the dangerous condition of the vehicle and Defendant condoned the acts of its attorney-in-fact when it received its copy of the North Carolina damage disclosure statement and the sales receipt. Defendant's managers further condoned these events when they ignored Mr. Whitley's demand that Defendant take back the car and return his money.

Defendant asserts, without any evidence at trial or in its motion, that an agent at the



ADESA Auto Auction completed the North Carolina Damage Disclosure form without any information from Midlands Honda. This is incorrect. The trial testimony of Mr. Geyer shows Mr. Farrell, the used car manager, had to discuss the condition of any vehicle being sold at the auction with an employee of the auction. Furthermore, Defendant, through its manager Mr. Farrell, had an affirmative duty to explain any and all announcements that needed to be made about the vehicles Defendant was selling at the auction. This shows that a "manager of the corporation participated in the conduct constituting the aggravating factors giving rise to punitive damages".

Plaintiffs provided additional testimony from Mr. Ecklund and Mr. Threatt, Defendant's general manager, which showed Mr. Threatt knew the Civic had been previously wrecked, cut in half, improperly welded to the back-end of another car and was dangerous. Defendant's former managers testified they knew Defendant could not sell cars in North Carolina or South Carolina that were dangerous. They also testified that they knew the North Carolina damage disclosure form had to be completed as it was required under North Carolina law and the auction rules. Furthermore, Mr. Threatt, who had all this information, was the manager who made the decision to sell the car at the auction. Clearly, Defendant's managers "participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages".

Based on the foregoing, Defendant's motion for JNOV should be denied.

**3. DEFENDANT IS NOT ENTITLED TO A NEW TRIAL ABSOLUTE.**

"When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or

prejudice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004).

The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. In other words, to warrant a new trial absolute, the verdict reached must be so "grossly excessive" as to clearly indicate the influence of an improper motive on the jury. Mere undue liberality on the part of the jury does not warrant an inference that the verdict resulted from improper influences. Becker v. Walmart Stores, Inc., 339 S.C. 629, 529 S.E.2d 758 (2000).

Defendant bears the burden to prove the jury's verdict was governed by "passion, caprice, prejudice, or other considerations not reflected by the evidence". Defendant fails to address several of factors, and Defendant's broad brush approach to the factors it does discuss fails to show that the verdict was "grossly excessive".

Plaintiffs note that Defendant has not made a motion for new trial absolute based on the amount of the actual damages verdict. Defendant's motion must therefore be viewed in light of the punitive damages verdict only. Defendant has not provided any evidence the verdict was the result of any improper motive. In light of the egregious and fraudulent conduct of Defendant, the jury's punitive damages' verdict of \$2,381,888 is warranted.

**a. The punitive damage verdict should be upheld in its entirety.**

The punitive damages verdict against Defendant is not so "excessive so as to shock the conscience of the court and clearly indicate the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive." Rather the verdict is entirely reasonable and could be higher.

As set out more fully below, Defendant's conduct of knowingly selling a dangerous, previously wrecked car without disclosure, is egregious conduct. Defendant followed its policy of selling rebuilt wrecked cars without disclosing the damage. Defendant's management knew the Civic had been "clipped". It intentionally refused to inspect the car using its Honda trained technicians. It withheld information the auction should have disclosed to the auction buyers. It lied on the statutorily mandated damage disclosure form. It failed to satisfy its common law duties of inspection and disclosure of the prior wreck damage. These actions were all in conformity with Defendant's stated policy of not inspecting cars for damage or disclosing prior wreck damage of which it learns. It never returned Plaintiffs' call demanding their money back.

The Court's punitive damages jury charge used North Carolina's punitive damages statute. The law states a jury may consider only that evidence that relates to the following:

1. The reprehensibility of the defendant's motives and conduct.
2. The likelihood, at the relevant time, of serious harm.
3. The degree of the defendant's awareness of the probable consequences of its conduct.
4. The duration of the defendant's conduct.
5. The actual damages suffered by the claimant.
6. Any concealment by the defendant of the facts or consequences of its conduct.
7. The existence and frequency of any similar past conduct by the Defendant.
8. Whether the defendant profited from the conduct.
9. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

The jury heard testimony regarding all of these factors.

**i. The reprehensibility of the Defendant's motives and conduct.**

Midlands Honda's motive is simple, greed. Mr. Farrell testified about the competitive nature of the car business inside and outside of the dealership. Mr. Threatt also testified that if you did not produce for the dealership, you did not get paid. If you continued not to produce, you were fired. He further testified the dealership would not spend money on an inspection of a car which was being sent to the auction, even if it had been previously wrecked. Mr. Farrell's testimony was that he did not care about the cars. He only cared about "moving the metal".

Mr. Threatt's and Mr. Farrell's conduct constituted egregious behavior. Both managers knew the Civic was a dangerous "clipped" car. It is not entirely clear what happened with the car when it was returned by Mr. Ecklund. What is clear is that senior management knew the Civic was clipped and dangerous. It strains credibility that Midlands Honda would not have inspected the car. If a customer comes back with a complaint that the dealership sold him a clipped car, the dealership is not likely to trust the customer. It will inspect the car to verify the customer's claim. However, even if Mr. Threatt did not have the car inspected, it is just as bad. Having been informed that the car had been previously wrecked and was dangerous, Midlands Honda' management put it right back in the stream of commerce with no concern for the subsequent buyer or the motoring public.

Midlands Honda's top management refused to provide the auction with the proper announcements. Failing to tell the auction the truth caused the damage disclosure form to contain material misrepresentations relied on by Mr. Whitley and the other bidders. Midlands Honda continued to withhold information from Mr. Whitley by failing to tell him the

car was clipped when he offered to pay \$5000 for the car. Instead, Midlands Honda provided Mr. Whitley a North Carolina damage disclosure form affirmatively representing the vehicle had not been damaged more than 25% of its value nor had it been reconstructed.

Defendant's reprehensible conduct was compounded by Defendant's conscious misrepresentations on the statutorily mandated damage disclosure form. Defendant's managers had dealt with car sales in North Carolina for years. They knew the auction required the damage disclosure form to be completed in its entirety. Instead of providing true information, it withheld the truth about the Civic. Thus, when it filled out the damage disclosure form, Defendant's agent, the auto auction, affirmatively misrepresented that the vehicle had not been damaged more than 25% of its value nor had it been reconstructed.

Additionally, when Mr. Whitley found out about the prior wreck damage and demanded his money back, Defendant ignored him.

**ii. The likelihood, at the relevant time, of serious harm.**

North Carolina's punitive damages statute does not limit the likelihood of serious harm to only the person who purchased the item. As stated at trial, this car was to be driven on the roads of North Carolina and South Carolina. The testimony of Mr. Allen clearly shows that some of the major structural components of the Civic were welded together improperly. Other structural components were not welded together at all. The likelihood of serious harm to the owner of the car, the occupants of the car, and others around the car is tremendous. It does not take an expert to know that if the Civic came apart and jagged pieces of steel or other parts struck people, those people would be severely hurt or killed. The Defendant did not present any evidence to contradict Plaintiffs'

evidence that this car is dangerous to Mr. Whitley and to the community. Additionally, harm does not have to be limited to personal injury. Mr. Whitley lives in a small town in rural North Carolina. If Plaintiffs had not done the right thing, Plaintiffs could have very quickly gotten a reputation for selling dangerous cars and defrauding people. Such a reputation would seriously impact their ability to sell cars leading to the demise of their business.

**iii. The degree of the defendant's awareness and of the probable consequences of its conduct.**

While Defendant knows that people can get seriously hurt in a car wreck, Defendant's witnesses testified they did not know nor did they care why dealers were buying previously wrecked cars at the auction. They only cared about making the most money they could from selling this Civic. Their testimony showed total disregard for other car dealers and how the purchase of this vehicle might affect their businesses. They also showed total indifference to how an unsafe car on the road might maim or kill people.

**iv. The duration of the defendant's conduct.**

Defendant's witnesses also testified that sending previously wrecked cars to an auction without disclosing the prior wreck damage was how they had always disposed of unwanted cars. Mr. Farrell had been the used car manager since 2008. He had always used the same procedure. Mr. Nalawaja testified that Mr. Threatt and Mr. Farrell had followed Defendant's policies and procedures by disposing of the Civic by sending it to the auction without disclosing the prior wreck damage. In fact, Mr. Nalawaja testified Defendant has not changed its policies and still sells cars at the auction the same way it did in 2010 when it sold the Civic to Plaintiffs. The process used to sell the Civic was not

an anomaly. It was business as usual.

**v. The actual damages suffered by the claimant.**

The jury was permitted to consider its actual damages verdict of \$6,645.00. In light of the thousands of cars Defendant sells each year, the jury knew this small amount would not cause Defendant to change its conduct.

Defendant relies almost exclusively on the ratio between actual and punitive damages in its attempt to prove excessiveness. The United States Supreme Court has already stated that small damages will support higher ratios and a number of other courts have agreed. Plaintiffs have provided numerous cases in argument ii The ratio between actual damages and punitive damages. starting on page 32 of this brief allowing ratios ranging from 87-to-1 to 2,750-to-1. In this case, the ratio of 358-to-1 is not excessive. (See Plaintiffs' discussion of ratios under State Farm below.)

**vi. Any concealment by the defendant of the facts or consequences of its conduct.**

As stated by Mr. Farrell, Defendant was in a superior position to a consumer or another dealer who might buy the Civic. It knew from its 159 point certified preowned inspection, the Carfax at the time it initially bought the Civic from Ms. Watkins, the Carfax when it was returned by Mr. Ecklund, Ms. Ecklund's telephone message (exhibits 68 and 70), discussions with Mr. Ecklund, and any subsequent inspection performed by Midlands Honda that the Civic had been previously wrecked, "clipped", and rebuilt. Defendant's former and present managers adamantly testified that Defendant did not have to disclose the prior damage and that they left it up to the buyer to discover the truth. North Carolina and South Carolina courts have found this behavior egregious. See Huff v. Autos

Unlimited, Inc., 124 N.C.App. 410, 477 S.E.2d 86 (Ct. App. 1996) and Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010). By not disclosing the dangerous condition of the Civic, Defendant tried to pass on its losses to others, as well as the consequences of having to deal with any fallout from selling this Frankencar to a consumer.

Additionally, Mr. Threatt, Mr. Farrell, and Mr. Nalawaja testified that Defendant did nothing wrong. Defendant's motions show it continues to maintain it has done nothing wrong. The jury understood that neither Defendant nor its managers have any remorse, believe that their actions were wrong, or that the way they conducted business needs to change. This showed the jury that a large punitive damage verdict was needed to get Defendant's attention and to deter it and other dealerships from putting the community at risk. As the Court heard, this case is all about concealment. North Carolina and South Carolina law say it is egregious conduct not to disclose prior wreck damage and that such conduct should not be tolerated or condoned.

**vii. The existence and frequency of any similar past conduct by the Defendant.**

The primary example of the existence and frequency of similar past conduct is what happened to Mr. Ecklund. Defendant conducted a 159 point Honda certified pre-owned inspection of the Civic. Defendant would have us believe that its Honda trained technician missed the two tones of paint on the underside of the vehicle and the shoddy, defective weld going from one side of the car to the other. It did not tell Mr. Ecklund about the prior damage and the dangerous condition of the vehicle. Defendant conducted itself in the same way in dealing with Plaintiffs.



Defendant's witnesses also testified they had sold previously wrecked vehicles without disclosing the damage over numerous years. According to Mr. Farrell, in 2010 and the prior years, the dealership was selling well over 2,000 cars per year. Many people buying cars will trade in a car. Many of those had been previously wrecked. Defendant's could not state how many of these previously wrecked cars were sent to the auction or were sold on its lot. We will never know the exact number of previously wrecked cars that the Defendant sold without disclosure since Defendant did not and does not inspect cars it sells at auction. Defendant's policy and practice of selling previously wrecked cars without disclosing the damage to buyers has been repeated many times each year, if not each month.

**viii. Whether the defendant profited from the conduct.**

Defendant profited from its conduct. Defendant admits as much in its brief on page 10.

If the Court desires more discussion: Mr. Nalawaja testified as to the profit made by Midlands Honda. Defendant's own documents show Defendant made approximately \$2,400 in profit from the sale of this car to Mr. Ecklund and to Plaintiffs. Even when Defendant got caught by Mr. Ecklund, it still made a profit. Instead of giving him back his money, Midlands Honda forced Mr. Ecklund to buy another car from it. Although it lost a little bit of money in the second transaction, it made up for it by selling the Civic to Plaintiffs.

We will never know exactly how much Defendant profited by selling other cars at the auction without disclosing prior wreck damage. Some purchasers may never have discovered the damage. Some purchasers may have discovered the damage in another

wreck but chose not to pursue a remedy based on someone else paying for their loss, like an insurance company. Some purchasers may have decided the time and expense did not justify making a claim against Defendant, like Mr. Ecklund. Some purchasers may have complained to Defendant only to be ignored, like Plaintiffs, only they chose not to pursue their claims against Defendant.

**ix. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.**

Defendant can pay the punitive damages award. Mr. Nalawaja testified that Defendant's revenues for 2015 were \$2,381,888.00. He also testified that Defendant's net worth for 2015 was \$10,969,318.00. Plaintiffs' counsel specifically stated to the jury that Plaintiffs were not trying to put Defendant out of business. Counsel suggested the jury consider ordering Defendant to pay between 15% and 25% of its net worth as punitive damages. The jury declined to give the full amount that Counsel requested. The jury's award of \$2,381,888.00 is one year's revenue which equates to 21.7% of Defendant's net worth. The jury simply wanted to get Defendant's attention and deter it and other dealers from lying and cheating. The jury reasonably determined that to change Defendant's behavior, Defendant should relinquish one year's worth of revenues. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 52-53, 691 S.E.2d 135, 150 (2010) (holding as a matter of course that the wealth of the defendant is a proper consideration) (finding that a net worth of \$1,444,561 easily suffices to uphold a punitive damage award of \$216,000, or 15% of Defendant's net worth) (sale of previously-wrecked vehicle without disclosure).

Defendant bears the burden to prove the jury's verdict was governed by "passion,

caprice, prejudice, or other considerations not reflected by the evidence". Defendant's broad brush approach to the factors it does discuss fails to show that the verdict was "grossly excessive" instead of warranted or even unduly liberal. Its motion should be denied.

In sum, Defendant has failed to prove the jury's verdict was governed by "passion, caprice, prejudice, or other considerations not reflected by the evidence". Under the North Carolina factors, the punitive damages award is quite reasonable. Moreover, Defendant's actions after getting caught by Mr. Ecklund, after getting caught by the present Plaintiffs, and after hearing from the jury, indicate that a much larger award may be necessary to make it change its ways. According to North Carolina law, the award should be weighed in light of the purposes of punitive damages. (N.C.G.S. §1D-35(1).); §1D-1. The purposes are to punish and deter Defendant and others from acting similarly. §1D-1.

Defendant has maintained a policy and practice of deceiving customers about previously-wrecked cars; maintained at trial there is nothing wrong with doing so; and even after hearing from the jury, Defendant continues to insist there is nothing wrong with putting wrecked vehicles on the road, and hoping the buyer does not find out. Safety should not be a concern, Defendant writes as, "No term of the contract addressed safety of the vehicle, and O&W Cars presented no evidence or authority that Midlands Honda was obligated to disclose safety concerns with the vehicle at any time (neither the arbitration rules nor the damage disclosure require disclosure of safety concerns)." Def's Mot. at 11-12. This is a defendant which does not, will not, "get" that putting wrecked vehicles on the highway to risk the lives of buyers and the motoring public is forbidden.

**b. Defendant errs in asserting that the jury should not have been allowed to consider safety issues.**

Defendant did not object to the jury instructions on punitive damages. Therefore, its arguments that the jury was allowed to consider improper issues is waived. Southern Ry. Co. v. Coltex, Inc., 329 S.E.2d 736, 285 S.C. 213 (1984) (The right to have the law declared is waived by silence in the face of an omission from the charge.); Winters v. Fiddie, 394 S.C. 629, 716 S.E.2d 316 (S.C. App. 2011) (Sellers' failure to object to the omitted portion of the jury instruction precluded the trial court from granting a new trial on that ground.)

Second, Defendant's argument that juries cannot consider safety concerns of nonparties under Phillip Morris, USA v. Williams, 549 U.S. 346 (2007), completely misrepresents Phillip Morris.

Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible--although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.

549 U.S., at 355 (emphasis added). The Court reiterated, "[W]e recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few." Id., at 357.

The Court again explained, id.,

How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to punish the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of

any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one--because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury--a court, upon request, must protect against that risk.

Thus Defendant is wrong. A jury may consider the safety risk to others -- under the very case Defendant cites for the opposite proposition.

All Defendant was entitled to was an instruction that the safety issues go solely to reprehensibility, if it had requested such. It did not request that instruction and cannot now complain.

If the court requires further discussion: Counsel's recollection, contrary to Defendant's assertion on page 11 of its motion, is that Defendant did not object to Mr. Allen's testimony on grounds he was not qualified to render an opinion on safety. However, if Defendant did object on those grounds, the objection was properly overruled: an expert on automotive repair should know which repairs are cosmetic and which are needed for safety reasons. He should also know when a vehicle is beyond repair to make it safe.

Defendant again errs when it writes "Allen is a mechanic". Allen is a collision repair master technician with more than twenty-five years of experience in auto body repair.

He was presented to the Court as an expert collision repairman. Defendant did not object to his qualifications. Mr. Allen testified that the cutting of the Civic's frame in the locations where it was cut created structural weakness in the Civic not designed by Honda. As such, it will not react in a wreck the way Honda designed it to.

Mr. Allen did not testify directly to car valuation, but only to the effect that the problem was so far beyond repair that the vehicle should not be on the road. This

testimony enabled Mr. Whitley, who *is* knowledgeable about car sales, to more accurately value the vehicle.

Defendant errs in stating that Mr. Allen was admitted only to testify as to damages. Defendant may be confusing the Court's reasonable holding - that testimony about the inability to repair the car to make it safe is relevant to value - with a holding that Mr. Allen could testify only to value or damages. The Court did not so hold, nor would such a holding have made sense.

Defendant's only objection at trial to the introduction of Mr. Allen's testimony was based on relevancy. The Court ruled that Mr. Allen's testimony was relevant for the purposes of determining the value of the vehicle. Mr. Whitley testified the vehicle was only worth \$500 due to its unsafe condition. Defendant tried to force Mr. Whitley to agree the vehicle had a fair market value of \$2,000. This line of testimony raised a jury question. The jury decided the issue against Defendant. Its consideration of Mr. Allen's testimony, whether the vehicle was safe and the impact of its dangerous condition on the value of the Civic, was appropriate<sup>4</sup>.

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<sup>4</sup> Defendant is both wrong and misleading when it writes, Mot. p. 11-12, that "O&W Cars presented no evidence or authority that Midlands Honda was obligated to disclose safety concerns with the vehicle at any time (neither the arbitration rules nor the damage disclosure require disclosure of safety concerns)." Defendant is wrong because the arbitration rules quite clearly require disclosure of frame damage, damage to pillars and roof, damage to rocker panels, of reconstructed vehicles, and of "Frame/Unibody Damage (existing, altered, or repaired)." Each of these safety concerns is specifically required to be disclosed by the arbitration rules. (See attached pages 9 and 10 of Trial Exhibit 52.) Furthermore, Huff v. Autos Unlimited, Inc., 124 N.C. App. 410, 477 S.E.2d 86 (Ct. App. 1996) states, "An automobile dealer with knowledge that a car he intends to sell has been wrecked should not escape liability by pleading ignorance where the damage can be detected by visual inspection; nor likewise, should he be allowed to sell the same car with assurances of reliability." Disclosure of safety issues is even more imperative.

Defendant may be correct, but is highly misleading, when it complains that the damage disclosure form does not require disclosure of safety concerns. The damage disclosure form itself may not be required, but when the form is filled out, it requires disclosure.

Defendant seems to argue that Plaintiffs were improperly arguing to the jury that other people were hurt by Defendant's conduct and that Defendant needed to be punished to compensate those other hurt individuals. Plaintiffs made no such argument. Plaintiffs' arguments were limited to showing the impact Defendant's actions could have on others not that others were actually hurt but not compensated enough, if at all.

Defendant argues in a footnote and without any supporting authority that Plaintiffs employed one improper argument by employing the "golden rule". Thus, the Court should not consider that argument.

If the Court were to consider it at all, the Court must reject it because Defendant never made an objection at trial on this ground.

Moreover, Plaintiffs did not make a "golden rule" argument as they never asked the jurors to put themselves in Plaintiffs' shoes. An argument that the jury is acting for the community, however, is permissible. State v. Daniels, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012).

Defendant also errs in alleging Plaintiffs' argument that the dangerous Civic could hurt and kill people is somehow similar to the racially discriminatory remarks made in Toyota of Florence v Lynch, 314 SC 257 (1997), wherein Plaintiffs' counsel drew pictures representing a defendant's employees as Japanese and another picture of the Southeast United States containing nuclear explosions. These arguments are not the same. Plaintiffs' argument is based on the facts presented at trial. The Lynch arguments were designed to play on the jury's prejudices.

Since Defendant has failed to meet its burden of showing a denial of due process, its motion should be denied.

**c. The jury's verdict is within constitutional limits.**

Plaintiffs have previously and in Plaintiffs' Brief Opposing Defendant's Motion to Enforce North Carolina's Punitive Damages Cap argued that no reduction is warranted under the relevant statutes or, in the alternative, that punitive damages be reduced to \$2,000,000 under South Carolina's punitive damages statute. They reassert and incorporate those arguments here.

As a preliminary matter, the United States Supreme Court, in its discussion of the ratio regarding punitive damages, was concerned about the unbounded nature of punitive damages. The Court determined that Defendants should have notice of the potential penalties they may face for egregious conduct. In response, States enacted statutes cabin and guiding punitive damages awards. North Carolina and South Carolina did so. See N.C.G.S. §1D-1 et seq. and SC Code §15-32-510 et seq. As a result, awards that meet the statutory factors enjoy an enhanced presumption of constitutionality.

Plaintiffs maintain that punitive damages follow *lex fori* and thus, South Carolina law applies. Nevertheless, were the court to use North Carolina law, Plaintiffs have addressed the North Carolina statutory law above, pages 13-22, and, as to the law's constitutionality, Plaintiffs argue as follows: Rhyne v. K-Mart Corp., 358 N.C. 160, 594 S.E.2d 1 (2004) resolves any constitutional concerns regarding N.C.G.S. § 1D-25. The jury awarded compensatory damages to Mr. Rhyne in the amount of \$8,255.00 and \$10,730.00 to Mrs. Rhyne. The jury then awarded each plaintiff punitive damages in the amount of \$11.5 million. The trial court then reduced the punitive damage award to \$250,000.00 to for each plaintiff. In Rhyne, the Court stated,



Because the limitation on punitive damages contained in N.C.G.S. § 1D-25 bears some rational relationship to several legitimate governmental interests, as reflected in the above noted discussion, we conclude that section 1D-25 does not violate principles of due process and equal protection as guaranteed by our state Constitution.

594 S.E.2d at 18.

Since the North Carolina Supreme Court has already determined that the punitive damage statute meets constitutional muster, the Court need not look any further. This is how a North Carolina court would decide the issue.

Nonetheless, because of Defendant's argument, Plaintiffs analyze the punitive damages award as set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996). The analysis mirrors many of the factors used in N.C.G.S. §1D-25, which were discussed above.

**i. Reprehensibility of Midlands Honda's conduct.**

In Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010), the Supreme Court held that a dealership's deceptive omissions in the sale of a previously wrecked vehicle "can only be construed as exhibiting an extremely high degree of reprehensibility." 387 S.C. at 53, 691 S.E.2d at 151. Defendant's actions here were even more reprehensible because it involved affirmative misrepresentations and because the subpar repairs were more likely to result in serious injury.

**(1) The harm caused was physical as opposed to economic.**

The harm actually incurred by Plaintiffs was economic. However, the potential harm included extreme physical injuries, up to and including death.

**(2) The tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others.**

Even though Defendant knew from its conversations with Mr. and Mrs. Ecklund that the vehicle was dangerous, Defendant had no qualms about reinserting the Civic into the stream of commerce. Even though North Carolina statutory law, common law and the auction rules required disclosure of the dangerous nature of this car, Defendant's managers intentionally withheld crucial information about the safety of the car. This behavior endangered anyone who may have driven the Civic, anyone in the motoring public, anyone who may have been around the vehicle after it left Defendant's possession, including Plaintiffs, and anyone to whom Plaintiffs sold the Civic. As discussed above, page 17, Defendant continues to exhibit extreme indifference to the dangers to which it subjects buyers and the motoring public. See Parrott v. Carr Chevrolet, Inc., 331 Or. 537, 17 P.3d 473, 488 (2001) ( "[D]efendant's failure to disclose that the [used vehicle] previously had been damaged also implicated its overall safety and evinced an indifference not only to plaintiff's health and safety, but also to the health and safety of the general public that would share the road with a potentially unsafe vehicle."). (upholding an award of punitive damages 87 times the amount of actual damages.)

Even though Defendant had a duty to inspect the car, Mr. Threatt testified he intentionally did not and would not inspect this, or any other known dangerous, car that he was getting rid of at an auction. While Mr. Ecklund had informed Defendant the Civic was dangerous, Defendant's managers did not know the extent Mr. Farrell likewise stated he did not know what happened to vehicles after they were sold at the auction nor was that any of his concern.

Additionally, Mr. Threatt, Mr. Farrell and Mr. Nalawaja testified that Defendant had not done anything wrong by following its established policies and procedures of not

inspecting cars to make sure they are safe prior to sale, selling a previously wrecked car without disclosure, and selling dangerous cars at auction without disclosure, disregarding the safety of others.

**(3) The target of the conduct had financial vulnerability.**

Mr. Whitley's and Mr. O'Shields' business is very small. Mr. Whitley and Mr. O'Shields are retired. Mr. Whitley testified that the profit made on the cars he sells is very small as he is not trying to make a living selling cars. His objective is to provide good dependable cars to the economically disadvantaged people in his community. Rescinding the sale of this car to Ms. White by Plaintiffs resulted in Plaintiffs losing the money they had in the Civic through the purchase price and repairs (\$5,995) as well as gross profits of approximately \$650. That may not be a lot of money to an expansive and wealthy dealership like Defendant, but to a small dealership like O&W, \$6,645.00 is a lot. To make up for the damage caused by Defendant, the Plaintiffs would have to sell approximately 10 cars, the number of cars usually on their lot at any one time, to come close to breaking even. Plaintiffs are located in Shelby, North Carolina. It is a small community. Being known for selling dangerous, previously wrecked vehicles would ruin Plaintiffs' reputation and effectively put them out of business.

**(4) The conduct involved repeated actions or was an isolated incident.**

'[R]epeated misconduct is more reprehensible than an individual instance of malfeasance,' " and, therefore, " 'a recidivist may be punished more severely than a first offender.' " State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423, 123 S. Ct. 1513, 1523 (2003) (quoting Gore, 517 U.S. at 577, 116 S.Ct. at 1599-1600).

Plaintiffs produced evidence of Defendant's pattern of committing the same kind of malfeasance in the past. Defendant sold the Civic to Mr. Ecklund after it conducted a 159 point Honda certified pre-owned inspection. Defendant knew the vehicle had been "clipped" and was, therefore, dangerous, but sold it to Mr. Ecklund nonetheless. When Defendant was caught, it acted innocent with Mr. Ecklund, but then sold the car at the auction, again without disclosing the prior dangerous condition of the Civic. This was supported by Mr. Threatt's testimony of Defendant's pattern of not inspecting a car that was to be sold at an auction even though Mr. Threatt knew it to be dangerous. Mr. Farrell likewise stated Midlands Honda routinely sold previously wrecked cars at auction, he did not know what happened to previously wrecked vehicles after they were sold at the auction, and what happened to the vehicles after they were sold was not any of his concern.

Midlands Honda also exhibited a pattern of indifference and recklessness towards the health and safety of others. The policies and procedures as set forth by its former and current general managers and its former used car manager showed Defendant routinely dealt with previously wrecked vehicles. Some it would sell on its lot. Others it would sell at an auction. Numerous times these witnesses stated they would not disclose to potential bidders at auction or customers on its lot that these vehicles had previous wreck damage. Defendant left it up to the bidders to learn the truth before they were injured, even though statutory law, common law, and the auction rules required them to do otherwise. Mr. Threatt, Mr. Farrell, and Mr. Nalawaja testified that this sale followed Defendant's everyday policy and procedures.

Defendant engaged in this conduct not merely repeatedly, but routinely, as a matter of policy.

**(5) The harm was the result of intentional malice, trickery, or deceit, or mere accident.**

The harm here was the result of intentional trickery and deceit. Defendants managers knew exactly what they had, a dangerous vehicle that should not be on the road. They intentionally withheld information in violation of North Carolina statutory law, common law, and the auction rules. This caused Defendant's attorney-in-fact to affirmatively misrepresent the vehicle to Plaintiffs. Defendant's managers knew that this information would be important to anyone looking at buying this car. They knew that if the truth was told about this car, they would have to accept a much lower figure.

**ii. The ratio between actual damages and punitive damages.**

Defendant's reliance on State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) is misplaced. The State Farm Court stated,

Because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages."

The North Carolina Court in Rhyne found the ratio of 30-to-1 between Mr. Rhyne's compensatory damages and punitive damages and the ratio of 23-to-1 for Mrs. Rhyne to be constitutionally permissible. Other courts have allowed double and triple digit ratios. See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 456, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (Court approved punitive damages award 526 times greater than the compensatory damages award stating, "the disparity between the punitive award and the potential harm does not, in our view, 'jar one's constitutional sensibilities.'") Following the United States Supreme Court's holding would allow a punitive damage award

of \$3,495,270 in this case. Other Courts hold similarly. Greene v. Royster, 652 S.E.2d 277 (N.C. App. 2007) (upholding fraud judgment of \$1,911 in compensatory damages and \$250,000 in punitive damages reduced from \$500,000 pursuant to N.C.G.S. § 1D-25, a ratio of 131-to-1); Krysa v Payne, 176 S.W. 3d 150 (Mo. Ct. App. 2005) (upholding \$18,449.53 in compensatory damages and \$500,000 in punitive damages against owners of used car dealership who misrepresented number of vehicle's prior owners and concealed fact that car was actually two halves welded together); St. Joseph Healthcare, Inc. v. Thomas, No. 2014-SC-000008-DG, 2016 Ky. LEXIS 179 (May 5, 2016) (a ratio of 386-to-1 comports with due process, \$3,750 in actual damages and \$1,450,000 in punitive damages); Wilkins v. Peninsula Motorcars, Inc., 266 Va. 558, 587 S.E. 2d 581 (2003) (\$4,000 actual damages, \$100,000 punitive damages); Parrott v Carr, 17 P. 3d 473 (Or. 2001) (\$11,496 in compensatory damages and \$1 million in punitive damages, a ratio of 87-to-1); Bishop v Mid-America Auto Auction, Inc., 807 F. Supp. 863 (D. Kan. 1992) (upholding jury verdict on fraud and federal odometer statute count for \$5,000 in actual damages and a total of \$600,000 in punitive damages, a ratio of 120-to-1.); Romanski v Detroit Entm't, LLC., 428 F. 3d 629 (6<sup>th</sup> Cir 2005) (upholding \$600,000 of jury's \$875,000 punitive damages award on compensatory damages of \$279.05, a 2,750-to-1 ratio); Williams v. Kaufman County, 352 F.3rd 994 (5<sup>th</sup> Cir 2004) (affirming \$15,000 punitive damages award when jury awarded \$100 nominal damages, a 150-to-1 ratio, in section 1983 strip search case); Lincoln v. Case, 340 F. 3<sup>rd</sup> 283 (5<sup>th</sup> Cir 2003) (upholding \$55,000 of \$100,000 punitive damages award on \$500 compensatory damages, an 110-to-1 ratio, in housing discrimination case); Estate of Overbey v. Chad Franklin Nat'l Auto Sales N. LLC., 361 S.W. 3d 364 (Mo 2012) (upholding \$500,000 punitive damages for automobile

finance fraud when compensatory damages were \$4500, a 111-to-one ratio); Myers v. Workman's Auto Ins. Co., 90 P. 3<sup>rd</sup> 977 (Idaho 2004) (affirming \$300,000 punitive damages when jury awarded nominal damages of \$735, a 408-to-1 ratio).<sup>5</sup>

As stated, the Parties have presented four options: 1) No reduction, a ratio of 358-to-1, as more extensively explained in Plaintiffs' Brief Opposing Defendant's Motion to Enforce North Carolina's Punitive Damages Cap, 2) reduction to \$2,000,000 under South Carolina's punitive damages statute, a ratio of 300-to-1, 3) reduction to \$250,000 under North Carolina's punitive damages statute, a ratio of 37-to-1, and 4) Defendant has suggested no more than \$59,805.00, a ratio of 9-to-1. The State Farm limitation does not apply, under its own terms. In light of the repeated reprehensible egregious conduct of Defendant and the small size of the actual damages verdict, a ratio up to 358-to-1 is appropriate.

**iii. The difference between the punitive damages award and civil penalties authorized or imposed in comparable cases.**

Plaintiffs have listed a number of comparable cases in the prior section and incorporate them herein. Additionally, the Court should look at North Carolina's punitive damages statute N.C.G.S. §1D-1 et seq. as notice of a potential civil penalty to which it may be subject.

Furthermore, "A regulatory scheme of sanctions that includes interruption or closure of business operations provides sufficient notice to a business defendant that its violation of the law could have serious economic consequences." Parrott v Carr, 17 P.3d 473 (Or.

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<sup>5</sup> If the Court does wish to consider unpublished cases, see Brooks v. Youngert, 2006 WL 3759810 (W.D. Mich. Dec. 19, 2006) (approving total of \$6,000 punitive damages on four dollars compensatory damages, a 1500-to-1 ratio).

2001).

In addition to the civil penalties listed by Defendant, the Court should also consider the penalties which can be imposed under North Carolina's Article 12 dealing with the motor vehicle dealers and manufacturers licensing law which is designed to prevent frauds and other abuses by car dealers. N.C.G.S. §20-285<sup>6</sup>. Indeed, one of the main purposes, the first purpose listed, of North Carolina's licensing of motor vehicles is "to prevent frauds." Defendant here has acted against the purpose of licensing. It should not be surprised at any punishment short of a complete termination of its business<sup>7</sup>. Dealers doing business in North Carolina know that if they commit unfair trade practices or make material misrepresentations, they can lose their license. This can impose significant financial damages on the dealership. Obviously, if Defendant was in North Carolina and was shut down because of its fraud, it stands to lose \$2,381,888 per year which is a one-to-one ratio with the punitive damage verdict.

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<sup>6</sup>

§ 20-71.2. Declaration of purpose.

The titling of salvage motor vehicles constitutes a problem in North Carolina because members of the public are sometimes misled into believing a motor vehicle has not been damaged by collision, fire, flood, accident, or other cause or that the vehicle has not been altered, rebuilt, or modified to such an extent that it impairs or changes the original components of the motor vehicle. It is therefore in the public interest that the Commissioner of Motor Vehicles issue rules to give public notice of the titling of such vehicles and to carry out the provisions of this Part of the motor vehicle laws of North Carolina.

§ 20-285. Regulation of motor vehicle distribution in public interest.

The General Assembly finds and declares that the distribution of motor vehicles in the State of North Carolina vitally affects the general economy of the State and the public interest and public welfare, and in the exercise of its police power, it is necessary to regulate and license motor vehicle manufacturers, distributors, dealers, salesmen, and their representatives doing business in North Carolina, in order to prevent frauds, impositions and other abuses upon its citizens and to protect and preserve the investments and properties of the citizens of this State.

<sup>7</sup>

North Carolina may deny, suspend, place on probation, or revoke a dealer's license if the dealer defrauded someone, used unfair methods of competition, unfair deceptive acts or practices, or knowingly advertised by any means, any assertion, representation or statement of fact which is untrue, misleading or deceptive. N.C.G.S. §20-294(4), (6) and (7).



Additionally, N.C.G.S. §20-348, North Carolina's Vehicle Mileage Act, and §75-16.1, North Carolina's UTPA, impose additional penalties on fraudulent dealerships by allowing the imposition of attorneys fees. This should also be considered by the Court.

In sum, under an analysis of South Carolina, North Carolina and federal law, Plaintiffs' punitive damages verdict satisfies Defendant's due process rights. Plaintiffs urge the Court to enter the jury's full verdict as the judgment of the Court.

**d. The Court correctly allowed Brian Allen to provide opinions regarding the Civic.**

For the reasons stated above at pages 24-25, there was no error in allowing Mr. Allen to provide opinions regarding the Civic.

Additionally, it is self-evident that if someone is buying a car, they would want to know if it is dangerous so they could weigh the risks to themselves physically, financially, and, as in the case of a dealer, to their reputation.

What Defendant really contests is the evidence presented by Mr. Allen to which it did not object nor did it provide contradicting evidence. Defendant now wishes for the Court to invade the province of the jury by substituting its view of the evidence for that of the jury. Mendelsohn v. Whitfield, 430 S.E.2d 524, 312 S.C. 17 (S.C. App. 1993) (a party who does not object to the admission of evidence when it is offered cannot make its admission a ground for appeal).

Simply because the jury verdict was \$2,382,888 does not show prejudice caused by Mr. Allen's testimony. It really reflects the jury's deliberate determination that lying and cheating people and businesses and endangering the health and welfare of people and the reputation of businesses will not be tolerated. Obviously, the jury felt its verdict was needed

in order to get the attention of Defendant. Based on Defendant's arguments, it does not appear that the jury was successful.

**e. Reasonable reliance was a jury issue.**

"The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." Forbis v. Neal, 361 N.C. 519, 527, 649 S.E.2d 382, 387 (2007). During the directed verdict motion, Defendant's counsel recognized that reliance was a jury issue. (DV Tr. 45:5-18.) Defendant, however, again attempts to have the court substitute its view of the facts for those of the jury. Defendant was allowed to present to the jury all of the arguments it has presented in this motion. The jury did not accept those arguments. The jury's province should not be invaded.

Furthermore, the facts are not "so clear as to support only one conclusion". Defendant complains that Plaintiffs' inspection of the Civic was "cursory", however, Defendant has provided only a "cursory" explanation of its argument. Even so, North Carolina law states, "Reliance is not reasonable if a plaintiff fails to make any independent investigation...". State Properties, LLC v. Ray, 155 N.C. App. 65, 574 S.E.2d 180 (N.C. App. 2002). The key word is "any". Defendant's own statements defeat its argument as it relies on the word "cursory" which implies some, albeit small, investigation. Therefore, there was some investigation as opposed to none which is needed to show unreasonable reliance.

Even if North Carolina law required more, Defendant did not present any evidence at trial as to the standard of an "independent investigation". Without such a standard, Defendant's argument should not be considered. Even if this argument were considered, it should be rejected as Defendant did not present any evidence or testimony at trial that

the inspection, test drive, and review of the auction documents, performed by Mr. Whitley did not qualify as an "independent investigation." The jury, however, found it did.

Defendant, also, complains that Plaintiffs, at the time of purchase, failed to exercise reasonable diligence, however, Defendant did not elicit any testimony at trial as to what reasonable diligence was or that Plaintiffs were not reasonably diligent. Again, failure of Defendant to provide the standard and testimony showing Plaintiffs failure to meet that standard, should be fatal to Defendant's argument. But even if the failure to establish the standard was not fatal to Defendant's claim, the jury obviously concluded Plaintiffs' investigation met the North Carolina criteria.

If the Court still has any questions, it should be noted that all of the witnesses testified that the damage was not visible until the Civic was raised in the air. Mr. Farrell and Mr. Whitley made it clear that it was unsafe to get under a car as it moved across the block and that there was no opportunity for bidders to lift a car prior to buying it.

Defendant ignores the realities of an auction which does not allow a bidder to lift a vehicle off the ground. Mr. Whitley testified that he performed the inspection which is standard at the auction, a walk around and test drive. As Defendant's own witnesses testified, you can only do a walk around inspection at an auction and evidence of that the car was "clipped" was only visible when the car was in the air.

Even though the car was sold under a red light, Defendant still had five duties requiring disclosure of the dangerous condition of the Civic. Since Defendant intentionally withheld that the car was "clipped" causing no announcement to be made, the additional damage to the rear passenger door only reinforced Plaintiffs' belief that that damage was why it was being sold under the red light. Seeing obvious, but minor, damage, reinforced

belief in Defendant's representations that there was not any major damage to the Civic.

Additionally, Defendant's false representations concerning the vehicle's condition induced Plaintiffs "to forego additional investigation", which under North Carolina law would excuse any failure by Plaintiffs. State Properties, LLC v. Ray, 155 N.C. App. 65, 574 S.E.2d 180 (N.C. App., 2002). Mr. Whitley did not have to assume, nor was there any reason to believe, that the Civic was a "clipped" car when Defendant did not announce it as such during the auction and affirmatively misrepresented the Civic's condition through the North Carolina Damage Disclosure Form. Ultimately, the question was for the jury to decide. It decided the question in favor of Plaintiffs.

**f. The auction's terms and conditions created independent duties which Defendant was required to follow.**

As stated above, the auction rules are a contract between the auction and a dealer. It is not a contract between two dealers. As a result, each dealer has duties to other dealers which arise outside of any contract between the two dealers. While Defendant argues that the terms and conditions of the auction rules are part of the contract between the parties, these terms and conditions become part of the contract only after the contract has been consummated. The integration of the terms and conditions into a subsequent contract does not negate the duties owed by a dealer prior to its sale of a vehicle.

Defendant assumes that since the jury verdict indicated that the North Carolina damage disclosure form was not the sole basis for the jury's verdict, the arbitration rules must have been a factor in the jury's determination. First, there is no evidence for this assertion. Second, Defendant continues to ignore North Carolina's common law regarding affirmative misrepresentations, willful blindness, and its duties to inspect for and disclose

prior wreck damage. Defendant has not provided any evidence that North Carolina's common law duties were not part of the jury's deliberation. As such, Defendant cannot show the jury even considered the auction's rules.

**g. Defendant is not entitled to a new trial based on the issue of intent.**

First, during the directed verdict motion, Defendant recognized that intent is a jury issue. (DV Tr. 44:19-20.) Defendant told the Court that fraud is a jury issue; now that the jury decided the issue against Defendant, Defendant maintains it is not a jury issue. Parties are not allowed to ask the Judge to do one thing, and then complain about the results when the Judge does as asked. Especially when the litigant's proposed remedy is to treat the jury's work as a nullity. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997). Defendant simply does not like the fact that it was found liable for Plaintiffs' damages.

Second, it is almost impossible to get a Defendant to admit that it intended to lie, cheat, and steal from people. As a result, intent must be shown through circumstantial evidence. The Court charged the jury that circumstantial evidence had the same weight as direct evidence.

Third, Mr. Farrell testified he had sold numerous cars in North Carolina and knew that the North Carolina damage disclosure form had to be completed with the sale of each car.

Fourth, ignorance of the law is no excuse. By doing business in North Carolina, Defendant is charged with knowing its responsibilities under the North Carolina Damage Disclosure Act - especially when it repeatedly does business in the State.

Fifth, there was evidence that Defendant knew or should have known about the

auction rules as they had been in effect at least four months prior to the sale of this vehicle. Mr. Farrell stated that he had been to the auction during that period.

Six, Defendant was on notice, through its contract with the auction, that the rules of the auction could change at any time. (Exhibit 50.) Defendant cannot now claim ignorance of its contract with the auction.

Finally, and most importantly, there was ample evidence that Defendant intended to foist the car onto an unsuspecting customer, and to do so with complete disregard for the safety of the buyer and the motoring public. There was extensive evidence that Defendant had a policy of doing so.

Defendant failed to follow the statutory and common law of North Carolina and the auction's rules. It knew what its obligations were as those had been in place for years. It intended for a bidder to rely on its representations and its silence, which Plaintiffs did. There was ample evidence from which a jury could find intent, which this jury did.

**h. Defendant's attorney-in-fact completed the damage disclosure form as directed by Defendant's manager.**

Defendant is liable for the representations made on the damage disclosure form. Defendant had a duty to inform its attorney-in-fact that the vehicle had been reconstructed. It cannot now blame its attorney-in-fact for not disclosing the information or making inaccurate representations because Defendant hid the truth from its attorney-in-fact.

Defendant failed to raise this issue until the directed verdict motion on the third day of trial. It then withdrew its motion allowing the matter to be presented to the jury. (DV Tr. 58:1-62:7) Having permitted the issue to be litigated, it cannot now complain.

Furthermore, if Defendant felt the auction had breached its contract with Defendant

or violated some other duty, it could have taken action against the auction. It has not done so. It can only be inferred its attorney-in-fact did what Defendant wished.

Plaintiffs have argued this point in other parts of this brief. Plaintiffs incorporate those arguments here.

**i. The Court's recharge on the elements of fraud was appropriate.**

Plaintiffs' counsel does not recall Defendant's counsel requesting any additional charges be given to the jury as a result of its questions. Even if counsel had requested the charges set forth in its motion, the Court would not have committed any error in not providing the additional information. The jury asked the Court for information on two occasions. On the first occasion, it asked for the elements of causes of action regarding the NC UTPA and fraud. On the occasion at issue, the Court was asked a specific question by the jury. The Court provided the exact information which was requested. Had the jury not received the information it desired, it knew how to request that additional information. Since the jury did not request any additional information, it can only be presumed that the jury received the information it requested. Therefore, taking the jury instruction in its entirety, the Court did not commit any error.

Moreover, any alleged error would be harmless at best, as the evidence of Defendant's fraud was overwhelming; so too was the evidence that Plaintiffs conducted the most reasonable investigation under the circumstances and were induced not to investigate further by the Defendant's misrepresentations.

Additionally, Defendant has failed to show any prejudice that resulted from any alleged error. Without such, Defendant is not entitled to a new trial.

**4. THE COURT SHOULD NOT ORDER A NEW TRIAL AS THE 13<sup>TH</sup> JUROR.**

Defendant's motion for a new trial under the thirteenth juror doctrine should be denied, as Defendant has not set forth the specific grounds upon which its motion is based. Thus, the Court is left to guess what grounds Defendant asserts. The Court's purpose is to decide specific issues, not to give opinions. Therefore, Defendant's motion should be denied.

Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under "thirteenth juror doctrine," trial court may grant a new trial if the judge believes the verdict is unsupported by evidence and, similarly, a new trial may be granted if the verdict is inconsistent and reflects jury's confusion); Bailey v. Peacock, 318 S.C. 13, 14-15, 455 S.E.2d 690, 692 (1995) ("The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi additur.") Moreover, the thirteenth juror doctrine is properly used only in extreme cases: the authority to order a new trial as the thirteenth juror "has been used sparsely and rightly so." Graham v. Whitaker, 282 S.C. 393, 401, 321 S.E.2d 40 (S.C. 1984).

For the reasons previously stated, which are incorporated here, the verdict is justified and consistent. The verdict was rendered after due and diligent reflection by the jury. Based on the facts presented at trial, it would be an abuse of discretion to overturn the jury's verdict under the "thirteenth juror" doctrine.

**5. THE COURT SHOULD NOT ORDER A NEW TRIAL *NISI REMITTITUR*.**

The trial court alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive. Chapman v. Upstate RV & Marine, 364 S.C. 82, 610 S.E.2d 852, (citing McCourt v. Abernathy, 318 S.C. 301, 457



S.E.2d 603 (1995)). However, compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur*. Cf. Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993). The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. Cf. Vinson v Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723. The jury's determination of damages, however, is entitled to substantial deference. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993).

The jury's verdict is not excessive. Defendant continues to mischaracterize the facts of this case by claiming this is a small case where no one was hurt with little impact on anyone other than the parties. Defendant continues to miss the point. The evidence presented shows extremely reprehensible conduct by Defendant. Midlands Honda's witnesses and its arguments in its post-trial motions show its total indifference to the duties it owes others and to the damage it caused Plaintiffs. The damages suffered by Plaintiffs were, fortunately, relatively small which is one reason why a large punitive damage award is necessary.

By selling cars at auctions, Defendant is constantly making money on previously wrecked cars. If the cars are selling at roughly the same price as the Civic, \$5,200.00, unscrupulous dealers who purchase these cars may try to pass their losses onto an unsuspecting consumer instead of fighting with the seller, i.e. Midlands Honda. Other dealers may not wish to incur the time and expense necessary to collect \$5,200.00. As a result, Defendant is able to sell previously wrecked cars with impunity. The only way to change Defendant's conduct is to prevent selling previously wrecked cars without disclosure from being a profit center. A substantial punitive damages verdict is necessary

to get the attention of Defendant and to deter it and others from future fraudulent conduct. Anything less than full justice will encourage Defendant to continue its business as usual, endangering more people.

If the Court intends to reduce the punitive damages award, it should do so in light of the South Carolina or the North Carolina punitive damages Act.

## 6. CONCLUSION

From Defendant's arguments, it is clear Defendant still does not see the error of its ways. To set aside any part of the verdict would reinforce Defendant's belief and encourage the continuation of its reprehensible conduct. For the reasons stated above, and for such other reasons as may be apparent to the Court, Plaintiffs request that Defendant's motions for JNOV, New Trial Absolute, and New Trial *Nisi Remittitur* be denied.

**C. STEVEN MOSKOS, P.A.**  
**Attorney for the Plaintiffs**

By: 

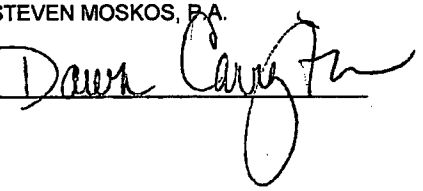
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Charleston, South Carolina  
July 20, 2016

### Certificate of Service

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 20<sup>th</sup> day of July, 2016.

C. STEVEN MOSKOS, P.A.

By: 

State of South Carolina.,)  
)  
)  
County of Richland. )

In the Court of Common  
Pleas of Columbia  
Case No.: 2013-CP-40-00319

Daniel O'Shields.,)  
et al., )  
)  
Plaintiff., )  
)  
-vs- )  
)  
PSC Automotive., )  
et al., )  
)  
Defendant. )  
\_\_\_\_\_)

Partial Transcript  
Of Record

April 18-22, 2016  
Columbia, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Judge, and a jury.

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Wanda Nelson, CVR-M  
Official Court Reporter  
Sixteenth Judicial Circuit  
To The Honorable John C. Hayes, III

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BY:

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Kevin Ivey

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Mr. Walker . . . . .

Charles Ecklund

Video/Audio Deposition

Joe Guyer

Video/Audio Deposition

Randy Threatt

Mr. Moskos . . . . .

Mr. Walker . . . . .

Brent Farrell

Mr. Moskos . . . . .

Mr. Walker . . . . .

Brian Allen

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Greg Nalewaja

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Roger Whitley

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| 1  |            |                               |            |             |
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| 3  |            |                               |            |             |
| 4  | Pl.1       | Damage Disclosure Form        |            |             |
| 5  | Pl.2-10    | Photos                        |            |             |
| 6  | Pl.11      | Estimate                      |            |             |
| 7  | Pl.12      | Midland Honda '03             |            |             |
| 8  |            | Civic Advertisement           |            |             |
| 9  | Pl.13      | Midland Honda Buyer's         |            |             |
| 10 |            | Order (8-2-08) \$12,901.00    |            |             |
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| 3  |            |                                 |            |             |
| 4  | Pl.47      | ADESA Indemnity and             |            |             |
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| 14 | Pl.55      | ADESA Sales Contract (S)        |            |             |
| 15 | Pl.56      | ADESA Sales Contract (B)        |            |             |
| 16 | Pl.57      | Vehicle Info printed            |            |             |
| 17 |            | 12/10/13 @ 09:55 am.            |            |             |
| 18 | Pl.58      | Google Map - ADESA Compound     |            |             |
| 19 | Pl.59      | Street view ADESA @ Gate 3      |            |             |
| 20 | Pl.60-61   | Photo/Street view               |            |             |
| 21 | Pl.62      | Google Map - Westinghouse Blvd. |            |             |
| 22 | Pl.63      | Google Map - Street view WHB    |            |             |
| 23 | Pl.64      | Google - Aerial View ADESA      |            |             |
| 24 | Pl.65      | Google - Aerial View ADESA      |            |             |
| 25 | Pl.66      | Midland Honda Repair Report     |            |             |

I-N-D-E-X - CONTINUED

E-X-H-I-B-I-T-S

| <u>NO.</u>                                              | <u>DESCRIPTION</u>                       | <u>ID.</u> | <u>EVD.</u> |
|---------------------------------------------------------|------------------------------------------|------------|-------------|
| Pl.67                                                   | '08 Car Fax . . . . .                    |            |             |
| Pl.68                                                   | 3/11/0 Car Fax . . . . .                 |            |             |
| Pl.69                                                   | ADESA Corporation Acknow. Form . . . . . |            |             |
| Pl.70                                                   | 3/11/10 Handwritten Message . . . . .    |            |             |
| Pl.71                                                   | Photo . . . . .                          |            | P.76        |
| Pl.72                                                   | Photo . . . . .                          |            | P.83        |
| Pl.73-76                                                | Photos . . . . .                         |            | P.84        |
| Pl.77-83                                                | Photos . . . . .                         |            | P.88        |
| Pl.84-89                                                | Photos . . . . .                         |            | P.94        |
| Pl.90                                                   | 4/2/10 Ck. \$6,960.00. . . . .           |            |             |
| Pl.91                                                   | \$550.00 Repair Bill . . . . .           |            |             |
| Pl.92                                                   | Bill of Sale . . . . .                   |            |             |
| Pl.93                                                   | \$10.00 Bill for Relay Switch. . . . .   |            |             |
| Pl.94                                                   | Deal Recap . . . . .                     |            |             |
| Pl.95                                                   | Deal Recap . . . . .                     |            |             |
| Pl.96                                                   | Midland Honda '15 Financial . . . . .    |            |             |
| Ct.1                                                    | Jury note @ 03:45 pm. . . . .            |            |             |
| Ct.2                                                    | Jury note @ 05:20 pm. . . . .            |            |             |
| Ct.3                                                    | Jury note @ 05:55 pm. . . . .            |            |             |
| Ct.4                                                    | Jury note @ 11:15 am. . . . .            |            |             |
| Court Reporter's Note: All Exhibits were filed with the |                                          |            |             |
| Richland County Clerk of Court's Office.                |                                          |            |             |



1 (COURT BACK IN SESSION WEDNESDAY, APRIL 20, 2016 AT  
2 09:35 AM.)

3 THE COURT: Okay. Do you all from a scheduling  
4 standpoint do you anticipate we'll get it to the jury  
5 today?

6 MR. MOSKOS: Maybe.

7 THE COURT: You think?

8 MR. WALKER: Your Honor, he said he had three  
9 witnesses, one of whom is this safety person. I think  
10 that's just a proffer unless you've changed your mind. And  
11 then he said he had two more witnesses and I would hope we  
12 ought to get most of the testimony in by lunch.

13 THE COURT: Okay. I didn't know whether you were  
14 gonna put up any witnesses.

15 MR. WALKER: He's called my employees and if he's got  
16 two more witnesses, if he doesn't call Mr. Nalewaja then  
17 that would be a real short direct.

18 THE COURT: Okay. All right then I guess we need to  
19 talk about charges, you know, and the verdict form.

20 MR. WALKER: I've got a proposed form I'll be glad to  
21 hand up.

22 THE COURT: Okay.

23 (DOCUMENTS RECEIVED UP BY THE COURT.)

24 MR. MOSKOS: I'm sorry, your Honor, I didn't hear what  
25 Mr. Walker said.

1 MR. MOSKOS: My apologies, your Honor.

2 THE COURT: I mean I know you - Instead of - It seem  
3 to me to be clearer instead of him going back and deal with  
4 'em one at a time so I was just hearing him in response to  
5 you wanting it to be stricken.

6 Go ahead, Mr. Reibold.

7 MR. REIBOLD: The economic there are a claim for  
8 negligence which is a failure to disclose claim. There's a  
9 negligent misrepresentation claim; there's a failure to  
10 disclose claim. And in North Carolina they've - in some of  
11 the cases they even apply it in loss to UTPA and fraud.  
12 I'll tell you why that this does apply. Part of the  
13 disclosures that they complained about in this case are the  
14 things that are contained in those arbitration rules.

15 This car was sold off a lot. The only reason those  
16 arbitration rules apply is because the parties' contract  
17 says we're gonna incorporate by reference the terms and  
18 conditions of the auction and the auction incorporate by  
19 reference the arbitration rules. So the obligation to  
20 disclose anything on that appendix is a term of their  
21 contract. Otherwise those rules wouldn't apply in this  
22 case. And the violation of those rules to the extent  
23 they're claiming these technically caused damage is a  
24 breach of contract in this case.

25 That is the exact same remedy they're seeking in the

1 negligence claim; that exact same measure of damage they're  
2 seeking in the negligent misrepresentation and measure of  
3 damages they're seeing in the UTPA claim and the exact same  
4 measure of damages they're seeking in the fraud claim with  
5 respect to that portion or that alleged non-disclosure.  
6 Those are contract remedies; it's a term of the contract  
7 between the parties. Their seeking the same measure of  
8 damages that's a contract remedy.

9 Economic loss rule would bar any recovery for a claim  
10 related to the condition of a product itself and that's all  
11 this is. So I think the Economic Loss Rule would apply in  
12 this case to the extent they're claiming a non-disclosure  
13 pursuant to the Arbitration Rules which were incorporated  
14 by reference into the parties contract.

15 MR. MOSKOS: And that's simply not the case here. The  
16 problem that they have is that the fraudulent  
17 representations that are made before the sale, those are,  
18 they have affirmative duties not to misrepresent -  
19 represent their cars. That's independent of any  
20 contractual rights that arise after the contract is  
21 consummated. You've got the damage disclosure Form which  
22 is a North Carolina statute. The duty to set forth that  
23 it's a reconstructed vehicle; that's outside of any sort of  
24 arbitration rules. That's outside of the terms and  
25 conditions of the auction rules. At the end of the day

1       reduce - Well, at the end of the day you've got - there are  
2       so many parts of this that are wrong. I'm having a hard  
3       time articulating. First, it doesn't apply because the  
4       duties arise outside of the contract. So, that doesn't -  
5       that doesn't even apply, the Economic Loss Rule in this  
6       situation.

7               If you take Mr. Rodger's position that the contract  
8       claim is everything in this case then all of a sudden you  
9       have no fraud, you can't sue for negligent  
10      misrepresentation, you can't sue for negligence and if he  
11      has his way he can't sue for unfair and deceptive acts and  
12      practices so the public policy consideration then becomes  
13      how do you - How do you keep people from cheating in  
14      contracts when all they have to do is give back the money?

15             If I was a criminal and I got caught and I came before  
16      you, Judge, and I said here let me just give him back his  
17      money let me go, you'd look over those glasses pretty hard  
18      when you'd say no, I don't think so, son, you're gonna go  
19      to jail. And - You know that's what they're asking for.  
20      They've been asking for a pass since this case began.

21             MR. REIBOLD: Our motion is not very close to what  
22      he's described. It's a much narrower motion. I am not  
23      standing before you saying the Economic Loss Rule bars a  
24      claim based upon North Carolina's Damage Disclosure  
25      Statute. I'm saying the economic loss rule bars a claim

1 based upon the auction rules. Those are totally separate.  
2 If you were to grant my motion you would not be dismissing  
3 any claim in its entirety. You would only be dismissing  
4 that portion of the claim which is based upon the Auction  
5 Rules. This is the Sale Contract of both parties.

6 THE COURT: I've never seen that.

7 MR. REIBOLD: And it says that the vehicle is sold  
8 subject to the auction terms and conditions. The  
9 disclosure requirements in the auction rules are  
10 incorporated into records by reference into this contract  
11 to sale between the parties. That portion, the duty to  
12 disclose under that Arbitration Matrix that's been  
13 displayed in this case, is a contract. So what we're  
14 saying is that the Plaintiff can't stand before the jury  
15 and say they committed negligence, they committed negligent  
16 misrepresentation, unfair trade practices, or fraud based  
17 upon that Matrix.

18 If they want to argue, hey, the damages disclosure  
19 statute says they had a duty, that's fine. But the  
20 arbitration rules part is from a contract and it should not  
21 survive. That's our motion on the economic loss.

22 MR. MOSKOS: And just so we're clear, your Honor, I  
23 apologize for continuing this, but the contract, the terms  
24 and conditions, are ADESA's. That's a contract that they  
25 have with individual dealers. It's not like my client went

1           And it's an unfair trade practice misrepresenting the  
2 facts of this car. Excuse me.

3           THE COURT: Do you want to respond to that?

4           MR. REIBOLD: I sure do. Something like that I think  
5 needs a response. We would agree initially that directed  
6 verdict is appropriate in respect to liability on the  
7 breach of contract claim. The arbitration rules were  
8 incorporated in the contract. It was a disclosure not made  
9 as required by the arbitration matrix. That's a breach of  
10 contract. So as to liability on that claim we would  
11 concede directed verdict is appropriate. We do not believe  
12 damages are undisputed at this point and I think Mr. Moskos  
13 agrees with that.

14           With respect to the remaining claims however there are  
15 a variety of other elements that are still very much an  
16 issue. For example, fraud requires contempt. There was -  
17 The evidence is we did not intend to do this; this was a  
18 mistake and we didn't understand the rules or North  
19 Carolina law whatever it may be. Intent is an issue. A  
20 directed verdict on fraud is inappropriate. Negligent  
21 misrepresentation, first of all I think that's subject to  
22 the economic loss rule and you'll see what one of our  
23 affirmative defenses is strictly legal in nature affects  
24 both the negligence claim and the negligent  
25 misrepresentation claim which would make it inappropriate

1 to grant this motion. I can do this now or I can do that  
2 when I do my presentation in full, however you would like  
3 it.

4 THE COURT: Okay.

5 MR. REIBOLD: But negligent misrepresentation also  
6 requires justifiable reliance. We think there's a question  
7 about whether reliance is justified between car dealers  
8 given the option rules which require a very careful  
9 inspection and verification of all announced conditions.  
10 Was it reasonable for her to do that rather than do his own  
11 inspection? I think that's a jury question. In fact in  
12 every case I've ever tried if I've ever tried to argue that  
13 reasonable was not a jury question I lost. I lost that  
14 argument. I think justifiable reliance are gonna result in  
15 negligent misrepresentation we have to go forward. The  
16 UTPA claim in North Carolina has a reliance to Article II,  
17 both actual and justifiable, and I think that would prevent  
18 directed verdict on that claim.

19 Negligence: The negligence claim and the negligent  
20 misrepresentation claim are essentially synonymous at this  
21 point so I think the same grounds would apply. And so the  
22 only directed verdict that's appropriate based on that  
23 admission is gonna be the breach of contract claim with  
24 respect to liability.

25 I'll also tell you that in my presentation in chief

1           MR. REIBOLD: I also would talk about damages and I  
2 think I have to mention because of some of the arguments  
3 that were just made the issue of agency. Agency is not  
4 plead in the complaint. We were not alleged to have been  
5 liable for an improper conduct by the auction agent who  
6 committed the sole act of negligence. I mean based on our  
7 attorney admission agency but that's not a theory that's  
8 plead in the complaint. There has been no testimony about  
9 what the auction person knew or did. There has to be  
10 underlying liability on the part of the auction to make a  
11 principle liable. Agency just doesn't fit on these facts.

12           MR. MOSKOS: There's power of attorney admitted into  
13 evidence without objection giving the auction the authority  
14 to make representations on behalf of the dealership. It's  
15 not a simple fact of oh, we hired this guy to go out and do  
16 something and he screwed up. This is a fiduciary  
17 responsibility. Now if they think that the auction has  
18 some liability, I mean the auction clearly disclaims any  
19 liability in the terms and conditions because they say, you  
20 know, we're just repeating - we're parroting what you tell  
21 us so you make sure all of your disclosures and  
22 announcements are correct. You know it's just like  
23 Midland's Honda is standing right there.

24           THE COURT: I understand that. My understanding from  
25 the testimony though there was no testimony that the



1        auctioneer said anything about the car other than it was a  
2        red light. He didn't make any disclosures one way or the  
3        other. He didn't go through that sheet and say there's  
4        been no - he made no disclosure. At least that's what I -  
5        and I may be wrong about that - so no disclosures were made  
6        when it was sold. It was just sold under a red light. And  
7        Mr. Farrell didn't make any because he didn't think he had  
8        to. It was sold under a red light. Only that sheet came  
9        out right at sometime either when the check was written or  
10       when the title was given. And whoever checked those - the  
11       things on that sheet, now, and the girl at the auction  
12       company checked those. She did not have the authority to  
13       check those because - -

14           MR. MOSKOS: Oh, absolutely.

15           THE COURT: No, no.

16           MR. MOSKOS: That's what Mr. Guyer testified to. He  
17       testified that they would - that they complete those  
18       documents when the - when the dealer doesn't - isn't  
19       present. They had the authority under the - -

20           THE COURT: Do you mean to tell me they can bind the  
21       deal when she just arbitrarily checks no and nobody tells  
22       her to check it off?

23           MR. MOSKOS: It's not that she arbitrarily - Well the  
24       simply answer is yes. If she just went willy nilly yes  
25       then maybe Midlands might have something or a dealer might

1 have a claim against the auction for some negligent hiring  
2 or something of that nature. But in this case what we have  
3 is the power of attorney in the record; there are multiple  
4 documents from ADESA saying that the auction is acting in  
5 the stead of the dealer when the dealer's not there. The  
6 auction has the authority to complete the paperwork based  
7 on the information given by the dealer. In this case Mr.  
8 Farrell got on the front of them and - whether he didn't  
9 say anything or he affirmatively said no there are not  
10 announcements is irrelevant. At the bottom - you know, at  
11 the end of the day the auction checked off the information  
12 based on what was given to them by Midland's Honda under  
13 the authority of the terms and conditions.

14 THE COURT: I know. But I heard no testimony about  
15 that. I mean cause that's - If Midland Honda tells the  
16 auctioneer no, no, no, no, no, she checks the block that's  
17 true. But if she - they don't tell her anything cause he's  
18 telling me under North Carolina law negligence - omission  
19 is not there. If they don't tell 'em anything and she does  
20 that on her own without any representation from Midlands  
21 that's - they've just omitted telling. Right? So how  
22 could she bind them?

23 MR. MOSKOS: Because there is a valid power of  
24 attorney that allows the auction to complete the paperwork  
25 on behalf of the seller.

1           THE COURT: So, but, but how does she know whether the  
2 car had been wrecked without anything and she just  
3 arbitrarily checks no.

4           MR. MOSKOS: But she doesn't arbitrarily check no.  
5 What happens is you've got the telephone call and this is  
6 what Mr. Guyer testified to - not this specific one but  
7 generally what happens is the guy calls up and says I'm  
8 sending cars - I'm not gonna be at the auction - I'm  
9 sending cars and I've got three green lights and two reds.  
10 The reds have an engine problem or has been wrecked. You  
11 know this is the announcement. Or they don't say anything  
12 because there's no requirement under the law that says  
13 there's a mechanical issue. Excuse me, there's no  
14 requirement under the auction rules such as a mechanical  
15 issue to disclose it so they don't have to make an  
16 announcement. And the ladies take down the information;  
17 they put it into the computer. When the car sells the  
18 damage disclosure form is completed based on the  
19 information from the dealership. The sales receipt is  
20 completed based on the information from the dealership.  
21 And you know the lights are checked the announcements if  
22 any are put onto the paperwork and the paperwork is given  
23 to the buyer.

24           THE COURT: Okay.

25           MR. MOSKOS: That - That's in the record.

1           MR. REIBOLD: Your Honor, with respect as I now  
2 understand it is his theory is that Midland's is  
3 responsible for the actions of it's agent appointed  
4 through the power of attorney. That's not in the complaint  
5 but I think that's probably appropriately raised. I'll  
6 withdraw our motion on a directed verdict on that ground.

7           THE COURT: All right.

8           MR. REIBOLD: The last thing I would have then is a  
9 little bit on damages.

10          THE COURT: Okay.

11          MR. REIBOLD: What you have in this case I think has  
12 really been an attempt to double dip.

13          THE COURT: I'm sorry.

14          MR. REIBOLD: A little bit of an attempt to double  
15 dip.

16          THE COURT: Okay.

17          MR. REIBOLD: One of the items they're claiming is  
18 loss profit. But they're also claiming expenses that would  
19 go into your lost profit calculation. You don't get - You  
20 can't do that twice. You've got the five hundred and fifty  
21 dollars to repair the car door; you've got the two hundred  
22 dollars of fees paid to the purchaser - I'm sorry, two  
23 hundred dollars in - Yeah, commission to salesman. And you  
24 have three hundred and fifty dollars to the customer.  
25 Those are already a part of the lost profit calculation.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
  
DANIEL O'SHIELDS AND ROGER  
W. WHITLEY A PARTNERSHIP  
D/B/A O&W CARS  
  
Plaintiffs  
  
vs.  
  
COLUMBIA AUTOMOTIVE  
COMPANY, LLC D/B/A MIDLANDS  
HONDA  
  
Defendant

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT  
) CASE NO. 13-CP-40-0319  
)  
)  
) FIRST SUPPLEMENTAL AFFIDAVIT OF  
) ATTORNEY'S FEES  
) OF C. STEVEN MOSKOS IN SUPPORT  
) OF PLAINTIFFS' MOTION FOR  
) ATTORNEY'S FEES

FILED  
2016 JUL 26 AM 11:10  
CLARENCE W. HOSKINS  
C.C.P. & G.S.

PERSONALLY appeared before me C. Steven Moskos, Esquire, who being duly sworn, deposes and says as follows:

1. That he is an attorney for Plaintiffs Daniel O'Shields, Roger W. Whitley, and O&W Cars in the above-entitled action.
2. That he incorporates by reference his affidavit of attorneys' fees which was filed with the Court May 2, 2016.
3. That the undersigned, in accordance with his time and expense records, which were maintained on a daily and contemporaneous basis, states to the Court that the attached time and expenses were necessarily expended by him in the preparation of this case from May 2, 2016 through July 21, 2016. (Exhibits 1 and 2.) The time spent by the undersigned and his staff as set forth in Exhibits 1 and 2 is related to the claims made under the North Carolina Monopolies, Trusts and Consumer

Protection Act<sup>1</sup> N.C.G.S. §75-1 et seq. hereinafter UTPA. The time spent is so intertwined with the other claims, they cannot be separated. The time and expenses have been computed through July 20, 2016 and do not include services rendered subsequent to that date.

4. That as of the date of the signing of this affidavit, Midlands Honda has not paid any money toward the outstanding verdict due Plaintiffs.
5. That it is affiant's opinion that the North Carolina UTPA attorney fee provision applies to the time spent working to prepare a case and the trial of the case to a jury.
6. It is also the affiant's opinion that failure to adequately compensate consumer law plaintiffs' attorneys has a negative effect on the ability of consumers to obtain adequate legal representation for meritorious claims. It is further the opinion of affiant that an award of attorneys fees as set forth below would serve to have a positive effect on the ability of consumers to obtain adequate legal representation. A full award of attorney's fees also furthers the intent of the law to incentivize attorneys to pursue the rights of injured buyers thereby furthering the goals of the applicable statute.
7. The affiant has computed his time at an hourly rate of \$390.00 per hour which he understands to be at the lower end of hourly rates for such work.
8. That affiant has previously provided copies of a Trial Court order showing the Court's approval of a \$390.00 per hour rate for his time.

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<sup>1</sup> This is North Carolina's Unfair Trade Practices Act which is similar to South Carolina's Unfair Trade Practices Act at SC Code 39-5-10 *et seq.*

9. That in addition to the 452.1 hours spent through May 1, 2016, Plaintiffs' counsel has spent 153.8 hours working on responding to Defendant's post trial motions. At a baseline rate of \$390.00 per hour, the lodestar amount, prior to any multiplier, is \$236,301.00.
10. That the Supreme Court has found higher hourly rates appropriate. See Layman v. State, 658 S.E.2d 320, 376 S.C. 434 (2008).
11. That affiant believes that exceptional circumstances were involved in the handling, prosecution, and trial of this case resulting in a substantial verdict for Plaintiffs.
12. That affiant is not licensed to practice in North Carolina and is not familiar with North Carolina law. Affiant has had to research complex legal issues under North Carolina law which has increased the time needed to handle this matter.
13. That Defendant has consistently down played Plaintiffs' case, however, Defendant has consistently raised complex issues in an effort to defeat Plaintiffs' claim. Some of these issues include evidentiary rules regarding the admission of witnesses' testimony, the economic loss rule, set off, election of remedies, and constitutional and statutory caps on punitive damages.
14. That Defendant has further complicated the matter by failing to establish whether its motions relate to substantive or procedural matters. As a result, affiant has had to do substantial work trying to research these issues. Additionally, affiant has had to argue his clients' position under both North Carolina and South Carolina to insure that their points are covered under both State's law.
15. That as the Court knows from the directed verdict motion heard April 20 and 21, 2016, the economic loss rule has been relied on very heavily by Defendant even

though it is not applicable to this case. Defendant has tried through its summary judgment motion, its directed verdict motion, and its post trial motion to convince the Court to expand the North Carolina economic loss rule beyond the current North Carolina precedent.

16. That Defendant has also made conclusory statements which on their face appear to be correct, however, they are not. Plaintiffs' counsel has been forced to review, with intense scrutiny, all of the statements and arguments set forth by Defendant to insure that Defendant's statements about North Carolina and South Carolina law are accurate. This has increased the time needed for preparation of Plaintiffs' response to Defendant's post trial motions.
17. Some examples of the statements referenced in the prior paragraph include:
  - a. Defendant's Motion for Set-Off: Defendant claims South Carolina law applies without any reference to whether the law of set-off is substantive or procedural. Defendant then makes a blanket statement that it is entitled to have any money paid by Nationwide offset against Plaintiffs' verdict without any recognition that different claims were made against Nationwide under South Carolina law or any analysis as to how the law applies to those claims.
  - b. Defendant's Motion to Enforce NC Statutory Cap: Defendant has failed to provide any authority that North Carolina law applies. Furthermore, Defendant claims Plaintiffs are entitled to only one recovery of punitive damages; however, North Carolina law allows each of the three Plaintiffs to recover \$250,000.00 in punitive damages.
  - c. Defendant's JNOV, New Trial and New Trial Nisi Remittitur: Defendant simply renewed its directed verdicts motions by reference. This is not a proper method of moving for relief. Without specific motions set forth, the Court must guess what motions Defendant is making. Without knowing the specific motions being made, Plaintiffs' counsel has had to attempt to anticipate certain arguments from Defendant which has caused more time to be spent on the case than may have otherwise been needed. Defendant has moved for JNOV based on new issues not previously presented. Under its economic loss rule arguments, Defendant has provided a laundry list of cases which have had to be researched and analyzed for accuracy. Some of



the cases Defendant relies on actually support Plaintiffs' position that the economic loss rule does not apply. Defendant also argues that punitive damages may not be imposed because the activities of the auction invalidate Defendant's concealment and affirmative misrepresentation of the dangerous conditions of the Civic which is not accurate. Defendant makes bald assertions that the punitive damages verdict shocks the conscience and must be motivated by passion, caprice, prejudice, or some improper consideration, however, Defendant fails to provide any evidence or any rationale for its statements other than to state the ratio of actual to punitive damages. Defendant's punitive damages arguments required Plaintiffs to research North Carolina, South Carolina and federal constitutional law. To support its arguments, Defendant makes arguments not supported by the testimony like, "Midlands Honda never made a false representation to the Plaintiffs". The only evidence of the actual events at the auction came from Mr. Whitley who testified that he received the Damage Disclosure Form containing Defendant's representations at the time of the sale. That was completed based on the information from Defendant's managers. Such statements required Plaintiffs' counsel to have to double check all factual statements for accuracy. Defendant also relies heavily on the ratio of actual to punitive damages with little regard for the other factors the Supreme Court requires to be considered. Defendant raised various evidentiary rulings it did not like even though the Court ruled correctly. Defendant also raised issues regarding intent and reliance that it agreed at the directed verdict stage were jury issues.

- d. Defendant's Motion to Require Election of Remedies: Again, Defendant has failed to state whether North Carolina or South Carolina law applies forcing Plaintiffs' counsel to have to prepare for arguments under both States' laws. Defendant simply asserts Plaintiffs are entitled to one recovery. When Plaintiffs elected their remedy as ordered by the Court, Defendant objected stating that North Carolina's legislature had invalidated United Laboratories which allows Plaintiffs to recover actual and punitive damages under a tort claim and attorney's fees under the North Carolina Unfair Trade Practices Act. Defendant failed to inform the Court that North Carolina Courts have continued to cite United Laboratories as good law. Thus, additional research into North Carolina or South Carolina law had to be performed by Plaintiffs' counsel to protect Plaintiffs' verdict.

- 18. That because Defendant's counsel has had numerous lawyers working on this case, the complexity of the law, and the difficult nature of Defendant's arguments, Plaintiffs' counsel believed he had to hire associate counsel to help protect Plaintiffs' rights and their verdict.

19. That Plaintiffs' counsel associated Brooks Fudenberg to assist with the construction and refinement of Plaintiffs' arguments.
20. That Plaintiffs' counsel has performed the bulk of the work on Plaintiffs' post trial briefs, however, Mr. Fudenberg's assistance has been invaluable in streamlining Plaintiffs' arguments.
21. That Mr. Fudenberg was involved in Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010), Austin v. Stokes-Craven Holding Corp., 406 SC 187, 750 SE 2d 78 (2013), and Henderson v. Summerville Ford-Mercury, 405 SC 440, 748 SE 2d 221 (2013). This experience has helped Mr. Fudenberg focus and help tailor the arguments in Plaintiffs' post trial briefs.
22. That Plaintiffs' counsel has spent a significant amount of time on the various post trial issues raised by Defendant which has prevented Plaintiffs' counsel from working on other clients' matters
23. That Plaintiffs' counsel has had to work extra hours and on the weekends to complete the work necessary to respond to Defendant's motions and to maintain the other work in his office.
24. That based on the work required to meet Midlands Honda's defenses and motions, the work necessary to present this matter to the Court, and the verdict of \$2,388,533.00, affiant believes the Court should award a multiplier of 1.5 to the lodestar amount for the additional work required since May 2, 2016 for an additional award of attorney's fees in the amount of \$89,973.00.
25. That in addition to the attorney's fees, Plaintiffs have incurred additional costs in the amount of \$25.00 as they have had to file a Motion for Reconsideration of the

Court's Order requiring them to elect a remedy prior to the Court finally determining the amounts that are due Plaintiffs under the verdict rendered by the jury. Those costs were necessarily spent to protect Plaintiffs' rights.

26. That the additional costs of \$25.00 should be added to Plaintiffs' judgment.

27. That Plaintiffs' counsel requests the Court Order Defendant to pay additional attorney's as follows:

|                                            |                                                     |                     |
|--------------------------------------------|-----------------------------------------------------|---------------------|
| <b><u>HOURS</u></b>                        | Attorney fees 153.8 x \$390.00/hour - See Exhibit 1 | \$ 59,982.00        |
| SUBTOTAL OF FEES                           |                                                     | \$ 59,982.00        |
| MULTIPLIER                                 |                                                     | 1.5                 |
| ADDITIONAL FEES                            |                                                     | \$ 89,973.00        |
| <b>COSTS - See Exhibit 2</b>               |                                                     | <u>\$ 25.00</u>     |
| <b><u>FEES AND EXPENSES</u></b>            |                                                     | <u>\$ 89,998.00</u> |
| INITIAL FEE APPLICATION                    |                                                     | <u>\$280,545.12</u> |
| TOTAL FEES AND COSTS THROUGH JULY 20, 2016 |                                                     | \$370,543.12        |

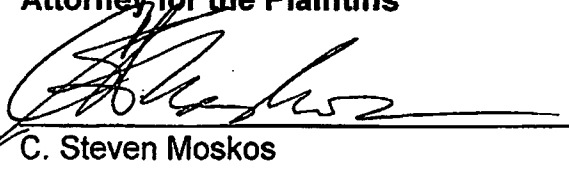
Affiant, therefore, requests the Court find that Plaintiffs are entitled to additional attorney's fees for affiant's services in the amount of \$89,973.00 and \$25.00 in costs for a total of \$89,998.00.

28. That based on the time necessarily devoted to this case and the other criteria which have been held to be relevant in the setting and awarding of attorney's fees, the undersigned requests that this Court review the file herein, together with this First Supplemental Affidavit, Counsel's initial affidavit, and Plaintiffs' Brief in Support of an Award of Attorney's Fees, and grant judgment in favor of Plaintiffs in the amount of \$370,543.12 as determined by the Court to be reasonable suit expenses and attorney's fees for the time and effort put forth by affiant from the beginning of this case through July 20, 2016.

29. That Plaintiffs' further seek an Order that Columbia Automotive Company, LLC

d/b/a Midlands Honda be required to pay the same within a reasonable time as may be determined by this Court.

**C. STEVEN MOSKOS, P.A.**  
**Attorney for the Plaintiffs**

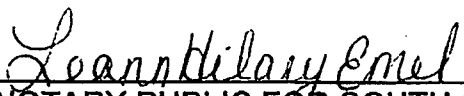
BY: 

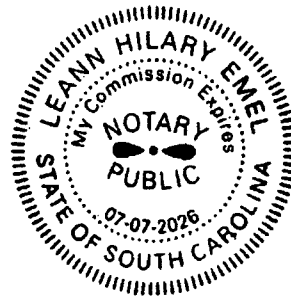
C. Steven Moskos  
4000 Faber Place Drive, Suite 300  
N. Charleston, SC 29407  
Telephone: (843) 763-5297  
Email: csmoskos@earthlink.net

Charleston, South Carolina  
7/21, 2016

**SWORN TO BEFORE ME THIS**

21 DAY OF July 2016.

  
NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES: 1/1/2026



# EXHIBIT 1

## SUPPLEMENTAL ATTORNEY'S FEES FOR ROGER WHITLEY, DANIEL O'SHIELDS AND O&W CARS VS. PSC AUTOMOTIVE GROUP d/b/a MIDLANDS HONDA FROM 5/2/2016 THROUGH 7/20/16

|           |                                                                                                                                                                                                                                                                                                                                                                                                                                                            |      |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| 5/2/2016  | Finalize Post Trial Motions, Briefs, Exhibits and Affidavits.<br>Organize Briefs and Exhibits. Review of Affidavit of Attorney's Fees and Costs. Travel to Richland County Clerk of Court to file Post Trial Motions, Briefs and affidavits. Telephone conference with Brooks Fudenberg regarding status of the motions and possible appeal.                                                                                                               | 9.70 |
| 5/4/2016  | Telephone conference with Roger Whitley regarding post trial motions filed by Midlands Honda and Roger.                                                                                                                                                                                                                                                                                                                                                    | .90  |
| 5/5/2016  | Review of Post Trial Motions from Clay Walker. Dictate email to Brooks Fudenberg regarding Post Trial Motions.                                                                                                                                                                                                                                                                                                                                             | .60  |
| 5/14/2016 | Work on Plaintiffs' Brief Opposing Motion to Enforce Statutory Cap.                                                                                                                                                                                                                                                                                                                                                                                        | .70  |
| 5/14/2016 | Work on Brief responding to Defendant's Motion for Plaintiffs' to elect a remedy. Legal research regarding due process regarding punitive damages. Legal research regarding high ratio verdicts and multiple Plaintiffs. Work on Brief Opposing Defendant's Motion for Setoff or Recoupment. Work on Brief Opposing Defendant's Motion to Enforce North Carolina's Punitive Damages Cap. Telephone conference with Brooks Fudenberg regarding damages cap. | 9.30 |
| 5/15/2016 | Review of Brief Opposing Motion to Enforce North Carolina's Punitive Damages Cap. Legal research regarding punitive damages for each Plaintiff. Legal research regarding standards for JNOV motion. Review of Defendant's JNOV Motion. Telephone conference with Brooks Fudenberg regarding issues raised by JNOV Motion. Legal research on directed verdict motion criteria.                                                                              | 5.60 |
| 5/16/2016 | Work on Brief Opposing Motion for JNOV and a new trial. Legal research regarding standards for JNOV. Review file regarding facts of case and directed verdict motion. Telephone conference with Brooks Fudenberg regarding Brief re JNOV                                                                                                                                                                                                                   | 4.20 |
| 5/20/2016 | Review of email from Judge Cothran regarding election of remedies. Work on Brief Opposing Set Off. Legal research regarding setoff and collateral estoppel.                                                                                                                                                                                                                                                                                                | 3.30 |
| 5/21/2016 | Review of Brief Opposing Defendant's Motion for a Set Off. Legal research regarding collateral source. Review of Brief Opposing Defendant's Motion to Enforce NC Cap on Punitive Damages. Review of Brief Regarding Defendant's Motion to Require Election of Remedies. Prepare Election of Verdict as required by Court per Defendant's Motion to Require Election of Remedies. Work on                                                                   | 4.60 |

|           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |      |
|-----------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
|           | Brief Opposing Defendant's Motion for JNOV. Review transcript from directed verdict motion.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |      |
| 5/21/2016 | Review of transcript from trial motion for directed verdict.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | 1.00 |
| 5/22/2016 | Review of directed verdict motion transcript. Review of Briefs opposing punitive damages cap, setoff, and election of remedies. Dictate email to Brooks Fudenberg regarding briefs. Telephone conference with Brooks Fudenberg regarding changes to briefs. Dictate email to Judge Cothran's law clerk regarding election of remedies. Legal research regarding economic loss rule.                                                                                                                                                                                                                                                                                                 | 6.30 |
| 5/23/2016 | Legal Research on economic loss rule for Brief Opposing Motion for JNOV. Work on Brief Opposing Motion for JNOV. Prepare Motion for Reconsideration of Court's ruling requiring election of remedies. Telephone conference with Clay Walker regarding my motion to reconsider the Court's ruling requiring election of remedies. Dictate email to Clay Walker with body of motion to reconsider the Court's ruling requiring election of remedies. Dictate email to Brooks Fudenberg. Dictate emails to Ryan White, Judge Cothran's law clerk regarding election of remedies issues. Dictate correspondence to Richland County Clerk of Court regarding motion for reconsideration. | 7.00 |
| 5/24/2016 | Work on Brief Opposing Motion for JNOV. Legal research regarding new trial absolute and thirteenth juror doctrine. Work on arguments regarding punitive damages. Review of State Farm v Campbell and BMW v Gore.                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | 8.20 |
| 5/25/2016 | Legal research of constitutionality of NC Punitive Damages statute. Review of Rhine v K-Mart. Work on Brief Opposing Motion for a New Trial. Legal research regarding BMW v Gore and State Farm v Campbell.                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | 2.90 |
| 5/26/2016 | Legal research regarding Ratio aspect of punitive damages award. Legal research regarding difference between punitive damages and civil penalties. Telephone conference with Matt Norris regarding difference between punitive damages and civil penalties. Legal research regarding 13th juror doctrine. Legal research regarding new trial nisi remoter. Legal research regarding "Golden Rule" doctrine.                                                                                                                                                                                                                                                                         | 7.70 |
| 5/27/2016 | Review of Brief Opposing Motion for JNOV, New Trial, and Nisi Remittitur. Review of deposition of Joseph Guyer. Review of correspondence from Rob Reibold regarding Objection to Plaintiffs' Election of Remedies. Legal research regarding United Laboratories v. Kuykendall.                                                                                                                                                                                                                                                                                                                                                                                                      | 5.60 |
| 5/28/2016 | Review of Brief Opposing Motion for JNOV, New Trial, and Nisi Remittitur. Legal research regarding 13th juror doctrine. Review of deposition of Joseph Guyer. Review of exhibits. Legal research regarding punitive damages. Review of Defendant's Brief regarding Objection to Plaintiffs' Election of Remedies. Legal research regarding United Laboratories v. Kuykendall and election of                                                                                                                                                                                                                                                                                        | 8.10 |

|           |                                                                                                                                                                                                                                                                                                                                                                            |       |
|-----------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
|           | remedies.                                                                                                                                                                                                                                                                                                                                                                  |       |
| 5/29/2016 | Review of Brief Opposing Motion for Set Off. Review of Brief Opposing Regarding Election of Remedies. Review of Brief Opposing Defendant's Motion to Enforce Punitive Damages Cap. Legal research regarding punitive damages and the factors used. Review of Summons and Complaint. Start review of Brief Opposing Motion for JNOV, New Trial and New Trial Nisi Addittur. | 3.30  |
| 5/30/2016 | Review of Brief Opposing Motion for JNOV, New Trial and New Trial Nisi Remittitur. Legal research regarding choice of laws provisions. Work on Plaintiffs' Response to Defendant's Response to Plaintiffs' Election of Remedies. Legal research regarding Brown v King and Broussard.                                                                                      | 5.20  |
| 6/1/2016  | Telephone conference with Brooks Fudenberg regarding hearing requested by Judge Cothran for June 9. Dictate emails to Ryan White, Judge Cothran's law clerk.                                                                                                                                                                                                               | .50   |
| 6/3/2016  | Review of Brooks Fudenberg's notes and references in Plaintiffs' Brief Opposing Defendant's Motion for JNOV and for a New Trial. Telephone conference with Brooks Fudenberg discussing Plaintiffs' Brief Opposing Defendant's Motion for JNOV and for a New Trial.                                                                                                         | 6.30  |
| 6/4/2016  | Work on Brief Opposing JNOV and New Trial Motions. Conference with Brooks Fudenberg to work on Brief Opposing JNOV and New Trial Motions.                                                                                                                                                                                                                                  | 9.20  |
| 6/5/2016  | Work on JNOV and new trial outline. Work on brief opposing JNOV and New Trial and Thirteenth Juror issues. Conference with Brooks Fudenberg regarding brief opposing JNOV and New Trial and Thirteenth Juror issues. Legal research regarding new trials, punitive damages standards, reliance, and intent. Work on Brief Opposing Defendant's Motion for Setoff.          | 10.90 |
| 6/6/2016  | Work on Brief opposing Defendant's Motion for a Set Off. JNOV Motion. Work on elements of fraud and UTPA. Review of jury instructions. Review of SC Code Ann Sec 15-38-50. Telephone conference with Brooks Fudenberg regarding set off.                                                                                                                                   | 3.30  |
| 6/8/2016  | Telephone conference with Brooks Fudenberg regarding motion hearing with Judge Cothran and the briefs that need to be sent to Judge Cothran.                                                                                                                                                                                                                               | 1.00  |
| 6/10/2016 | Telephone call to Roger Whitley regarding status of the post trial hearings.                                                                                                                                                                                                                                                                                               | .60   |
| 6/21/2016 | Review of brief opposing JNOV, New Trial and Nisi motions.                                                                                                                                                                                                                                                                                                                 | 1.20  |
| 6/22/2016 | Review of Brief Opposing Motion for JNOV, New trial and New trial Nisi.                                                                                                                                                                                                                                                                                                    | 6.30  |
| 6/28/2016 | Prepare correspondence to Roger Whitley regarding post trial motions. Work on Brief opposing JNOV.                                                                                                                                                                                                                                                                         | .70   |
| 7/8/2016  | Work on Brief Opposing Motion for JNOV and New Trial.                                                                                                                                                                                                                                                                                                                      | .40   |
| 7/9/2016  | Work on corrections needed to Brief Opposing Motion for JNOV and New Trial.                                                                                                                                                                                                                                                                                                | 4.80  |

|                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |               |
|--------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|
| 7/14/2016                                                                | Review of Brief Opposing Defendant's Motion for Setoff.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | .70           |
| 7/16/2016                                                                | Work on Brief Opposing Defendant's Motion to Enforce NC's Punitive Damages Cap. Legal research regarding punitive damages in SC.                                                                                                                                                                                                                                                                                                                                                                                                                       | 1.90          |
| 7/19/2016                                                                | Work on Brief Opposing Motion for Setoff. Telephone conference with Brooks Fudenberg. Review of Brief Regarding Defendant's Response to Plaintiffs' Election of Remedies.                                                                                                                                                                                                                                                                                                                                                                              | 2.00          |
| 7/20/16                                                                  | Finalize Brief Opposing Setoff, Brief regarding election of remedies, Brief regarding enforcement of North Carolina punitive damages cap, Brief regarding Defendant's response to Plaintiffs' election of remedies, and Brief opposing Defendant's motion for JNOV, New trial and New Trial Nisi. Telephone calls and emails to Brooks Fudenberg regarding final briefs. Work on First Supplemental Affidavit of Attorney's Fees. Dictate email to Judge Cothran and Clay Walker regarding Post Trial briefs. Telephone conference with Roger Whitley. | 9.8           |
| <b>TOTAL ATTORNEY'S HOURS FROM<br/>MAY 2, 2016 THROUGH JULY 20, 2016</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | <b>153.80</b> |



# Richland County Common Pleas

Clerk : Jeanette W. McBride  
Richland County Judicial Center  
Columbia, SC 29201  
(803) 576-1999

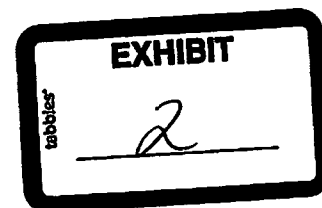
Received From: Moskos, C. Steven  
4000 Faber Place Dr.  
Charleston, SC 29405  
Paying for: O Shields, Daniel  
Transaction Type: Payment  
Payment Type: Check \$25.00  
Total Paid: \$25.00

Date: 5/26/2016  
Receipt #: 208558  
Clerk: METTSB

Reference #: 5830  
Comment:

Non-Refundable

| Case #         | Caption                                                                          | Previous Balance | Amount Paid | Balance Due |
|----------------|----------------------------------------------------------------------------------|------------------|-------------|-------------|
| 2013CP4000319  | Daniel O Shields , plaintiff, et al vs : PSC Automotive Group , defendant, et al | \$25.00          | \$25.00     | \$0.00      |
| Total Cases: 1 |                                                                                  | \$25.00          | \$25.00     | \$0.00      |



|                               |   |                                |
|-------------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS   |
|                               | ) | FOR THE FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND            | ) | CASE NO. 13-CP-40-0319         |
|                               | ) |                                |
| DANIEL O'SHIELDS AND ROGER W. | ) |                                |
| WHITLEY A PARTNERSHIP D/B/A   | ) |                                |
| O&W CARS                      | ) |                                |
|                               | ) |                                |
| Plaintiffs,                   | ) |                                |
|                               | ) |                                |
| vs.                           | ) |                                |
|                               | ) |                                |
| COLUMBIA AUTOMOTIVE           | ) |                                |
| COMPANY, LLC D/B/A MIDLANDS   | ) |                                |
| HONDA                         | ) |                                |
|                               | ) |                                |
| Defendant.                    | ) |                                |

2016 JUL 26 AM 11:14  
 JEANETTE W. MCBRIDE  
 C.C.P. & G.S.

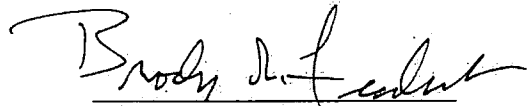
**Affidavit of Brooks R. Fudenberg**

- 1) I have been a member in good standing of the South Carolina Bar since 2003. I am also a member of the Bars of the federal Fourth Circuit and the District of South Carolina.
- 2) I graduated in 1991 from Yale Law School.
- 3) My constitutional scholarship has been published by the UCLA Law Review. It has been favorably received by the academic community.
- 4) I have published extensive articles in The Washington Post and other national publications.
- 5) I am a contributing author to *South Carolina Damages* (2nd Ed) (SC Bar 2009) and a member of the South Carolina Bar's Practice & Procedure Committee.
- 6) My practice consists largely of appellate and similar matters on which trial counsel throughout the State request my services.

7) Following the verdicts in this case, Mr. Moskos engaged me to handle any appeal, and to assist with Plaintiffs' post-trial motions and with responses to any post-trial motions to be filed by Defendants.

8) The attached timesheets accurately reflect my work on this matter for which compensation is sought. Significant additional time incurred has not been included. Time was kept on a contemporaneous basis. The timesheets reflect work through July 20, 2016, and do not reflect work since that date.

9) I have provided the affidavit of Jason Scott Luck (Ex. 1), an appellate attorney in South Carolina, who attests that an hourly rate \$390.00 is a reasonable hourly rate for my services in this litigation.



Brooks R. Fudenberg  
Law Office of Brooks R. Fudenberg, LLC  
171 Church Street, Suite 160  
Charleston, SC 29401  
Tel. (843) 416-2558  
eFax: (910) 401-1242  
BRF@Fudenberglaw.com

Attorney for Plaintiffs

Charleston, South Carolina

**SWORN TO BEFORE ME THIS**

21 DAY OF July 2016

M. Eugenie Winnik

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: 8/27/2023

**TIME NECESSARILY EXPENDED BY BROOKS R. FUDENBERG**  
**on Daniel O'Shields and Roger W. Whitley A Partnership D/B/A O&W Cars vs.**  
**Columbia Automotive Company, LLC D/B/A Midlands Honda**  
**From 04-22-2016 through 07-20-2016**

|           |     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|-----------|-----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 4/22/2016 | 0.2 | Tel. Conf. with C. Steven Moskos, Esq. re: verdict and overview of certain issues.                                                                                                                                                                                                                                                                                                                                                                                                             |
| 4/23/2016 | 0.1 | Email from Mr. Moskos re: whether caps on punitive are unconstitutional; send reply                                                                                                                                                                                                                                                                                                                                                                                                            |
| 4/27/2016 | 0.1 | Tel. Conf. with Mr. Moskos re: his 2.3 million judgment and strategy issues.                                                                                                                                                                                                                                                                                                                                                                                                                   |
| 4/28/2016 | 0.4 | Read entirety of N.C. Gen. Stat. § 1D                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|           | 0.1 | Email to Mr. Moskos re: whether caps on punitive damages are unconstitutional.                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 4/29/2016 | 0.7 | Tel. Conf. with Mr. Moskos re: various issues in the case                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 4/30/2016 | 0.9 | Tel Conf. with Mr. Moskos re: same                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 5/1/2016  | 4.1 | Read, make suggestions on "Plaintiffs' Post-Trial Motions," "Plaintiffs' Brief in Support of Treble Damages," "Plaintiffs' Brief in Support of Plaintiffs' Request for Attorney's Fees," "Plaintiffs' Brief in Support of Interest under Offer of Judgment," "Plaintiffs' Brief in Support of Plaintiff's Request for Prejudgment Interest," with attachments. Also read letters of 1-23-15 from Mr. Moskos to H. Clayton Walker, Esq., and of 1-26-15 from Mr. Walker's office to Mr. Moskos. |
|           | 0.3 | Tel. confs. (2) with Mr. Moskos re: Post-Trial Motions and Briefs.                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 5/2/2016  |     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|           | 0.1 | Tel. Conf. with Mr. Moskos re: attachments to today's filings.                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|           | 1.0 | Tel. conf with Mr. Moskos re: transcript sections and possible appeal.                                                                                                                                                                                                                                                                                                                                                                                                                         |
|           | 0.2 | Tel. Conf. with clerk of court's office; call Mr. Moskos and relay substance of conversation with clerk's office.                                                                                                                                                                                                                                                                                                                                                                              |
| 5/3/2016  |     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|           | 0.2 | Emails (2) from Mr. Moskos and (1) to Mr. Moskos re: possible errors in transcript of trial.                                                                                                                                                                                                                                                                                                                                                                                                   |

|           |     |                                                                                                                                                                                                           |
|-----------|-----|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 5/5/2016  | 0.7 | Receive, read, Defendants' 4 Post-Trial Motions. Emails to Mr. Moskos (2) and from Mr. Moskos (1) re: same.                                                                                               |
| 5/14/2016 | 0.7 | Tel Conf. with Mr. Moskos re: responses to Defs' post-trial motions, esp. the motion re: punitive damages, and the JNOV motion which discusses punitive damages, focusing on the cap on punitive damages. |
|           | 0.1 | Email from Mr. Moskos re: whether setoffs are substantive or procedural                                                                                                                                   |
| 5/15/2016 | 0.5 | Tel. call from Mr. Moskos. Read the Rhyne case on whether lex fori applies to punitive damages.                                                                                                           |
| 5/16/2016 | 0.9 | Tel. Conf. with Mr. Moskos re: draft Brief in response to JNOV                                                                                                                                            |
| 5/21/2016 | 0.1 | Email from Mr. Moskos re: which remedy to elect, and the elements of fraud in NC                                                                                                                          |
|           | 0.5 | Tel. Conf. with Mr. Moskos. Review the marked-up JNOV.                                                                                                                                                    |
|           | 0.2 | Read, analyze the elements of NC's fraud cause of action from NC pattern jury instructions                                                                                                                |
| 5/22/2016 | 0.1 | Read, comment on new draft of discussion of the election of the verdicts.                                                                                                                                 |
|           | 0.4 | Read, comment on the Brief in Response to Defs' Motion for Setoff                                                                                                                                         |
|           | 0.4 | Read, comment on the Briefs in Response to Defs' Motion to Elect Remedies and Defs' Motion to Enforce Statutory Cap'                                                                                      |
|           | 1.0 | Tel. Conf. with Mr. Moskos re: changes to Briefs                                                                                                                                                          |
|           | 0.1 | Email to Mr. Moskos re: needed change in response to Defendant's Objection to Plaintiffs' Election of Remedies                                                                                            |
| 5/23/2016 | 0.1 | Email from Mr. Moskos with proposed filing; edit, comment, return same.                                                                                                                                   |
|           | 0.1 | Forwarded email from Mr. Moskos to Mr. Walker                                                                                                                                                             |
|           | 1.1 | Tel. Conf. with Mr. Moskos                                                                                                                                                                                |
| 5/25/2016 | 0.1 | Tel. Conf. with Mr. Moskos                                                                                                                                                                                |

5/31/2016

- 3.9 Read Defs' Response to Plaintiffs' Election of Remedies. Read, add to, and revise draft Response. Read, edit, comment on draft response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur. Read portions of transcript
- 0.3 Tel. Conf. with Mr. Moskos
- 1.6 Re-read Defs' JNOV/New Trial motion, copy and paste parts into the Response, with thoughts re: the same. Spell check, finalize, email to Mr. Moskos.

6/1/2016

- 0.2 Email from and to Mr. Moskos.
- 0.3 Tel. Conf. with Mr. Moskos re: certain points in BRF review of the JNOV response, re: timing of our responses, re: draft email to Judge Cothran's clerk re: the proposed hearing next week.
- 0.6 Research re: United Laboratories, Inc. v. Kuykendall.
- 0.2 Pull, read. Shepardize N.C.G.S. § 1D-20.
- 0.7 Read, mark up draft Response to Defs' Motion re: Setoff
- 0.2 Read draft Response to Defs' Motion to Elect Remedies
- 0.6 Read, mark up Response to Motion to Enforce Statutory Cap
- 0.4 Tel. Conf. with Mr. Moskos re: emails from Mr. Walker and Judge Cothran, scheduling and strategy

6/3/2016

- 1.3 Tel. confs. (3) with Mr. Moskos re: Plaintiffs' draft Response to Defendant's Motion for JNOV/New Trial/New Trial Nisi Remittitur.

6/4/2016

- 6.2 Tel. Confs. with Mr. Moskos re: draft Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur. Receive, read Dealer Acknowledgement Form dated 01-09-07, Damage Disclosure form, Documents from ADESA - Charlotte, parts of Binder 2 Non Confidential ADSEA, with Mr. Moskos talking me through them. Reorganize/rewrite one section of Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur. Skim/read case. Draft revisions to Plaintiffs' Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur re: the reprehensibility of Defs' conduct, and re: the conflict between Defs' position at trial as to the extent of their JNOV motion and the position in Defs' post-trial Motion for JNOV/New Trial/New Trial Nisi Remittitur.

|           |     |                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-----------|-----|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|           | 1.5 | Draft section on what, precisely, the Court allowed Plaintiff's expert Mr. Allen to testify to. Read, write up discussion of, Phillip Morris USA v. Williams, on which Defendants rely in the above Motion.                                                                                                                                                                                                              |
| 6/5/2016  |     |                                                                                                                                                                                                                                                                                                                                                                                                                          |
|           | 2.5 | Tel. confs. with Mr. Moskos re: draft Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur. Shepardize case. Emails (12) to or from Mr. Moskos.                                                                                                                                                                                                                                                         |
|           | 5.6 | Tel. Conf. with Mr. Moskos re: Defs' Motion for Setoff. emails (2) from Mr. Moskos. Draft response to Defs' argument that the arbitration rules did not require disclosure, nor did the disclosure statement, and therefore it is fine to place unsafe vehicles on the road. Work on Response to Defs' Motion for Setoff. Work on response to Defs' "Golden Rule" argument; issues re: punitive damages. LEXIS research. |
| 6/6/2016  |     |                                                                                                                                                                                                                                                                                                                                                                                                                          |
|           | 1.0 | Work on Response to Defs' Motion for Setoff.                                                                                                                                                                                                                                                                                                                                                                             |
|           | 0.1 | Read excerpts sent by Mr. Moskos of NC fraud jury instructions and UTPA jury instructions.                                                                                                                                                                                                                                                                                                                               |
|           | 0.1 | Read Outline of draft Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur.                                                                                                                                                                                                                                                                                                                             |
|           | 0.2 | Email from Mr. Moskos. Read case he inquires about.                                                                                                                                                                                                                                                                                                                                                                      |
|           | 0.7 | Tel. Confs. (2) with Mr. Moskos re: law of setoffs.                                                                                                                                                                                                                                                                                                                                                                      |
|           | 0.4 | Research NC law re: setoffs, email to Mr. Moskos setting forth findings.                                                                                                                                                                                                                                                                                                                                                 |
|           | 0.3 | Receive, mark up, re-read confidential document.                                                                                                                                                                                                                                                                                                                                                                         |
|           | 0.1 | Tel. Conf. with Mr. Moskos                                                                                                                                                                                                                                                                                                                                                                                               |
| 6/8/2016  |     |                                                                                                                                                                                                                                                                                                                                                                                                                          |
|           | 0.9 | Tel. Conf. with Mr. Moskos re: regarding motion hearing with Judge Cothran and the briefs that need to be sent. Edit draft Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur.                                                                                                                                                                                                                        |
| 6/9/2016  |     |                                                                                                                                                                                                                                                                                                                                                                                                                          |
|           | 0.2 | Emails (5) to or from Mr. Moskos re: date for hearing and timing of briefs.                                                                                                                                                                                                                                                                                                                                              |
| 6/23/2016 |     |                                                                                                                                                                                                                                                                                                                                                                                                                          |
|           | 2.3 | Receive revised draft of Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur. Edit same.                                                                                                                                                                                                                                                                                                               |
|           | 0.6 | LEXIS research re: N.C. Gen. Stat. § 20-294. Mark up same.                                                                                                                                                                                                                                                                                                                                                               |
|           | 0.1 | Read revised outline of draft Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur.                                                                                                                                                                                                                                                                                                                     |

|                              |       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|------------------------------|-------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                              | 0.9   | Review comments on draft Response. Insert discussion of Austin v. Stokes Craven Holding Corp. ("Austin I"). Calculate punitive damages at Austin's 15% of net worth.                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|                              | 0.2   | Spell check                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 7/19/2016                    |       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|                              | 0.1   | Emails to and from Jason Luck, Esq., potential affiant.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 7/20/2016                    | 6.1   | Tel confs. (6) with Mr. Moskos re: aspects of Plaintiffs' Response to Defs' Motion for JNOV/New Trial/New Trial Nisi Remittitur, Brief Opposing Setoff, Brief regarding election of remedies, Brief regarding enforcement of North Carolina punitive damages cap, Brief regarding Defendant's response to Plaintiffs' election of remedies, and Brief opposing Defendant's motion for JNOV; Tel. Confs. (3) with Mr. Moskos re: fee application; Tel. Confs. (3) with Jason Luck re: affidavit. Emails (35) to and from Mr. Moskos; (10) to and from Mr. Luck. Draft Affidavit of Brooks R. Fudenberg. Edit/revise portions of Plaintiffs' Briefs. |
| Total                        | 56.10 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| Lodestar amount              |       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 56.1 hours at \$390 per hour |       | \$21,879.00                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |



STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND ) FIFTH JUDICIAL CIRCUIT

Daniel O'Shields and Roger W. )  
Whitley, a partnership d/b/a O&W ) CASE NO.: 2013-CP-40-0319  
Cars, )

Plaintiffs, )

vs. )

Affidavit of Jason Scott Luck

Columbia Automotive Company, LLC )  
d/b/a Midlands Honda, )

Defendant )

2016 JUL 26 AM 11:14  
JASON SCOTT LUCK  
C.P. & D.S.

Personally appeared before me Jason Scott Luck, who being duly sworn, deposes and says as follows:

1. I am Jason Scott Luck, an attorney licensed to practice law in the state of South Carolina. My office is located at 38 Broad Street, Suite 200, Charleston, SC 29401. I have been licensed to practice in this state since November of 2005. I am also licensed to practice law in the United States Virgin Islands, though this license is currently inactive. I am also licensed to appear before the United States Patent and Trademark Office, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit, the United States Court of Appeals for the Federal Circuit, and the United States Supreme Court. For my work in the Marccuci case (see ¶ 2), I was named the 2012 Pro Bono Lawyer of the Year by the South Carolina Bar. I regularly lecture at the undergraduate level on issues of law.

2. I have a diverse practice; a significant portion of it is appeals. I have personally argued before all appellate courts of South Carolina and before the Fourth Circuit Court of Appeals. I have appeared via pleading before the United States Supreme Court. Some of my more significant appellate cases were/are: Too Tacky P'ship v. S.C. Dep't of Health and Envtl Control, 386 S.C. 326, 86 S.E.2d 194 (Ct.App. 2009) *cert. dismissed as improvidently granted*, Op. No. 27198 (S.C.Sup.Ct. filed Dec. 5, 2012) (OCRM critical area permit appeal); Charleston County Dep't of Soc. Servs. v. Marccuci, 396 S.C. 218, 721 S.E.2d 768 (2011) (Termination of parental rights action); Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (U.S. 2013) (Private CERCLA action under sections 107 & 113); Poch

2

v. Bayshore Concrete Prod./South Carolina, Inc., 405 S.C. 359, 747 S.E.2d 757 (2013) (wrongful death action); State v. Perez, Op. No. 2015-UP-217 (S.C. Ct. App. filed May 8, 2015) *cert. granted*, No. 2015-001576 (S.C. Sup. Ct. filed June 16, 2016) (criminal appeal). I have tried cases before the South Carolina Magistrate Court, South Carolina Family Court, South Carolina Circuit Court, South Carolina Public Service Commission, and South Carolina Federal District Court.

3. I have reviewed the public index regarding this case, and I have particularly reviewed the following pleadings:

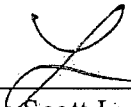
- a. Plaintiffs' Post-Trial Motions, Plaintiffs' Brief in Support of Treble Damages, Plaintiffs' Brief in Support of Plaintiffs' Request for Attorney Fees, Plaintiffs' Brief in Support of Interest under Offer of Judgment, Plaintiffs' Brief in Support of Plaintiff's Request for Prejudgment Interest, Plaintiff's Election of Remedies, Plaintiff's Brief Re: Defendants' Motion for JNOV/New Trial/New Trial Nisi Remittitur, Plaintiffs' Brief Re: Defendants' Motion for Setoff, Plaintiffs' Brief Re: Defendants' Motion to Require Election, Plaintiffs' Brief Re: Defendants' Motion to Enforce the Statutory Cap, and Plaintiffs' Brief Re: Defendants' Objection to Election of Remedies; and
- b. Defendants' Notice of Motion and Motion for Judgment Notwithstanding the Verdict/New Trial/New Trial Nisi Remittitur, Defendants' Notice of Motion and Motion for Setoff or Recoupment, Defendants' Notice of Motion and Motion to Require Election of Remedies, and Defendants' Notice of Motion and Motion to Enforce NC Punitive Damages Cap.

4. I am aware that hourly rates for appellate practitioners in South Carolina range from \$200.00 to over \$500.00 per hour, depending on various factors such as the nature of the case, the number of issues involved, the complexity of the issues, and the experience of counsel. My hourly rate in my latest appellate case, Yates v. Terry, 817 F.3d 877 (4th Cir. 2016) is \$400.00 an hour. In light of the difficulty of the issues and the complexity of the case presented by the Defendant, I am of the opinion that the hourly rate claimed (\$390.00) is well within the range of the hourly rates charged by appellate/post-trial practitioners in South Carolina.

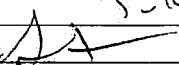
5. Further, in light of the complexity of this case, which presents robust post-trial motions practice, it appears that the time he has devoted to this case was necessary, fair, and reasonable.

6. I have also reviewed the credentials of attorney Brooks Fudenberg and find him to be outstanding and well-qualified within his, and this, field.

7. It is my opinion, within a reasonable degree of certainty as an attorney licensed to practice law in the state of South Carolina that the hours expended by Fudenberg are reasonable under the circumstances and an hourly rate of \$390.00 is a reasonable hourly rate in light of the nature of the litigation, and the experience and expertise of the counsel.

  
\_\_\_\_\_  
Jason Scott Luck  
SEIBELS LAW FIRM, P.A.  
38 Broad Street, Suite 200  
Charleston, SC 29401  
Telephone: (843) 722-6777  
Facsimile: (843) 722-6783  
jluck@seibelsfirm.com

SWORN to before me this 20<sup>th</sup>  
day of July, 2016

  
\_\_\_\_\_  
Notary Public for South Carolina  
My commission expires: 11/29/2022

STATE OF SOUTH CAROLINA )  
)  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Daniel O'Shields and Roger W. )  
Whitley, A Partnership d/b/a )  
O&W Cars, )

Civil Action No. 2013-CP-40-0319

*Plaintiffs*

DEFENDANT'S BRIEF IN OPPOSITION  
TO PLAINTIFF'S MOTION TO  
TREBLE DAMAGES

v.

Columbia Automotive, LLC d/b/a )  
Midlands Honda, )

*Defendant.*

RICHLAND COUNTY  
FILED  
2016 JUL 22 PM 2:20  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

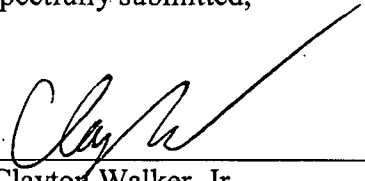
Plaintiffs moved the Court to treble the jury's verdict of \$6,645 on the North Carolina Unfair Trade Practices Act Claim pursuant to N.C.G.S. § 75-16. Defendant does not dispute that treble damages are ordinarily mandatory under North Carolina law. However, Plaintiffs' motion to amend the judgment is premature.

North Carolina law requires that Plaintiffs make an election of remedies between recovery of punitive damages for fraud and recovery for violation of North Carolina's unfair trade practices act prior to judgment. The applicable North Carolina statute provides that "[a] claimant must elect, *prior to judgment*, between punitive damages and *any other remedy pursuant to another statute that provides for multiple damages*. " N.C.G.S. § 1D-20 (emphasis added). Defendant believes this statute requires Plaintiffs to choose between the fraud and unfair trade practices claims. At a minimum, the common law forbids recovery of both punitive damages and treble damages where, as here, the awards are based on the same conduct. *Jennings Glass Co., Inc. v. Brummer*, 362 S.E.2d 578 (N.C.App. 1987) (a plaintiff is not entitled

to recover both punitive damages and treble damages); *see also Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 391 S.E.2d 249 (1990) (“an award of both treble and punitive damages constitutes double recovery, and is impermissible”).

An amendment of the judgment to treble damages is therefore appropriate only if Plaintiffs elect recovery under the unfair trade practices act claim and thereby forego recovery for fraud and/or punitive damages.

Respectfully submitted,



---

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July 22, 2016

ATTORNEY FOR DEFENDANT

STATE OF SOUTH CAROLINA )  
)  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Daniel O'Shields and Roger W. )  
Whitley, A Partnership d/b/a )  
O&W Cars, )

Civil Action No. 2013-CP-40-0319

*Plaintiffs*

DEFENDANT'S BRIEF IN OPPOSITION  
TO PLAINTIFF'S MOTION FOR  
INTEREST UNDER OFFER OF  
JUDGMENT

v.

Columbia Automotive, LLC d/b/a )  
Midlands Honda, )

*Defendant.*

RICHLAND COUNTY  
FILED  
2016 JUL 22 PM 2:20  
JENNIFER W. MCBRIDE  
C.C.P. & G.S.

Plaintiffs seek an award of more than \$236,628.01 in interest and costs in the amount of \$14,279.82 pursuant to S.C. Code Ann. § 15-35-400, South Carolina's statute governing offers of judgment. Plaintiffs argue that recovery of these amounts is authorized because the verdict in this case exceeded the \$280,000 offer of judgment made before trial.

As a preliminary matter, § 15-35-400 may not apply. Authorities are split as to whether recovery pursuant to a statute governing offers of judgment is substantive or procedural, and therefore governed by the law of the place of injury or the law of the forum state. *E.g., Southeast Floating Docks, Inc.*, 82 So.3d 73 (Fla. 2012) (Florida's offer of judgment statute is substantive, and therefore inapplicable where conflict of laws rules mandate application of law from another state); *but see Paine Webber Jackson and Curtis, Inc. v. Winters*, 579 A.2d 545 (Conn.App. 1990) (offer of judgment rule is procedural). If North Carolina law applies, Plaintiffs' motion must be denied. Only defendants may make offers of judgment under North Carolina law. Rule 68, NCRCP.

Assuming South Carolina law applies, Plaintiffs' motion should be denied at this time. The motion is premature, and seeks a variety of costs which are not authorized.

**I. Plaintiffs' Motion Is Premature.**

A verdict or determination at least as favorable as the rejected offer of judgment is a prerequisite to recovery. S.C. Code Ann. § 15-35-400(B). Plaintiffs argue that this requirement is satisfied because the punitive damages award alone far exceeds their pre-trial offer of judgment in the amount of \$280,000. However, the determination on which Plaintiffs rely is not final.

Defendant has filed multiple post-trial motions which may either eliminate or significantly reduce Plaintiffs' verdict. For example, if the Court orders a new trial because the punitive damages award was grossly excessive, there will be no verdict on which to base recovery related to Plaintiffs' offer of judgment. If the Court were to cut the punitive damages award to two to three times actual damages (in keeping with comparable civil penalties for similar conduct), then Plaintiffs' verdict would be reduced to less than \$20,000, an amount far below the \$280,000 offer of judgment. Even if the Court does nothing more than enforce North Carolina's \$250,000 punitive damages cap, Plaintiffs' recovery would be reduced below the \$280,000 offer of judgment.

Not only is it too early to determine whether Plaintiffs are entitled to recovery of any kind under § 15-35-400, and if so, in what amount, it is highly unlikely that will ever be entitled to such a recovery.

## II. Plaintiffs Seek Costs Which Are Not Authorized.

Plaintiffs also seek an award of costs in the amount of \$14,279.82 under § 15-35-400. Even if Plaintiffs ultimately meet the requirements for recovery related to their offer of judgment, this amount of costs is not authorized.

Section 15-35-400 authorizes recovery only of administrative, filing, and other “court costs” from the date of the offer until judgment. S.C. Code Ann. § 15-35-400(B). This provision is strictly construed. *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 433 S.E.2d 21, 25 (Ct.App. 1993). Plaintiffs’ itemization of costs sought in connection with the offer of judgment is in large part the same itemization made in connection with their motion for attorney’s fees.<sup>1</sup> The itemization is replete with costs which are not administrative, filing, or other court costs and are therefore not recoverable.

The Court in *Black*, for example, approved the denial of the vast majority of costs claimed by Plaintiffs in this motion, including but not limited to, deposition fees, expert witness fees, mailings, publications, and travel expenses such as meals, lodging, car rental and mileage. Plaintiffs also seek recovery of costs which were incurred *prior* to February 6, 2015, the date the offer of judgment was filed, and are therefore clearly outside the purview of the offer of judgment.

Review of Plaintiffs’ claimed expenses reveals only the following items which may be legitimately claimed under § 15-35-400:

|    | <u>Date</u> | <u>Item</u>                                              | <u>Amount</u> |
|----|-------------|----------------------------------------------------------|---------------|
| 1. | 4/2/15      | Richland County Sheriff, service of deposition subpoenas | \$30.00       |

---

<sup>1</sup> To the extent Plaintiffs’ seek the same costs under more than one theory, such costs can only be recovered once.



|               |         |                                                                                 |                      |
|---------------|---------|---------------------------------------------------------------------------------|----------------------|
| 2.            | 5/22/15 | Payment to SW Process Service<br>re: Watkins                                    | \$10.00 <sup>2</sup> |
| 3.            | 4/4/16  | Trial check for Brent Farrell                                                   | \$31.80              |
| 4.            | 4/4/16  | Trial check for Randy Threatt                                                   | \$31.80              |
| 5.            | 4/7/16  | Payment to SWS Process Service<br>for trial subpoenas for Farrell and<br>Threat | \$20.00 <sup>3</sup> |
| 6.            | 4/7/16  | Payment to James Ruopoli for service<br>of trial subpoena                       | \$10.00 <sup>4</sup> |
| 7.            | 4/17/16 | FedEx office printing costs                                                     | \$85.47              |
| 8.            | 4/18/16 | Richland County jury roster                                                     | \$10.00              |
| 9.            | 4/28/16 | Post-trial motion filing fee                                                    | <u>\$25.00</u>       |
| <b>Total:</b> |         |                                                                                 | <b>\$254.07</b>      |

In conclusion, it is premature to award any recovery under § 15-35-400 because the final amount of Plaintiffs' recovery has not been determined and Plaintiffs are unlikely to recover an amount which is at least as much as their rejected \$280,000 offer of judgment, and if they do, the amount recoverable cannot be determined without knowing the final amount awarded. In the event that Plaintiffs' are entitled to any recovery, their claim for costs in connection with the offer of judgment should be reduced to \$254.07.

\*\*\*SIGNATURE TO FOLLOW ON PAGE 5\*\*\*

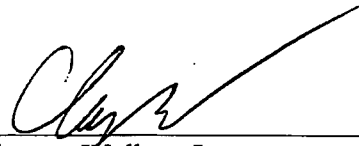
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<sup>2</sup> The amount claimed is \$60.00, but fees for service of process cannot exceed the amount which would be charged by the Sheriff, here \$10. Rule 54(e)(4), SCRCF.

<sup>3</sup> The amount claimed of \$85.00 has been reduced to the amount charged by the Sheriff.

<sup>4</sup> Again, the amount claimed of \$70 has been reduced to the amount charged by the Sheriff.

Respectfully submitted,



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July 22, 2016

ATTORNEY FOR DEFENDANT

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Daniel O'Shields and Roger W. )  
Whitley, A Partnership d/b/a )  
O&W Cars, )

Civil Action No. 2013-CP-40-0319

*Plaintiffs*

DEFENDANT'S BRIEF IN RESPONSE  
TO PLAINTIFF'S MOTION FOR  
PREJUDGMENT INTEREST

v.

Columbia Automotive, LLC d/b/a )  
Midlands Honda, )

*Defendant.*

RICHLAND COUNTY  
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2016 JUL 22 PM 2:20  
JENNIFER W. MCBRIDE  
J.C.P. & G.S.

Plaintiffs moved the Court for an award of prejudgment interest under N.C.G.S. § 24-5 and, alternatively, under S.C. Code Ann. § 34-31-20 (1976). Defendant concedes that prejudgment interest is appropriate under North Carolina law in the amount specified by Plaintiffs in their motion. However, alternative relief under South Carolina law is unavailable. North Carolina law rather than South Carolina law controls the issue of prejudgment interest. In any event, an award of prejudgment interest under South Carolina law is inappropriate because damages were not liquidated.

**I. North Carolina Law Controls.**

South Carolina adheres to the traditional choice of law rule of *lex loci delicti*. *Lister v. Nationsbank of Del.*, 329 S.C. 133, 494 S.E.2d 449 (Ct.App. 1997). The substantive law of the place of the injury therefore governs. Prejudgment interest is treated as an element of damages, which are substantive rather than procedural. *Tennessee Carolina Transportation, Inc. v. Strick Corporation*, 196 S.E.2d 711 (N.C. 1973) (the question of prejudgment interest, like damages

generally, is a substantive matter not controlled by the law of the forum); *see also Cooper v. Roberts, Inc.*, 505 A.2d 1305 (Del.Sup. 1986) (recovery of prejudgment interest is a matter of substantive law). Because Plaintiffs' injuries occurred in North Carolina, North Carolina law controls the question of prejudgment interest.

## **II. Damages Were Not Liquidated.**

Prejudgment interest is not available on an unliquidated claim. *Dibble v. Sumter Ice & Fuel Co.*, 283 S.C. 278, 322 S.E.2d 674 (Ct.App. 1984). Here, Plaintiffs' damages were not liquidated at the time their claim arose because a determination of the amount of damages owed rested on evidence of the retail value of the vehicle, which would not be presented until trial. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010). In *Austin*, our Supreme Court rejected a very similar claim for prejudgment interest advanced by Mr. Moskos, Plaintiffs' counsel in this case. It stated:

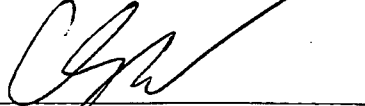
[a]lthough [plaintiff] is correct that prejudgment interest is statutorily authorized by the provisions of section 34-31-20 of the South Carolina Code, we find [plaintiff's] damages were not liquidated at the time his claim arose. [Plaintiff's] lawsuit arose out of his dissatisfaction with the purchase of a used vehicle. Because [plaintiff] alleged claims of fraud, constructive fraud, negligence, and violations of state and federal motor vehicle acts his prospective damages were unliquidated and could not have been ascertained without evidence of the retail value of the truck. Given [plaintiff's] monetary recovery could not have been reduced to certainty, the trial judge correctly denied [plaintiff's] request for prejudgment interest.

*Id.* at 58, 691 S.E.2d at 154.

Given Mr. Moskos's own participation in *Austin*, a controlling authority directly adverse to Plaintiffs' position, Plaintiffs' attempt to seek prejudgment interest under South Carolina law borders on the frivolous.

\*\*\*SIGNATURE TO FOLLOW ON PAGE 3\*\*\*

Respectfully submitted,



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July 22, 2016

ATTORNEY FOR DEFENDANT

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND )

Daniel O'Shields and Roger W. )  
Whitley, A Partnership d/b/a )  
O&W Cars, )

Civil Action No. 2013-CP-40-0319

*Plaintiffs* )

DEFENDANT'S BRIEF IN OPPOSITION  
TO PLAINTIFF'S MOTION FOR  
ATTORNEY'S FEES

v. )

Columbia Automotive, LLC d/b/a )  
Midlands Honda, )

*Defendant.* )

RICHLAND COUNTY  
FILED  
2016 JUL 22 PM 2:21  
JEANETTE W. MCBRIDE  
C.C.P. & G.S.

---

**DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS'  
MOTION FOR ATTORNEY'S FEES**

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## INTRODUCTION

Only one claim in this case gives rise to the possibility of an attorney's fee award for a prevailing plaintiff -- the North Carolina Unfair Trade Practices Act ("NCUTPA") claim. The jury determined that Plaintiffs' actual damages on that claim were a mere \$6,645, but Plaintiffs seek fees and expenses in the astounding amount of \$280,545.12, more than 42 times their actual damages. This request should be denied for the reasons set forth below.

As an initial matter, the NCUTPA does not require an award of attorney's fees. N.C.G.S. § 75-16.1.<sup>1</sup> Such awards rest within the sound discretion of the Court and are reserved for "extreme cases." *See Evans v Full Circle Productions, Inc.*, 443 S.E.2d 108, 110 (N.C.App. 1994). Moreover, North Carolina law *precludes* the recovery of attorney's fees in the absence of certain factors. N.C.G.S. § 75-16.1. Among these factors is whether the plaintiff can establish an unwarranted refusal to settle on the part of the defendant. *Id.*; *Llera v. Security Credit Systems, Inc.*, 93 F.Supp.2d 674 (W.D.N.C. 2000). In this case, Plaintiffs cannot meet their burden on this element.

North Carolina law also requires Plaintiffs to elect between recovery for punitive damages for fraud and recovery under the NCUTPA. N.C.G.S. § 1D-20 ("[a] claimant must elect, prior to judgment, between punitive damages and *any other remedy* pursuant to a statute that provides for multiple damages."). Plaintiffs have purported to elect recovery under their fraud claim for actual and punitive damages, and this election precludes any remedy under the NCUTPA, including attorney's fees.

---

<sup>1</sup> In contrast, the South Carolina Unfair Trade Practices Act ("SCUTPA") provides for an award of attorney's fees to a successful plaintiff but provides that any enhanced (treble) damages lie within the Court's discretion. S.C. Code Ann. § 39-5-140(a).



Alternatively, if the Court determines that attorney's fees should be awarded, Plaintiffs' claim is excessive both in relation to the NCUTPA award and in terms of the fees claimed and costs included. Finally, Plaintiffs are not entitled to a multiplier under North Carolina law.

## **ARGUMENT**

### **I. Plaintiffs' Request For Attorney's Fees Should Be Denied.**

Under the NCUTPA, attorney's fees may be awarded under the following conditions:

[i]n any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, *in his discretion*, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, *and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit*; or
- (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C.G.S. § 75-16.1 (emphasis added). The plain wording of the statute confirms both that: (1) attorney's fees may not awarded unless there was an unwarranted refusal to settle; and (2) even if such a refusal is present (and it is not), an award of fees rests in the discretion of the Court. Here, the Defendant made every effort to settle, and, in any event, this case is not an extreme case warranting an attorney's fee award.

#### **A. There Was No Unwarranted Refusal to Settle.**

Plaintiffs bear the burden of proving that there was an unwarranted refusal to settle. *Llera v. Security Credit Systems, Inc.*, 93 F.Supp.2d at 680 (citing *Standing v. Midgett*, 850 F.Supp 396, 404 (E.D.N.C. 1993)). To determine whether there was an unwarranted refusal to resolve matter for purposes of awarding attorney's fees, North Carolina courts consider a variety of factors, including:

- The Defendant's Settlement Efforts. Courts may look to a defendant's efforts to settle a matter and the reasonableness of those efforts. *See Leftwich v. Gaines*, 521 S.E.2d 717, 729 (1999); *Lapierre v. Samco Development Corp.*, 406 S.E.2d 646, 651 (1991); *United Laboratories, Inc., v. Kuykendall*, 403 S.E.2d 104, 111 (1991). A defendant who earnestly participates in settlement will not be penalized under the NCUTPA. *E.g., Bridgetree, Inc. v. Red F Marketing, LLC*, 2013 WL 443698 (W.D.N.C. 2013). In *Bridgetree*, the parties engaged in court-ordered mediation, voluntarily participated in a judicial settlement conference, and spoke frankly with the Court about the strengths and weaknesses of their cases. *Id.* at \*20. The court observed that the defendant appeared to “genuinely consider settlement proposals,” and found as a result that there was no unwarranted refusal to settle. *Id.*; *see also Volumetrics Medical Imaging, Inc.*, 2003 WL 21650004 (M.D.N.C. 2003) (finding no unwarranted refusal to settle where the defendant exhibited no less enthusiasm about settlement than the plaintiff).

- The Plaintiff's Obstinace. North Carolina courts also consider whether the plaintiff made settlement difficult. *E.g., Llera*, 93 F.Supp.2d at 679-81. In *Llera*, the court reviewed the settlement history of the case, and noted that the plaintiff had rejected not one, but two offers of judgment in the case, and had not heeded the court's advice that settlement would be advisable. The court explained that “[p]laintiff's failure to counter-offer for more than one year suggests that Defendants' failure to resolve this matter was not unwarranted. Plaintiff failed to do her part to foster a negotiation in this case.”

- Strength of the Defendant's Case. A defendant who possesses reasonable defenses may be justified in refusing to settle. *E.g., Media Network v. Long Haymes Carr, Inc.*, 678 S.E.2d 671 (N.C.App. 2009). In *Media Network*, North Carolina's Court of Appeals affirmed the denial of attorney's fees because the existence of unique legal issues justified the defendant's decision to litigate the claim to its conclusion. *Id.* at 688-89; *see also Belk v. Meyer Corporation, U.S.*, 2010 WL 3474918 (W.D.N.C. 2010) (concluding that there was no unwarranted refusal to settle in part because both sides strongly contested the facts and legal issues).

- The Ultimate Recovery in the Case. North Carolina courts are uniform in holding that a mere comparison of the NCUTPA verdict to the defendant's last settlement offer is not dispositive as to whether the defendant made reasonable efforts to settle. *Llera*, 93 F.Supp.2d at 682. However, a comparison can sometimes be useful.

#### (1) Timeline of Settlement Activities

The pleadings, the affidavit of H. Clayton Walker, Jr., the affidavit Robert L. Reibold, and Plaintiffs' counsel's time records establish the following timeline with respect to settlement:

| Date       | Event                      |
|------------|----------------------------|
| 12/12/2010 | Steven Moskos takes case.  |
| 6/29/2011  | Moskos's first time entry. |

|                                              |                                                                                                                                                                                                                                                                                                    |
|----------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 3/2012                                       | Moskos begins drafting complaint.                                                                                                                                                                                                                                                                  |
| 1/--/2013                                    | Complaint filed. Moskos does not make any effort to settle this case pre-filing.                                                                                                                                                                                                                   |
| 2/13/2013                                    | Defendant's counsel receives complaint                                                                                                                                                                                                                                                             |
| 2/14/2013                                    | Reibold contacts Moskos and raises settlement value of case. Moskos does not provide any guidance as to settlement value, nor does he make any demand.                                                                                                                                             |
| 2/20/2013, 3/6/2013, 3/29/2013, and 8/1/2013 | Walker discusses joint settlement with co-defendant (Nationwide).                                                                                                                                                                                                                                  |
| 10/29/2013                                   | Court signs consent order submitted by Plaintiffs extending mediation deadline until April 30, 2014. As of that time, Moskos had taken no steps to select a mediator or schedule a mediation within the original deadline.                                                                         |
| 11/19/2013                                   | Meeting of all counsel. Plaintiffs decline to engage in settlement negotiations.                                                                                                                                                                                                                   |
| 4/30/2014                                    | Extended mediation deadline passes. Once again, Plaintiffs' counsel took no steps to select a mediator or schedule a mediation.                                                                                                                                                                    |
| 1/23/2015                                    | Walker twice contacts Moskos in hopes of soliciting settlement demand.                                                                                                                                                                                                                             |
| <b>1/26/2015</b>                             | <b>Moskos conveys first settlement demand of \$350,000.</b>                                                                                                                                                                                                                                        |
| 1/26/2015                                    | After calling Moskos to understand basis for demand, Defendant sends offer of judgment in the amount of \$15,000, plus reasonable attorney's fees as determined by the Court. Plaintiffs did not accept this offer, but instead sent on offer of judgment of their own in the amount of \$280,000. |
| 4/7/2015                                     | Walker again discusses need for mediation with Moskos. Plaintiffs take no action, despite fact the mediation deadline passed nearly a year before.                                                                                                                                                 |
| 6/5/2015                                     | Walker again calls and writes Moskos about the need for mediation. Plaintiffs take no action.                                                                                                                                                                                                      |
| 7/--/2015                                    | <b>Defendant files motion to compel mediation. Only then do Plaintiffs begin to participate in mediation process.</b>                                                                                                                                                                              |
| 8/4/2015                                     | Parties attempt mediation, but are unable to resolve the case.                                                                                                                                                                                                                                     |
| 4/18/2016                                    | Trial begins. <b>Plaintiffs file a motion to preclude the Court from ever learning about settlement negotiations at mediation.</b>                                                                                                                                                                 |

**(2) There is no indication that Defendant engaged in any type of unwarranted refusal to settle; instead, Plaintiffs were the primary obstacle to settlement.**

As reflected in the table, Defendant attempted to settle this case as soon as its counsel received the complaint and continued in its efforts through the date of trial. Defendant's offers were reasonable efforts to resolve the NCUTPA claim. Defendant offered judgment in the amount of \$15,000 (representing treble the Defendant's assessment of \$5,000 actual damages without any reduction based on Defendant's defenses) *plus* reasonable attorney's fees. The trial evidence showed a range of values was possible for the NCUTPA claim, and \$5,000 was within that range. In a case between two car dealers over the sale of a used car for \$5,200, which did not involve personal injury, it is difficult to even imagine that a settlement offer of almost triple the sales price of the car *plus* attorney's fees was not a reasonable attempt to fully resolve a disputed unfair trade practices claim.<sup>2</sup>

Plaintiffs, on the other hand, did not even suggest a value until January 2015, more than four years after Moskos took the case and roughly two years after the complaint was filed. Plaintiffs also refused to participate in the mediation process until well after all deadlines had passed, and Defendant was forced to file a motion to compel mediation before Plaintiffs would engage in mandatory dispute resolution. Interestingly, Plaintiffs served a pre-trial motion to prevent the Court from hearing evidence of settlement negotiations undertaken at mediation. This attempt to hide information from the Court about settlement negotiations at mediation speaks volumes about which party is at fault for the failure to resolve this matter. It is simply unfair for

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<sup>2</sup> Rather than accepting this amount, Plaintiffs offered judgment in the amount of \$280,000.

Plaintiffs to claim there was an unwarranted refusal to settle on the part of the Defendant and simultaneously seek to suppress evidence of settlement negotiations in mediation.<sup>3</sup>

Plaintiffs' demands also fell well outside the range of damages which would have been recoverable under the NCUTPA. Claimed actual damages were \$6,645, which, when trebled, would yield \$19,935. Plaintiffs' initial settlement demand was \$350,000.<sup>4</sup> It far exceeded any possible recovery under this theory and did not take into account the Defendant's defenses, including lack of reliance and the economic loss rule.

Plaintiffs then served an offer of judgment in the amount of \$280,000. This offer suffered from the same problems as did the original demand. These demands were not realistic—Defendant could literally have defaulted on the NCUTPA claim and not been exposed to a judgment approaching the demands made by the Plaintiffs.

Plaintiffs based these damages on a possible award of punitive damages on another cause of action. As stated in Plaintiffs' initial demand letter: "[I]astly, your clients have exposure of \$250,000 in punitive damages under North Carolina law. I am sure the jury will reach that number easily." (Moskos letter dated Jan. 23, 2015). However, the potential for punitive damages on other claims is irrelevant to whether there was an unwarranted refusal to settle the NCUTPA dispute. Punitive damages are not complementary to or consistent with recovery under the NCUTPA. North Carolina does not allow punitive damages under the NCUTPA. N.C.G.S. § 75-16. It also requires an election of remedies between punitive damages and any remedy under the NCUTPA.

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<sup>3</sup> Plaintiffs should either stipulate that settlement negotiations may be disclosed under applicable ADR rules or drop their claim for attorney's fees.

<sup>4</sup> At the time Plaintiffs made their initial demand (January 2015), counsel had spent 60.5 hours total on the case, including all claims and defendants. Even accepting these totals and Plaintiffs' rate from his affidavit, fees at that time would only amount to \$43,530, making a total possible recovery of \$50,175 plus costs.

N.C.G.S. § 1D-20 (“A claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages.”). Because the demands far exceeded any possible recovery under the NCUTPA, and because the demands were based on factors unique to the common law claims, Plaintiffs never made a good faith effort to settle the NCUTPA claim.

Even if punitive damages were somehow relevant to the NCUTPA claim, Plaintiffs’ demand was still unreasonable. It exceeded Constitutional and statutory limits on punitive damages and was made in a case where there was no evidence of intent to deceive. In cases involving a contract between two businesses where there has been no personal injury, Due Process ordinarily caps punitive damages at something less than quadruple actual damages. *State Farm. Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Only in extraordinary cases may something more than a single digit ratio comply with Due Process. *Id.* Here, actual damages were \$6,645; thus, a punitive damages award would ordinarily be capped somewhere below \$26,580 (4 times actual damages) to survive a Constitutional challenge.<sup>5</sup> Even if this were an extraordinary case, and it is not, the demands far exceeded even a single digit ratio of actual damages. Demands which grossly exceed Constitutional limits are unreasonable.

Plaintiffs’ demands even exceeded the statutory \$250,000 punitive damages cap under North Carolina law. N.C.G.S. § 1D-25. Moskos acknowledged this limitation in his initial demand letter, but proceeded to demand \$350,000, which was well in excess of the maximum recovery on non-statutory claims (\$256,645 or \$6,645 in actual damages plus \$250,000 in punitive damages).

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<sup>5</sup> Even if this case presented extraordinary circumstances, the restriction to a single digit ratio imposed by Due Process would cap potential punitive damages at \$59,805.

As argued elsewhere, Defendant does not believe this is a case that warrants a \$250,000 punitive damages award, but even so, there can be no dispute that Plaintiffs' demands were unreasonable.

**(3) Defendant had a meritorious defense.**

The existence of a meritorious defense alone can justify a failure to settle and thereby prevent an award of attorney's fees under North Carolina law. *E.g. Belk v. Meyer Corporation*, U.S., 2010 WL 3474918 (W.D.N.C. 2010). In *Belk*, the court stated:

[b]ased on a review of the entire history of this case, the Court finds that there was not an unwarranted refusal on Belk's part to fully resolve the matter. As stated above, both sides strongly contested the factual and legal issues involved in this case and both sides seemed to believe they had the stronger hand at different points in the litigation. However, as detailed in the factual section above, both sides attempted to settle the case on various occasions. Therefore, the Court cannot conclude that Belk made an unwarranted refusal to settle the case. Consequently, [plaintiff] is not entitled to attorneys' fees under N.C. Gen.Stat. § 75-16.1 and its Motion is denied.

*Id.* at \*8.

Here, Defendant had a strong defense. North Carolina law requires both actual and reasonable reliance in connection with this type of claim. *Bumpers v. Community Bank of N. Va.*, 747 S.E.2d 220 (N.C. 2013). Furthermore, reliance is not reasonable under North Carolina law if a plaintiff fails to make any independent investigation or if plaintiff is informed of the true condition of the property. *State Properties, LLC v. Ray*, 574 S.E.2d 180 (N.C.App. 2002). A plaintiff also must show that it was induced to forego additional investigation by the defendant's misrepresentations. *Id.*

Given this law, Defendant reasonably believed that it would be very difficult for the Plaintiffs to establish reliance. A number of factors highlighted the need for an inspection. For example, the car was marked as sold under the "red light," sold "as is," and had visible accident damage. Auction rules themselves also warned Plaintiffs to inspect vehicles very carefully and to

verify any announced conditions. Despite these factors, Plaintiffs performed only a “cursory” inspection. Finally, there is no evidence that Plaintiffs were induced to forego additional investigation by Defendant’s representations as Defendant never spoke to Plaintiffs.

Defendant also believed that North Carolina’s economic loss rule barred Plaintiffs’ unfair trade practices claim. *Bussian v. DaimlerChrysler Corp.*, 411 F. Supp. 2d 614, 625-28 (M.D. N.C. 2006); *Moore v. Coachmen Indus., Inc.*, 499 S.E.2d 772, 780 (N.C. Ct. App. 1998); *Coker v. Daimler Chrysler Corp.*, 2004 WL 32676, \*3 (N.C. Super. Ct. 2004) (unpublished opinion), *aff’d on other grounds*, 617 S.E.2d 306 (N.C. Ct. App. 2005), *aff’d*, 627 S.E.2d 461 (N.C. 2006). The existence of these defenses would have justified Defendant’s refusal to settle even if Plaintiffs had made a reasonable demand with respect to the unfair trade practices.

**B. This is not an “extreme case” warranting attorney’s fees.**

Even where conditions precedent are satisfied, the Court retains discretion to deny a request for attorney’s fees. N.C.G.S. § 75-16.1; *Evans v Full Circle Productions, Inc.*, 443 S.E.2d 108, 110 (N.C. App. 1994). The attorney’s fee statute is designed to allow recovery of attorney’s fees only in “extreme cases.” *Evans*, 443 S.E.2d at 110. While what constitutes an extreme case has not been defined, it is clear that an extreme case is one in which there is something *more* than: (1) a willful violation; and (2) an unwarranted refusal to settle. This construction is apparent from the language of the fee statute itself. Fees cannot be awarded unless “[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit.” N.C.G.S. § 75-16.1(1). If the court retains discretion to deny attorney’s fees even when these factors exist, then something more must be present for the case to qualify as an extreme case warranting attorney’s fees.



This case is not such a case. Defendant did not intend to violate the NCUTPA. It had no knowledge of the change in auction rules requiring a disclosure. It did not complete the damage disclosure form, and had no idea a disclosure form had been given to Plaintiffs by the auction. Additionally, as explained in detail above, Defendant did not unwarrantedly refuse to settle the NCUTPA claim. Where the conditions precedent to an award of attorney's fees themselves are not satisfied, or are in doubt, there can be no doubt that this case is not an extreme case.

**C. Plaintiffs' Election of Remedies Bars an Award of Attorney's Fees.**

North Carolina law provides that "[a] claimant must elect, prior to judgment, between punitive damages and any other remedy pursuant to another statute that provides for multiple damages." N.C.G.S. § 1D-20. This statutory provision is more restrictive than North Carolina common law on election of remedies. By its express terms, it requires an election between punitive damages and "*any* other remedy pursuant to a statute that provides for multiple damages." The NCUTPA falls within the scope of this statute because it provides for treble damages (and discretionary attorney's fees). N.C.G.S. § 75-16. Consequently, Plaintiffs must elect between the punitive damages award and "any other remedy" provided by the NCUTPA, including attorney's fees. Plaintiffs have now elected the punitive damage award, mooting their right to recover attorney's fees.

**II. Alternatively, the Amount of Fees Claimed Should Be Significantly Reduced.**

North Carolina law requires that attorney's fee requests be reviewed using the following factors: (1) time and labor extended; (2) the skill required; (3) the customary fee for like work; and (4) the experience or ability of the attorney. *United Laboratories, Inc. v. Kuykendall*, 403 S.E.2d

104, 111 (1991), *aff'd*, 437 S.E.2d 374 (1993).<sup>6</sup> The most useful starting point for determining the amount of a reasonable attorney's fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Southeast Air Charter, Inc. v. Stroud*, 2015 WL 4897790 at \*3 (N.C. Sup.Ct. 2015) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Hours that are excessive, redundant, or otherwise unnecessary are removed and should not be included in the trial court's assessment of attorney's fees. *Id.* (citing *Hensley*, 461 U.S. at 434)). North Carolina courts do not employ a multiplier. *Nakatsukasa v. Furiex Pharmaceuticals, Inc.*, 2015 WL 4069818 (N.C. Super. Ct. 2015) (“[p]laintiffs have not cited to, and this Court is unable to find, any reported case in which a North Carolina court has applied a ‘multiplier’ to increase the lodestar amount.”).

Plaintiffs' request for attorney's fees and costs: (1) is excessive; (2) includes improper time; (3) relies upon a multiplier, which is not used in North Carolina; and (4) includes a variety of costs which are not recoverable.

**A. Plaintiff's Claimed Attorney's Fees Are Excessive.**

Plaintiffs seek an award of attorney's fees under the NCUTPA in the amount of \$280,545.12. This amount is astounding in comparison with the \$6,645 actual damages award. Even after trebling actual damages to slightly less than \$20,000, the amount sought for attorney's fees exceeds the maximum NCUTPA recovery by more than \$260,000. Put simply, it was not reasonable to expend \$280,000 in pursuit of less than \$20,000.<sup>7</sup>

This case was not complex for Plaintiffs' counsel. It was cookie cutter. Plaintiffs' counsel primarily handles “auto fraud and unfair trade practice type cases.” (Moskos Aff. at ¶¶ 18 and 19). He makes similar claims, using form complaints and form discovery. Copies of complaints and

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<sup>6</sup> Plaintiffs' brief addresses additional factors considered by South Carolina courts, such as contingency of compensation, which are not considered under North Carolina law.

<sup>7</sup> Actual damages will be reduced when the amount paid in settlement by Nationwide is set-off.

discovery used by Mr. Moskos in other cases have been provided for review by the Court.<sup>8</sup> The Complaint in this case uses the same base set of causes of action as his other cases (breach of contract, negligence, negligent misrepresentation, fraud, constructive fraud, violation of the South Carolina Dealer's Act, and unfair trade practices).<sup>9</sup> The discovery served in this case was largely Moskos's stock written discovery.

This case did call for the application of North Carolina law, but this factor does not justify the enormous attorney's fee sought in this case for two reasons. First, contrary to Plaintiffs' counsel's statements at trial, this case did not have to be brought in South Carolina. Plaintiffs' reside in North Carolina and the transaction occurred in North Carolina. North Carolina's long arm statute would have permitted Plaintiffs to sue in North Carolina with a North Carolina attorney. Plaintiffs were certainly free to use Moskos to sue in South Carolina, but it is not fair to make Defendant pay the extra cost incurred because of Plaintiffs' choice. Second, while North Carolina law varies from South Carolina in certain respects, there is no significant difference between North Carolina law and South Carolina on the majority of the claims and causes of actions asserted.

Finally, the punitive damages verdict does not somehow justify the amount of attorney's fees claimed. The purpose of attorney's fees under NCUTPA is to encourage private enforcement of the unfair and deceptive trade practices statute. *Shepard*, 664 S.E.2d 388, 396 (N.C. App. 2008). They were not meant to, and do not, allow for recovery of time spent in pursuing punitive damages, which are not available under the NCUTPA. That Plaintiffs have now elected to take recovery

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<sup>8</sup> Copies of the other complaints are attached hereto collectively as Appendix 1. Copies of other discovery served are attached hereto collectively as Appendix 2.

<sup>9</sup> These exact causes of action appeared in the original complaint filed in this case. Plaintiffs' later dropped the South Carolina statutory claims and added the NCUTPA claim.

under common law fraud rather than under the unfair trade practices statute evidences that Plaintiffs' efforts were not primarily directed toward vindication of statutory rights.

**B. Plaintiffs' Fee Request Includes Inappropriate Time.**

In addition to the sheer size of the demand itself, there are a number of specific issues with Plaintiffs' attorney's fees request. These deficiencies are as follows:

**(1) Time for Work on Punitive Damages**

Punitive damages are not recoverable under the NCUTPA. Accordingly, any time devoted to punitive damages is unrelated to the unfair trade practices dispute and should not be recovered. A list of the time entries that seek compensation for work on punitive damages rather than the unfair trade practices claim is set forth in Appendix 3 to this Memorandum. As shown in Appendix 3, Defendant estimates that the total reduction in claimed hours for work done on punitive damages ranges from 7.05- 21.45 hours.

**(2) Time for Pursuit of Claims Against Nationwide.**

Defendant should not be charged for time spent by Plaintiffs' counsel pursuing claims against the original co-defendant, Nationwide Insurance. Plaintiffs themselves acknowledged this point when they submitted time records which purport to exclude hours spent for work on claims against Nationwide. However, Plaintiffs' request still contains a significant amount of time spent on Nationwide, in communication with Sean Cox, Nationwide's counsel, or on tasks jointly involving both defendants as shown in Appendix 4. These entries total 10.95 hours of attorney time.

**(3) Travel Time**

Defendant objects to Plaintiffs' request for compensation for time spent for travel at full claimed hourly rates of \$390/hr on two levels. First, as explained below, a significant portion of

the travel was unnecessary, and should be completely disallowed. Second, travel does not involve the exercise of legal expertise or skill, and, as a result, courts typically do not compensate travel time at full hourly rates.

**(a) Unnecessary Travel Time Should Be Disallowed.**

Moskos's attempt to claim travel time is problematic for several reasons. Much of the travel was unnecessary and would have been avoided had this case been brought in North Carolina. Even after Plaintiffs elected to file suit in South Carolina rather than North Carolina, they compounded the issue by retaining an attorney from Charleston rather than an attorney from their chosen venue, Richland County (which would have eliminated any travel between Charleston and Columbia). Although Plaintiffs have the right to sue in South Carolina and to retain the counsel of their choice, it is not reasonable to force Defendant pay for Plaintiffs' decision to make the case more expensive than it had to be. A summary of the time entries that should be disallowed is set forth in Appendix 5. These entries total 20.3 hours.

**(b) Travel Time Should Not Be Compensated at Full Rates.**

Courts recognize that travel time is not time which requires the application of specialized legal knowledge or skills, and therefore typically reduce the rate at which attorney travel time is compensated in lodestar calculations. *E.g., Maceira v. Pagan*, 698 F.2d 38, 41 (1st Cir.1983) (compensation for travel time at half the hourly rate of the attorney); *In re Vitamin C Antitrust Litigation*, 2013 WL 6858853 (E.D.N.Y. 2013) (reducing rate for attorney travel time to half normal hourly rate); *Auburn Police Union v. Tierney*, 762 F.Supp. 3 (D.Me. 1991) (reducing rate for attorney travel time to \$10/hr).

Defendant submits that all travel time claimed by Plaintiffs' counsel should, if otherwise allowed, be compensated at 50% of the hourly rate determined to be appropriate by the Court.

Using typical travel times, Defendant estimates that approximately 40 hours claimed by Plaintiffs' counsel is attributable solely to travel. Stated differently, almost 10% of all hours spent by Plaintiffs' counsel in the more than 5.5 years leading up to and including trial were for travel. These hours should not be compensated at full rates.

**C. A Multiplier Is Not Appropriate.**

Plaintiffs seek a multiplier of 1.5 times the actual hours expended. Plaintiffs cite no North Carolina authority permitting a multiplier of attorney's fees under the NCUTPA, nor could they. North Carolina courts do not employ multipliers in computing attorney's fees. *Nakatsukasa v. Furiex Pharmaceuticals, Inc.*, 2015 WL 4069818 (N.C.Sup.Ct. 2015) (“[p]laintiffs have not cited to, and this Court is unable to find, any reported case in which a North Carolina court has applied a ‘multiplier’ to increase the lodestar amount.”).

A multiplier would be inappropriate even if permitted under North Carolina law. The United States Supreme Court has explained that enhancements or multipliers should only be used in *rare and exceptional circumstances*. *Perdue v. Kenny A. ex rel. Winn.*, 559 U.S. 542, 552 (2010). This case does not present such circumstances. The only justification advanced by Plaintiffs in support of a multiplier is that they achieved a large punitive damages verdict, but the punitive damages verdict is irrelevant to the attorney's fees question. The relevant result for purposes of the attorney's fees is the result on the unfair trade practices claim. On that claim, Plaintiffs achieved a verdict of only \$6,645. Plaintiffs' punitive damage verdict on a separate, common law claim for which fees are not recoverable has no bearing on the attorney's fees award. Additionally, and in any event, multipliers are not awarded based upon the results obtained because the results are already subsumed in the lodestar analysis. An enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation. *Perdue*, 559 U.S. at 552.

**D. Plaintiffs Seek Reimbursement for Costs Which Are Not Permitted.**

Plaintiffs also seek an award of costs in the amount of \$14,866.62. The vast majority of this amount is not recoverable. Unlike most issues in the case, the award of costs is governed by South Carolina law. *Restatement (Second) of Conflicts* § 122, cmt. a (noting that a court applies its own rules to matters of judicial administration, such as costs). The applicable provision of South Carolina law is Rule 54, SCRCP.

This rule restricts the type of costs which can be recovered to those enumerated therein or otherwise authorized by statute. Costs recoverable under Rule 54 are:

- (1) Costs authorized by statute and sanctions imposed in favor of the prevailing party;
- (2) Fees of the clerk;
- (3) Fees of the sheriff;
- (4) Fees incurred in service of process;
- (5) Witnesses' Fees;
- (6) Fees for exemplification of copies of papers necessarily obtained for trial.

The cost for such items as deposition fees, expert witness fees, mailings, publications, and travel expenses such as meals, lodging, car rental and mileage is not recoverable. *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 433 S.E.2d 21, 25 (Ct.App. 1993).

Applying these standards to the itemization of costs submitted by Plaintiffs yields the following list of recoverable costs:

|    | <u>Date</u> | <u>Item</u>                                              | <u>Amount</u>         |
|----|-------------|----------------------------------------------------------|-----------------------|
| 1. | 1/14/13     | Filing fee to Richland County                            | \$150.00              |
| 2. | 9/22/15     | Motions filing fees                                      | \$125.00              |
| 3. | 4/2/15      | Richland County Sheriff, service of deposition subpoenas | \$30.00               |
| 4. | 5/22/15     | Payment to SW Process Service re: Watkins                | \$10.00 <sup>10</sup> |
| 5. | 4/4/16      | Trial check for Brent Farrell                            | \$31.80               |
| 6. | 4/4/16      | Trial check for Randy Threatt                            | \$31.80               |

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<sup>10</sup> The amount claimed is \$60.00, but fees for service of process cannot exceed the amount which would be charged by the Sheriff, here \$10. Rule 54(e)(4), SCRCP.

|               |         |                                                                                 |                       |
|---------------|---------|---------------------------------------------------------------------------------|-----------------------|
| 7.            | 4/7/16  | Payment to SWS Process Service<br>for trial subpoenas for Farrell and<br>Threat | \$20.00 <sup>11</sup> |
| 8.            | 4/7/16  | Payment to James Ruopoli for service<br>of trial subpoena                       | \$10.00 <sup>12</sup> |
| 9.            | 4/17/16 | FedEx office printing costs                                                     | \$85.47               |
| 10.           | 4/18/16 | Richland County jury roster                                                     | \$10.00               |
| 11.           | 4/28/16 | Post-trial motion filing fee                                                    | <u>\$25.00</u>        |
| <b>Total:</b> |         |                                                                                 | <b>\$529.07</b>       |

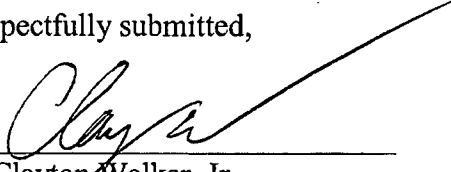
For this reason, any amount awarded to Plaintiffs for costs should not exceed \$529.07.

### CONCLUSION

Plaintiffs' request for attorney's fees should be denied. Fees are not authorized in this case because there was no unwarranted refusal to settle. Additionally, and in any event, this case is not an extreme case warranting attorney's fees under North Carolina law. Finally, Plaintiffs have elected punitive damages, and cannot also recover attorney's fees.

If the Court is inclined to award attorney's fees, such fees should be substantially reduced from the amount requested by Plaintiffs. Given the meager jury verdict of \$6,645 on the NCUTPA claim, attorney's fees in the amount of approximately \$280,000 are grossly excessive and inclusive of numerous items of both fees and costs/ expenses which should be disallowed.

Respectfully submitted,

  
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July 22, 2016

ATTORNEY FOR DEFENDANT

<sup>11</sup> The amount claimed of \$85.00 has been reduced to the amount charged by the Sheriff.

<sup>12</sup> Again, the amount claimed of \$70 has been reduced to the amount charged by the Sheriff.



## **APPENDIX 1**

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
2016 APR 29 PM 3:31 ) FOR THE FIRST JUDICIAL CIRCUIT  
COUNTY OF DORCHESTER ) CASE NO. 16-CP-18-820

RICHARD M. ALLEN

*Cheryl [Signature]*  
CLERK OF COURT  
DORCHESTER COUNTY  
Plaintiffs

vs.

**COMPLAINT**  
**(Jury Trial)**

HOOVER AUTOMOTIVE, LLC D/B/A  
HOOVER CHRYSLER JEEP DODGE  
RAM SUMMERVILLE AND TD AUTO  
FINANCE, LLC

Defendants

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

1. That the Plaintiff is a resident of Charleston, South Carolina.
2. That the Defendant, Hoover Automotive, LLC d/b/a Hoover Chrysler Jeep Dodge Ram Summerville (hereinafter "Hoover Chrysler") is a corporation organized and licensed under the laws of the State of South Carolina with its principle place of business in the County of Dorchester, State of South Carolina.
3. That TD Auto Finance, LLC is a corporation organized and licensed under the laws of a State other than the State of South Carolina; however, it is doing business in South Carolina.
4. That as a holder of the consumer credit contract for the 2011 Jeep VIN: 1J4RS5GG5BC577734, the vehicle at issue, TD Auto Finance is subject to all claims and defenses which Plaintiff, as the debtor, could assert against the seller of goods or services obtained pursuant thereto or with the proceeds thereof.
5. That any allegations made against the Defendant Hoover Chrysler should be read

as also against TD Auto Finance.

6. That on or about November 18, 2010, William Hart Mathis, Jr. purchased a 2011 Jeep VIN: 1J4RS5GG6BC577734.
7. That on or about July 3, 2012, Mrs. Mathis was involved in a one car wreck with the vehicle.
8. That the car was repaired.
9. That on October 4, 2013, Mr. Mathis went to Defendant's dealership to trade in the subject vehicle.
10. That during the transaction, Mr. Mathis informed Defendant Hoover Chrysler's agents and employees that the vehicle had been previously wrecked.
11. That after learning of the prior wreck damage to the Jeep, Hoover Chrysler purchased the Jeep.
12. That Defendant Hoover Chrysler had the Jeep inspected by its Jeep authorized mechanics.
13. That Defendant Hoover Chrysler's employees informed Defendant Hoover Chrysler's Jeep authorized mechanics about the prior wreck damage.
14. That Defendant Hoover Chrysler's Jeep authorized mechanics noticed the prior damage to the vehicle.
15. That Defendant's Jeep authorized mechanics informed Defendant's agents and employees of the extent of the damage to the subject vehicle.
16. That Defendant Hoover Chrysler then placed the subject vehicle on its lot for sale.
17. That on or about November 2, 2013, Mr. Allen and his wife went to Defendant Hoover Chrysler to purchase a vehicle.

18. That Mr. Allen and his wife were shown the subject vehicle by Defendants' salesman.
19. That Defendants' salesman showed Mr. and Ms. Allen the subject Jeep.
20. That Ms. Allen stated she did not want a used vehicle.
21. That Defendants' salesman informed Mr. and Ms. Allen that the car had been owned by a young woman that he knew.
22. That Defendants' salesman also stated that the woman who owned the Jeep trades her cars in every few months so she can get a new vehicle.
23. That Defendants' salesman further stated the car had a clean Carfax, that it still had the manufacturer's warranty on it, and that it had only been driven 30,000 miles.
24. That Plaintiff and his wife asked Defendants' salesman if the Jeep had been in any wrecks.
25. That Defendants' salesman stated that the Jeep had never been in a wreck, again pointing out that the Carfax was clean.
26. That Defendants' salesman also stated that the Carfax would have shown any damage to the car greater than a scratch caused by a grocery store buggy in a parking lot.
27. That Defendants' salesman also stated that Defendant Hoover inspects all of its vehicles and had inspected this vehicle.
28. That Defendants' salesman also stated that Hoover Chrysler's General Manager had been using the vehicle as his personal vehicle.
29. That Defendants' salesman also stated that this used car was just as good as a new car.

30. That Defendants' salesman stated that Mr. and Ms. Allen could buy a bumper to bumper extended warranty for added peace of mind.
31. That based on the representations of Defendants' salesman, Mr. Allen agreed to buy the subject vehicle.
32. That Mr. Allen and his wife were then taken to meet with Defendants' finance manager.
33. That Ms. Allen, still concerned about buying a used car, asked the finance manager if the car had been damaged in any way.
34. That Defendants' finance manager also stated that the Jeep had never been wrecked or damaged, citing the clean Carfax.
35. That Defendant Hoover Chrysler then paid off another truck owned by Mr. Allen but failed to pay off the Nissan Xterra traded in to purchase the subject Jeep.
36. That by the time Defendant Hoover Chrysler rectified its mistake, Mr. Allen had missed two payments on the Nissan Xterra.
37. That the credit reporting
38. That on or about August 30, 2015, Mr. Allen's son was involved in an accident with a deer.
39. That on or about September 3, 2015, Ms. Allen was looking over the Jeep with GEICO's adjuster.
40. That GEICO's adjuster informed Ms. Allen that the vehicle had previously been a total loss vehicle.
41. That on or about October 28, 2015, Mr. and Ms. Allen drove to Hoover Chrysler to speak to its General Manager regarding the prior wreck damage and

misrepresentations by Defendants' salesman and finance manager.

42. That when Mr. and Ms. Allen arrived at Hoover Chrysler, its General Manager was not on the premises.
43. That Mr. Allen left his telephone number with Hoover Chrysler and asked that its General Manager, Mr. Roberts, call Mr. Allen.
44. That neither Mr. nor Ms. Allen received a telephone call from Mr. Roberts.
45. That on or about November 2, 2016, Mr. Allen called Mr. Roberts.
46. That Mr. Allen was told the number he previously left had been disconnected and Mr. Roberts was unable to contact him.
47. That Mr. Allen again left his number and asked for Mr. Roberts to call him.
48. That on or about November 3, 2016, having not heard from Mr. Roberts, Mr. Allen again called Mr. Roberts.
49. That Mr. Allen was transferred to "Steve", a Sales Manager at Defendant Hoover Chrysler.
50. That "Steve" stated the car had a clean Carfax, that he would have to speak to Mr. Roberts about the matter, and that he would call Mr. Allen back.
51. That on or about November 4, 2016, Mr. Allen called Defendant Hoover Chrysler and again spoke with "Steve".
52. That "Steve" got Mr. Roberts on the telephone.
53. That Mr. Roberts told Mr. Allen he would not buy the car back and that Mr. Allen needed to deal with his insurance company.
54. That Defendant TD Auto Finance has made demand on Mr. Allen for the payoff of the vehicle which Mr. Allen does not have.

55. That Defendant TD Auto Finance is attempting to take the vehicle from Mr. Allen.
56. That Mr. Allen is informed and believes that Defendant TD Auto Finance has reported this matter to the credit bureau, damaging Mr. Allen's credit.
57. That Mr. Allen has had to hire an attorney to represent him in this matter.

**FOR A FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

58. That Mr. Allen repeats all previous paragraphs as if repeated herein verbatim.
59. That Mr. Allen entered into a contract with Defendant Hoover Chrysler for the purchase of a vehicle which was undamaged, in good condition, safe and could be operated and used dependably in the State of South Carolina.
60. That Defendant Hoover Chrysler failed to sell to Mr. Allen a vehicle which was undamaged, in good condition, safe and could be operated and used dependably in the State of South Carolina.
61. That as a result of Defendants' breach of contract, Mr. Allen has been damaged in that he has lost the benefit of the bargain he made with the Defendant and he has paid more for a vehicle than what it is worth.
62. That as a result of Defendants' breach of contract, Mr. Allen has suffered actual damages, together with the costs and disbursements of this action.

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence)**

63. That Mr. Allen repeats all previous paragraphs as if repeated herein verbatim.
64. That Defendant owed a duty to Mr. Allen in one or more of the following particulars:
  - a. To research the history of the subject vehicle prior to buying it;

- b. To hire appraisers who could properly evaluate damage previously done to vehicles;
  - c. To train properly used car managers, service managers, and service employees to evaluate properly previous damage done to vehicles;
  - d. To inspect the subject vehicle thoroughly prior to offering it for sale to the public;
  - e. To notify Mr. Allen and other consumers of prior damage to the vehicle; and
  - f. To do those things which a reasonable, prudent person or company would do under the circumstances then and there prevailing.
65. That Defendant failed to perform one or more of the aforementioned duties.
66. That as a result of Defendants' negligence, carelessness, recklessness, wilfulness, and wantonness, Mr. Allen has been damaged in that he has purchased a vehicle that was not as represented, he has lost the benefit of the bargain he made with Defendant Hoover Chrysler, he has paid more for a vehicle than what it is worth, his creditworthiness has been damaged, and he has suffered embarrassment, anxiety, inconvenience, mental distress and emotional distress.
67. That as a result of Defendants' negligence, carelessness, recklessness, wilfulness, and wantonness, Mr. Allen demands actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

**FOR A THIRD CAUSE OF ACTION**  
**(NEGLIGENT MISREPRESENTATION)**

68. That Mr. Allen repeats all previous paragraphs as if repeated herein verbatim.



69. That Defendant Hoover Chrysler made false representations to Mr. Allen.
70. That Defendant Hoover Chrysler had a pecuniary interest in making the statements.
71. That Defendant Hoover Chrysler owed a duty of care to communicate truthful information to Mr. Allen.
72. That Defendant Hoover Chrysler breached that duty by failing to exercise due care.
73. That Mr. Allen justifiably relied on Defendant Hoover Chrysler's representations.
74. That Mr. Allen has been damaged in that he has purchased a vehicle that was not as represented, he has lost the benefit of the bargain he made with Defendant Hoover Chrysler, he has paid more for a vehicle than what it is worth, his credit worthiness has been damaged, and he has suffered embarrassment, anxiety, inconvenience, mental distress and emotional distress.
75. As a direct and proximate result, Mr. Allen was damaged, thereby entitling Mr. Allen to actual and punitive damages together with prejudgment interest, together with the costs and disbursements of this action.

**FOR A FOURTH CAUSE OF ACTION**  
**(Fraud)**

76. That Mr. Allen repeats all previous paragraphs as if repeated herein verbatim.
77. That Defendants' agents and employees failed to disclose material facts regarding the vehicle to Mr. Allen.
78. That the Defendants' agents and employees made false representations of material fact to Mr. Allen.
79. That Defendant knew or should have known that the representations which were made to Mr. Allen were false.

80. That Defendant Intended that Mr. Allen rely upon their misrepresentations of material fact concerning the condition of the vehicle.
81. That Mr. Allen were unaware of the falsity of the representations and at the time the representations were made, Mr. Allen were unable to discover the falsity of the representations made by the Defendants' agent and employee.
82. That Mr. Allen had a right to rely and did rely upon the representations made by the Defendants' agent and employee.
83. That Defendant had an obligation to inform Mr. Allen that the car had previously been wrecked and rebuilt.
84. That Defendant failed to fulfill their obligations to Mr. Allen.
85. That Defendants' failure to disclose to Mr. Allen the condition of the car constitutes affirmative fraud, fraudulent concealment, or nondisclosure of material facts regarding the transaction.
86. That as a result of the Defendants' constructive fraud, Mr. Allen has been damaged in that he has purchased a vehicle that was not as represented, he has lost the benefit of the bargain he made with Defendant Hoover Chrysler, he has paid more for a vehicle than what it is worth, his credit worthiness has been damaged, and he has suffered embarrassment, anxiety, inconvenience, mental distress and emotional distress.
87. That as a result of the Defendants' constructive fraud, Mr. Allen demand their actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

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

88. That Mr. Allen repeats all previous paragraphs as if repeated herein verbatim.
89. That Mr. Allen is informed and believes that the malicious and deceptive acts and practices of Defendant constitutes a violation of Section 56-15-10 et. seq. of the South Carolina Code of Laws 1976.
117. That as a result of Defendants' deceptive acts and practices, Mr. Allen has been damaged in that he has purchased a vehicle that was not as represented, he has incurred various repair bills, he has lost the benefit of the bargain he made with the Defendant, and he has paid more for a vehicle than what it is worth.
118. That as a result of Defendants' violation of this State's Statutes dealing with the regulation of motor vehicle dealers, Plaintiff demands twice his actual damages, together with punitive damages not to exceed three times the actual damages, together with attorney fees, together with the costs and disbursements of this action.

**FOR A SIXTH CAUSE OF ACTION**  
**(UTPA Violation)**

90. That Mr. Allen repeats all previous paragraphs as if repeated herein verbatim.
91. That the aforementioned acts and practices of Defendant were unfair and deceptive.
121. That the aforementioned acts and practices of Defendant are against the public interest and that these acts and practices are capable of repetition.
122. That Defendants' actions were willful and wanton in that Defendant knew or should have known that its conduct was unfair and deceptive and, therefore, a violation of

this State's statutes concerning unfair and deceptive acts and practices.

123. That as a result of the Defendants' violation of the Unfair Trade Practices Act, Mr. Allen has been damaged in that he has purchased a vehicle that was not as represented, he has lost the benefit of the bargain he made with Defendant Hoover Chrysler, he has paid more for a vehicle than what it is worth, his credit worthiness has been damaged, and he has suffered embarrassment, anxiety, inconvenience, mental distress and emotional distress.
124. That as a result of Defendants' violation of the Unfair Trade Practices Act, the Plaintiff is entitled to his actual damages, together with three (3) times his actual damages, together with attorney's fees, together with the costs and disbursements of this action.

**WHEREFORE**, Mr. Allen prays for judgment against Defendant as follows:

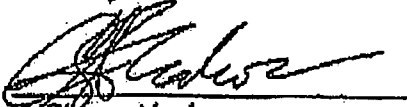
- a. In the First Cause of Action for his actual damages together with the costs and disbursements of this action.
- b. In the Second Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- c. In the Third Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- d. In the Fourth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- e. In the Fifth Cause of Action for two (2) times the actual damages, together with punitive damages not to exceed three times the actual damages, together with attorney's fees, together with the costs and disbursements of this action.
- f. In the Sixth Cause of Action for three (3) times the actual damages, together

with attorney's fees, together with the costs and disbursements of this action.

- g. For an award of reasonable attorney's fees.
- h. For such other and further relief as this Court deems just and proper.

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

BY:



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Charleston, South Carolina  
April 27, 2016

STATE OF SOUTH CAROLINA

COUNTY OF KERSHAW

BILLY KINCER AND DEBORAH  
KINCER

Plaintiffs

vs.

MIDLANDS AUTOMOTIVE, LLC,  
D/B/A CAROLINA CHRYSLER,  
DODGE, JEEP, RAM AND GROW  
FINANCIAL FEDERAL CREDIT  
UNION.

Defendants

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT  
) CASE NO. 15-CP-28- 033

COMPLAINT  
(Jury Trial)

FILED FOR RECORD  
2015 JAN 14 AM 9:16  
JOYCE HODGKINS  
CLERK OF COURT  
KERSHAW COUNTY, S.C.

Plaintiffs, complaining of Defendants, allege the following:

1. That Plaintiff, Billy Kincer, is a resident of Virginia.
2. That Plaintiff, Deborah Kincer, is a resident of Virginia.
3. That Defendant, Midlands Automotive, LLC, d/b/a Carolina Chrysler Dodge Jeep Ram (hereinafter "Carolina Chrysler") is a corporation organized and licensed under the laws of the State of South Carolina with its principle place of business in the County of Kershaw, State of South Carolina.
4. That Defendant Grow Financial Federal Credit Union, hereinafter Grow Financial FCU, is a corporation organized and licensed under the laws of a State other than South Carolina, but, it is doing business in the County of Kershaw, State of South Carolina.
5. That as a holder of the consumer credit contract for the new 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578, the vehicle at issue,

Grow Financial FCU is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant thereto or with the proceeds thereof.

6. That any allegations made against the Defendant Carolina Chrysler should be read as also against Grow Financial FCU.
7. That prior to April 2014, Mr. Kincer purchased a 2014 Dodge Ram from Defendant Carolina Chrysler.
8. That on July 24, 2014, Plaintiff Billy Kincer communicated with one of Defendant's agents and employees, Josh Brewer, who was acting at all times within his scope of employment as a dealer, employee, agent, and authorized representative of Defendant Carolina Chrysler, regarding the trade in of a 2014 Dodge Ram for a 2014 Dodge Challenger R/T Plus 100<sup>th</sup> Anniversary Edition.
9. That Mr. Kincer inquired as to how to cancel the extended warranty on the Dodge Ram so he could reduce the loan balance on the Ram so he could trade it in to buy a Dodge Challenger.
10. That Mr. Kincer informed Mr. Brewer he was interested in the 2014 Dodge Challenger because he goes to cruise-ins and car shows and has owned three other Dodge Challengers in the past.
11. That Mr. Brewer stated that Defendant Carolina Chrysler had a 2014 Challenger coming in that would meet Mr. Kincer's requirements.
12. That Mr. Kincer informed Mr. Brewer that he was interested in purchasing the 2014 Challenger and asked Mr. Brewer to figure out what his monthly payments would be.

13. That on or about July 24, 2014, Mr. Brewer called Mr. Kincer and informed Mr. Kincer that Defendant Carolina Chrysler would extend credit to Mr. Kincer so he could buy the 2014 Challenger for the same monthly payment as Mr. Kincer was paying for his 2014 Dodge Ram pickup truck.
14. That on or about July 25, 2014, Mr. Kincer called Mr. Brewer and asked if the payments for the 2014 Challenger could be lowered.
15. That on or about July 25, 2014, Defendant's agent and employee called back saying it would extend credit with a lower monthly payment.
16. That on or about July 25, 2014, Mr. Kincer agreed to Defendant's terms regarding the purchase of the 2014 Challenger.
17. That Mr. Kincer said that he would come to Defendant's dealership the next morning to purchase the 2014 Challenger.
18. That on or about July 26, 2014, Mr. Kincer went to Defendant Carolina Chrysler's place of business to look at the 2014 Challenger he had agreed to buy.
19. That upon arrival at the dealership, Mr. Kincer did not see the car that he had discussed with Mr. Brewer.
20. That Mr. Brewer informed Mr. Kincer that the Challenger about which they had discussed was "around back".
21. That when Mr. Brewer drove the Challenger from "around back" it was still dusty and dirty as it had not been detailed.
22. That Mr. Kincer voiced his disappointment that the Challenger was not clean.
23. That Mr. Brewer said that another Challenger which had come to the dealership came in from transport had been "chipped up" and Defendant had to send it back



and the dealer sold three more Challengers.

24. That Defendant Carolina Chrysler offered to sell the 2014 Dodge Challenger R/T Plus Anniversary Edition for \$43,741.89.
25. That on or about July 26, 2014, Mr. and Ms. Kincer decided to purchase the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578.
26. That Mr. and Ms. Kincer also traded in their 2014 Dodge Ram 1500 towards the purchase of the 2014 Dodge Challenger R/T Plus Anniversary Edition.
27. That on July 26, 2014, Mr. and Ms. Kincer left Defendant's lot with the new 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition.
28. That on July 27, 2014, after arriving home to Virginia, Mr. Kincer was detailing the body of the vehicle and noticed numerous spots and imperfections in the paint of the vehicle.
29. That on or about July 28, 2014, Mr. and Ms. Kincer contacted Defendant's agent and/or employee Mr. Brewer concerning the subject vehicle and the paint work that had been done on the car.
30. That Defendant's agents and employees never disclosed to Mr. and Ms. Kincer that this vehicle had had body work done on it.
31. That Defendant's agents and employees denied any knowledge of the vehicle having previous paint work.
32. That Mr. Brewer, the agent and/or employee of Defendant, took down the information from Mr. Kincer and promised to call him back about his concerns.
33. That neither Mr. nor Ms. Kincer received a call from Defendants after five hours.
34. That Mr. Kincer called Defendant back regarding his concerns.

35. That Mr. Brewer told Mr. Kincer to take the vehicle to the nearest Dodge dealership.
36. That Mr. Kincer took the vehicle to the Shelor Motor Mile in Christiansburg, VA.
37. That the body shop at the Shelor Motor Mile informed Mr. Kincer that the whole drivers side, from the hood to the rear end, had been painted recently.
38. That Mr. Kincer contacted Defendant once again about what Shelor Motor Mile had found.
39. That Mr. Kincer spoke with Allen Hagan, who was acting at all times within his scope of employment as a dealer, employee, agent, officer, and authorized representative of Defendant Carolina Chrysler.
40. That Mr. Kincer informed Mr. Hagan that he wanted a replacement vehicle that had not had recent body work.
41. That Mr. Hagan said he would see what he could do, and to give him two days.
42. That on or about July 30, 2014, Mr. Kincer called Defendant Carolina Chrysler to discuss the exchange of collateral.
43. That Mr. Kincer was told that the person he needed to speak with was off work and that Defendant would have a difficult time locating a similar vehicle.
44. That Mr. Kincer agreed to compromise regarding the features of the vehicle in order to get a vehicle without prior body work.
45. That Defendant's agents and employees said that they would call Mr. and Ms. Kincer back with a couple options.
46. That on or about August 1, 2014, Mr. Kincer called Defendant to speak with Mr. Hagan regarding the collateral exchange.
47. That Mr. Hagan stated he had not had time to look and would get back with Mr.

Kincer the next day.

48. That on or about August 2, 2014, Mr. Kincer did not receive a call back from Defendant.
49. That on or about August 2, 2014 around 4:30 PM, Mr. Kincer called Defendant.
50. That Mr. Kincer was told that Mr. Hagan was tied up and would call back later.
51. That on or about August 2, 2014 around 5:45 PM, Mr. Kincer called Defendant back.
52. That on or about August 2, 2014, Defendant told Mr. Kincer that he had located a substitute vehicle and it would be on their lot around August 4<sup>th</sup> or August 6<sup>th</sup>.
53. That on August 6, 2014, Mr. Kincer called Defendant, since he had not heard anything, and Mr. Hagan told Mr. Kincer that they were waiting on money.
54. That Mr. Hagan then offered an option of a substitute vehicle that Defendant had on a sister lot, which would be easier to swap out.
55. That Mr. Kincer agreed to the collateral exchange, as long as the payments would be the same.
56. That on or about August 8, 2014, Defendant sent Mr. Kincer the MSRP Window sticker on the 2014 Challenger Shaker R/T it had on the sister lot.
57. That the sticker price of the 2014 Challenger Shaker R/T was three thousand dollars more expensive than that of the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition he had originally purchased.
58. That Mr. Kincer questioned Defendant regarding the more expensive car, and Defendant reassured Mr. Kincer that his payment would not go up.
59. That unbeknownst to Mr. Kincer, Defendant ran his credit for him to purchase the

2014 Challenger Shaker R/T.

60. That Mr. Kincer called Defendant back later on the same day and was informed by David Nudelman, who was acting at all times within his scope of employment as a dealer, employee, agent, officer, and authorized representative of Defendant, that Defendant was unable to assign the contract to another lending institution.
61. That Mr. Nudelman informed Mr. Kincer that Defendant was only willing to provide Mr. Kincer a new vehicle through an exchange of collateral.
62. That Mr. Kincer expressed frustration with Mr. Nudelman, as Mr. Kincer was not aware that they were attempting to obtain financing to replace the defective 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition that it had sold to Mr. Kincer.
63. That Mr. Kincer contacted Chrysler Corporate regarding his dissatisfaction with the vehicle in his possession and the customer service provided to him by Defendant.
64. That on or about August 9, 2014, Mr. Kincer contacted Defendant and spoke with David.
65. That David informed Mr. Kincer that there was nothing that Defendant could do for him.
66. That on or about August 11, 2014, Mr. Kincer contacted Chrysler Corporate again, and was told that there was nothing that it could do to help him.
67. That on or about August 11, 2014, Mr. Kincer again took the subject vehicle to Shelor Motor Mile, in Christiansburg, VA, to get an estimate to repair the vehicle.
68. That Shelor Motor Mile found that the vehicle had been repainted up the hood and the top of the car and from front to back.
69. That Shelor Motor Mile also found dirt in the paint, over spray on the windows and

hood, and multiple spots of orange peel on the vehicle.

70. That on or about August 14, 2014, Chrysler called and told Mr. Kincer to return the car to the original dealership but that it would not cover the repair under the warranty.
71. That Mr. Kincer informed Chrysler that he wanted a different 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition that had not had any body work done on it.
72. That Chrysler informed Mr. Kincer that it was only able to help with warranty issues, and since this was not a warranty issue he needed to discuss it with the dealership where he purchased it.
73. That on or around August 18, 2014, Chrysler called Mr. Kincer to find out what he decided to do in regards to vehicle.
74. That Mr. Kincer told Chrysler that he was unsure about what he was going to do because he was working away from home.
75. That on or about August 18, 2014, Mr. Kincer took the subject vehicle to Collision Plus 2 in Christianburg, VA to determine the estimate to repair the subject vehicle properly.
76. That Collision Plus 2 determined that the estimate to repair the vehicle was two thousand three hundred fifty-two and 87/100 dollars (\$2,352.87).
77. That the estimate to repair the current nonconformities in the vehicle is greater than three percent (3%) of the Manufacturer's Suggested Retail Price of the vehicle.
78. That on or about August 18, 2014, Collision Plus 2 also provided Mr. Kincer was an estimate of the original repairs made to the vehicle prior to him purchasing it.
79. That Collision Plus 2 determined that the estimate for the original repairs to the

vehicle was one thousand six hundred seven and 88/100 dollars (\$1,607.88).

80. That the estimate for the original repair to the vehicle is greater than 3% of the MSRP of the subject vehicle.
81. That Plaintiffs have had to hire an attorney to represent them in this matter.

**FOR A FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

82. That Mr. and Ms. Kincer repeat all previous paragraphs as if repeated herein verbatim.
83. That Plaintiffs entered into a contract with Defendant for the purchase of a new vehicle which was in new condition, safe and could be operated and used dependably in the State of South Carolina.
84. That Defendant failed to sell to Plaintiffs a new vehicle which was in new condition, safe and could be operated and used dependably in the State of South Carolina.
85. That as a result of Defendant's breach of contract, Plaintiffs have been damaged in that they have lost the benefit of the bargain they made with Defendant, they have had to pay interest on a loan from Grow Financial FCU, they have paid more for a vehicle than what it is worth, and they have had to buy a substitute vehicle.
86. That as a result of Defendant's breach of contract, Plaintiffs have suffered actual damages, together with the costs and disbursements of this action.

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence)**

87. That Mr. and Ms. Kincer repeat all previous paragraphs as if repeated herein verbatim.

88. That Defendant owed a duty to Plaintiffs in one or more of the following particulars:
- a. To inspect, examine, and know the true condition of the new vehicles offered for sale;
  - b. To truthfully and completely inform consumers of the condition and quality of the new vehicles offered for sale;
  - c. To notify consumers that vehicles have been repaired;
  - d. To repair or remedy any defects in vehicles sold as brand new to consumers;
  - e. To do those things which a reasonable, prudent person would do under the circumstances then and there prevailing.
89. That Defendant failed to perform one or more of the aforementioned duties.
90. That as a result of Defendant's negligence, carelessness, recklessness, wilfulness, and wantonness, Plaintiffs have been damaged in that they have lost the benefit of the bargain they made with Defendant, they have had to pay interest on a loan from Grow Financial FCU, they have paid more for a vehicle than what it is worth, and they have had to buy a substitute vehicle.
91. That as a result of Defendant's negligence, carelessness, recklessness, wilfulness, and wantonness, Plaintiffs demand actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

**FOR A THIRD CAUSE OF ACTION**  
**(NEGLIGENT MISREPRESENTATION)**

92. That Mr. and Ms. Kincer repeat all previous paragraphs as if repeated herein verbatim.

93. That Defendant made false representations to Plaintiffs.
94. That Defendant had a pecuniary interest in making the statements.
95. That Defendant owed a duty of care to communicate truthful information to Plaintiffs.
96. That Defendant breached that duty by failing to exercise due care.
97. That Plaintiffs justifiably relied on Defendant's representations.
98. That Plaintiffs have been damaged in that they have lost the benefit of the bargain they made with Defendant, they have had to pay interest on a loan from Grow Financial FCU, they have paid more for a vehicle than what it is worth, and they have had to buy a substitute vehicle.
99. As a direct and proximate result, Plaintiffs were damaged, thereby entitling Plaintiffs to actual and punitive damages together with prejudgment interest, together with the costs and disbursements of this action.

**FOR A FOURTH CAUSE OF ACTION**  
**(Constructive Fraud)**

100. That Mr. and Ms. Kincer repeat all previous paragraphs as if repeated herein verbatim.
101. That Defendants' agents and employees failed to disclose material facts regarding the vehicle to Plaintiff.
102. That Defendants' agents and employees made false representations of material fact to Plaintiff.
103. That Defendant knew or should have known that the representations which were made to Plaintiffs were false.



104. That Plaintiffs were unaware of the falsity of the representations and at the time the representations were made, Plaintiffs were unable to discover the falsity of the representations made by Defendants' agent and employee.
105. That Plaintiffs had a right to rely and did rely upon the representations made by Defendants' agent and employee.
106. That Defendant had an obligation to inform Plaintiff that the car had previously had body work done on it in excess of 3% of the MSRP.
107. That Defendant failed to fulfill its obligation to Plaintiffs.
108. That as a result of Defendants' constructive fraud, Plaintiffs have been damaged in that they have lost the benefit of the bargain they made with Defendant, they have had to pay interest on a loan from Grow Financial FCU, they have paid more for a vehicle than what it is worth, and they have had to buy a substitute vehicle.
109. That as a result of Defendant's constructive fraud, Plaintiffs demand their actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

**FOR A FIFTH CAUSE OF ACTION**  
**(Fraud)**

110. That Mr. and Ms. Kincer repeat all previous paragraphs as if repeated herein verbatim.
111. That Defendants intended that Plaintiffs rely upon its misrepresentations of material fact concerning the condition of the vehicle.
112. That Defendants' failure to disclose to Plaintiffs the condition of the car constitutes affirmative fraud, fraudulent concealment, or nondisclosure of material facts

regarding the transaction.

113. That as a result of Defendants' fraud, Plaintiffs have been damaged in that they have lost the benefit of the bargain they made with Defendants, they have had to pay interest on a loan from Grow Financial FCU, they have paid more for a vehicle than what it is worth, and they have had to buy a substitute vehicle.
114. That as a result of Defendants' fraud, Plaintiffs demand their actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

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

115. That Mr. and Ms. Kincer repeat all previous paragraphs as if repeated herein verbatim.
116. That Plaintiffs were informed and believed that the malicious and deceptive acts and practices of Defendants constitute a violation of Section 56-15-10 et. seq. of the South Carolina Code of Laws 1976.
117. That as a result of Defendants' deceptive acts and practices, Plaintiffs have been damaged in that they have lost the benefit of the bargain they made with Defendants, they have had to pay interest on a loan from Grow Financial FCU, they have paid more for a vehicle than what it is worth, and they have had to buy a substitute vehicle.
118. That as a result of Defendants' violations of this State's Statutes dealing with the regulation of motor vehicle dealers, Plaintiffs demand that Defendants pay two times their actual damages, together with punitive damages not to exceed three

times the actual damages, together with attorney fees, together with the costs and disbursements of this action.

**FOR A SEVENTH CAUSE OF ACTION**  
**(UTPA Violation)**

119. That Mr. and Ms. Kincer repeat all previous paragraphs as if repeated herein verbatim.
120. That the aforementioned acts and practices of Defendants were unfair and deceptive.
121. That the aforementioned acts and practices of Defendants are against the public interest and that these acts and practices are capable of repetition.
122. That Defendants' actions were willful and wanton in that Defendant knew or should have known that its' conduct was unfair and deceptive and, therefore, a violation of this State's statutes concerning unfair and deceptive acts and practices.
123. That as a result of Defendant's violation of the Unfair Trade Practices Act, Plaintiffs have been damaged in that they have lost the benefit of the bargain they made with Defendant, they have had to pay interest on a loan from Grow Financial FCU, they have paid more for a vehicle than what it is worth, and they have had to buy a substitute vehicle.
124. That as a result of Defendants' violation of the Unfair Trade Practices Act, Plaintiffs are entitled to their actual damages, together with three (3) times their actual damages, together with attorney's fees, together with the costs and disbursements of this action.

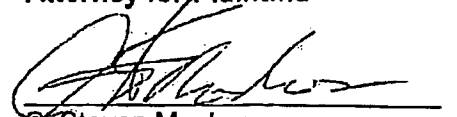
**WHEREFORE,** Plaintiffs pray for judgment against Defendants as follows:

- a. For an injunction against Defendants to prevent them from conducting business in the manner described above and to require Defendants to notify consumers when a vehicle has been damaged prior to the consumer buying the vehicle.
- b. In the First Cause of Action for his actual damages together with the costs and disbursements of this action.
- c. In the Second Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- d. In the Third Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- e. In the Fourth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- f. In the Fifth Cause of Action for actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
- g. In the Sixth Cause of Action for two times the actual damages, together with punitive damages not to exceed three times the actual damages, together with attorney fees, together with the costs and disbursements of this action.
- h. In the Seventh Cause of Action for three (3) times his actual damages, together with attorney's fees, together with the costs and disbursements of this action.
- i. For the Defendants to receive the subject vehicle, the Plaintiffs to receive their money back, for Grow Financial FCU to be paid off, and for any other damages caused by the Defendants' actions.
- j. For an award of reasonable attorney's fees.
- k. For such other and further relief as this Court deems just and proper.

**SIGNATURE ON NEXT PAGE**

**C. STEVEN MOSKOS, P.A.**  
**Attorney for Plaintiffs**

BY:

  
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Charleston, South Carolina  
January 8, 2015

STATE OF SOUTH CAROLINA  
COUNTY OF DORCHESTER

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

Plaintiff

vs.

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

Defendants

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

COMPLAINT  
(Jury Trial)

*Charles E. Graham*  
CLERK OF COURT  
DORCHESTER COUNTY

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

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

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

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

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



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

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

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

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

**FOR A FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

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

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence)**

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

particulars:

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

63. That the Defendant failed to perform one or more of the aforementioned duties.

64. That as a result of the Defendant's negligence, carelessness, recklessness, wilfulness, and wantonness, the Plaintiff have been damaged in that she has lost the benefit of her bargain with the Defendant, she has overpaid for the subject vehicle, she has incurred higher insurance payments, she has incurred higher property tax bills, and she has been embarrassed and humiliated.

65. That as a result of the Defendant's negligence, carelessness, recklessness, wilfulness, and wantonness, the Plaintiff has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.

**FOR A THIRD CAUSE OF ACTION**  
**(NEGLIGENT MISREPRESENTATION)**

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

**FOR A FOURTH CAUSE OF ACTION**  
**(Constructive Fraud)**

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

regarding the vehicle to the Plaintiff.

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

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

**FOR A FIFTH CAUSE OF ACTION**  
**(Fraud)**

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

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

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

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

91. That as a result of the Defendant's deceptive acts and practices, the Plaintiff has been damaged in that she has incurred various repair bills, she has lost the benefit of the bargain she made with the Defendant, she has paid more for a vehicle than what it is worth, she has had to pay interest on the loan made by Capital One Auto Finance, she has had to pay higher insurance for the car, she has been embarrassed and humiliated, she has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
92. That as a result of the Defendant's violation of this State's Statutes dealing with the regulation of motor vehicle dealers, the Plaintiff demands that the Defendant pay two times her actual damages, together with punitive damages not to exceed three times the actual damages, together with attorney fees, together with the costs and disbursements of this action.
- FOR A SEVENTH CAUSE OF ACTION**  
**(UTPA Violation)**
93. That the Plaintiff repeats all previous paragraphs as if repeated herein verbatim.
94. That the aforementioned acts and practices of the Defendant were unfair and deceptive.
95. That the aforementioned acts and practices of the Defendant are against the public interest and that these acts and practices are capable of repetition.
96. That the Defendant's actions were willful and wanton in that the Defendant knew or



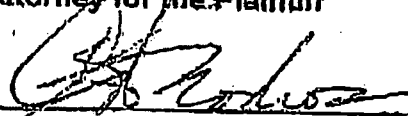
- should have known that its conduct was unfair and deceptive and, therefore, a violation of this State's statutes concerning unfair and deceptive acts and practices.
97. That as a result of the Defendant's violation of the Unfair Trade Practices Act, the Plaintiff has been damaged in that she has incurred various repair bills, she has lost the benefit of the bargain they made with the Defendant, she has paid more for a vehicle than what it is worth, she has had to pay interest on the loan made by Capital One Auto Finance, she has had to pay higher insurance for the car, she has been embarrassed and humiliated, she has incurred actual damages, together with punitive damages, together with prejudgment interest, together with the costs and disbursements of this action.
98. That as a result of the Defendant's violation of the Unfair Trade Practices Act, the Plaintiff is entitled to her actual damages, together with three (3) times her actual damages, together with attorney's fees, together with the costs and disbursements of this action.

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

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

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

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

BY: 

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535 Stinson Dr  
Charleston, SC 29407  
Telephone: (843) 763-5297

Charleston, South Carolina  
January 9, 2009

11, 12, 4, 13

## **APPENDIX 2**



identification and verbatim quotation of the interrogatory to which the answer responds.

Furthermore, you are under a duty to supplement seasonably your response with respect to any interrogatory directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. In addition, you are under a duty to amend a prior response which, although correct when made, is no longer true, and the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.

### **DEFINITIONS**

As used in Plaintiff's interrogatories and document production requests herein the terms "you" and "your", or "yourself" refer to you personally, each of your agents, representatives, and attorneys, and each person acting or purporting to act on your behalf. Unless the context otherwise requires, the terms "you", "your", or "yourself" refer to the particular corporate defendants, each of its parents, predecessors, subsidiaries, and affiliates, each of its present and former officers, employees, agents, representatives, and attorneys, and each person acting or purporting to act on its behalf.

1. **Representative.**

As used herein, the term "representative" means any and all agents, employees, servants, officers, directors, attorneys, or other persons acting or purporting to act on behalf of the person in question.

2. **Person.**

As used herein, the term "person" means any natural individual in any capacity

whatsoever or any entity or organization including divisions, departments, and other units therein, and shall include, but not be limited to, a public or private corporation, partnership, joint venture, voluntary or unincorporated association, organization proprietorship, trust, estate, governmental agency, commission, bureau, or department.

3. Document.

As used herein, the term "document" means any medium upon which intelligence or information can be recorded or retrieved, and includes without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memorandum (including any bill, order forms, receipt, financial statement, accounting entry, diary, calendar, telex, telegram, cable, report, record, contract, agreement, study, handwritten note, draft, working graph, index, list, tape, photograph, microfilm, data sheet or transcribed, punched, taped, filmed, or graphic matter, however produces or reproduced, which is in your possession, custody or control or which was, but is no longer, in your possession, custody, or control.

4. Communication.

As used herein, the term "communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interview, consultations, agreements, and other understandings between or among two or more persons.

5. Identification.

As used herein the terms "identification", "identity", or "identify", when used in reference to (a) a natural individual, requires you to state his or her full name and

residential and business addresses; (b) a corporation requires you to state its full name or style under which the business is conducted, its business address or addresses, the types of businesses in which it is engaged, the geographic areas in which it conducts those businesses, and the identity of the person or person who own, operate and control the business; (c) a document, require you to state the number of pages and the nature of the document (e.g., letter or memorandum), its title, its date, the name or names of its authors and recipients, and its date, the location and custodian; (d) a communication, requires you, if any part of the communication is written to identify the document or documents which refer to or evidence the communication, and, to the extent that the communication was non-written, to identify date, manner, place, and substance of the communication; (e) an act, require you to state each transaction or act constituting occurred; identify each document referring or relating thereto; and identify each person participating or engaging therein; (f) a meeting, require you to state the date, nature, and purpose of the meeting; the substance of the meeting; and the place of the meeting.

#### **INSTRUCTIONS CONCERNING IDENTIFICATION OF DOCUMENTS**

With respect to each interrogatory, in addition to supplying the information requested, you are to identify all documents that support, refer to, or evidence the subject matter of each interrogatory and your answer thereto.

If any or all documents identified herein are no longer in your possession, custody, or control because of destruction, loss, or any other reasons, then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original and a copy of the document; (d) state in as much detail as

possible the contents of the document; and (e) state the manner and date of disposition of the document.

If you contend that you are entitled to withhold from production any or all documents identified herein on the basis of the attorney-client privilege, the work product doctrine, or other ground, then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original and a copy of the document; (d) state the subject matter of the document; and (e) state the basis upon which you contend you are entitled to withhold the document from production.

#### **THE WORD "OR"**

As used herein, the word "or" appearing in an interrogatory should not be read so as to eliminate any part of the interrogatory, but, whenever applicable, it should have the same meaning as the word "and." For example, an interrogatory stating "supporting or refer" should be read as "supporting and refer" if an answer that does both can be made. The singular shall be taken to include the plural herein, and vice versa.

#### **INTERROGATORIES**

1. Please give me the following information concerning each person known to the party or counsel to be a witness concerning or have any connection with the facts of the case:
  - a. What are their names and addresses? If any of the people identified were, but are no longer, employed by the Defendant, please provide their home address and telephone number.
  - b. Have written or recorded statements been taken from any of them?



- c. If so, who is in possession of such statements?
  - d. Set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.
- 2. Please set forth a list of photographs, plats, sketches, policies and procedures manuals, or other prepared documents in possession of the party or counsel that relate to the claim or defense in this case.
- 3. List the names, current addresses, and phone numbers of expert witnesses whom the party proposes to use as a witness at the trial of the case and for each state the following: the speciality or sub-specialty in which you claim they are an expert; the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; whether the expert has testified previously in other actions within the same speciality or sub-specialty; and for each expert in which the answer was affirmative, list the name of the action, the jurisdiction, the civil action number, the date of the testimony or deposition, and the names, current addresses, and telephone numbers for the attorneys for each of the parties in the action.
- 4. Is there any insurance policy which is applicable to this case? If so, what are the policy limits and what is the insurance company?
- 5. Furnish a detailed factual basis for the defenses you assert in your answer.
- 6. Please state whether or not the Defendant is properly identified. If the Defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and pleading reflecting correct identification.

7. Identify each and every person who, at any time, has informed the Defendant that the subject vehicle has previously been wrecked or damaged in any way. Include that person's name, address, telephone number, the substance of the communication and whether the communication was oral or in writing.
8. IDENTIFY all ORAL STATEMENTS and all DOCUMENTS relating to each purchase of the subject vehicle by you including but not limited to all statements and documents relating to negotiations and communications prior to the purchase of the vehicle, and to the actual purchase transactions on the vehicle. Identify all persons known to you to have knowledge of or to have participated in any discussions, inspections, repairs, or maintenance concerning any subject vehicle between the time you first knew of the vehicle and the present, and for each such person STATE IN FULL DETAIL the nature of his/her knowledge of or participation in those events.
9. "STATE IN FULL DETAIL" any inspections, repairs, maintenance or appraisals done by you or for you to the "vehicle," and list the date of each such repair or maintenance and "identify" all persons known to you who inspected or performed mechanical inspections or repairs on the "vehicle."
10. "STATE IN FULL DETAIL" all steps and precautions you took to ensure that the "vehicle" did not have damage when it was sold to you or by you.
11. STATE IN FULL DETAIL all inspections or checks on the subject vehicle made by or for you and any findings or conclusions made as a result of the inspections or checks (including, for example, but not limited to, safety inspections, checks of mechanical items such as the odometer or engine, appraisals, and checks of wreck damage or indications the vehicle might have been stolen), and list the date each

such inspection or check was made and the identity of each person making such inspections or checks.

12. Please set forth the training program provided by the Defendant so that the Defendant's employees will be properly trained. Said training includes, but is not limited to, training on how to inspect vehicles for prior damage of any kind and how prior damage is to be disclosed to subsequent purchasers. Please include when said training sessions occur, who teaches the training sessions, what policies and procedures manuals are provided to the employee, and any other documents or training received by the employee.
13. Please identify the person or persons who inspected the subject vehicle from the time it was first purchased by the Defendant until the Plaintiff purchased it.
14. Please list each agent or employee of the Defendant who spoke with or in any way dealt with the Plaintiff in regards to the vehicle which is the subject of this action. Please include when said meeting occurred, what was discussed, who was present, when said discussion occurred and why it occurred. Please include the agent's or employee's current address and telephone number, as well as a detailed explanation of their conversation with the Plaintiff regarding the documents in the Defendant's file, when said discussion occurred, where the conversation occurred and who was present during the discussion.
15. Identify from whom you purchased the subject vehicle. Include when you bought it and how much you paid for the vehicle.
16. Set forth any and all conversations the Defendant's agent and employee had with the seller or its representative during the purchase of the subject vehicle by the

Defendant.

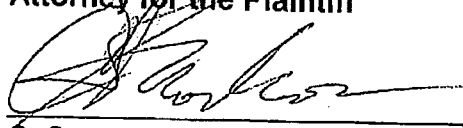
17. Set forth any and all representations about the condition of the vehicle made to the Defendant's agent and employee by the seller or its representative during the purchase of the subject vehicle by the Defendant.
18. Please state the difference in value on April 2, 2010 between the 2003 Honda Civic VIN: 2HGES1654H577916 that the Plaintiff was promised and the damaged Honda car they received. Please state who determined this value, the number of years he or she has been in the car business, that person's position in the Defendant's organization, the criteria used by that person to determine the difference in value of the cars, and the books, reference materials, or other documents used to determine the difference in value of the cars.
19. Please set forth the procedures used by the Defendant to investigate and evaluate a vehicle being used by a customer as a trade-in.
20. Please state whether or not the Defendant was informed that the subject vehicle had any damage prior to the Defendant's purchase of the vehicle. If Defendant was notified of damage to the subject vehicle, please state when the Defendant was notified of said damage, the extent of damage to subject vehicle, when said damage occurred and whether or not the Defendant did any repair to the subject vehicle.
21. Please state the date when the Defendant first determined that the subject vehicle had been previously wrecked.
22. Please identify any other persons or companies with whom the Defendant communicated regarding the subject vehicle prior to buying it.
23. Please state the value of the subject vehicle on the date it was sold to the Plaintiff.

24. Did the Defendant obtain a Carfax, AutoCheck, Vanguard, or similar report relating to the vehicle prior to the sale to Plaintiff?
25. Identify all sheets, notes, records, memoranda, training manuals and other documents outlining, directing, mentioning or in any way instructing the Defendant's employees or its agents as to sales practices, pricing, appraising, or any other aspect of soliciting or selling motor vehicles to prospective customers or customers. For each such document, state:
- a. the substance of the document,
  - b. the name of the person(s) who prepared the document, and
  - c. the date the document was prepared.
26. IDENTIFY each and every civil suit in which you have been a defendant at any time between January 1, 2008 and the present, which included allegations that you made any misrepresentations, failed to disclose, violated any unfair trade practices act, or violated any "consumer protection" statutes, and for each such case,
1. State the court in which such case was handled, the case number, the identities of your attorney and the opposing parties' attorneys, and the date when the case was filed; and
  2. STATE IN FULL DETAIL the nature of the case, and the outcome of the case.
27. State when the title to the subject vehicle was first acquired by the Defendant Midlands Honda.
28. State the date when Defendant Midlands Honda delivered title to the subject vehicle to the Plaintiff.

29. State the name, title and work address of each person who assisted or participated in preparing and/or supplying any of the information given in answer to, or relied upon, in preparing answers to these interrogatories.
30. Identify by name, address and telephone number all stockholders of the Defendant.
31. Identify by name, address and telephone number all officers of the Defendant.
32. State the defendant's net worth for the last three years, excluding this year.
33. Please list the names of current automobile dealerships or other businesses owned by the current owner or majority shareholder of the Defendant.

These Interrogatories are deemed to be continuing throughout the pendency of this action.

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

BY: 

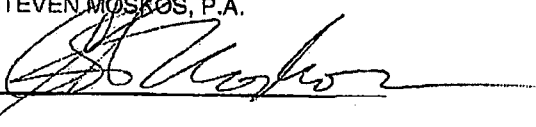
C. Steven Moskos  
4000 Faber Place Drive, Ste. 300,  
North Charleston, South Carolina 29405  
Telephone: (843) 763-5297

Charleston, South Carolina  
October 21, 2013

**CERTIFICATE OF SERVICE**

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper, properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 21<sup>st</sup> day of October, 2013.

C. STEVEN MOSKOS, P.A.

By: 



requests. Said documentary evidence is alleged to be in the Defendant's possession, custody, and control and is pertinent to the issues in this case.

### **DEFINITIONS**

All references to "interrogatory" or "interrogatories" herein refer to the Plaintiff's Interrogatories to Defendant and reference herein to any such interrogatory by number shall be deemed to incorporate by reference herein any such interrogatory in its entirety.

As used in Plaintiff' Interrogatories and document production requests herein, the terms "you" and "your", or "yourself" refer to you personally, each of your agents, representatives, and attorneys, and each person acting or purporting to act on your behalf. Unless the context otherwise requires, the terms "you", "your", or "yourself" refer to the particular corporate defendants, each of its parents predecessors, subsidiaries, and affiliates, each of its present and former officers, employees, agents, representatives, and attorneys, and each person acting or purporting to act on its behalf.

### **DOCUMENT**

As used herein, the term "document" means any medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memoranda including any bill, order form, receipt, financial statement, accounting entry, contract, diary, calendar, telex, telegram, cable, report, record, contract, agreement, study, handwritten note, draft, working paper, chart, paper, print, laboratory record, drawing sketch, graph, index, list, tape, photograph, microfilm, data sheet or data processing card, or any other written recorded, transcribed, punched, taped, filmed or graphic matter,



however produced or reproduced, which is in your possession, custody, or control or which was, but is no longer, in your possession, custody or control.

### **COMMUNICATION**

As used herein, the term "communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons.

### **INSTRUCTIONS CONCERNING PRODUCTION OF DOCUMENTS**

If any and all documents identified herein are no longer in your possession, custody, or control because of destruction, loss, or any other reasons, then do the following with respect to each and every such document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original of the documents; (d) state in as much detail as possible the contents of the documents; and (e) state the manner and date of disposition of the document.

If you contend that you are entitled to withhold from production any or all documents identified herein on the basis of the attorney-client privilege, the work-product doctrine, or other grounds then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original of the document; (d) state the subject matter of the document; and (e) state the basis upon which you contend

you are entitled to withhold the document from production.

### **THE WORD "OR"**

As used herein, the word "or" appearing in a request should not be read so as to eliminate any part of the request but, whenever applicable, it should have the same meaning as the word "and", for example, an interrogatory stating "supporting or refer" should be read as "supporting and refer" if an answer that does both can be made. The singular shall be taken to include the plural herein, and vice versa.

### **REQUEST FOR PRODUCTION**

1. Copies of all statements, written or recorded, of any persons, including parties hereto, who are or may be witnesses to any of the matters complained of in the Complaint.
2. Copies of all photographs relating in any way to the 2003 Honda Civic VIN: 2HGES1654H577916 or any matter referred to in the Complaint or to the damages claimed.
3. Copies of the deal jackets for the 2003 Honda Civic VIN: 2HGES1654H577916 when it was sold to Midlands Honda by Nancy Lynn Watkins, when it was sold to Charles Ecklund by Midlands Honda , when it was sold to Midlands Honda by Charles Ecklund, when it was sold to the Plaintiffs by Midlands Honda and any other occasion Midlands Honda created a deal jacket regarding the subject vehicle.
4. Copies of all diagrams, statements, memoranda, reports, policy and procedures manuals, or other documents relating to the matters in the suit.
5. Copies of the Defendant's last three (3) financial statements showing the

Defendant's net worth.

6. Copies of all reports of experts which may pertain, in any way, to issues involved in this case.
7. Copies of Errors and Omissions or other similar insurance agreements which may be liable to satisfy or reimburse Defendant for all or part of any judgment rendered herein.
8. Copies of the Defendant's floor planning agreement.
9. Copies of the rates sheets, underwriting guidelines and/or program information for all financing programs available as of the date the Defendant sold the vehicle to Plaintiff.
10. Copies of any and all contracts, including rate sheets and underwriting guidelines, between the Defendant and any and all financing companies to whom the Defendant assigns loans.
11. Copies of the Defendant's entire files regarding the 2003 Honda Civic VIN: 2HGES1654H577916 which is the subject of this case. These documents should include the following documents and things which refer to Midland Honda's purchase of the vehicle from Ms. Watkins or Mr. Ecklund, Plaintiff's purchase of the vehicle, to the Plaintiff or to the vehicle:
  - a. each Purchase Order and Sales Invoice
  - b. each Retail Installment Contract or other loan agreement
  - c. each odometer statement
  - d. each application for financing or questionnaire about income, assets or liabilities, including any documents which refer to any prior credit problems

or explanations of same

- e. each credit report on Plaintiff or other document which refers to Plaintiff's income, assets, liabilities or prior credit history
- f. each document which identifies Plaintiff's relatives or references
- g. each document which refers to Plaintiff's employer or history of employment
- h. each document which refers to Plaintiff's residence or history of his place of residence
- i. all other documents submitted by Plaintiff to the Defendant in connection with his purchase or financing of the vehicle, including without limitation all documentation of his income, finances, assets and liabilities and/or explanation of any past credit problems
- j. each document which refers to the temporary or permanent registration of the vehicle, or temporary or permanent tags to the vehicle, including power of attorney forms
- k. each document which constitutes or refers to title to the car at any time, including without limitation each Application for Certificate of Title and related documents
- l. each deal jacket on Plaintiff's vehicle and each deal jacket on Plaintiff's trade-in
- m. the stock and inventory cards or like records for the vehicle and Plaintiff's trade-in
- n. all handwritten or typewritten notes and a printout of all computer entries which refer to Plaintiff, his deal, the trade-in financing of Plaintiff's deal, or to

the vehicle

- o. the daily cash receipts journal or ledger which reflect any payments by Plaintiff or others on his behalf (including, without limitation, any and all down payment checks and funds received from the Defendant, and all receipts for cash or checks received from, or on behalf of, Plaintiff
- p. all documents which disclose or refer to sales bonuses, spiffs or incentives on the vehicle purchased by Plaintiff
- q. all documents which reflect or refer to the commissions earned by or credited to each person at Midlands Honda in connection with the vehicle purchased by Plaintiff, and/or his trade-in, including without limitation those earned by or credited to each salesperson, F & I officer, sales manager or any other person, including hard copy printouts of any computer entries reflecting commissions or credits
- r. all internal worksheets or other drafts or documents used by the Defendant or its personnel in connection with the vehicle
- s. all internal invoices, internal controls or accounting documents which refer to the Defendant's cost for the vehicle, to the price of the vehicle or Plaintiff's trade-in, or to gross, net or other profits to be earned by Dealership or its personnel in connection with Plaintiff's deal
- t. all internal memos or other documents providing directions to the Defendant's title clerks, registration clerks, tag clerks, accounting personnel, sales or other staff in connection with Plaintiff's deal or its financing
- u. all correspondence received from or sent to Plaintiff or his representatives

at any time

- v. all documents which the Defendant received from or sent to any potential lender in connection with Plaintiff's deal
- w. each inspection sticker or certificate for the vehicle and all other documents which refer to the vehicle being inspected by, passed or failed by any inspection station
- x. the factory invoice for the vehicle
- y. each check, bill, or purchase order for each and every repair performed to or on the subject vehicle
- z. each repair, maintenance or service order (including customer, warranty and shop copies) for or other documentation of mechanical or body work performed on the vehicle at any time by any person or entity, including all sublet work
- aa. all other documents which record or refer to changes made or work done to the vehicle by the Defendant or others prior to its sale to Plaintiff, at time of sale or after its sale to the Plaintiff
- bb. all other documents (including, without limitation, handwritten notes and a hard copy printout of any computer entries) which refer to the Defendant's inspection of or observations about the vehicle at any time, including when it initially acquired the vehicle, when the vehicle was in its inventory, when it performed a Predelivery Inspection prior to delivering the vehicle to Plaintiff, or at any other time
- cc. all notes or other documents which refer to inspections of or observations

- about the vehicle at any time by any persons other than the Defendant including, without limitation, any inspection station, and any other mechanic, body shop or other person who inspected or observed the vehicle at any time
- dd. each estimate or repair order prepared by any person in connection with any vandalism, theft, accident damage or other damage to the vehicle
  - ee. all correspondence and other documents which relate to or refer to insurance claims or coverage in connection with the vehicle, including all checks, drafts, confirmation of wire transfers or other evidence of payment made by or received by the Defendant in connection with damage to the vehicle
  - ff. all notes, memoranda or other documents which record or reflect conversations or other communications related to the vehicle or Plaintiff, whether before, during or after his purchase of the vehicle
  - gg. all documents prepared for, sent to or received from the police or any insurance company or representative concerning theft, vandalism, accidents or damage involving the vehicle at any time
  - hh. each photograph, videotape or other visual embodiment of the vehicle taken or prepared at any time
  - ii. all printed advertisements, sales brochures or other promotional materials which refer to the vehicle, at any time
  - jj. all other documents which refer to the condition of the vehicle, at any time
  - kk. the warranty history of the vehicle and all records submitted by or received by the Defendant in connection with any warranty claims on the vehicle
  - ll. all correspondence and other documents which you sent to, or received

from, the person or entity from whom you acquired the vehicle which refer to the vehicle in any way, at any time

- mm. the FTC Buyer's Guide for the vehicle
  - nn. all written warranties applicable to the vehicle
  - oo. all notices or other documents posted on or in the vehicle when shown to Plaintiff or any other person
  - pp. all other documents which refer to Plaintiff or the vehicle in any way
  - qq. all other documents of any kind signed by Plaintiff, or by others for him, and any other documents which purport to bear his signature.
16. Copy of the Defendant's Recap Sheet regarding the subject vehicle.
  17. Copy of the check which the Defendant used to buy the subject car.
  18. Copy of any and all documents received by the Defendant as a result of buying the subject vehicle.
  19. Copy of the Carfax, Autocheck or similar type report from any source received by or used by the Defendant from the time the Defendant or its agent first looked at the 2003 Honda Civic VIN: 2HGES1654H577916 until the present.
  20. Copy of the Block Ticket received by the Defendant when it sold the subject vehicle at auction.
  21. Copy of any documents sent to or received from the Adesa Auto Auction regarding the sale of the subject vehicle.
  22. Copy of any documents sent to or received from any auto auction to which the Defendant Midlands Honda sent the subject vehicle to be sold.
  23. Copy of the NC disclosure document signed by the Defendant prior to or at the time



of the sale of the vehicle at the auction to the Plaintiffs.

24. Copy of any documents received by the Defendant Midlands Honda from any auction regarding the sale or purchase of the subject vehicle.
25. Copies of all documents the Defendant intends to use at the time of trial.
26. Any and all documents identified, contained, or referred to by the Defendant in its responses to Plaintiff's Interrogatories to Defendant, and all such documents used in any way in preparing or which support such responses.
27. Any photographs and/or video tapes referring or relating to the vehicle which is the subject of this litigation, or otherwise relating to the claims set forth in the Defendant's Answer.
28. Any documents in the possession of the Defendant or the Defendant's counsel referring or relating to the vehicle, which is the subject of this litigation, including but not limited to, owner's manual, publications, brochures, written warranties, instructions and/or warnings regarding vehicle operations and service, pamphlets, photographs, videos, reports, analyses, inspection results and/or tests and the result thereof, design and/or manufacture drawings, displays, design and/or manufacture analyses and the results thereof.
29. All documents, including any statements or reports, concerning or relating to the matters set forth in the Plaintiff's Complaint made by an expert who may be a witness at trial, and all notes, memoranda, writings, and recordings concerning and/or relating to such statements or reports.
30. All documents, including but not limited to, textbooks, articles, studies, literature, videotapes, audiotapes, and depositions, that were reviewed, referred to, or relied

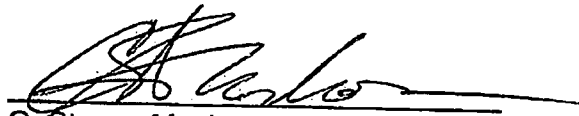
upon in connection with the preparation of any reports, memoranda, or statements or the formulation of any opinions of any experts with whom the Defendant intends to call as a witness at trial.

31. Copies of any and all documents, letters, reports, faxes, or any other record, kept in any media, that relates to the problems the Plaintiffs complain of in their complaint.
32. Any and all policies and procedures manuals regarding the Defendant's policy and procedures for selling previously wrecked vehicles.
33. Provide a copy of any and all notes, records, or other documents which support any of the Defendant's defenses set forth in the Defendant's Answer. Identify which defense is supported by which documents provided by the Defendant.
34. If the Defendant no longer has all the documents generated, received or otherwise in its possession regarding the 2003 Honda Civic VIN: 2HGES1654H577916, please identify the document the Defendant no longer has, what happened to it, the reason the document(s) is no longer in its possession, and how another copy of that document(s) may be obtained.
35. Any documents submitted to any auto auction to advertise the subject vehicle.
36. Any documents submitted to Ebay as a result of any complaint made by the Plaintiff.
37. Any documents submitted to Ebay as a result of any complaint made by any other customer or potential customer of the Defendant Midlands Honda.
38. Provide a copy of the personnel file for the person who authorized the vehicle to be sold at the Adesa Auto Auction.

39. Provide a copy of the personnel file for the person who provided the representations to be used to market the subject vehicle at the Adesa Auto Auction.
40. Provide a copy of the policy and procedure manual regarding how the Defendant Midlands Honda's employees are to advertise, market, disclose information regarding vehicles sold at auctions by or for the Defendant Midlands Honda.
41. Any documents received by the Defendant Midlands Honda pursuant to a subpoena or by any other method.

These Requests for Production are deemed continuing throughout the pendency of this matter.

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

BY: 

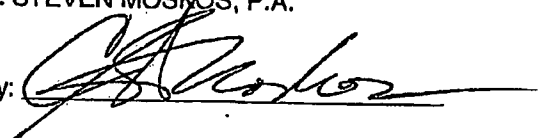
C. Steven Moskos  
4000 Faber Place Drive, Ste. 300  
North Charleston, South Carolina 29405  
Telephone: (843) 763-5297

Charleston, South Carolina  
October 21, 2013

#### CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper, properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 21<sup>st</sup> day of October, 2013.

C. STEVEN MOSKOS, P.A.

By: 

|                                 |   |                                |
|---------------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS   |
|                                 | ) | FOR THE FIFTH JUDICIAL CIRCUIT |
| COUNTY OF KERSHAW               | ) | CASE NO. 15-CP-28-033          |
|                                 | ) |                                |
| BILLY KINGER AND DEBORAH KINGER | ) |                                |
|                                 | ) |                                |
|                                 | ) |                                |
| Plaintiffs                      | ) |                                |
|                                 | ) |                                |
| vs.                             | ) | PLAINTIFFS' FIRST SET OF       |
|                                 | ) | INTERROGATORIES TO THE         |
| MIDLANDS AUTOMOTIVE, LLC,       | ) | DEFENDANT MIDLANDS AUTOMOTIVE, |
| D/B/A CAROLINA CHRYSLER,        | ) | LLC, D/B/A CAROLINA CHRYSLER,  |
| DODGE, JEEP, RAM AND GROW       | ) | DODGE, JEEP, RAM               |
| FINANCIAL FEDERAL CREDIT        | ) |                                |
| UNION.                          | ) |                                |
|                                 | ) |                                |
|                                 | ) |                                |
| Defendants                      | ) |                                |

**TO: CLAY WALKER, ESQ. ATTORNEY FOR THE DEFENDANT**

The Plaintiffs through their undersigned attorney, propounds the following Set of Interrogatories to the Defendant, Midlands Automotive, LLC, d/b/a Carolina Chrysler, Dodge, Jeep, Ram (hereinafter referred to as the "Defendant" or "Carolina Chrysler"), pursuant to Rule 33(b) of the South Carolina Rules of Civil Procedure, to be signed and returned within thirty (30) days.

#### INSTRUCTIONS AND DEFINITIONS

Pursuant to Rules 26 through 33 of the South Carolina Rules of Civil Procedure, you shall answer each of the following Interrogatories under oath, in writing, separately, in the fullest detail possible, and in accordance with the definitions and instruction set forth below. The answers shall be signed by the person making them, and a copy of the answers shall be signed by the person making them, and a copy of the answers, together with your objections, if any, shall be served, no later than thirty (30) days after the service of these

Interrogatories upon you.

The Plaintiffs request that the answer to each interrogatory be preceded by the identification and verbatim quotation of the interrogatory to which the answer responds.

Furthermore, you are under a duty to supplement seasonably your response with respect to any interrogatory directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. In addition, you are under a duty to amend a prior response which, although correct when made, is no longer true, and the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.

#### DEFINITIONS

As used in Plaintiffs' interrogatories and document production requests herein the terms "you" and "your", or "yourself" refer to you personally, each of your agents, representatives, and attorneys, and each person acting or purporting to act on your behalf. Unless the context otherwise requires, the terms "you", "your", or "yourself" refer to the particular corporate defendants, each of its parents, predecessors, subsidiaries, and affiliates, each of its present and former officers, employees, agents, representatives, and attorneys, and each person acting or purporting to act on its behalf.

1. Representative.

As used herein, the term "representative" means any and all agents, employees, servants, officers, directors, attorneys, or other persons acting or purporting to act on behalf of the person in question.

2. Person.

As used herein, the term "person" means any natural individual in any capacity whatsoever or any entity or organization including divisions, departments, and other units therein, and shall include, but not be limited to, a public or private corporation, partnership, joint venture, voluntary or unincorporated association, organization proprietorship, trust, estate, governmental agency, commission, bureau, or department.

3. Document.

As used herein, the term "document" means any medium upon which intelligence or information can be recorded or retrieved, and includes without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memorandum (including any bill, order forms, receipt, financial statement, accounting entry, diary, calendar, telex, telegram, cable, report, record, contract, agreement, study, handwritten note, draft, working graph, index, list, tape, photograph, microfilm, data sheet or transcribed, punched, taped, filmed, or graphic matter, however produces or reproduced, which is in your possession, custody or control or which was, but is no longer, in your possession, custody, or control.

4. Communication.

As used herein, the term "communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interview, consultations, agreements, and other understandings between or among two or more persons.

5. Identification.

As used herein the terms "identification", "identity", or "identify", when used in reference to (a) a natural individual, requires you to state his or her full name and residential and business addresses; (b) a corporation requires you to state its full name or style under which the business is conducted, its business address or addresses, the types of businesses in which it is engaged, the geographic areas in which it conducts those businesses, and the identity of the person or person who own, operate and control the business; (c) a document, require you to state the number of pages and the nature of the document (e.g., letter or memorandum), its title, its date, the name or names of its authors and recipients, and its date, the location and custodian; (d) a communication, requires you, if any part of the communication is written to identify the document or documents which refer to or evidence the communication, and, to the extent that the communication was non-written, to identify date, manner, place, and substance of the communication; (e) an act, require you to state each transaction or act constituting occurred; identify each document referring or relating thereto; and identify each person participating or engaging therein; (f) a meeting, require you to state the date, nature, and purpose of the meeting; the substance of the meeting; and the place of the meeting.

#### INSTRUCTIONS CONCERNING IDENTIFICATION OF DOCUMENTS

With respect to each interrogatory, in addition to supplying the information requested, you are to identify all documents that support, refer to, or evidence the subject matter of each interrogatory and your answer thereto.

If any or all documents identified herein are no longer in your possession, custody, or control because of destruction, loss, or any other reasons, then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter

or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original and a copy of the document; (d) state in as much detail as possible the contents of the document; and (e) state the manner and date of disposition of the document.

If you contend that you are entitled to withhold from production any or all documents identified herein on the basis of the attorney-client privilege, the work product doctrine, or other ground, then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original and a copy of the document; (d) state the subject matter of the document; and (e) state the basis upon which you contend you are entitled to withhold the document from production.

#### THE WORD "OR"

As used herein, the word "or" appearing in an interrogatory should not be read so as to eliminate any part of the interrogatory, but, whenever applicable, it should have the same meaning as the word "and." For example, an interrogatory stating "supporting or refer" should be read as "supporting and refer" if an answer that does both can be made. The singular shall be taken to include the plural herein, and vice versa.

#### INTERROGATORIES

1. Please give me the following information concerning each person known to the party or counsel to be a witness concerning or having any connection with the facts of the case:
  - a. What are their names and addresses? If any of the people identified were, but are no longer, employed by the Defendant, please provide their home address and telephone number.



- b. Have written or recorded statements been taken from any of them?
  - c. If so, who is in possession of such statements?
  - d. Set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.
2. Please set forth a list of photographs, plats, sketches, policies and procedures manuals, or other prepared documents in possession of the party or counsel that relate to the claim or defense in this case.
3. List the names, current addresses, and phone numbers of expert witnesses whom the party proposes to use as a witness at the trial of the case and for each state the following: the speciality or sub-specialty in which you claim they are an expert; the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; whether the expert has testified previously in other actions within the same speciality or sub-specialty; and for each expert in which the answer was affirmative, list the name of the action, the jurisdiction, the civil action number, the date of the testimony or deposition, and the names, current addresses, and telephone numbers for the attorneys for each of the parties in the action.
4. Is there any insurance policy which is applicable to this case? If so, what are the policy limits and what is the insurance company?
5. Please state whether or not the Defendant is properly identified. If the Defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and pleading reflecting correct

**Identification.**

6. Identify each and every person who, at any time, has informed the Defendant that the subject vehicle has previously been wrecked or damaged in any way. Include that person's name, address, telephone number, the substance of the communication and whether the communication was oral or in writing.
7. "STATE IN FULL DETAIL" any inspections, repairs, maintenance or appraisals done by you or for you to the "vehicle," and list the date of each such repair or maintenance and "identify" all persons known to you who inspected or performed mechanical inspections or repairs on the "vehicle."
8. Identify the insurance company which was notified by Defendant that the subject vehicle had been damaged prior to arriving at the Defendant's dealership. Include the insurance company's address and the name of the adjuster who handled Defendant's claim.
9. Please list each agent or employee of the Defendant who spoke with or in any way dealt with the Plaintiffs in regards to the vehicle which is the subject of this action. Please include when said meeting occurred, what was discussed, who was present, when said discussion occurred and why it occurred. Please include the agent's or employee's current address and telephone number, as well as a detailed explanation of their conversation with the Plaintiffs regarding the documents in the Defendant's file, when said discussion occurred, where the conversation occurred and who was present during the discussion.
10. Set forth any and all conversations the Defendant's agent and employees had with the manufacturer or its representatives, the shipping company or its representatives,

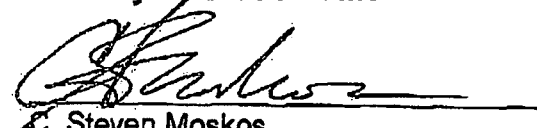
or the body shop or its representatives relating to any damage done to the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578.

11. Please state any and all representations about the condition of the vehicle made to the Defendant's agents and employees by the manufacturer at the time the Defendant came into possession of the subject vehicle.
12. IDENTIFY each and every civil suit in which you have been a defendant at any time between January 1, 2008 and the present, which included allegations that you made any misrepresentations, failed to disclose, violated any unfair trade practices act, or violated any "consumer protection" statutes, and for each such case,
  - a. State the court in which such case was handled, the case number, the identities of your attorney and the opposing parties' attorneys, and the date when the case was filed; and
  - b. STATE IN FULL DETAIL the nature of the case, and the outcome of the case.
13. Please list the names of current automobile dealerships or other businesses owned by the current or majority shareholder of the Defendant.
14. Please state the Defendant dealer's authorized warranty rate for labor.
15. Please state the Defendant dealer's authorized warranty rate for parts.
16. Please state the MSRP of the subject vehicle. For purposes of this interrogatory, the "manufacturer's suggested retail price" means the retail price of the new motor vehicle suggested by the manufacturer including the retail delivered price suggested by the manufacturer for each accessory or item of optional equipment physically attached to the new motor vehicle at the time of delivery to the motor vehicle dealer.

17. Please list all Challengers, by VIN, returned to the manufacturer for any reason from May 2014-September 2014.
18. Please provide the name and contact information for the company used to transport and deliver the subject vehicle to Carolina Chrysler

These Interrogatories are deemed to be continuing throughout the pendency of this action.

**C. STEVEN MOSKOS, P.A.**  
**Attorney for the Plaintiffs**

BY: 

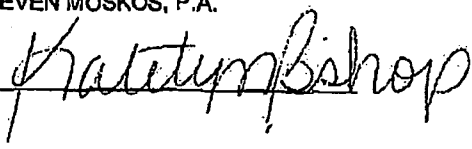
C. Steven Moskos  
4000 Faber Place Drive, Ste. 300,  
North Charleston, South Carolina 29405  
Telephone: (843) 763-5297

Charleston, South Carolina  
3/19, 2015

#### CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper, properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 19 day of March, 2015.

C. STEVEN MOSKOS, P.A.

By: 



29405, for the purpose of inspecting, photographing, copying, or otherwise reproducing or transcribing the documents, writings, and memoranda describe in the following enumerated requests. Said documentary evidence is alleged to be in the Defendant's possession, custody, and control and is pertinent to the issues in this case.

#### DEFINITIONS

All references to "interrogatory" or "interrogatories" herein refer to the Plaintiffs' Interrogatories to Defendant and reference herein to any such Interrogatory by number shall be deemed to incorporate by reference herein any such interrogatory in its entirety.

As used in Plaintiffs' interrogatories and document production requests herein, the terms "you" and "your", or "yourself" refer to you personally, each of your agents, representatives, and attorneys, and each person acting or purporting to act on your behalf. Unless the context otherwise requires, the terms "you", "your", or "yourself" refer to the particular corporate defendants, each of its parents predecessors, subsidiaries, and affiliates, each of its present and former officers, employees, agents, representatives, and attorneys, and each person acting or purporting to act on its behalf.

#### DOCUMENT

As used herein, the term "document" means any medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memoranda including any bill, order form, receipt, financial statement, accounting entry, contract, diary, calendar, telex, telegram, cable, report, record, contract, agreement, study, handwritten note, draft, working paper, chart, paper, print, laboratory record, drawing sketch, graph, index, list, tape, photograph, microfilm, data sheet or data processing card,

or any other written recorded, transcribed, punched, taped, filmed or graphic matter, however produced or reproduced, which is in your possession, custody, or control or which was, but is no longer, in your possession, custody or control.

#### COMMUNICATION

As used herein, the term "communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons.

#### INSTRUCTIONS CONCERNING PRODUCTION OF DOCUMENTS

If any and all documents identified herein are no longer in your possession, custody, or control because of destruction, loss, or any other reasons, then do the following with respect to each and every such document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original of the documents; (d) state in as much detail as possible the contents of the documents; and (e) state the manner and date of disposition of the document.

If you contend that you are entitled to withhold from production any or all documents identified herein on the basis of the attorney-client privilege, the work-product doctrine, or other grounds then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original of the document; (d) state the subject matter of the document; and (e) state the basis upon which you contend

you are entitled to withhold the document from production.

#### THE WORD "OR"

As used herein, the word "or" appearing in a request should not be read so as to eliminate any part of the request but, whenever applicable, it should have the same meaning as the word "and", for example, an interrogatory stating "supporting or refer" should be read as "supporting and refer" if an answer that does both can be made. The singular shall be taken to include the plural herein, and vice versa.

#### REQUEST FOR PRODUCTION

1. Copies of all statements, written or recorded, of any persons, including parties hereto, who are or may be witnesses to any of the matters complained of in the Complaint.
2. Copies of all photographs relating in any way to the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578, or any matter referred to in the Complaint or to the damages claimed.
3. Copies of the deal jacket for the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578 when it was sold to Billy Kincer.
4. Copies of the deal jackets for the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578 when it was sold to Carolina Chrysler by the manufacturer, and any other occasion when Carolina Chrysler created a deal jacket regarding the subject vehicle.
5. Copies of any and all service records in the possession or control of the Defendant regarding the subject vehicle which is the subject of this action.
6. Copies of all diagrams, statements, memoranda, reports, policy and procedures



manuals, or other documents relating to the matters in the suit.

7. Copies of the Defendant's last three (3) financial statements showing the Defendant's net worth.
8. Copies of all reports of experts which may pertain, in any way, to issues involved in this case.
9. Copies of the Defendant's entire files regarding the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578, which is the subject of this case. These documents should include the following documents and things which refer to Carolina Chrysler's purchase of the vehicle from the manufacturer or Billy Kincer's purchase of the vehicle from Carolina Chrysler:
  - a. each Purchase Order and Sales Invoice
  - b. each Retail Installment Contract or other loan agreement
  - c. each odometer statement
  - d. each application for financing or questionnaire about income, assets or liabilities, including any documents which refer to any prior credit problems or explanations of same
  - e. each credit report on Plaintiffs or other document which refers to Plaintiffs' income, assets, liabilities or prior credit history
  - f. each document which identifies Plaintiffs' relatives or references
  - g. each document which refers to Plaintiffs' employer or history of employment
  - h. each document which refers to Plaintiffs' residence or history of their place of residence
  - i. all other documents submitted by Plaintiffs to the Defendant in connection

with their purchase or financing of the vehicle, including without limitation all documentation of their income, finances, assets and liabilities and/or explanation of any past credit problems

- j. each document which refers to the temporary or permanent registration of the vehicle, or temporary or permanent tags to the vehicle, including power of attorney forms
- k. each document which constitutes or refers to title to the car at any time, including without limitation each Application for Certificate of Title and related documents
- l. each deal jacket on Plaintiffs' vehicle and each deal jacket on Plaintiffs' trade-in
- m. the stock and inventory cards or like records for the vehicle and Plaintiffs' trade-in
- n. all handwritten or typewritten notes and a printout of all computer entries which refer to Plaintiffs, their deal, the trade-in financing of Plaintiffs' deal, or to the vehicle
- o. the daily cash receipts journal or ledger which reflect any payments by Plaintiffs or others on their behalf (including, without limitation, any and all down payment checks and funds received from the Defendant, and all receipts for cash or checks received from, or on behalf of, Plaintiffs
- p. all documents which disclose or refer to sales bonuses, spiffs or incentives on the vehicle purchased by Plaintiffs
- q. all documents which reflect or refer to the commissions earned by or credited

to each person at Carolina Chrysler in connection with the vehicle purchased by Plaintiffs, and/or their trade-in, including without limitation those earned by or credited to each salesperson, F & I officer, sales manager or any other person, including hard copy printouts of any computer entries reflecting commissions or credits

- r. all internal worksheets or other drafts or documents used by the Defendant or its personnel in connection with the vehicle
- s. all internal invoices, internal controls or accounting documents which refer to the Defendant's cost for the vehicle, to the price of the vehicle or Plaintiffs' trade-in, or to gross, net or other profits to be earned by Dealership or its personnel in connection with Plaintiffs' deal
- t. all internal memos or other documents providing directions to the Defendant's title clerks, registration clerks, tag clerks, accounting personnel, sales or other staff in connection with Plaintiffs' deal or its financing
- u. all correspondence received from or sent to Plaintiffs or their representatives at any time
- v. all documents which the Defendant received from or sent to any potential lender in connection with Plaintiffs' deal
- w. each inspection sticker or certificate for the vehicle and all other documents which refer to the vehicle being inspected by, passed or failed by any inspection station
- x. the factory invoice for the vehicle
- y. each check, bill, or purchase order for each and every repair performed to

or on the subject vehicle

- z. each repair, maintenance or service order (including customer, warranty and shop copies) for or other documentation of mechanical or body work performed on the vehicle at any time by any person or entity, including all sublet work
- aa. all other documents which record or refer to changes made or work done to the vehicle by the Defendant or others prior to its sale to Plaintiffs, at time of sale or after its sale to the Plaintiffs
- bb. all other documents (including, without limitation, handwritten notes and a hard copy printout of any computer entries) which refer to the Defendant's inspection of or observations about the vehicle at any time, including when it initially acquired the vehicle, when the vehicle was in its inventory, when it performed a Predelivery Inspection prior to delivering the vehicle to Plaintiffs, or at any other time
- cc. all notes or other documents which refer to inspections of or observations about the vehicle at any time by any persons other than the Defendant including, without limitation, any inspection station, and any other mechanic, body shop or other person who inspected or observed the vehicle at any time
- dd. each estimate or repair order prepared by any person in connection with any vandalism, theft, accident damage or other damage to the vehicle
- ee. all correspondence and other documents which relate to or refer to insurance claims or coverage in connection with the vehicle, including all checks, drafts, confirmation of wire transfers or other evidence of payment made by or

- received by the Defendant in connection with damage to the vehicle
- ff. all notes, memoranda or other documents which record or reflect conversations or other communications related to the vehicle or Plaintiffs, whether before, during or after their purchase of the vehicle
  - gg. all documents prepared for, sent to or received from the police or any insurance company or representative concerning theft, vandalism, accidents or damage involving the vehicle at any time
  - hh. each photograph, videotape or other visual embodiment of the vehicle taken or prepared at any time
  - ii. all printed advertisements, sales brochures or other promotional materials which refer to the vehicle, at any time
  - jj. all other documents which refer to the condition of the vehicle, at any time
  - kk. the warranty history of the vehicle and all records submitted by or received by the Defendant in connection with any warranty claims on the vehicle
  - ll. all correspondence and other documents which you sent to, or received from, the person or entity from whom you acquired the vehicle which refer to the vehicle in any way, at any time
  - mm. the FTC Buyer's Guide for the vehicle
  - nn. all written warranties applicable to the vehicle
  - oo. all notices or other documents posted on or in the vehicle when shown to Plaintiffs or any other person
  - pp. all other documents which refer to Plaintiffs or the vehicle in any way
  - qq. all other documents of any kind signed by Plaintiffs, or by others for them,

and any other documents which purport to bear their signature.

10. Copy of the Defendant's Recap Sheet regarding the subject vehicle.
11. Copy of any body shop work done to the subject vehicle by the Defendant or sublet by the Defendant.
12. Copies of any communication with the manufacturer of the subject vehicle as a result of any damage to the vehicle during transport.
13. Copy of any and all documents received by the Defendant as a result of buying the subject vehicle.
14. Copy of the Carfax, Autocheck or similar type report from any source received by or used by the Defendant pertaining to the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578.
15. Copies of the policies and procedures manuals from Carolina Chrysler or the manufacturer setting forth the policies and procedures on how to inform a consumer that a vehicle on Defendant's lot has been previously damaged and repaired.
16. Any and all documents identified, contained, or referred to by the Defendant in its responses to Plaintiffs' Interrogatories to Defendant, and all such documents used in any way in preparing or which support such responses.
17. Any photographs and/or video tapes referring or relating to the vehicle which is the subject of this litigation, or otherwise relating to the claims set forth in the Defendant's Answer.
18. Any documents in the possession of the Defendant or the Defendant's counsel referring or relating to the vehicle, which is the subject of this litigation, including but not limited to, owner's manual, publications, brochures, written warranties,

instructions and/or warnings regarding vehicle operations and service, pamphlets, photographs, videos, reports, analyses, inspection results and/or tests and the result thereof, design and/or manufacture drawings, displays, design and/or manufacture analyses and the results thereof.

19. All documents from the manufacturer of the subject vehicle approving Defendant's hourly labor rate.
20. All documents, including any statements or reports, concerning or relating to the matters set forth in the Plaintiffs' Complaint made by an expert who may be a witness at trial, and all notes, memoranda, writings, and recordings concerning and/or relating to such statements or reports.
21. All documents, including but not limited to, textbooks, articles, studies, literature, videotapes, audiotapes, and depositions, that were reviewed, referred to, or relied upon in connection with the preparation of any reports, memoranda, or statements or the formulation of any opinions of any experts with whom the Defendant intends to call as a witness at trial.
22. Copy of any and all phone logs or notes regarding the subject vehicle or the Plaintiffs.
23. Copies of any and all documents, letters, reports, faxes, or any other record, kept in any media, that relates to the problems the Plaintiffs complains of in their complaint.
24. Provide a copy of any and all notes, records, or other documents which support any of the Defendant's defenses set forth in the Defendant's Answer. Identify which defense is supported by which documents provided by the Defendant.

25. Copy of the Defendant Carolina Chrysler's dealer agreement with the manufacturer.
26. Copy of any and all policies or procedures required of or suggested by the manufacturer to the Defendant Carolina Chrysler. regarding providing notice to customers that vehicles have prior damage.
27. Any documents received by the Defendant pursuant to a subpoena or by any other method.
28. Any and all documents regarding the damage done to the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578 during transport.
29. Any and all documents regarding the claims for damage repair for the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578 which was repaired prior to the Plaintiffs taking possession of the vehicle.
30. Any and all documents generated by the manufacturer or Defendant Carolina Chrysler regarding the transportation of the vehicle from the manufacturer to the Defendant's place of business.
31. Any and all claim forms or documents submitted to an insurance company or the manufacturer regarding damage done to the 2014 Challenger R/T Plus 100<sup>th</sup> Anniversary Edition VIN No. 2C3CDYBT7EH310578, which is the subject of this action.

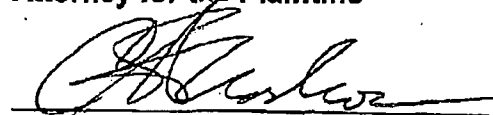
These Requests for Production are deemed continuing throughout the pendency of this matter.

**(SIGNATURE IS ON NEXT PAGE)**



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

BY:



C. Steven Moskos  
4000 Faber Place Drive, Ste. 300  
North Charleston, South Carolina 29405  
Telephone: (843) 763-5297

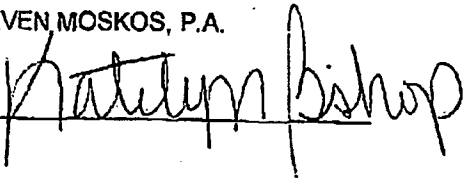
Charleston, South Carolina  
3/19, 2015

CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper, properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 19 day of March, 2015.

C. STEVEN MOSKOS, P.A.

By:



|                                |   |                                       |
|--------------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA        | ) | AMERICAN ARBITRATION                  |
| COUNTY OF CHARLESTON           | ) | ASSOCIATION CONSUMER - RELATED        |
|                                | ) | DISPUTE                               |
| DIANE R. HENDERSON F/K/A DIANE | ) | CASE NO. 31 420 00490 09              |
| M. REED                        | ) |                                       |
|                                | ) |                                       |
|                                | ) |                                       |
| Plaintiff                      | ) | <b>PLAINTIFF'S INTERROGATORIES TO</b> |
|                                | ) | <b>DEFENDANT SUMMERVILLE</b>          |
| vs.                            | ) | <b>FORD-MERCURY, INC</b>              |
|                                | ) |                                       |
| SUMMERVILLE FORD-MERCURY,      | ) |                                       |
| INC. AND CAPITAL ONE AUTO      | ) |                                       |
| FINANCE, INC.                  | ) |                                       |
|                                | ) |                                       |
|                                | ) |                                       |
| Defendants                     | ) |                                       |

**TO: ROBERT REIBOLD, ESQ., ATTORNEY FOR THE DEFENDANT SUMMERVILLE FORD-MERCURY, INC.:**

The Plaintiff, Diane R. Henderson f/k/a Diane M. Reed, through her undersigned attorney, propounds the following Set of Interrogatories to the Defendant, Summerville Ford-Mercury, Inc., pursuant to Rule 33(b) of the South Carolina Rules of Civil Procedure, to be signed and returned within thirty (30) days.

#### INSTRUCTIONS AND DEFINITIONS

Pursuant to Rules 26 through 33 of the South Carolina Rules of Civil Procedure, you shall answer each of the following Interrogatories under oath, in writing, separately, in the fullest detail possible, and in accordance with the definitions and instruction set forth below. The answers shall be signed by the person making them, and a copy of the answers shall be signed by the person making them, and a copy of the answers, together with your objections, if any, shall be served, no later than thirty (30) days after the service of these

Interrogatories upon you.

The Plaintiff requests that the answer to each interrogatory be preceded by the identification and verbatim quotation of the interrogatory to which the answer responds.

Furthermore, you are under a duty to supplement seasonably your response with respect to any interrogatory directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony. In addition, you are under a duty to amend a prior response which, although correct when made, is no longer true, and the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.

#### DEFINITIONS

As used in Plaintiff's interrogatories and document production requests herein the terms "you" and "your", or "yourself" refer to you personally, each of your agents, representatives, and attorneys, and each person acting or purporting to act on your behalf. Unless the context otherwise requires, the terms "you", "your", or "yourself" refer to the particular corporate defendants, each of its parents, predecessors, subsidiaries, and affiliates, each of its present and former officers, employees, agents, representatives, and attorneys, and each person acting or purporting to act on its behalf.

1. Representative.

As used herein, the term "representative" means any and all agents, employees, servants, officers, directors, attorneys, or other persons acting or purporting to act on

behalf of the person in question.

2. Person.

As used herein, the term "person" means any natural individual in any capacity whatsoever or any entity or organization including divisions, departments, and other units therein, and shall include, but not be limited to, a public or private corporation, partnership, joint venture, voluntary or unincorporated association, organization proprietorship, trust, estate, governmental agency, commission, bureau, or department.

3. Document.

As used herein, the term "document" means any medium upon which intelligence or information can be recorded or retrieved, and includes without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memorandum (including any bill, order forms, receipt, financial statement, accounting entry, diary, calendar, telex, telegram, cable, report, record, contract, agreement, study, handwritten note, draft, working graph, index, list, tape, photograph, microfilm, data sheet or transcribed, punched, taped, filmed, or graphic matter, however produces or reproduced, which is in your possession, custody or control or which was, but is no longer, in your possession, custody, or control.

4. Communication.

As used herein, the term "communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interview, consultations, agreements, and other understandings between or among two or more

persons.

5. Identification.

As used herein the terms "identification", "identity", or "identify", when used in reference to (a) a natural individual, requires you to state his or her full name and residential and business addresses; (b) a corporation requires you to state its full name or style under which the business is conducted, its business address or addresses, the types of businesses in which it is engages, the geographic areas in which it conducts those businesses, and the identity of the person or person who own, operate and control the business; (c) a document, require you to state the number of pages and the nature of the document (e.g., letter or memorandum), its title, its date, the name or names of its authors and recipients, and its date, the location and custodian; (d) a communication, requires you, if any part of the communication is written to identify the document or documents which refer to or evidence the communication, and, to the extent that the communication was non-written, to identify date, manner, place, and substance of the communication; (e) an act, require you to state each transaction or act constituting occurred; identify each document referring or relating thereto; and identify each person participating or engaging therein; (f) a meeting, require you to state the date, nature, and purpose of the meeting; the substance of the meeting; and the place of the meeting.

INSTRUCTIONS CONCERNING IDENTIFICATION OF DOCUMENTS

With respect to each interrogatory, in addition to supplying the information requested, you are to identify all documents that support, refer to, or evidence the subject matter of each interrogatory and your answer thereto.

If any or all documents identified herein are no longer in your possession, custody, or control because of destruction, loss, or any other reasons, then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original and a copy of the document; (d) state in as much detail as possible the contents of the document; and (e) state the manner and date of disposition of the document.

If you contend that you are entitled to withhold from production any or all documents identified herein on the basis of the attorney-client privilege, the work product doctrine, or other ground, then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original and a copy of the document; (d) state the subject matter of the document; and (e) state the basis upon which you contend you are entitled to withhold the document from production.

#### THE WORD "OR"

As used herein, the word "or" appearing in an interrogatory should not be read so as to eliminate any part of the interrogatory, but, whenever applicable, it should have the same meaning as the word "and." For example, an interrogatory stating "supporting or refer" should be read as "supporting and refer" if an answer that does both can be made. The singular shall be taken to include the plural herein, and vice versa.

#### INTERROGATORIES

1. Please give me the following information concerning each person known to the

party or counsel to be a witness concerning the facts of the case, regardless of whether the Defendant plans to call the witness at the time of trial:

- a. What are their names and addresses?
  - b. Have written or recorded statements been taken from any of them?
  - c. If so, who is in possession of such statements?
  - d. Set forth either a summary sufficient to inform the other party of the important facts known to or observed by such witnesses, or provide a copy of any written or recorded statements taken from such witnesses.
2. Please set forth a list of photographs, plats, sketches, policies and procedures manuals, or other prepared documents in possession of the party or counsel that relate to the claim or defense in this case.
  3. List the names, current addresses, and phone numbers of expert witnesses whom the party proposes to use as a witness at the trial of the case and for each state the following: the speciality or sub-specialty in which you claim they are an expert; the subject matter on which the expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; whether the expert has testified previously in other actions within the same speciality or sub-specialty; and for each expert in which the answer was affirmative, list the name of the action, the jurisdiction, the civil action number, the date of the testimony or deposition, and the names, current addresses, and telephone numbers for the attorneys for each of the parties in the action.

4. Is there any insurance policy which is applicable to this case? If so, what are the policy limits and what is the insurance company?
5. Furnish a detailed factual basis for the defenses you assert in your answer.
6. Please state whether or not the Defendant is properly identified. If the Defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and pleading reflecting correct identification.
7. Identify each and every person who, at any time, has informed the Defendant that the subject vehicle has previously been wrecked. Include that person's name, address, telephone number, the substance of the communication, when that person notified the Defendant about the prior wreck damage and whether the communication was oral or in writing.
8. IDENTIFY all ORAL STATEMENTS and all DOCUMENTS relating to your purchase of the subject vehicle including but not limited to all statements and documents relating to negotiations and communications prior to the purchase of the vehicle, and to the actual purchase transactions on the vehicle. Identify all persons known to you to have knowledge of or to have participated in any discussions, inspections, repairs, or maintenance concerning any subject vehicle between the time you first knew of the vehicle and the present, and for each such person STATE IN FULL DETAIL the nature of his/her knowledge of or participation in those events.
9. "STATE IN FULL DETAIL" any inspections, repairs, maintenance or appraisals done by you or for you to the "vehicle," and list the date of each such repair or



maintenance and "identify" all persons known to you who inspected or performed mechanical inspections or repairs on the "vehicle."

10. "STATE IN FULL DETAIL" all steps and precautions you took to ensure that the "vehicle" did not have wreck damage or an inaccurate odometer reading when it was sold by you.
11. STATE IN FULL DETAIL all inspections or checks on the subject vehicle made by or for you and any findings or conclusions made as a result of the inspections or checks (including, for example, but not limited to, safety inspections, checks of mechanical items such as the odometer or engine, appraisals, and checks of wreck damage or indications the vehicle might have been stolen), and list the date each such inspection or check was made and the identity of each person making such inspections or checks.
12. STATE IN FULL DETAIL any repairs or maintenance done by or for you to any of the subject vehicle, and list the date each such repair or maintenance was done and the IDENTITY of each person doing such repair or maintenance.
13. Please set forth the training program provided by the Defendant so that the Defendant's employees will be properly trained. Said training includes, but is not limited to, training on how to inspect vehicles for prior wreck damage and how prior wreck damage is to be disclosed to consumers. Please include when said training sessions occur, who teaches the training sessions, what policies and procedures manuals are provided to the employee, and any other documents or training received by the employee.

14. Please identify the person or persons who inspected the 2003 Jeep Grand Cherokee from the time it was first seen by an agent or employee of the Defendant until the Plaintiff purchased it.
15. Please identify the person or persons who inspected the 2003 Jeep Grand Cherokee after the Plaintiff purchased the vehicle.
16. Please list each agent or employee of the Defendant who spoke with or in any way dealt with the Plaintiff regarding the vehicle which is the subject of this action. Please include when said meeting occurred, what was discussed, who was present, when said discussion occurred and why it occurred. Please include the agent's or employee's current address and telephone number, as well as a detailed explanation of his conversation with the Plaintiff regarding the documents in the Defendant's file, when said discussion occurred, where the conversation occurred and who was present during the discussion.
17. Please identify the person or persons who inspected this vehicle for the Defendant prior to the Defendant obtaining it.
18. Please identify the person who sold the vehicle to the Defendant.
19. If this vehicle was sold thru an auction, identify the auction by name, address and telephone number. Include any and all persons at the auction with whom the Defendant or its agents or employees dealt on the date the subject vehicle was purchased by the Defendant.
20. Please set forth the procedures used by the Defendant to investigate and evaluate a vehicle being used by a customer as a trade-in.

21. Please state whether or not the Defendant was informed that the subject vehicle had been damaged prior to the Defendant's purchase of the vehicle. If Defendant was notified of the damage to the subject vehicle, please state when the Defendant was notified of said damage, the extent of damage to subject vehicle, when said damage occurred and whether or not the Defendant did any repair to the subject vehicle.
22. Please state the date when the Defendant first determined that the subject vehicle had previously been wrecked.
23. Please identify any other persons or companies with whom the Defendant communicated regarding the subject vehicle prior to buying it.
24. Please state the actual cash value of the subject vehicle on the date it was sold to the Plaintiff.
25. Please identify each and every person or business contacted by the Defendant prior to accepting the subject vehicle, in order to determine whether the vehicle had been previously damaged.
26. Please identify each and every person involved in the transaction whereby the Defendant accepted the subject vehicle.
27. Did the Defendant obtain a Carfax report relating to the vehicle prior to the sale to Plaintiff?
28. Did the Defendant obtain a "Vanguard" or similar report relating to the vehicle (from CCC Information Services, Inc. or any other database provider of insurance claim

information) prior to the sale of the subject vehicle to the plaintiff?

29. Identify all sheets, notes, records, memoranda, training manuals and other documents outlining, directing, mentioning or in any way instructing the Defendant's employees or its agents as to sales practices, pricing, appraising, or any other aspect of soliciting or selling motor vehicles to prospective customers or customers.

For each such document, state:

- a. the substance of the document,
  - b. the name of the person(s) who prepared the document, and
  - c. the date the document was prepared.
30. IDENTIFY each and every civil suit in which you have been a defendant at any time between January 1, 2004 and the present, which included allegations that you made any misrepresentations, failed to disclose, violated any unfair trade practices act, or violated any "consumer protection" statutes, and for each such case,
1. State the court in which such case was handled, the case number, the identities of your attorney and the opposing parties' attorneys, and the date when the case was filed; and
  2. STATE IN FULL DETAIL the nature of the case, and the outcome of the case.
31. State the name, title and work address of each person who assisted or participated in preparing and/or supplying any of the information given in answer to, or relied upon, in preparing answers to these interrogatories.

32. Identify by name, address and telephone number all stockholders of the Defendant.
33. Identify by name, address and telephone number all officers of the Defendant.
34. "Identify" your net "income" and "net profits" for the last three years, excluding the current year. This identification should include the following:
  - a. The amount of the net "income" and the year in which it was received;
  - b. Each "person" who was involved in the calculation of net "income";
  - c. The gross "income" used to calculate "net profits";
  - d. The "Deductible costs" used to calculate "net profits";
  - e. The method used to calculate "net profits".
  - f. The "persons" involved in the calculation of the net "income";
  - g. All "documents" used to calculate "net profits".
35. State the Defendant's net worth for the last three years, excluding this year.
36. Please list the names of current automobile dealerships or other businesses owned by the current owner or majority shareholder of the Defendant.

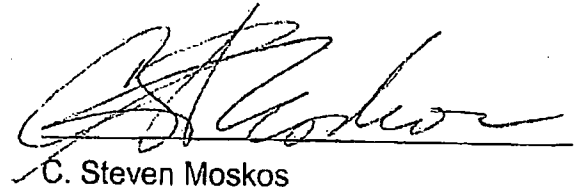
These Interrogatories are deemed to be continuing throughout the pendency of this action.

SIGNATURE ON THE NEXT PAGE

**C. STEVEN MOSKOS, P.A.**

**Attorney for the Plaintiff**

BY:



C. Steven Moskos

535 Stinson Drive

Charleston, SC 29407

Telephone: (843) 763-5297

Charleston, South Carolina

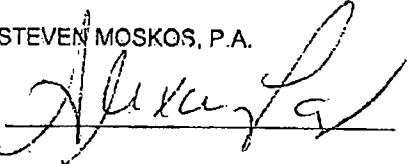
May 28, 2010

**CERTIFICATE OF SERVICE**

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper, properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 28<sup>th</sup> day of May, 2010.

C. STEVEN MOSKOS, P.A.

By:



STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

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

Plaintiff )

vs. )

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

Defendant )

AMERICAN ARBITRATION ASSOCIATION  
CONSUMER - RELATED DISPUTE  
CASE NO. 31 420 00490 09

**PLAINTIFF'S REQUEST TO PRODUCE  
TO DEFENDANT SUMMERVILLE  
FORD-MERCURY, INC. .**

**TO: ROBERT REIBOLD, ESQ., ATTORNEY FOR THE DEFENDANT SUMMERVILLE  
FORD-MERCURY, INC. :**

The Plaintiff, Diane R. Henderson f/k/a Diane M. Reed, through her undersigned attorney, request the Defendant produce for inspection and copying the following described documents and things in the possession, custody or control of the Defendant or its attorney, pursuant to South Carolina Rules of Civil Procedure Rule 34:

**INSTRUCTIONS AND DEFINITIONS**

Comes now the Plaintiff and pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, who propounds the following Request for Production of Documents to the above-named Defendant. Within thirty (30) days of the receipt of this request, you are hereby requested to make available to C. Steven Moskos, P.A., at his office at 535 Stinson Drive, Charleston, South Carolina 29407, for the purpose of inspecting, photographing, copying, or otherwise reproducing or transcribing the documents, writings, and memoranda describe in the following enumerated requests. Said documentary evidence is alleged to be in the Defendant's possession, custody, and control

and is pertinent to the issues in this case.

### **DEFINITIONS**

All references to "interrogatory" or "interrogatories" herein refer to the Plaintiff's Interrogatories to Defendant and reference herein to any such interrogatory by number shall be deemed to incorporate by reference herein any such interrogatory in its entirety.

As used in Plaintiff's interrogatories and document production requests herein, the terms "you" and "your", or "yourself" refer to you personally, each of your agents, representatives, and attorneys, and each person acting or purporting to act on your behalf. Unless the context otherwise requires, the terms "you", "your", or "yourself" refer to the particular corporate defendants, each of its parents predecessors, subsidiaries, and affiliates, each of its present and former officers, employees, agents, representatives, and attorneys, and each person acting or purporting to act on its behalf.

### **DOCUMENT**

As used herein, the term "document" means any medium upon which intelligence or information can be recorded or retrieved, and includes, without limitation, the original and each copy, regardless of origin and location, of any book, pamphlet, periodical, letter, memoranda including any bill, order form, receipt, financial statement, accounting entry, contract, diary, calendar, telex, telegram, cable, report, record, contract, agreement, study, handwritten note, draft, working paper, chart, paper, print, laboratory record, drawing sketch, graph, index, list, tape, photograph, microfilm, data sheet or data processing card, or any other written recorded, transcribed, punched, taped, filmed or graphic matter, however produced or reproduced, which is in your possession, custody, or control or which was, but is no longer, in your possession, custody or control.

### **COMMUNICATION**



As used herein, the term "communication" means any oral or written utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, conversations, dialogues, discussions, interviews, consultations, agreements, and other understandings between or among two or more persons.

### **INSTRUCTIONS CONCERNING PRODUCTION OF DOCUMENTS**

If any and all documents identified herein are no longer in your possession, custody, or control because of destruction, loss, or any other reasons, then do the following with respect to each and every such document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original of the documents; (d) state in as much detail as possible the contents of the documents; and (e) state the manner and date of disposition of the document.

If you contend that you are entitled to withhold from production any or all documents identified herein on the basis of the attorney-client privilege, the work-product doctrine, or other grounds then do the following with respect to each and every document: (a) describe the nature of the document (e.g., letter or memorandum); (b) state the date of the document; (c) identify the persons who sent and received the original of the document; (d) state the subject matter of the document; and (e) state the basis upon which you contend you are entitled to withhold the document from production. Do not object to an entire request because some of the requested documents may be subject to a claim of privilege.

### **THE WORD "OR"**

As used herein, the word "or" appearing in a request should not be read so as to eliminate any part of the request but, whenever applicable, it should have the same meaning as the word "and", for example, an interrogatory stating "supporting or refer"

should be read as "supporting and refer" if an answer that does both can be made. The singular shall be taken to include the plural herein, and vice versa.

#### **REQUEST FOR PRODUCTION**

1. Copies of all statements, written or recorded, of any persons, including parties hereto, who are or may be witnesses to any of the matters complained of in the Complaint.
2. Copies of all photographs relating in any way to the matter referred to in the Complaint or to the damages claimed.
3. Copies of all diagrams, statements, memoranda, reports, policy and procedures manuals, or other documents relating to the matters in the suit.
4. Copies of the Defendant's last three (3) financial statements showing the Defendant's net worth.
5. Copies of all reports of experts which may pertain, in any way, to issues involved in this case.
6. Copies of all documents the Defendant intends to use at the time of trial.
7. Any and all documents identified, contained, or referred to by the Defendant in its responses to Plaintiff's Interrogatories to Defendant, and all such documents used in any way in preparing or which support such responses.
8. A complete copy of the deal jacket regarding the purchase of the 2003 Jeep Grand Cherokee which is the subject of this action by the Defendant Summerville Ford from Michael Karriker.
9. A complete copy of the deal jacket regarding the Plaintiff's purchase of the 2003

Jeep Grand Cherokee which is the subject of this action from the Defendant Summerville Ford.

10. A complete copy of the service file for any work done to the 2003 Jeep Grand Cherokee which is the subject of this action by the Defendant Summerville Ford.
11. Provide a copy of the Carfax report acquired for the 2003 Jeep Grand Cherokee at any time..
12. A complete copy of the file maintained by the Defendant, whether kept as a hard copy or electronically, of any and all matters relating to the 2003 Jeep Grand Cherokee .
13. The entire claim file(s) for the 2003 Jeep Grand Cherokee which is the subject of this lawsuit.
14. Provide a copy of the personnel file for each person who inspected the 2003 Jeep Grand Cherokee prior to the Defendant buying it or taking it in as a trade-in.
15. Provide a copy of the personnel file for each person who inspected the 2003 Jeep Grand Cherokee after the Defendant bought it or took it in as a trade-in.
16. Provide a copy of the personnel file for each person who showed or attempted to sell the 2003 Jeep Grand Cherokee.
17. Provide a copy of the personnel file for each person involved in the financing of the vehicle at the dealership regardless of whether financing was obtained at the dealership.
18. Provide a copy of the personnel file for each person involved in the handling of the

- title paperwork or any other paperwork regarding the 2003 Jeep Grand Cherokee.
19. Provide a copy of the personnel file for each person who did repair work or other service work on the 2003 Jeep Grand Cherokee.
  20. A copy of the check used to purchase the subject vehicle.
  21. Any documents in the possession of the Defendant or the Defendant's counsel referring or relating to the vehicle, which is the subject of this litigation, including but not limited to, owner's manual, publications, brochures, written warranties, instructions and/or warnings regarding vehicle operations and service, pamphlets, photographs, videos, reports, analyses, inspection results and/or tests and the result thereof, design and/or manufacture drawings, displays, design and/or manufacture analyses and the results thereof, any document provided to you by the Defendant's representative, and any document provided you by Summerville Ford-Mercury, Inc.
  22. All documents, including any statements or reports, concerning or relating to the matters set forth in the Plaintiff's Complaint made by an expert who may be a witness at trial, and all notes, memoranda, writings, and recordings concerning and/or relating to such statements or reports.
  23. All documents, including but not limited to, textbooks, articles, studies, literature, videotapes, audiotapes, and depositions, that were reviewed, referred to, or relied upon in connection with the preparation of any reports, memoranda, or statements or the formulation of any opinions of any experts with whom the Defendant intends to call as a witness at trial.

24. Any and all documents that relate to, refer to, or concern any communications between you or anyone acting on your behalf, regarding the damages alleged to be in the 2003 Jeep Grand Cherokee.
25. Copies of any and all documents, letters, reports, faxes, or any other record, kept in any media, that relates to the problems the Plaintiff complains of in her complaint.
26. Copies of any and all contracts the Defendant Summerville Ford had with the Defendant Capital One between September 2006 and December 2006.
27. Any and all policies and procedure manuals regarding Summerville Ford-Mercury, Inc.'s policy and procedures for inspecting vehicles prior to purchasing them to determine if they have been previously wrecked or are mechanically sound.
28. Any and all policies and procedure manuals regarding Summerville Ford-Mercury, Inc.'s policy and procedures for inspecting vehicles after purchasing them to determine if they have been previously wrecked or are mechanically sound.
29. Any and all policies and procedure manuals regarding Summerville Ford-Mercury, Inc.'s policy and procedures for disclosing prior wreck damage or mechanical issues to customers prior to customers purchasing a vehicle from the Defendant.
30. Any and all policies and procedure manuals regarding Summerville Ford-Mercury, Inc.'s policy and procedures for disclosing prior wreck damage or mechanical issues to customers after customers have purchased a vehicle from the Defendant.
31. Any and all policies and procedure manuals regarding Summerville Ford-Mercury, Inc.'s policy and procedures for repurchasing vehicles which were allegedly wrecked

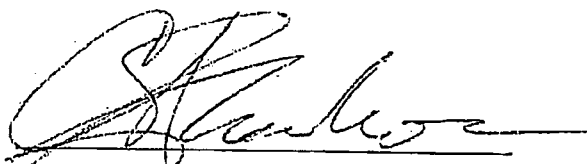
prior to the vehicles being sold to customers.

32. Provide a copy of any and all documents the Defendant has provided to anyone or received from anyone regarding the subject vehicle or the facts of this case. If the Defendant claims any privilege, please provide those documents to which the Defendant does not claim a privilege.
33. If you contend any documents or other items need not or should be produced (whether based on a claim of privilege or for other reasons), identify each such document or item, set forth all bases for your failure or refusal to produce same, and provide a privilege log for all documents as to which you claim a privilege, as required by SCRCP 26.

These Requests for Production are deemed continuing throughout the pendency of this matter.

**C. STEVEN MOSKOS, P.A.**  
**Attorney for the Plaintiffs**

BY:



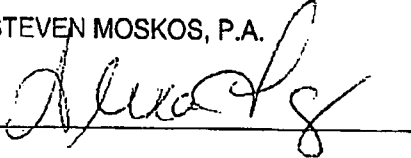
C. Steven Moskos  
535 Stinson Drive  
Charleston, SC 29407  
Telephone: (843) 763-5297

Charleston, South Carolina  
May 28, 2010

# CERTIFICATE OF SERVICE

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper, properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 28 day of May, 2010.

C. STEVEN MOSKOS, P.A.

By: 

## **APPENDIX 3**



### Appendix 3. Time entries relating to punitive damages.

| <u>Date</u> | <u>Task</u>                                                                                                                                                                                                                                                                                   | <u>Hours</u> | <u>Comment</u>                                                                                                                                                                                                                          |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 5/30/14     | Review statutory law on punitive damages. <i>Legal research on punitive damage limits.</i>                                                                                                                                                                                                    | 0.40         | Work on punitive damages is not related to the unfair trade practices claim.                                                                                                                                                            |
| 8/30/15     | <i>Legal research regarding punitive damages.</i> Dictate correspondence to Tommy Lydon for the Mediation. Dictate email to Jeff Grady attorney for ADESA Auto Auction to obtain the Personal Guaranty and Dealer Acknowledgement Form signed by Midlands Honda                               | 1.40         | The portion of this time devoted to punitive damages is not recoverable.                                                                                                                                                                |
| 4/12/16     | Work on stipulation regarding testimony of Nationwide. Work on pretrial brief. Review of ratification. <i>Work on procedural nature of punitive damages cap.</i>                                                                                                                              | 2.3          | The portion of this time devoted to punitive damages is not recoverable.                                                                                                                                                                |
| 4/13/16     | Prepare for trial. Work on Cross of Randy Threatt. <i>Work on Brief regarding regarding substantive v procedural aspect of punitive damages.</i>                                                                                                                                              | 6.80         | The portion of this time devoted to punitive damages is not recoverable.                                                                                                                                                                |
| 4/14/16     | Prepare for trial. Review documents for exhibits. Work on issues for trial, including introduction of exhibits, <i>punitive damages</i> , and evidentiary issues. <i>Dictate email to Clay Walker regarding Midlands Honda's Dealer Financial Statement—Balance Sheet for 2014 and 2015.</i>  | 1.70         | Defendant's balance sheet is solely for use in connection with Plaintiffs' punitive damages claim. The portion of this time devoted to punitive damages is not recoverable.                                                             |
| 4/22/16     | <i>Work on punitive damages argument. Travel to court. Attend trial. Direct Examination of Midlands Honda's 30(b) (6) corporate representative. Give closing argument on punitive damages. wait for jury verdict. Conference with client. Travel to Charleston. Drove total of 284 miles.</i> | 7.0          | The portion of this time which reflects travel is addressed below. The remainder of this time is devoted exclusively to punitive damages, and was incurred the jury had already returned a verdict on the unfair trade practices claim. |

4/29/16

Work on Motion for Costs. Telephone call to Mary Arnold regarding affidavit of attorney's fees. Acquire affidavit of attorney's fees from Mary Leigh Arnold. *Legal research regarding punitive damages issues.*

3.60 The portion of this time related to punitive damages is not recoverable.

## **APPENDIX 4**

**Appendix 4. Time entries relating to pursuing claim against Co-Defendant.**

| <u>Date</u> | <u>Task</u>                                                                                                                                                                                                                                                                     | <u>Hours</u> | <u>Comment</u>                                                                                                                                                               |
|-------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 6/29/11     | Review documents from <i>Nationwide</i><br>Dictate correspondence to Florida DMV                                                                                                                                                                                                | 0.30         | Nationwide file and Florida DMV records were relevant to the salvage title claims against Nationwide which were deleted from the Complaint against Defendant prior to trial. |
| 6/29/11     | Telephone call with Buck Daniel from <i>Nationwide</i> regarding <i>Nationwide</i> claim File                                                                                                                                                                                   | 0.10         | Same as above                                                                                                                                                                |
| 3/16/12     | Prepare Complaint                                                                                                                                                                                                                                                               | 1.30         | The Complaint asserted claims against both Nationwide and Defendant. such time should be split between the original Defendants.                                              |
| 12/2/12     | Work on Complaint                                                                                                                                                                                                                                                               | 1.20         | Same as above                                                                                                                                                                |
| 10/28/13    | Telephone call to Judge Casey Manning<br>Per the reason for mediation being put off until April. Dictate email to Rob Reibold and <i>Sean Cox</i> [counsel for Nationwide] regarding conversation with Judge's Secretary                                                        | 0.30         | Time should be split between the original defendants                                                                                                                         |
| 11/14/13    | Travel to meet clients for deposition preparation. Conference with clients regarding deposition. Review of file, liability and damages in case with clients. Discussion of settlement of the case.                                                                              | 7.0          | Plaintiffs' depositions were noticed and taken by Nationwide. Time should be split between Defendants.                                                                       |
| 11/19/13    | Travel to and from Columbia for depos of Roger Whitley and Dan O'Shields. attend depositions of Roger Whitley and Dan O'Shields. Conference with Roger Whitley and Dan O'Shields regarding depositions. Conference with <i>Sean Cox</i> and Clay Walker regarding production of | 8.30         | Same as above                                                                                                                                                                |

documents to be able to be able to settle case. Travel 132 miles.

|                                          |                                                                                                                                                                                                                         |              |                                                                                |
|------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|--------------------------------------------------------------------------------|
| 2/10/14                                  | Dictate email to <i>Sean Cox</i> and Clay Walker regarding discovery responses                                                                                                                                          | 0.10         | Email is to counsel for both Defendant and Nationwide and time should be split |
| 2/19/14                                  | Dictate email to Defendants requesting their discovery responses by February 27                                                                                                                                         | .10          | Email to both Defendants should be split between both Defendants               |
| 4/30/14                                  | Telephone call to Judge Manning's office<br>Telephone conference with <i>Sean Cox</i> .<br>Telephone conference with Judge Manning, Clay Walker, and <i>Sean Cox</i>                                                    | 0.50         | Conferences involving both defendants should be split between both defendants. |
| 5/6/14                                   | Dictate email to Clay Walker to find out When he will send his discovery responses<br>Dictate email to Sean Cox regarding Adesa Auto Auction subpoena. Telephone Roger Whitley regarding case.                          | 1.20         | Time should be split between defendants.                                       |
| 10/20/14                                 | Dictate email to Clay Walker and <i>Sean Cox</i> regarding depositions in case                                                                                                                                          | 0.20         | Time should be split between defendants                                        |
| 12/31/14                                 | Dictate email to <i>Sean Cox</i> and Clay Walker about the deposition of Charles Ecklund                                                                                                                                | 0.10         | Time should be split between defendants                                        |
| 1/5/15                                   | Telephone conference with <i>Sean Cox</i> and Clay Walker regarding scheduling of depositions and an Amended Scheduling Order. Telephone call to Charles Ecklund                                                        | 0.40         | Time should be split between defendants                                        |
| 4/15/15                                  | Dictate correspondence to Judge Manning regarding trial during the week of April 20, 2015. Dictate email to Judge Manning, his clerk, Clay Walker and <i>Sean Cox</i> regarding trial during the week of April 20, 2015 | 0.40         | Time should be split between defendants                                        |
| <b>Total Reduction of Claimed Hours:</b> |                                                                                                                                                                                                                         | <b>10.95</b> |                                                                                |

## **APPENDIX 5**

#### Appendix 5. Unnecessary travel time.

| <u>Date</u> | <u>Task</u>                                                                                                                                                                                                                                                                                                                                                      | <u>Hours</u> | <u>Comment</u>                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|-------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 11/14/13    | Travel to meet clients for deposition preparation. Conference with clients regarding deposition. Review of file, liability and damages in case with clients. Discussion of settlement of the case.                                                                                                                                                               | 7.0          | Based upon the time recorded Defendant assumes this entry reflects travel time from Charleston to Columbia. However, travel time to meet with clients results solely Plaintiffs' choice to file suit in South Carolina rather than North Carolina, and/or to employ counsel residing in Charleston. Defendant should not be charged with the costs of these decisions. Defendant estimates round trip travel from Charleston to Columbia at 3.5 hours. |
| 11/19/13    | Travel to and from Columbia for depositions of Roger Whitley and Dan O'Shields. attend depositions of Roger Whitley and Dan O'Shields. Conference with Roger Whitley and Dan O'Shields regarding depositions. Conference with Sean Cox and Clay Walker regarding production of documents to be able to settle case. Travel 132 miles.                            | 8.30         | Same as above. Defendant estimates travel time at 3.5 hours                                                                                                                                                                                                                                                                                                                                                                                            |
| 7/27/15     | Travel to Charlotte for deposition of ADESA Auto Auction 30(b)(6) witness. telephone conference with Jeff Grady. travel to ADESA to view the scene. travel to Pack Brothers to look at the car and to discuss case with Brian Allen. Conference with Roger Whitley regarding case and deposition. work exhibits for deposition. Review questions for deposition. | 9.60         | Again, the necessity of travel to Charlotte results solely from Plaintiffs' decision to sue in South Carolina and retain an attorney from Charleston. Defendant estimates travel time from Charleston to Charlotte at 3.3 hours.                                                                                                                                                                                                                       |
| 7/28/15     | Travel to Jeff Grady's office. Attend video deposition ADESA's 30(b)(6) representative Joe Guyer. Conference with Roger Whitley. Travel to                                                                                                                                                                                                                       | 8.3          | Same as above. Defendant estimates travel from Charlotte to Charleston at 3.3 miles.                                                                                                                                                                                                                                                                                                                                                                   |

Charleston. Round trip 449 miles.

|         |                                                                                                                                                                                                                                                                                                                                                                                                                            |             |                                                                                                                                                       |
|---------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------|
| 8/4/15  | Travel to and from Columbia for mediation. Attend mediation. Conference with Roger Whitley. 222 miles                                                                                                                                                                                                                                                                                                                      | 7.90        | Defendant should not be charged for travel time between Charleston and Columbia. Defendant estimates this travel time at 3.5 hours.                   |
| 4/18/16 | Travel to and from court. Attend docket sounding in jury qualification. Attend pretrial hearings. Conduct opening and direct examination of Nationwide. Conference with client to prepare for direct examination. Review of Charles Ecklund's deposition page and line numbers to present to the jury. Dictate email to Leon Bouknight to complete deposition testimony. Work on cross of Brent Farrell and Randy Threatt. | 13.20       | Defendant should not be charged for travel between Charleston and Columbia. Defendant estimates the travel from Columbia to Charleston at 1.75 hours. |
| 4/22/16 | Work on punitive damages argument. Travel to court. Attend trial. Direct examination of Midlands Honda's 30(b)(6) corporate representative. Give closing argument on punitive damages. Wait for jury verdict. Conference with client. Travel to Charleston. Drove total of 284 miles.                                                                                                                                      | 7.0         | Same as above. Defendant estimates travel time at 1.75 miles.                                                                                         |
|         | <b>Total Travel Time Which Should Be Disallowed<sup>1</sup></b>                                                                                                                                                                                                                                                                                                                                                            | <b>20.3</b> |                                                                                                                                                       |

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<sup>1</sup> If the Court rules that this time should be allowed, the rate for this time should nevertheless be reduced.



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE COURT OF COMMON PLEAS

Daniel O'Shields and Roger W. )  
Whitley, A Partnership d/b/a )  
O&W Cars, )  
 )  
*Plaintiffs* )

Civil Action No. 2013-CP-40-0319

AFFIDAVIT OF H. CLAYTON  
WALKER, JR.

v. )  
 )  
Columbia Automotive, LLC d/b/a )  
Midlands Honda, )  
 )  
*Defendant.* )

RICHLAND COUNTY  
FILED  
2016 JUL 22 PM 2:20  
KIEANETTE W. MCBRIDE  
C.C.P. & G.S.

PERSONALLY APPEARED BEFORE ME the undersigned, who being duly sworn, deposes and says that:

1. I am over 18 years old and am competent. I am counsel for the Defendant in the above-captioned action and have personal knowledge of the matters set forth herein. I am a licensed attorney in South Carolina, and have practiced law here for 35 years.

2. My first knowledge of this case was in February of 2013, when I received a copy of the summons and complaint. Mr. Moskos did not contact me prior to filing suit.

3. I have litigated with Mr. Moskos in the past. Attached to Defendant's Memorandum Opposing Attorney's Fees as Appendix 1 are true and correct copies of complaints Mr. Moskos has filed in other actions. Attached thereto collectively as Appendix 2 are true and correct copies of discovery Mr. Moskos has served in other actions.

4. In prior cases with Mr. Moskos, I have found it very difficult to engage in settlement negotiations in cases where statutory attorney's fees are available.

5. I discussed settlement strategies with Sean Cox, who represented the original co-defendant Nationwide. We had discussions about settlement on February 20, 2013, March 6, 2013, March 29, 2013, and August 1, 2013.

6. Plaintiffs' counsel took no steps to schedule mediation or choose a mediator within the original deadline for mandatory mediation. Instead, Plaintiffs' counsel proposed a consent order extending the mediation deadline to April 30, 2014. I agreed to the proposed order.

7. On November 19, 2013, counsel for all parties were present, and Defendants' counsel sought to pursue settlement negotiations with Mr. Moskos. Mr. Moskos could not or would not make a settlement demand from either Defendant at that time.

8. The extended deadline for mediation passed in April of 2014. This time, Plaintiffs made no effort to extend the deadline, and allowed the deadline to pass without comment.

9. On January 23, 2015, I called Mr. Moskos twice on the same day to pursue settlement once again. The case had been filed over two years before, and Plaintiffs had not yet made a single settlement demand to Defendant's counsel. Mr. Moskos finally agreed to make a settlement demand in that conversation.

10. I received Mr. Moskos' written settlement demand a few days later. A true and correct copy of the settlement demand is attached hereto as Exhibit 1. The

amount of the demand was \$350,000. I telephoned Mr. Moskos to get an understanding behind the sheer size of the demand.

11. I believed that the demand was wholly unreasonable for a variety of reasons. First, it was not based upon exposure in the unfair trade practices claim. Both the demand letter itself and my subsequent conversation with Mr. Moskos made clear that the demand was based on what Mr. Moskos perceived to be the potential for punitive damages.

12. That the demand did not reflect an attempt to settle the unfair trade practices exposure was also obvious from the size of the demand. Actual damages ranged somewhere between \$3,600 and \$6,645. Even trebled for purposes of North Carolina's Unfair Trade Practices Act, the amount in controversy fell somewhere between \$12,000 and \$20,000. Plaintiffs' \$350,000 demand was 17 to 20 times that amount. I believed this demand to be unreasonable with respect to the unfair trade practices claim.

13. The demand was also unreasonable with respect to the common law tort claims on which it was apparently based. Plaintiffs had actual damages of no more than \$6,645. Moreover, Due Process severely limits any award of punitive damages in this case. The comparable civil penalty is treble damages under North Carolina's Unfair Trade Practices Act and it is my understanding that Due Process awards of four times actual damages push the limits of Due Process in cases like this which do not involve personal injury. The United States Supreme Court has also stated that even where a greater award is possible, awards which exceed a single digit ratio are permissible only in exceptional circumstances.

14. In other words, Due Process most probably limited a punitive damage award to something less than 4 times actual damages or \$26,580, and there was almost no chance that a punitive award of more than 9 times actual damages, or \$59,805 would be Constitutionally permissible. Due Process most likely capped Plaintiffs' actual and punitive damages recovery at something below \$26,580 and almost certainly below \$65,000. A demand of \$350,000 was, in my opinion, irrational given existing law on punitive damages.

15. I believe the demand was unreasonable even if Due Process concerns did not come into play. As Mr. Moskos acknowledged in the demand letter, North Carolina limits punitive damages to \$250,000. His maximum actual damages were \$6,646, making his maximum recovery \$256,645, a figure almost \$100,000 below the demand. I was at a loss as to how I could settle a case when the amount demanded substantially exceeded my client's worst day in court.

16. The demand also made no room for the possibility that Plaintiffs might not recover on claims other than breach of contract. Plaintiffs' recovery on these claims was uncertain. All of these claims required both actual and reasonable reliance. I believed that objectively it would be very difficult for Plaintiffs to prove reliance was reasonable. The vehicle was marked sold "as is," sold under a "red light," and had visible wreck damage and differences in paint scheme. Additionally, the auction rules on which Plaintiffs themselves warned purchasers in similar sales to very carefully inspect the vehicle and verify any announced conditions. Yet, Plaintiffs performed only a cursory inspection. In my opinion, the disputed liability alone would have been a sufficient reason to forego settlement and try the case.

17. Mindful that North Carolina's Unfair Trade Practices Act permits recovery of attorney's fees under certain limited conditions, I nevertheless attempted to settle that exposure.

18. I prepared and sent an offer of judgment to Plaintiffs' counsel which was directed at the unfair trade practices claim. We offered to allow judgment to be taken against the Defendant in the amount of \$15,000 plus reasonable attorney's fees as determined by the court. We believed actual damages under that claim ranged from about \$4,000 to \$6,645. We chose \$5,000, which fell squarely within that range, and then offered judgment for triple that amount. Because the offer included attorney's fees, the offer was intended to be a good faith estimate of Plaintiffs' maximum unfair trade practices recovery. We were prepared to consider a reasonable counteroffer.

19. Plaintiffs did not accept the offer of judgment. Instead, they sent an offer of judgment of their own in the amount of \$280,000.

20. The new offer suffered from the same flaws as the first. It bore no relation to the unfair trade practices claim. Maximum recovery under the unfair trade practices claim fell somewhere between \$12,000 and \$20,000 plus attorney's fees.

21. The offer was several times what would be permitted by Due Process.

22. The offer exceeded maximum recovery under the common law and North Carolina's punitive damages cap. I was still faced with a settlement demand which was more than Plaintiffs' maximum recovery.

23. I hoped to make some headway at mediation, but Plaintiffs had allowed the already extended mediation deadline to pass.

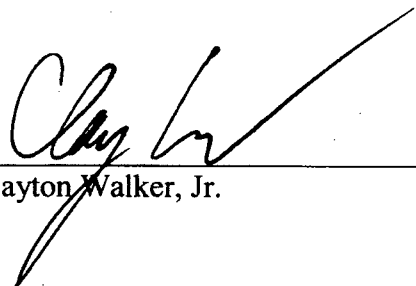
24. I reached out to Mr. Moskos on April 7, 2015 to discuss the need to select a mediator but Mr. Moskos would not participate in selecting a mediator or mediation date.

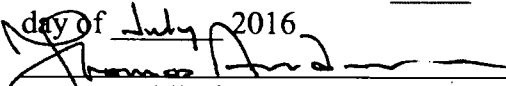
25. I tried again almost two (2) months later on June 5, 2015, but again Mr. Moskos would not participate in selecting a mediator or mediation date.

26. Finally, for the first time in my career I was forced to file a motion to compel the Plaintiffs to mediate. It was only after the motion was filed that Plaintiffs participated in the mediation process.

27. Plaintiffs have filed a motion to keep their mediation conduct secret and away from the Court.

I swear or affirm under penalty of perjury that the statements made herein are true.

  
H. Clayton Walker, Jr.

SWORN TO before me this 21<sup>st</sup>  
day of July 2016  
  
Notary Public for South Carolina  
My Commission Expires: 4-16-2022

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Daniel O'Shields and Roger W. )

Whitley, A Partnership d/b/a )

O&W Cars, )

*Plaintiffs* )

v. )

Columbia Automotive, LLC d/b/a )

Midlands Honda, )

*Defendant.* )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

AFFIDAVIT OF  
ROBERT L. REIBOLD

RICHLAND COUNTY  
FILED  
2016 JUL 22 PM 2:20  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

PERSONALLY APPEARED BEFORE ME the undersigned, who being duly sworn, deposes and says that:

1. I am over 18 years old and am competent. I am a licensed attorney in the State of South Carolina and have practiced for over 20 years. I assisted Clay Walker in the defense of the above-captioned case. I have personal knowledge of the matters set forth herein.

2. I have litigated cases with Mr. Moskos in the past which included claims for statutory attorney's fees. I have found these cases to be very difficult to settle. In the cases I have had with Mr. Moskos, he does not readily respond to requests for settlement demands. On occasion, I have started settlement negotiations by making an offer in the absence of a demand, but the offers are either rejected without a counteroffer or I simply get no response of any kind.

3. With this past history in mind, I broached the subject of settlement with Mr. Moskos at the outset. The day after my firm received the case, I called Mr. Moskos to discuss the value of the case. Mr. Moskos did not respond to my questions.

4. Like Mr. Walker, it is my opinion that Midlands Honda was more than reasonable in its attempts to settle the unfair trade practices exposure, and that Plaintiffs' demands were unreasonable.

5. Midlands Honda made an offer of judgment more than a year before trial, and before the majority of depositions were taken, in the amount of \$15,000 plus reasonable attorney's fees. At the time, Plaintiffs claimed the following damages in their answers to interrogatories:

|                                                                                   |                 |
|-----------------------------------------------------------------------------------|-----------------|
| Loss of purchase price of the vehicle                                             | \$5,385.00      |
| Loss of the profit on the sale of the vehicle                                     | \$1,415.00      |
| Fees paid to purchaser of the vehicle after vehicle was determined to be salvaged | \$200.00        |
| Repair of car door                                                                | \$550.00        |
| Registration of car                                                               | <u>\$350.00</u> |
|                                                                                   | \$7,900.        |

6. However, the measure of damages on the unfair trade practices claim, and all claims asserted for that matter, was the difference in value between the actual value of the vehicle and what was paid at the time of sale, plus incidental and/or consequential damages. Plaintiffs themselves stated that the vehicle was worth up to \$2,000. Mr. Whitley also admitted in deposition that the repair of the car door and other expenses should be deducted from the lost profit figure and that lost profits were probably no more than a few hundred dollars. Finally, the \$200 paid to the purchaser was not proximately caused by any conduct of the Defendant. Even if Plaintiffs' allegations were correct, Plaintiffs themselves had a duty to inspect the car for safety concerns before



selling it and failed to do so. Deducting \$2000 for the value of the vehicle, reducing lost profits to a few hundred dollars, including the claimed expenses in the lost profit figure, and eliminating the \$200 in damages caused by Plaintiffs' own negligence brought the actual damages figure down to \$3,685.

7. The offer of judgment for \$15,000 was more than triple this amount. It was intended to estimate Plaintiffs' maximum unfair trade practices recovery, assuming liability. It included attorney's fees, which are only available in extreme cases under North Carolina's Unfair Trade Practices Act. Because attorney's fees were included, and are often not awarded even to successful Plaintiffs under North Carolina law, the offer guaranteed Plaintiffs more than they might be entitled to even if the jury returned a verdict on the unfair trade practices claim. Not only was this offer a reasonable offer to resolve the unfair trade practices liability, it was a fantastic offer.

8. It would be unfair to the Defendant to require it to settle any and every claim asserted by the Plaintiffs or risk an award of attorney's fees in connection with a single claim on which the Defendant made a very good offer. The threat of attorney's fees under North Carolina's Unfair Trade Practices Act should not be used as a hammer to compel settlement of other claims with different exposure than the statutory claim.

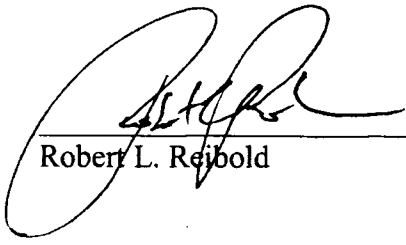
9. In any event, it is almost inconceivable to me that an offer to settle even the common law claims for almost triple the purchase price of the car, *plus* attorney's fees could be considered anything other than outstanding effort to resolve the case.

10. Even if it were appropriate to use punitive damages, which are not recoverable under the North Carolina statute, as a basis to judge the settlement demands made by the Plaintiffs, their settlement offers were still unreasonable. The lowest

demand ever made was \$280,000. This amount is far more than could be awarded for punitive damages given Due Process constraints. It also exceeds North Carolina's punitive damages cap of \$250,000.

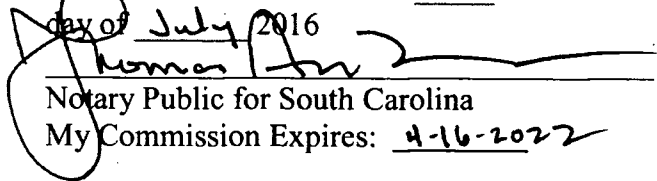
11. By demanding more than the maximum amount recoverable, Plaintiffs essentially made no compromise of any kind.

I swear or affirm under penalty of perjury that the statements made herein are true.

  
\_\_\_\_\_  
Robert L. Reibold

SWORN TO before me this 21<sup>st</sup>

day of July 2016

  
\_\_\_\_\_  
Notary Public for South Carolina

My Commission Expires: 4-16-2022

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Daniel O'Shields and Roger W. )

Whitley, A Partnership d/b/a )

O&W Cars, )

*Plaintiffs* )

v. )

Columbia Automotive, LLC d/b/a )

Midlands Honda, )

*Defendant.* )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

RICHLAND COUNTY  
FILED  
2016 JUL 22 PM 2:20  
JEANNETTE W. HOBBS  
C.C.P. & C.S.

**MEMORANDUM IN FURTHER SUPPORT OF MOTION FOR  
JUDGMENT NOTWITHSTANDING THE VERDICT ("JNOV"),  
OR, IN THE ALTERNATIVE A NEW TRIAL OR NEW TRIAL *NISI REMITTITUR***

Defendant Columbia Automotive, LLC d/b/a Midlands Honda ("Midlands Honda") submits this brief memorandum in further support of its motion for judgment notwithstanding the verdict ("JNOV"), or, in the alternative a new trial or new trial *nisi remittitur*. This case stems from a dispute between two car dealerships relating to the sale of a used car at an auction. It is a commercial dispute, not a personal injury action. Midlands Honda rests on its motion in large part; however, it uses this opportunity to direct the Court's attention to portions of the transcript relating to testimony and argument relating to the safety of the vehicle, separate and apart from the issue of the vehicle's value at the time of sale.

Midlands Honda anticipated this issue was likely to be raised by the Plaintiffs at trial and submitted a motion in limine seeking to exclude evidence of safety. (Motion in Limine attached as Ex. 1). As set forth in the motion, this evidence was not relevant to any cause of action. Midlands Honda further argued this evidence was barred under United States Supreme Court

precedent with respect to the consideration of punitive damages. *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) and *Phillip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (“we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant’s conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.”).

This issue was raised again at the beginning of the trial. (Transcript excerpts attached as Ex. 2, Tr. at 30-38). At that time, the Court indicated:

THE COURT: Okay. Well, assuming it’s -- You’ve certainly got a right to testify about what you bought and its condition. Now, how far the safety issue goes, as far as, you know, punitive damages, and everybody else on the road, because it wasn’t a situation it was on the road and caused a problem or caused any damages. It’s just, you know, I don’t know if you’ve got a right to talk about the potential damages that it could cause, but you’ve certainly got a right to testify about what you bought and what condition it was in.

You know, at least that’s what I’m thinking at this point. I need to re -- if you’ve got some other law to the contrary, I’ll be glad to look at it, but you’ve clearly got a right to testify the condition of what you bought. Now, the fact that it could have killed everybody on the road is another situation, because it didn’t happen. You know, those damages never occurred. Right?

The issue arose again when Plaintiff sought to introduce Brian Allen, a mechanic. (Tr. at 54-59). With respect to safety, the Court indicated that Allen could testify about safety to the extent it related to the value of the car. (Tr. at 59). Allen was proffered and qualified as an expert in “auto-body repair.” (Tr. at 63). He went on to testify about safety and crashworthiness, but never provided an opinion as to the value of the car. (Tr. at 60-100). He further testified this vehicle should not have been on the road. (Tr. at 99).

Plaintiff's counsel seized on this testimony throughout his closing on punitive damages, despite the mandates of the United States Supreme Court requiring that the conduct supporting an award of punitive damages be directed at the plaintiff and the objections of Midlands Honda.

Portions of the closing are highlighted below:

- "[T]hey knew [this car] was dangerous and should not be on the road." (Tr. at 307).
- "Make our communities safer." (Tr. at 309).
- "You have the opportunity to make our community safer." (Tr. at 309).
- "Now, Wednesday night I left the courtroom and I was -- I all of a sudden realized I was pretty upset. I was frustrated, I was pretty angry. And I thought about that and it occurred to me that as I was asking Mr. Threatt and Mr. Farrell questions I was thinking about my children. I got a fifteen year old who is now learning to drive and it's an interesting experience going to school. And I started thinking about what happens when he gets to drive and if he gets a car and it's one of these? And he has friends with him and driving down the road - -

MR. WALKER: Your Honor, I'm going to object. There is no personal injury in this case. This is a business dispute between two car dealers.

MR. MOSKOS: The impact on the public, your Honor. I get to talk about it, it's part of the case. It's the effect that this can have on people.

THE COURT: All right. Go ahead.

MR. MOSKOS: Thank you.

And all kinds of things can happen on the road. You know that. You can get in an accident, take your eyes off the road, deer run out in front of you and run off the road and hit a tree. What happens if the welds just give out? You hit a bump too hard? But I think about my son and he's with his friends and what if somebody's in the back seat of this car all of a sudden they're on the road. And I think about what if the person behind this car and all of a sudden the car in front of me breaks in half and people are spilling out onto the street. What am I gonna do? I'm gonna slam on my breaks as far as I can. Well now I got the guy behind me about to hit me. Or maybe I swerve and I hit the person next to me. God forbid I run over one of those children. And I think about the people on the side of the road whether they're bicyclist or a motorcyclist or somebody just walking and they get hit by a tire flying.

And then I think about myself. I get a call and I go to the scene and I see what I did because I got the car. I got the car. And there are all these people who are hurt because I bought this car. And I think -- I don't know that I could stand that.

You know my dad passed away a long time ago and I'd give anything, all my money, for another day with him. I would give even more to protect my children. But they didn't seem to care about that.

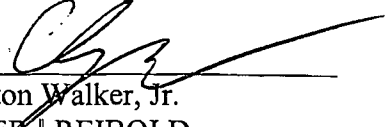
Ladies and gentlemen, the DOT right now is running an amazing add. It's called target zero and it's running up here, it's running in the low country, and they go around and they ask people questions. In the add I saw it had four questions. How many traffic fatalities do you think there were in the US last year? What is a reasonable goal for reducing traffic fatalities in South Carolina? What is a reasonable goal for traffic fatalities in your family? Should we have the same goals for our state as we do for our family?" (Tr. at 310-12).

- "Money over safety." (Tr. at 312).
- "The second thing, the second factor is the likelihood at the relevant time of serious harm. The likelihood at the relevant time of serious harm. Mr. Allen got up here and he did a marvelous job. He explained it very well. Okay. A lot of mechanics tend to be all caught up in the jargon and I thought he did an outstanding job of explaining how the structural components had been modified through what the Honda engineers who spent billions of dollars trying to figure out. In fact some of it was so bad the pieces of metal weren't even touching. The likelihood of serious harm is huge if it's -- it's dangerous to the occupants, occupants of the driver's on the road and it could be dangerous to pedestrians." (Tr. at 314).
- "But all it takes is five seconds to know if you put a dangerous car out on the road somebody could get hurt." (Tr. at 314).
- "You can be important in the lives of the children of South Carolina and North Carolina through your verdict today." (Tr. at 319).

As argued elsewhere, these considerations were improper as a matter of basic due process.

Given the size of the punitive damage award, there is no question but that the jury took these arguments to heart. Accordingly, and for all the other reasons raised in Midlands Honda's motion, the Court must order a new trial in this case.

Respectfully submitted,



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July 22, 2016

ATTORNEY FOR MIDLANDS HONDA

STATE OF SOUTH CAROLINA )

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND )

) Civil Action No. 2013-CP-40-0319

Daniel O'Shields and Roger W. )

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O&W Cars, )

) *Plaintiffs* )

) DEFENDANT'S MOTION IN LIMINE

) v. )

) PSC Automotive Group d/b/a )

) Midlands Honda, )

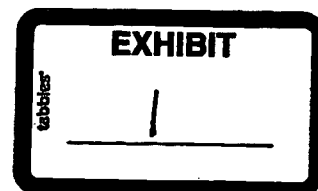
) *Defendants.* )

)  
Pursuant to Rule 104, SCRE, Defendant moves to exclude the following evidence from the trial of this case:

**I. All Evidence of Regarding Midlands Honda's Prior Transactions with Customers Other than the Plaintiffs.**

This case is an action between two car dealers. It involves the sale of a \$5000 used car at an automobile auction in North Carolina. The central claim in each of Plaintiffs' causes of action is the allegation that, even though the car was sold under a red light at the auto auction, Midlands Honda failed to disclose prior wreck damage, repair history and salvage history of the car. As you can imagine, the key issues in this case are:

- 1) what did Midlands Honda know and when
- 2) what was it required to disclose at the auction
- 3) did it make the required disclosures
- 4) if not, in what amount were Plaintiffs' harmed.





Midlands Honda will stipulate that prior to the auto auction, it learned that the car had been involved in an accident and had been seriously damaged. Given this stipulation, evidence of prior customers' transactions with the dealership is irrelevant.

Additionally, we believe that Plaintiffs' main purpose in seeking to introduce this evidence is to unfairly prejudice the jury with opinions from one prior customer, Mr. Ecklund, who sold the car back to Defendant, that he was poorly treated by the dealership. It is nothing more than character assassination. If this case were brought by Mr. Ecklund, that type of evidence might be admissible, but Mr. Ecklund is not a party here, and what may or may not have happened to him has no probative value. If it does have any probative value, that value is outweighed by its prejudicial effect. Defendant should not be forced to litigate a lawsuit within a lawsuit by someone who has no claim here.

**II. All Evidence Regarding Whether the Vehicle Was Safe to Drive When It Was Sent to the Auction.**

This evidence is both irrelevant and unfairly prejudicial.

**A. Evidence Regarding Safety of the Automobile Is Irrelevant.**

Safety of the car is not an element of any claim asserted by Plaintiffs, each of which will be discussed below:

(1) Breach of Contract. To the extent that Plaintiffs may argue that failing to provide a "safe" car was a breach of contract, Defendant has conceded liability for breach of contract. Defendant admits that it failed to make certain disclosures contained in the new auction rules which were incorporated by reference into the contract. Liability for breach of contract is not at issue, making evidence necessary to establish a breach irrelevant.

In any event, the failure to provide a safe contract is not a breach of contract. The word "safe" or "safety" does not appear in the contract or the auction rules which were incorporated by

reference. The sale was specifically marked “as is.” Moreover, Plaintiffs have not asserted a claim for breach of any implied warranty.

(2) All Other Claims. All other claims rest on the allegation that Defendant failed to disclose prior wreck history, repair history or salvage status. Plaintiff does not allege that Defendant falsely represented the car was safe.

(3) Punitive Damages. To the extent that Plaintiffs argue that the sale of an unsafe car implicates punitive damages, Plaintiffs may not introduce such evidence on punitive damages in the liability phase of the trial. N.C.G.S. §1D-30 (“[u]pon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admissible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages.”).

Additionally, and in any event, the evidence is not relevant to the claim of punitive damages. Due process requires that a Defendant be punished only for conduct that harmed the Plaintiff. *State Farm Mutual Auto. Ins. Co.*, 538 U.S. 408, 423 (2003). Plaintiff suffered only economic harm, not personal injury. The only potential harm which can properly be considered on the issue of punitive damages is potential harm to the Plaintiffs’ business partnership, and not to third parties. *Phillip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (“we can find no authority supporting the use of punitive damages awards for the purpose of punishing a defendant for harming others. We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's

conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*.”).

Whether or not sale of an unsafe car could have resulted in injury to persons who purchased the car from the Plaintiffs’ business is not a factor which can be considered on the issue of punitive damages. As a result, the issue of the “safety” of the car is irrelevant.

**B. The Issue Is Unduly Prejudicial**

Because Plaintiffs’ business suffered economic injuries, the only purpose for arguing that Defendant’s conduct could have injured third parties is to unfairly prejudice the jury against the Defendant. The prejudicial effect of such evidence is obvious, and clearly outweighs the probative value of evidence regarding safety, if any.

**III. Use of the Deposition of Edward Charles Ecklund, II**

Rule 30 would ordinarily allow the use of the deposition of Mr. Ecklund because he resides more than 100 miles from the court. However, the deposition of Mr. Ecklund is tainted because Plaintiff engaged in gamesmanship to prevent Defendant from properly preparing for the deposition. He withheld the address and contact information from Defendant for more than 6 months, and only disclosed it immediately prior to the scheduled deposition, which prevented Defendant from contacting and interviewing Mr. Ecklund prior to deposition.

**Timeline**

| <u>Event</u>                                                                             | <u>Date</u>  |
|------------------------------------------------------------------------------------------|--------------|
| 1. Service of Initial Interrogatories, which included request for addresses of witnesses | May 2013     |
| 2. Plaintiffs answer discovery, but do not disclose Mr. Ecklund’s address                | October 2013 |

- |    |                                                                                                                  |                   |
|----|------------------------------------------------------------------------------------------------------------------|-------------------|
| 3. | Plaintiffs notice Mr. Ecklund's deposition, but do not supplement responses to include Mr. Ecklund's address     | December 12, 2015 |
| 4. | After depositions are postponed, Defendant's counsel writes Plaintiffs' counsel asking for Mr. Ecklund's address | February 4, 2015  |
| 5. | Defendant received a notice of the rescheduled deposition of Mr. Ecklund                                         | June 16, 2015     |
| 6. | Plaintiffs mail supplemental response with Mr. Ecklund's address                                                 | June 18, 2015     |
| 7. | Defendant finally receives Mr. Ecklund's from Plaintiffs' counsel                                                | June 23, 2015     |
| 8. | Ecklund is deposed in Chicago, IL                                                                                | July 3, 2015.     |
| 9. | Mr. Ecklund's deposition confirms that Plaintiffs' counsel was in contact with him as early as January of 2015.  | July 3, 2015      |

Rule 33(b) provides that:

Interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, *shall be promptly* transmitted to the other party.

In this case, Plaintiffs' counsel knew of Mr. Ecklund's location at least 6 months in advance of the deposition, and did not notify Defendant's counsel of this information until immediately before the deposition, despite the fact that Defendant wrote Plaintiff in February specifically asking for this information. This conduct does not comply with Rule 33's requirement that Interrogatories be *promptly* supplemented.

This is gamesmanship, designed to prevent Defendant from speaking with Mr. Ecklund prior to his deposition – and it worked. Defendant was not able to talk with Mr. Ecklund and was therefore not able to properly prepare for the deposition.

Defendant requests exclusion of the deposition transcript from trial as a sanction for this conduct.

Respectfully submitted,

---

H. Clayton Walker, Jr.  
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Columbia, SC 29260  
(803) 454-0955  
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cwalker@walkerreibold.net

April \_\_\_\_, 2016

ATTORNEY FOR DEFENDANT

1 five, line twenty-two.

2 THE COURT: Okay. Tell me about yours.

3 MR. MOSKOS: Mr. Walker then, at this point, asks if  
4 the car ran well, if it was good, if he had any problems  
5 with it. Basically, it's a roundabout way of trying to get  
6 out expert testimony on the quality of this car and how  
7 good it was, and it's really not a dangerous car. Nobody  
8 ever had any problems with it, so it would never cause  
9 anybody any concern and I just think that that's improper,  
10 and should not be allowed.

11 MR. WALKER: He just stood here and wanted to argue  
12 about the value of the vehicle, if it ran well. I think,  
13 at some point in this deposition, the guy said it was a  
14 fabulous car. You know what's good for the goose is good  
15 for the gander.

16 THE COURT: He's given an opinion is that he knew what  
17 was wrong with it but he also when he asked him the whole  
18 time he had it, how did it run and how did it act, I think,  
19 is going to be relevant.

20 MR. WALKER: Yes, sir.

21 THE COURT: In light of, you know, if it's not unless  
22 we totally exclude the whole deposition. Okay?

23 MR. WALKER: Yes, sir.

24 THE COURT: All right. What's next? Any others?

25 MR. WALKER: With that deposition, we're done.

1 THE COURT: Okay.

2 MR. MOSKOS: Yes, sir.

3 THE COURT: All right.

4 MR. WALKER: Thank you, Judge.

5 THE COURT: Thank you. What is the next issue we need  
6 to deal with? I got a jury coming back at three thirty.

7 MR. WALKER: I know Mr. Moskos had filed a Motion in  
8 Limine of some sort.

9 MR. MOSKOS: Well, I do have a motion in limine.  
10 There's also -- I don't think we're going to get to it  
11 today, but there's also the videotaped deposition of Mr.  
12 Guyer. And Mr. Walker has made a number of objections to  
13 that, also.

14 THE COURT: Okay.

15 MR. MOSKOS: So, depending on whether you want to go  
16 through that now, or?

17 THE COURT: I would much rather engage in some more  
18 substantive matters, if we can.

19 MR. MOSKOS: Okay.

20 MR. WALKER: And then we can get teed up.

21 THE COURT: Okay. You know stuff that we really are  
22 facing today but we'll gonna be able to sit back down. A  
23 jury's coming back in twenty-five minutes; I'll have deal  
24 with it before we get started at three thirty and we'll  
25 deal with it.

1           MR. WALKER: Your Honor, some of the issues we  
2 discussed in chambers, the issue of safety, it's our  
3 position on a motion in limine, that the issue of the  
4 safety of the vehicle isn't relevant, shouldn't be  
5 mentioned. There's a breach of contract claim. There are  
6 auction rules that supposedly are the terms of this  
7 agreement. They don't mention safety of this vehicle at  
8 all. This vehicle was sold on a red light. The personnel  
9 at O & W, the plaintiff, they never communicated directly  
10 at all with us.

11           There is no, that s.o.b. told me on the telephone it  
12 was a safe car. There's no allegation we made a  
13 representation like that. This is an issue that is quite  
14 inflammatory, quite prejudicial. More importantly, your  
15 Honor, the U.S. Supreme Court has said, on issues like  
16 punitive damages, in a situation like this, that evidence  
17 is not admissible. They can only recover punitive damages  
18 for harm done to them. They don't have any personal  
19 injuries. They didn't have a wreck in the car, and then  
20 suffer enhanced damages because of the condition of this  
21 vehicle. This is a red herring that is designed to hurt my  
22 client but hurt them unfairly.

23           No question we botched knowing the auction rules. But  
24 this issue of safety is quite inflammatory, and totally  
25 irrelevant on punitive damages, and not an element of any



1 of their claims. There is no contract term in any of these  
2 rules that says a car sold under a red light, as-is, is  
3 represented by the seller to be safe.

4 THE COURT: Okay.

5 MR. MOSKOS: Yes, sir. Mr. Walker is trying to get  
6 into the economic loss rule without actually saying it.  
7 And as I said before, Judge Gee has already ruled on that  
8 issue. That we're not talking about trying to get -- We're  
9 not saying that there was a breach of the contract; and  
10 therefore, we should be able to get exemplary damages.  
11 What we're saying is, the defendant had a duty, and I am  
12 more than happy to provide you with a copy of the auction  
13 rules, and I have them for you already.

14 And frankly, there's a matrix, an arbitration matrix,  
15 that says, it says, "disclosure required, red light."  
16 Okay? So. And I don't know if your Honor's ever been to  
17 an auction, but they've got these various lights standing  
18 up behind an auctioneer. Green light, yellow light, red  
19 light, and what Mr. Walker is saying is, all you got to do  
20 is have the red light on, and you can sell whatever, and  
21 you don't make -- you don't have to make any  
22 representations. Well, that's not true. The auction  
23 specifically says, if there is any frame or unibody damage,  
24 and this car was cut in half, and this is a unibody car.

25 MR. WALKER: It doesn't say, safety.

1 THE COURT: And I understand that. Go ahead.

2 MR. MOSKOS: Existing, altered, or repaired. There's  
3 a -- let's see. Any state-required damage disclosures.  
4 And then, salvage or reconstructed, theft recovery, stolen  
5 vehicles, including history. While the word is - while the  
6 word, safety, may not be put in here, the bottom line is,  
7 reconstructing these cars improperly can create safety  
8 issues.

9 Everybody knows that, and to say, oh, gee, the auction  
10 rules don't say you have to announce frame damage because  
11 of a safety issue is kind of ludicrous. And we have an  
12 expert who is going to come and testify that this car is  
13 unsafe, it's dangerous, and it shouldn't be on the road.  
14 It goes -- It stuns me to say that in fraud claim and in an  
15 unfair trade practice claim that a condition of the car --  
16 you're basically hiding the truth from the jury if you say  
17 you can't say safety in the courtroom, because it's cut in  
18 half; it is unsafe; it's dangerous.

19 Mr. Walker knows that's a crucial part of the case,  
20 and like I said, he's trying to take the wind out of the  
21 sails of this case as much as he can, and I understand  
22 that. But at the end of the day, what was done is  
23 horrendous, and that's based on South Carolina law. South  
24 Carolina Court, in the Supreme Court, in *Stokes v Austin*,  
25 found that selling a wrecked car, a previously-wrecked car,

1 without disclosure is reprehensible. And here, what you  
2 have is not just simply a wrecked car. You've got two  
3 wrecked cars, cut and welded together. They aren't to  
4 Honda's specification. It's a dangerous vehicle, not only  
5 to the occupants of the car, but the people on the street,  
6 because if this car comes apart on the road, lots of people  
7 are getting hurt. And to simply say, oh, gee, this is a  
8 simple contract case, and safety has no part in it, is  
9 ludicrous.

10 THE COURT: Yes, sir.

11 MR. WALKER: Reprehensibility is punitive damages, and  
12 the U.S. Supreme Court clearly has said you can only look  
13 at harm to O&W Used Cars. There is no personal injury of  
14 any sort alleged. We've talked about the auction rules.  
15 He's held them up for you. They do not show the seller  
16 promising anything about safety, period. It's not an  
17 element of the claim. It is something incredibly -- you  
18 can tell by the passion in his voice, the prejudice drips  
19 from his lips when he talks about this.

20 MR. MOSKOS: And he's scared, very scared of this  
21 case, and that's why he's trying to keep it out. And he  
22 ought to be, and the dealership should be. They should be  
23 ashamed for selling this car. And it's not just simply the  
24 fact that this car could hurt a lot of people. You also  
25 got -- you also have Mr. Whitley, who's selling this car.

1 He's -- he had to go and explain to his customer that he  
2 sold them a clipped car, a dangerous car.

3 Now, I don't think those folks just went home and  
4 forgot that they bought a car. I think they talked to  
5 other people. And when that starts happening, now, you're  
6 talking about damaging Mr. Whitley's reputation. That's  
7 very important. It all goes into -- you know, to say  
8 safety -- like I -- I don't know how to say it any other  
9 way. Safety, in dealing with this car, is very important,  
10 and it needs to be -- the jury needs to know about it.  
11 It's simple.

12 MR. WALKER: Your Honor, Mr. Whitley's reputation is  
13 not an element in damage, and I spent a good bit of today  
14 fending off the pushing of the wrong button on evidence in  
15 this case. That's what we've spent much of the day doing,  
16 and this is Exhibit A in that effort, and I would urge the  
17 Court to exclude it.

18 THE COURT: Okay. You got a copy of any of those  
19 cases y'all talk about?

20 MR. MOSKOS: What -- you talking about *Stokes versus*  
21 *Austin*? I don't have it with me. I mean, it's a South  
22 Carolina case, but -- 2010. I don't have it with me.

23 THE COURT: All right. That's -- and I'm familiar  
24 with that case. I need to read it again after all I'm from  
25 Manning.

1           MR. MOSKOS: Well, you'll have to read it -- read two  
2 of them, because they had to come back and do a second  
3 opinion.

4           MR. WALKER: And your Honor, I apologize for not  
5 having copies. They are cited in --

6           THE COURT: And we -- I understand that's an issue in  
7 this case, and then -- and I need to read these cases and  
8 think about it. I mean, my first blush is, they have a  
9 right to testify about the car, this particular car and its  
10 condition, you know. Now, general safety on the roads and  
11 all this, I don't, you know, as far -- how far the envelop  
12 goes, I don't know yet. But the actual --

13          MR. MOSKOS: They had the opportunity -- they've  
14 inspected this car. They had their expert inspect it. So,  
15 if, you know, it's a question -- the information is  
16 admissible. Now, it goes to -- what he's talking about  
17 goes to the weight of the evidence that the jury wants to  
18 give it. If they want to put somebody up who's going to  
19 say it's a safe car, obviously, they have that right.

20          THE COURT: Okay. Is it a situation that we can start  
21 this, and y'all can do opening statements without going  
22 there?

23          MR. WALKER: I certainly can.

24          THE COURT: And I can stop. I mean, the reason I'm  
25 asking, clearly, if there's a con -- if it's a breach of

1 contract case then --

2 MR. MOSKOS: This isn't an ordinary breach of contract  
3 case.

4 THE COURT: That's what they told me it was. What do  
5 you think?

6 MR. MOSKOS: I think it's a fraud case. It's a clear  
7 fraud case. It's an unfair trade practice case.

8 THE COURT: Okay. Well, assuming it's -- You've  
9 certainly got a right to testify about what you bought and  
10 its condition. Now, how far the safety issue goes, as far  
11 as, you know, punitive damages, and everybody else on the  
12 road, because it wasn't a situation it was on the road and  
13 caused a problem or caused any damages. It's just, you  
14 know, I don't know if you've got a right to talk about the  
15 potential damages that it could cause, but you've certainly  
16 got a right to testify about what you bought and what  
17 condition it was in.

18 You know, at least that's what I'm thinking at this  
19 point. I need to re -- if you've got some other law to the  
20 contrary, I'll be glad to look at it, but you've clearly  
21 got a right to testify the condition of what you bought.  
22 Now, the fact that it could have killed everybody on the  
23 road is another situation, because it didn't happen. You  
24 know, those damages never occurred. Right?

25 MR. MOSKOS: That is true. But the potential for harm

## Brooks R. Fudenberg

---

**From:** Cothran, Ralph F. Jr., Law Clerk (John Furse) <rcothranlc@sccourts.org>  
**Sent:** Monday, August 29, 2016 12:37 PM  
**To:** 'C Steven Moskos' (csmoskos@earthlink.net); 'cwalker@walkerreibold.net'; Brooks R Fudenberg (Brooks.R.Fudenberg@Fudenberglaw.com)  
**Subject:** Midlands Honda-award

Gentlemen,

Judge Cothran has made a decision regarding the verdict awarded in this case. Judge Cothran directs the plaintiff to elect from either of the following awards: 1. *Treble Damages and attorney's fees for the N.C. Unfair Trade Practices Cause of Action*: \$6,645(actuals) X 3=\$19,935 plus an award of attorney's fees of \$21,264 for a total of **\$41,199**. OR 2. *Actual and Punitive damages for the fraud cause of action*: \$6,645(actuals) plus \$46,515 in punitive damages for a total of **\$53,160**.

Judge Cothran has given the plaintiff a 10 day deadline to make the election of award. Judge Cothran asks, that upon the election of award by the plaintiff, that defense counsel submit a proposed order on this issue within a reasonable time. Please contact me if you have any questions or concerns regarding this email or any other matters involving this case.

Thanks,

John L. Furse  
Law Clerk to the Honorable R. Ferrell Cothran, Jr.  
Circuit Judge of the Third Judicial Circuit  
P.O. Box 32  
Manning, SC 29102  
OFFICE: (803) 435-2450

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Brooks R. Fudenberg

From: C Steven Moskos <csmoskos@earthlink.net>
Sent: Monday, August 29, 2016 7:00 PM
To: 'Cothran, Ralph F. Jr., Law Clerk (John Furse)'; cwalker@walkerreibold.net; 'Brooks R Fudenberg'
Subject: RE: Midlands Honda-award

Dear Judge Cothran,

Please be advised that I have finished my affidavit which you allowed me to file at the conclusion of the post-trial oral arguments hearing. You have sent an email stating your decision regarding the post-trial motions prior to review of my affidavit. I would ask that you hold off on your decision until you have reviewed my affidavit which I will be sending to the Clerk tomorrow August 30.

I note that your email did not address the issues of prejudgment interest pursuant to N.C.G.S. §24-5 and awarding interest pursuant to S.C. Code §15-35-400. Will those issues be addressed in a future email?

Thank you for your consideration.

C. Steven Moskos
4000 Faber Place Dr., Suite 300
North Charleston, SC 29405
843-763-5297 Office

From: Cothran, Ralph F. Jr., Law Clerk (John Furse) [<mailto:rcothranlc@sccourts.org>]
Sent: Monday, August 29, 2016 12:37 PM
To: 'C Steven Moskos' (csmoskos@earthlink.net) <csmoskos@earthlink.net>; 'cwalker@walkerreibold.net' <cwalker@walkerreibold.net>; Brooks R Fudenberg (Brooks.R.Fudenberg@Fudenberglaw.com) <Brooks.R.Fudenberg@Fudenberglaw.com>
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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

DANIEL O'SHIELDS AND ROGER  
W. WHITLEY A PARTNERSHIP  
D/B/A O&W CARS

Plaintiffs

vs.

COLUMBIA AUTOMOTIVE  
COMPANY, LLC D/B/A MIDLANDS  
HONDA

Defendant

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT  
) CASE NO. 13-CP-40-0319  
)

) **AFFIDAVIT OF C. STEVEN MOSKOS IN**  
) **SUPPORT OF PLAINTIFFS' MOTION**  
) **FOR ATTORNEY'S FEES**  
)

FILED  
2016 AUG 31 AM 9:27  
CLERK OF COURT  
RICHLAND COUNTY

**PERSONALLY** appeared before me **C. Steven Moskos, Esquire**, who, being duly sworn, deposes and says as follows:

1. I over the age of eighteen. I am a South Carolina licensed attorney.
2. I do not understand how Mr. Reibold and Mr. Walker have found it difficult to engage in settlement negotiations with me based on our prior dealings.
3. I have been able to find five cases that I have handled prior to the present case where an attorney from the Walker Reibold law firm has been representing a Defendant from the beginning of the case. One case has only 1 letter to Clay Walker. He was not part of the litigation as the case moved forward. Two cases were personal injury cases handled by the firm's associates. Those were settled after discovery and depositions. Two cases dealt with automobile litigation. One of those was settled within four months without filing suit.
4. I have, however, found Mr. Walker and Mr. Reibold difficult to settle auto fraud cases with as they take the position that their clients have done nothing wrong and

that if their clients had done something wrong the damages suffered by my clients are minuscule. Their offers reflect the same. The difficulty in getting Midlands Honda to resolve this matter is discussed later. First, however, some basics of relevant North Carolina and South Carolina law must be touched upon.

5. In my view, North Carolina law requires the following:
6. The applicable attorney's fees statute is N.C.G.S. §75-16.1 which states:

In any suit instituted by a person who **alleges** that the Defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that:

(1) The party charged with the violation has **willfully engaged in the act or practice**, and there was an unwarranted refusal by such party to **fully** resolve the matter which constitutes the basis of such suit;  
(Emphasis added.)

7. The North Carolina Unfair Trade Practices Act N.C.G.S. 75-16.1 is a remedial statute that should be read broadly and liberally.<sup>1</sup> The statute is designed to supplement common law remedies that often prove ineffective to redress unfair or deceptive practices.<sup>2</sup>
8. To receive attorney's fees under N.C.G.S. §75-16.1, a Plaintiff does not have to bring a claim under N.C.G.S. §75-1.1. He only has to allege a violation of the Act.<sup>3</sup> Once the allegation is made, the Plaintiff 1) must be the prevailing party, 2) the Plaintiff must show a willful engagement in the act or practice, and 3) the Plaintiff

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<sup>1</sup> Tradewinds Airlines, Inc. v. C-S Aviation Servs., 733 S.E.2d 162 (N.C. App., 2012) ("The measure of damages applicable to claims for fraud in the inducement and claims for unfair and deceptive trade practices is broad and remedial."); City Finance Co. of Goldsboro, Inc. v. Boykin, 86 NC App 446, 358 SE 2d 83 (Ct. App. 1987) (N.C.G.S. § 75-16.1 should be construed and applied liberally).

<sup>2</sup> Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920 (N.C. App. 1998).

<sup>3</sup> Llera v. Security Credit Systems, Inc., 93 F. Supp. 2d 674 (WD NC 2000).

must show the defendant's unwarranted refusal to fully resolve the matter which constitutes the basis of such suit.

9. "Proof of fraud would necessarily constitute a violation of the prohibition against unfair and deceptive acts ....".<sup>4</sup>
10. "To be a 'prevailing party' within the meaning of N.C. Gen. Stat. § 75-16.1, the Plaintiff must prove both an actual violation of N.C. Gen. Stat. § 75-1.1 and actual injury to Plaintiff as a result of the violation. Where an offer of judgment is accepted by the Plaintiff, there is not a 'prevailing party' or a 'losing party.'"<sup>5</sup>
11. An "unwarranted refusal" is not defined by the statute; therefore, it has been left to the interpretation of the courts. Between 1978 and 1984, the first North Carolina cases which addressed this issue did not find any evidence that there had been an unwarranted refusal, while almost all of the latter cases found that there had been an unwarranted refusal by the losing party.
12. Reported North Carolina cases show that in 1978, the first case that dealt with the attorney fee issue denied fees. Starting in 1984, however, the North Carolina Courts began awarding fees routinely.<sup>6</sup> Those cases where the trial judge denied

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<sup>4</sup> Hardy v. Toler, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975); Jones v. Harrelson & Smith Contractors, LLC, 670 S.E.2d 242, 252 (N.C. Ct. App. 2008) ("[I]t is well-settled that a Plaintiff who proves fraud thereby establishes that unfair or deceptive acts have occurred." (citation and internal quotation marks omitted)), *aff'd*, 677 S.E.2d 453 (N.C. 2009) (*per curiam*).

<sup>5</sup> Evans v. Full Circle Productions, Inc., 443 S.E.2d 108, 114 N.C. App. 777 (N.C. App. 1994).

<sup>6</sup> Wilder v Squires, 68 NC App. 310, 320, 315 SE 2d 63, 62, cert. denied, 311 NC 769, 321 SE 2d 158 (1984); Concrete Service Corp. v. Investors Group, Inc., 79 NC App. 678, 688, 340 SE 2d 755, 762, cert. denied, 317 NC 333, 346 SE 2d 137 (1986); Pinehurst, Inc. v. O'Leary Bros., 79 NC App 51, 64, 338 SE 2d 918, 926, cert. denied, 316 NC 378, 342 SE 2d 896 (1986); Blankenship v. Town and Country Ford, Inc., 622 S.E.2d 638, 174 N.C. App. 764 (2005); Morris v. Bailey, 86 NC App 378, 387, 358 SE 2d 120, 125 (1987); Barbee v Atl. Marine Sales and Serv., 115 NC App 641, 446 SE 2d 117, review denied, 337 NC 689, 448 SE 2d 516 (1994) (The Court noted that the "record is rife with evidence of the Defendant's intractability." 115 NC App at 649, 446 SE 2d at 122.

or reduced fees dealt with new areas of the law, strong defenses and lots of settlement discussions, none of which exist in this case.

13. Under North Carolina law, it is my understanding that the primary focus of an award of fees should be on Defendant's actions not those of Plaintiffs.<sup>7</sup>
14. The courts in fraudulent inducement and unfair and deceptive trade practices cases seek to make the Plaintiff whole where fraud is proven and not to allow a Defendant to benefit from its own fraud. The fact finder in fraud and unfair and deceptive trade practices claims has broad discretion in awarding damages to insure that the Plaintiff is made whole and the wrongdoer does not profit from its conduct.<sup>8</sup>
15. A Defendant's general intractability/stubbornness as to resolving the disputed matter may constitute an unwarranted refusal to resolve.<sup>9</sup>
16. The determination of attorneys fees is within the discretion of the court. It is not limited to extreme cases. "Extreme cases" was used as dicta in Evans v. Full Circle Productions, Inc., 443 S.E.2d 108, 114 N.C. App. 777 (N.C. App. 1994) to differentiate between a mandatory and a discretionary award of fees. While Evans has been cited in other North Carolina State cases, none has stated that the case has to be "extreme". Even if a factor of the fee statute is that the case has to be extreme, this case easily satisfies that criteria as shown below.
17. North Carolina Courts have considered Defendants' settlement offers unreasonable

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<sup>7</sup> See N.C.G.S. §75-16.1; Llera v. Security Credit Systems, Inc., 93 F. Supp. 2d 674 (WD NC 2000).

<sup>8</sup> Tradewinds Airlines, Inc. v. C-S Aviation Services, 733 S.E.2d 162 (N.C. App. 2012).

<sup>9</sup> Barbee v. Atlantic Marine Sales & Service, Inc., 115 N.C. App. 641, 649, 446 S.E.2d 117, 122 (1994).

in light of the amount of the judgment entered for the Plaintiffs. North Carolina Courts find that a defendant's response to a plaintiff's offer to settle is unreasonable when Defendant refuses to accept plaintiff's offer or "to negotiate or offer some reasonable amount in an attempt to settle the matter."<sup>10</sup>

18. North Carolina Courts have considered the amount offered to settle, the fact that no counteroffer was made, and the amount of the final jury award to come to the conclusion that a Defendant had not made a realistic attempt at settling the matter.<sup>11</sup>
19. Even the Fourth Circuit has held that the defendant's refusal to seriously discuss settlement was a sufficient basis for concluding that the Defendant had unwarrantedly refused to fully resolve the case. The Defendant argued that the \$400,000 verdict exceeded the plaintiff's best settlement proposal by only \$50,000, demonstrating that its refusal to settle was not unwarranted. The court was not swayed. "[W]e simply fail to understand how evidence that [Defendant] could have settled this case for less than the amount of the judgment entered against it could vindicate the decision not to attempt a settlement."<sup>12</sup>
20. "When awarding fees pursuant to N.C. Gen. Stat. § 75-16.1, the court must make specific findings of fact that the actions of the party charged with violating Chapter 75 were willful, that it refused to resolve the matter fully, and that the attorney fee

---

<sup>10</sup> Lapierre v. Samco Development Corp., 406 S.E.2d 646, 103 N.C.App. 551 (N.C. App., 1991).

<sup>11</sup> United Laboratories, Inc. v. Kuykendall, 403 S.E. 2d 104, 102 N.C. App. 484 (N.C. App., 1991).

<sup>12</sup> United States ex rel. S&D Land Clearing v. D'Elegance Mgmt., No. 98-2758, No. 98-2852, No. 99-1437, 2000 U.S. App. LEXIS 16173, at \*26 (4<sup>th</sup> Cir. July 13, 2000) cert. denied, 531 US 1112, 121 S. Ct. 856 (2001).

was reasonable. . . . On appeal, the record must also contain findings regarding the attorney fees, such as: 'findings regarding the time and labor expended, the skill required to perform the services rendered, the customary fee for like work, and the experience and ability of the attorney.'"<sup>13</sup>

#### **PRIOR CASES WITH WALKER-REIBOLD**

21. In the only other completed automotive fraud case I have had with Mr. Reibold, he moved to compel arbitration. His client lost in arbitration under my client's fraud and unfair trade practices claims. When Plaintiff tried to confirm the award as allowed by statute, Mr. Reibold refused to consent to the confirmation of the award. Mr. Reibold objected stating his client did not want its name tarnished in the record. Upon Plaintiff's motion, the Honorable Edgar Dickson confirmed the award. Defendant then appealed. Mr. Reibold was notified that an appeal would result in additional attorney's fees being charged the Defendant. (Exhibit 1.) No money was at stake in the appeal. Defendant simply appealed the confirmation of the award. Defendant lost the appeal in a reported case. See Henderson v. Summerville Ford-Mercury Inc., 748 S.E. 2d 221 (2013). Mr. Reibold was informed that if the appeal went forward, Ms. Henderson would seek attorney's fees from the Defendant at the conclusion of the appeal. After winning the appeal, Ms. Henderson sought her legal fees. Mr. Reibold then fought Ms. Henderson's fee petition. (Exhibit 2.) Judge Dickson found Ms. Henderson was entitled to post trial, appellate and post appellate attorney's fees in the amount of \$185,717.76. (Exhibit 3.)
22. It is my recollection that, prior to this action, I have only litigated one issue in one

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<sup>13</sup> Blankenship v. Town and Country Ford, Inc., 622 S.E.2d 638, 174 N.C. App. 764 (2005).

case with Clay Walker. My client had brought an action against two car dealerships owned by the same men, Devall v Hoover Motors, Inc., 05-CP-08-1781. The Hoover dealerships were represented by attorney Warren Moise. These sister dealerships convinced the Court that Summary Judgment was appropriate. Hoover Motors wanted to file a motion against me personally under the South Carolina Frivolous Civil Proceedings Act. Mr. Moise refused to bring the motion. Hoover Motors then hired Mr. Walker who then filed the motion for sanctions. The Honorable Roger Young denied the motion on March 26, 2007.

23. While Mr. Walker may have known about other cases in his office this is the first full case he and I have litigated together.
24. Mr. Walker has attached documents from Allen v. Hoover and Kincer v. Midlands Automotive to his Brief Opposing the Award of Attorney's Fees. These cases are on going. Allen involves the sale of a previously wrecked car without disclosure. Kincer involves repaired damaged to a new car sold without disclosure of those repairs. In Allen, I sent a presuit letter to Hoover to settle the matter. (Exhibit 4.) Neither Hoover nor Mr. Walker responded to my settlement demand in any way at any time. In Kincer, Mr. Walker did not attempt any efforts to settle the matter. Instead, he demanded the matter proceed to arbitration to be resolved. (Exhibit 5.) The difficulty there is that my clients wish for their day in Court. Both cases have been forced into arbitration. Both cases include a claim for statutory attorney's fees under the South Carolina UTPA SC Code §39-5-10 et seq. and the Dealers Act SC Code §56-15-10 et seq.



## THE CURRENT CASE<sup>14</sup>

25. In this case, Midlands Honda was first contacted by Roger Whitley in the fall of 2010 after he discovered the car had been "clipped". Mr. Whitley demanded that Defendant repurchase the vehicle and reimburse Plaintiffs' \$5,200.00. Mr. Farrell, on behalf of Midlands Honda, stated he would investigate the matter and get back in touch with Mr. Whitley. Neither Defendant nor its employees ever communicated with Mr. Whitley again choosing not to fully resolve this matter for \$5,200 even though Midlands Honda knew the dangerous condition of the Civic at the time it sold it to Plaintiffs. Its failure to buy back the Civic was its first unwarranted refusal to fully resolve this matter.
26. I had my legal assistant work on the case getting background information on the Civic from February 15, 2011 until July 2011. That time was not billed to the file.
27. Prior to filing suit, I was able to receive very limited information about Midlands Honda's knowledge of the "clipped" nature of the Civic. I had my clients' information, photographs from Nationwide, an estimate from Nationwide, and the South Carolina title history. I was unable to make contact with Nancy Watkins, the prior owner of the vehicle who initially sold the car to Midlands Honda. I did not know how to contact Charles Ecklund, the owner who I later learned returned the vehicle to Midlands Honda after finding out the Civic had been "clipped", as he had moved from Columbia to Alabama.
28. Prior to filing suit, I did not have any access to Midlands Honda's records or its employees. Therefore, I could not be certain what knowledge Midlands Honda had

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<sup>14</sup> A time line of events is attached as Exhibit 6

of the prior wreck damage and the dangerous condition of the Civic. All of that information was under the control of Midlands Honda. Without having access to those additional documents and the employees knowledge, establishing an appropriate value of the case was nearly impossible.

29. I have never sued Midlands Honda before. I did not know who represented it, if anyone. Therefore, I had no reason to contact Mr. Reibold or Mr. Walker prior to filing suit as Mr. Walker implies I should have in paragraph 2 of his affidavit. Neither Mr. Reibold nor Mr. Walker contacted me prior to suit being filed.
30. On January 17, 2013, two years and several months after Plaintiffs' demand to settle the matter, Plaintiffs filed suit.
31. On February 14, 2013, I returned Robert Reibold's call. I expected him to say that he represented Midlands Honda and that he wanted an extension of time to answer the Complaint. He told me he was representing Midlands Honda. He asked me what the difference in the value of the Civic was on the day of purchase between what Plaintiffs thought they were receiving and what they actually received. He stated he wanted the information so he could answer the Complaint. He then asked for a copy of the ADESA auction rules. He then wanted to know if my clients would agree to limit their damages in the case to \$75,000. I told him that I did not know the answer to that question, so I could not agree. At that time, I could not value the case without a copy of Defendant's file which had not been provided. Nonetheless, I asked him if Midlands Honda had a settlement proposal. He told me his client had not given him a number yet. Contrary to Mr. Reibold's allegation in paragraph 3 of his affidavit, he did not ask me for a settlement demand nor did he discuss settling

this case.

32. I answered all the questions that Mr. Reibold asked. Mr. Reibold did not mention that Mr. Walker would be part of the case so I did not have any reason to contact him. Mr. Walker did not contact me to try to settle the case.
33. Midlands Honda answered the complaint on February 25, 2013. Mr. Walker signed the Answer, however, I could not tell whether he would be the primary attorney on the case. Defendant did not make any offers to fully settle the matter.
34. Several months passed as Midlands Honda had filed a Motion to Dismiss the South Carolina claims filed against it claiming that North Carolina law applied. While this motion waited to be heard, no discovery was done. Still Defendant did not make any effort to settle this case.
35. I expected that during this time defense counsel had spoken to Mr. Farrell and Mr. Threatt about the case and that counsel had reviewed the deal jackets, the purchase and sale files maintained by Defendant on the Civic, and the service records for the vehicle so it could value the case and make a reasonable settlement offer.
36. Between January 2013 and October 2013, Defense counsel did not contact me with any settlement offers or to even start discussing settlement.
37. The initial mediation deadline was November 13, 2013. At the beginning of October 2013, it appeared the case needed to be moved forward; however, the date to mediate the case needed to be extended so the Parties could conduct discovery. The Parties' attorneys agreed to extend the mediation date. A Consent Order was sent to the chief administrative judge, the Honorable Casey Manning. The Consent

Order extended the time to mediate until April 30, 2014 so that discovery could be finished and details regarding a protective order regarding Nationwide's documents could be worked out.

38. On October 21, 2013, Plaintiffs served interrogatories and requests for production on Midlands Honda. Defendant did not respond to Plaintiffs' discovery requests within thirty days.
39. On November 18, 2013, the Clerk's office filed the Consent Order extending the time to mediate.
40. On November 19, 2013, the Plaintiffs were deposed. Midlands Honda participated in the depositions. Midlands Honda had still not produced any documents in the case. At his deposition, Mr. Whitley stated that he had contacted Midlands Honda and demanded his money back. Nothing happened until he contacted an attorney. (Exhibit 7 Whitley Depo 67:10-68:5.) Defendant did not make any offer to settle this case in the months after Mr. Whitley's deposition.
41. On December 4, 2013, I emailed Mr. Walker to find out when I would receive Midlands Honda's discovery responses. I did not receive any discovery responses. (Exhibit 8.)
42. On Monday December 16, 2013, I again emailed Mr. Walker to find out when I would receive Midlands Honda's discovery responses. He responded that he was meeting with his client on December 18 and he would have "something" to me at the beginning of the following week. I did not receive any responses to my discovery requests. (Exhibit 9.)
43. On February 10, 2014, I attempted again by email to obtain responses to my

discovery requests. Mr. Walker responded stating he was in Philadelphia helping his girlfriend who had broken her leg. Mr. Walker further stated he would be in Philadelphia until February 17. (Exhibit 10.)

44. On February 20, 2014, I sent another email to Mr. Walker asking for his client's discovery responses. (Exhibit 11.) I received an auto-response stating he would be out of the office until February 24. (Exhibit 12.)
45. On March 4, 2014, I sent a letter to Mr. Walker requesting that his client respond to my discovery. I did not receive a response to my letter. (Exhibit 13.)
46. On Friday April 25, 2014, I received an email from Mr. Walker stating he would provide me his client's responses at the "first of the week". (Exhibit 14.)
47. On April 30, 2014, I again requested discovery responses from Midlands Honda. This was the same day that the Consent Order to Extend Mediation Deadline ran out. (Exhibit 15.)
48. Plaintiffs could not conduct a meaningful mediation within the allotted time frame without this discovery. Even if Plaintiff's had mediated the case, the Defendants dilatory discovery tactics prevented Plaintiffs from appropriately valuing the case.
49. To have attended a mediation without this discovery and without full knowledge of the facts of the case may have constituted malpractice. At the very least, it would have greatly impacted the settlement negotiations as Plaintiffs did not know the full extent of Defendant's knowledge about this dangerous Civic.
50. On May 1 and May 6, 2014, I sent emails again asking for Defendant's discovery responses so settlement talks could take place or the case could be prepared for trial. (Exhibits 16 and 17.) Including telephone conversations on April 30, 2014 and on May 12, 2014, at least ten (10) attempts by email, letters and telephone calls

were made to obtain Defendant's discovery responses.

51. On May 13, 2014, I received by email copies of the documents in Defendant's deal jackets. I then learned the extent of Defendant's knowledge about the dangerous "clipped" nature of the Civic. Mr. Walker, however, objected to responding to certain interrogatories.
52. On May 23, 2014, Defendant mailed its formal discovery responses to me; however, I did not receive them until after May 30.
53. Even after providing Midlands Honda's discovery responses, Defendant denied liability and failed to even try to settle the case.
54. Once I had Defendant's documents, I learned that Midlands Honda and its counsel knew:
  - a. The facts of the case.
  - b. That it had two Carfaxes dated before the sale of the Civic to Plaintiffs showing the Civic had prior damage.
  - c. That the Civic had gone through Honda's 159 point Certified Pre-Owned Inspection process.
  - d. That the Certified Pre-Owned Inspection checklist was missing.
  - e. That Mr. and Ms. Ecklund had notified Mr. Threatt of the dangerous condition of the Civic.
  - f. That North Carolina requires that sellers complete a damage disclosure form.
  - g. That Midlands Honda's employees knew how to complete North Carolina's damage disclosure form.
  - h. That the ADESA Auto Auction's rules required disclosure of frame damage.
  - i. That North Carolina common law required disclosure of major damage to a car.
  - j. That Midlands Honda could be held responsible for Plaintiffs' attorneys fees under the North Carolina Unfair Trade Practices Act.

- k. That United Laboratories v Kuykendall could subject Defendant to actual and punitive damages under fraud and make Defendant liable for attorney's fees under North Carolina's Unfair Trade Practices Act.
- l. That there are not any cases overturning United Laboratories v Kuykendall or stating that North Carolina's Punitive Damages statute over turned United Laboratories v Kuykendall.
- m. That North Carolina has a punitive damages statute that allows for punitive of \$250,000.00.
- n. That there are plenty of examples of large punitive damages verdicts against dealers, including Austin v Stokes-Craven, which also adopted the North Carolina election of remedies rule that a Plaintiff could receive actual and punitive damages under fraud and attorney's fees under an unfair trade practices claim.

When I received Defendant's discovery responses, I realized the extent of Defendant's knowledge of its egregious conduct. I was stunned that Defendant had not tried to resolve this matter quickly and before responding to discovery.

- 55. I believed this case, in front of a jury, could reach a substantial six figure verdict. I knew that to achieve that result I had to obtain expert testimony and the testimony of Charles Ecklund and ADESA Auto Auction.
- 56. Defendant was remarkably silent regarding settlement during all of 2014. In fact, Defendant did not make a settlement offer, request a settlement demand, or mention settlement negotiations during 2014.
- 57. On January 23, 2015 at 8:51 AM, Mr. Walker called asking for a settlement demand. I reviewed the file and determined that a demand of \$350,000.00 was appropriate based on the flagrant and egregious nature of Defendant's conduct.
- 58. At 3:59 PM, I called Mr. Walker with Plaintiffs' demand. At that time, he told me "we aren't going to settle". He informed me that this was an uninsured claim and that Midlands Honda would have to pay the entire amount. I then asked Mr. Walker

what Midlands Honda was offering to settle the case. He told me that Midlands Honda had not told him a number yet. That same day, I followed up our conversation with a letter to Mr. Walker setting forth my settlement demand. (Exhibit 18.) Mr. Walker never contacted me to determine how I arrived at my settlement demand or to discuss the amount.

59. Mr. Walker did not contact me again with a reasonable settlement offer. Instead, his next communication was Defendant's January 26, 2015 Offer of Judgment for \$15,000.00 plus reasonable attorney's fees for the resolution of Plaintiffs' six claims against Defendant. Defendant clearly intended that acceptance of the Offer would settle the entire case. Defendant was not offering to settle just the UTPA cause of action while allowing the others to continue.
60. I was frustrated by Defendant's offer. It was incomprehensible that Defendant thought it could settle all the causes of action for the same amount that might be reasonable had the suit only been under the UTPA. I was left with the impression that further settlement negotiations would not be successful because Defendant was markedly undervaluing the case.
61. It was obvious to me that either Defendant arrogantly believed its business practices were sound or Mr. Walker was unreasonably confident he could win at trial, and therefore, Defendant would not make a reasonable offer. It was especially unreasonable because they should have known that juries do not appreciate cheating by car dealers.
62. Defendant's offer also seemed invalid to me. I have read cases from South



Carolina<sup>15</sup>, North Carolina<sup>16</sup>, and other jurisdictions that stated Offers of Judgment do not make the Plaintiff a prevailing party entitled to attorney's fees. I could see a trap laid for me by Defendant. I would accept the offer and then Defendant would claim fees were not warranted as my clients were not the prevailing parties. My clients would be looking at me disappointedly while Defendant and its counsel did high fives leaving the courtroom only having to pay \$15,000.00. I did not consider the offer valid.

63. Based on my prior experience with car dealers, I did not think I would be able to settle the case. Nonetheless, I decided to test Defendant's resolve to settle the case by sending an offer of judgment of \$280,000.00 to Defendants, a \$70,000.00 or a 20% reduction in Plaintiffs' initial demand.<sup>17</sup> I took into account Plaintiffs' actual damages, a punitive damages award under the North Carolina Punitive Damages Act, and an amount of attorney's fees and costs below what had actually been incurred and spent.
64. On February 4, 2015, I sent Plaintiffs' \$280,000.00 Offer of Judgment to Defendant's counsel. I believed the \$70,000.00 reduction in Plaintiffs' demand would motivate Defendant to reconsider its position and make additional settlement offers. I was wrong. Defendant did not respond to Plaintiffs' Offer. (Exhibit 19.)
65. Defendant then began preparing for trial. It objected to Plaintiffs' counsel inspecting

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<sup>15</sup> See Belton v. State, 330 S.C. 422, 499 S.E.2d 225 (S.C. App., 1998) (The court's ministerial order to the clerk of court to file an offer of judgment does not transmute the offer and acceptance of judgment into a verdict rendered by the court.)

<sup>16</sup> Evans v. Full Circle Productions, Inc., 443 S.E.2d 108, 114 N.C. App. 777 (N.C. App. 1994); Martin & Loftis Clearing v. Saieed Const., 608 SE 2d 124 (N.C. App 2005).

<sup>17</sup> Llera v. Security Credit Systems, Inc., 93 F. Supp. 2d 674 (WD NC 2000) (finding that plaintiffs can test a defendant's resolve to settle, and whether a defendant's offer is a final offer, by making a counter offer.)

Defendant's dealership facilities. It demanded to inspect the Civic. It hired an undisclosed expert to inspect the car. The undisclosed expert did inspect the car. Later it filed a Motion to Amend its Answer to include additional defenses and it filed a substantial Motion for Summary Judgment.

66. Since Defendant failed to make any counter offers to Plaintiffs' Offer of Judgment, Plaintiffs were required to prepare their case for trial which included traveling to Chicago for the video taped deposition of Charles Ecklund and to Charlotte for the video taped deposition of Joseph Gayer, the 30(b)(6) representative of ADESA Auto Auction. These video tapes were for use at trial.
67. In April 2015, the Parties were still trying to finish taking Mr. Ecklund's and ADESA Auto Auction's depositions which were needed for trial. Mr. Walker's schedule, however, caused depositions to be pushed into July.
68. On April 6, 2015, I called Mr. Walker. He inquired as to whether my client would take a dismissal under Rule 40(j) SCRPC as he wanted to spend time with his girlfriend. We also discussed setting up a status conference with Judge Manning.
69. On April 7, 2015, Mr. Walker requested a status conference with Judge Manning. (Exhibit 20.)
70. On April 7, 2015, Mr. Walker casually mentions mediation in an email so we may be prepared to discuss a continuance with Judge Manning. (Exhibit 21.)
71. On June 5, 2015, Mr. Walker and I discussed mediating the case. He recommended two mediators, with whom I was unfamiliar. I told him I would get back with him.
72. The case was coming up on the trial roster. Mr. Walker and I agreed to ask for the case to be postponed pending the conclusion of discovery. I felt that I needed to

depose Mr. Ecklund who was in Chicago and ADESA Auto Auction in Charlotte. I attempted to schedule those depositions as soon as practicable. Mr. Walker, however, was on vacation with his girlfriend for part of June. He also wanted the Civic inspected.

73. On June 19, 2015, Mr. Walker's undisclosed expert was allowed access to the Civic.

74. On Friday June 26, 2015, Mr. Walker's office mailed to me Defendant's Supplemental Interrogatories to Plaintiff and a Motion to Amend its Answer. To me, it seemed as though Midlands Honda was gearing up to try the case.

75. On July 8, 2015, Mr. Walker mailed me his Motion to Compel Arbitration. Based on our conversations and the status of the case, it appeared Mr. Walker wanted to protect himself with the Court so he would not get in trouble for violating the mediation rules. Had he called me and said he was filing a motion to compel mediation we would have agreed on a mediator and set a time for the mediation. I never received any indication from Mr. Walker that he was pushing for mediation because he thought it would be successful.

76. On July 10, 2015, I received Defendant's motion. I called Thomas Lydon, an attorney with McAngus Goudelock & Courie in Columbia, to secure his mediation services.

77. On July 10, 2015, Defendant served its Motion for Summary Judgment.

78. On July 13, 2015, Mr. Lydon stated he was willing to mediate the case on August 3 or 4.

79. On July 17, 2015, I called Mr. Walker who confirmed that he was available to mediate the case on August 4.

80. I did not have high expectations of settlement. For six months, February through July, Midlands Honda continued to maintain that it did not have any responsibility for Plaintiffs' injuries. Midlands Honda never responded to Plaintiffs' settlement demand of \$280,000. Midlands Honda never separated its settlement offer under the UTPA from the other causes of action. Midlands Honda never increased its offer to settle all of the claims against it.
81. I felt the mediation would be an exercise in futility as Midlands Honda showed no concern for what might happen in the court room.
82. I felt Midlands Honda had drawn a line in the sand that it would not cross. The stance taken by Defendant was settle all claims for \$15,000 or try the case.
83. Midlands Honda did not make any efforts to settle the case prior to the mediation.
84. This matter was unsuccessfully mediated on August 4, 2015.
85. Midlands Honda has not made any settlement offer since the mediation. Based on Midlands Honda's offer of judgment, its position during discovery, and the mediation discussions, I had no confidence that Midlands Honda wished to discuss seriously a full resolution of this case.
86. It was clear to me that Midlands Honda would only offer to settle all of the claims for the price of settling one cause of action, the UTPA claim.
87. On October 1, 2015, Defendant's summary judgment motion was denied.
88. Between October 1, 2015 and April 18, 2016, Plaintiffs did not hear from Defendant regarding Plaintiffs' last settlement demand of \$280,000. Defendant did not make any counter offers or even mention settlement discussions.
89. The more I developed the facts of the case and developed my arguments for trial, the more I thought a jury would find in favor of Plaintiffs for significant punitive

damages. I could see a jury easily punishing Midlands Honda with a million dollar punitive damages verdict under Plaintiffs' fraud claim. In light of the egregious actions of Midlands Honda, I believed my clients' offer of judgment of \$280,000 to be fair.

90. This matter was called to trial on April 18, 2016.

91. At the end of the trial day on April 19, 2016, the Court, in chambers, asked the Parties if they could settle the case. I informed the Court of Defendant's \$15,000 plus reasonable attorney's fees offer and Plaintiffs' \$280,000.00 offer, which had also been stated in Plaintiffs' Pre-Trial Brief. I stated that Defendant needed to respond to Plaintiffs' last demand of \$280,000.00. Mr. Walker stated that Plaintiffs' demand was excessive, that Defendant did not need to, nor would it, respond to such a demand. Mr. Walker stated that Plaintiffs' demand was too great to make a counter offer. It saw no reason to increase its offer made 15 months before. I informed the Court that Defendant held the purse strings and that it would have to put more money on the table. Defendant refused to do so or to even discuss doing so.

92. Midlands Honda apparently had its head in the sand. Based on its offer of judgment, it acknowledged that it could be found liable under the UTPA; however, it refused to even entertain the thought that the same wilful, egregious conduct could result in punitive damages under Plaintiffs' fraud claim. This was an unreasonable position which resulted in Midlands Honda refusing to participate in settlement negotiations.

93. On April 20, 2016, during a break in the proceedings outside the presence of the jury, the Court again inquired as to whether the parties could resolve this case. I

again informed the Court that Defendant held the purse strings and it would have to make an offer to settle the case. Defendant again refused to offer any additional money or to engage in settlement discussions to fully resolve the case.

94. Undaunted by the voice of reason, Defendant rolled the dice and moved forward to trial.
95. The actual damages portion of the case went to the jury on April 21. The jury found in favor of Plaintiffs on every cause of action and found Plaintiffs were due \$6,645.00, the exact amount requested by Plaintiffs. Still Defendant did not approach Plaintiffs to resolve this case.
96. On April 22, 2016, the Court conducted the punitive damages phase of the trial. Plaintiffs prevailed again receiving a verdict of \$2,381,888.00. Still Mr. Walker did not approach me to discuss a resolution to this case.
97. From the time of the trial through the post trial motions, Mr. Walker did not contact me to discuss settlement.
98. Post trial motions were held on July 27, 2016 in Manning, South Carolina.
99. After the post trial motions oral arguments, the Court suggested the Parties might want to talk about settling the case. Remembering that Plaintiffs made the last offer to settle this matter and that the jury rendered a verdict for Plaintiffs for all actual damages requested and a substantial punitive damages award, I again stated that Defendant is the one with the money and it needed to make an offer. Mr. Walker, as of this affidavit, has not approached me with any settlement proposal to fully resolve the issues in the case.
100. In my view, Midlands Honda's argument against the award of attorney's fees is similar to the Defendant's argument in Custom Molders, Inc. v. Roper Corp., 401

S.E. 2d 96 (Ct. App 1991). Roper Corp. argued that Plaintiff's only settlement offers, \$324,000 and \$275,000, were greater than the jury award of \$249,016. Defendant believed that refusing to settle for more than the verdict is not an unwarranted refusal to settle. The Court disagreed holding that there was evidence to support an award of attorney's fees. The Court found that first Defendant could have settled the case before litigation by allowing Plaintiff to manufacture the parts ordered by Defendant, and second that "the jury's findings of calculated, intentional deceit and bad faith on Defendant's part established that Defendant knew from the beginning, even if Plaintiff did not, that it was sitting on or defending an unfair and deceptive trade practice case in which the damages could be trebled."<sup>18</sup>

101. In this case, the jury's verdict was above Plaintiffs' offers of \$350,000 and \$280,000. Midlands Honda could have settled this matter prior to suit for \$5,200.00. It chose to ignore Mr. Whitley thinking he would go away. Midlands Honda knew from the beginning that it was sitting on an unfair trade practices case. Midlands Honda then had at least two additional opportunities, my letter and the Offer of judgment, to settle the case. Of course, there is no rule that Plaintiffs have to be the ones who initiated settlement negotiations. Midlands Honda was free to make offers any time it wished. During the trial, Midlands Honda had, at the Court's suggestion, two more opportunities to fully resolve this case. It made the conscious decision not to do so. The jury then found against Defendant on Plaintiffs' fraud and UTPA claims. Even after the jury spoke, Defendant has remained recalcitrant and it has declined

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<sup>18</sup> See also Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920, (N.C. App., 1998)(The evidence recited included the disclosure by the record in the case that the Defendants' actions constituted more than a simple breach of contract and that intentional deception in dealing with the Plaintiffs had been shown.); United States ex rel. S&D Land Clearing v. D'Elegance Mgmt., 2000 U.S. App. LEXIS 16173 \* 18 (4th Cir. 2000) (citing North Carolina law).

to act on the Court's third suggestion to try to fully settle this matter. Thus, there is undeniable evidentiary support to find that Defendant's refusal to settle was unwarranted.

102. Midlands Honda has made one unwarranted settlement offer that no reasonable lawyer would have accepted. Midlands Honda's conduct was willful, egregious, and part of a pattern and practice. The verdict was bound to be large. Midlands Honda and its counsel knew it faced a substantial punitive damages verdict. Midlands Honda tried to settle this case "on the cheap" by trying to entice me to push my clients toward settlement by offering to pay "reasonable" attorney's fees. It thought attorney's fees were the motivating factor in this case. I have always believed this case was about more than my fee and I could not, in good conscience, "sell out" my clients so I could receive payment from Defendant.
103. Midlands Honda's obstinance in refusing to provide a counter offer to Plaintiffs' Offer of Judgment shows its failure to foster negotiations in this case.
104. In their affidavits, Mr. Walker and Mr. Reibold imply that Plaintiffs should have "bid against themselves" by lowering their \$280,000 demand without a corresponding offer from Defendant to increase what it would pay. Defendant chose to remain silent as to any additional offers even after the mediation. Plaintiffs believed their case was strong. They waited for Defendant to respond. It chose not to.
105. Defendant's argument that it made reasonable offers is based on its alleged attempt to value this case under only the UTPA. Its argument fails for several reasons. First, the Offer of Judgment (\$15,000) was below the treble amount of Plaintiffs' actual damages (\$19,935). Second, Defendant sought to settle all of Plaintiffs' claims with its "\$15,000 plus attorney's fees" offer. If it wanted to settle the entire



case it needed to include in its offer the value all of the claims presented.

106. Defendant had numerous opportunities to **fully** settle the case. It chose not to do so.

- a. Defendant did not respond to Mr. Whitley's demand to resolve this matter.
- b. Midlands Honda's did not make an offer at the time of the filing of action.
- c. Defendant refused to consider Plaintiffs' \$350,000.00 demand. "We're not going to settle."
- d. Defendant did not try to **fully** resolve the matter. Mr. Walker clearly states in the first full paragraph on page 7 of his affidavit that Defendant's offer only considered valuing the case under the UTPA. Mr. Reibold repeated this position at oral argument during the post trial motion hearing. No where in either Mr. Walker's or Mr. Reibold's affidavit do they claim Defendant valued Plaintiffs' fraud claim or that it made an offer by valuing any of the other claims. Defendant, nonetheless, wanted to settle all of Plaintiffs' claims. It just did not want to pay for them.
- e. There is even an argument that Defendant's Offer of judgment is not valid because the Court could deny a fee petition since the sum offered was not a definite amount and, under North Carolina law, Plaintiffs would not have been considered the "prevailing party".
- f. On the other hand, when Plaintiffs received Defendant's Offer of Judgment, they immediately reduced their demand to facilitate settlement. Their offer to settle included actual damages of \$6,645, punitive damages of \$250,000 and attorney's fees and other costs \$23,355.
- g. Defendant failed to respond in any fashion to Plaintiffs' offer.
- h. Defendant's only reason to mediate was to avoid court sanctions.
- i. Defendant did not make any settlement offers before mediation or after mediation.

107. The above opportunities were while Defendant knew of the facts and law set forth in paragraph 54 above establishing the likelihood of a significant punitive damages award.

108. I noted with interest that on page 6 of Mr. Walker's affidavit, he states he discussed

settlement of the entire case with Sean Cox, attorney for Nationwide, four times between February 20, 2013 and August 1, 2013. After August 1, 2013, Mr. Walker never spoke again to Nationwide about settlement.

109. Midlands Honda did not discuss settlement with Plaintiffs during the period it was talking to Nationwide, nor at any other time in 2013, at any time in 2014, after January 2015, at any time in 2016, during the trial, after the trial, or after the post trial motion hearing. This shows Midlands Honda was not interested in settling the case.
110. Plaintiffs discussed settlement with Nationwide on numerous occasions and did, in fact, resolve its dispute with Nationwide. Midlands Honda, however, was not interested in discussing settlement.
111. Defendant seeks to make whether mediation occurred a significant aspect of whether it made warranted steps in fully settling this case. It must be remembered that successful, meaningful mediation could not take place until Defendant responded to Plaintiffs' discovery requests. While Plaintiffs waited on Defendant to respond, two mediation deadlines passed over sixteen months.
112. Scheduling a mediation was difficult because of Mr. Walker's schedule. He was constantly out of town for work or to be with his girlfriend. (Exhibits 22-34.)
113. It was clear to me that Midlands Honda did not care when mediation occurred. It simply felt the case needed the rubber stamp of a mediation so the case could be tried. As it turned out, it did not make a difference. Plaintiffs never considered any offer Defendant made to be reasonable in light of the facts of the case. Based on the verdict, neither would the jury.
114. Defendant clearly did not try to fully resolve the issues in this case. It did not place

any value on Plaintiffs' fraud claim. It did not even offer a full resolution under the UTPA claim alone, as that would have been \$19,935. Defendant's \$15,000 offer was only 75.24% of the full value of the actual and extra compensatory damages under the UTPA. And as stated, Plaintiffs would not have been entitled to attorney's fees under Defendant's offer of "\$15,000, plus a reasonable attorney's fee" as they would not have been deemed the prevailing party under North Carolina law. Thus, Defendant's offer was not a full resolution of Plaintiffs' claims.

#### **MR. WALKER'S AND MR. REIBOLD'S AFFIDAVITS**

115. As with Mr. Walker's affidavit, Mr. Reibold's affidavit only refers to Plaintiffs' UTPA claim, ignoring exposure under the fraud claim. Furthermore, Defendant never once raised the issue of the punitive damages statute over turning Kuykendall. Not in its pleadings, not in answers to discovery, not at trial, not in discussions with the Court about settlement. The first time this issue was raised was during the preparation of post trial motions.
116. Defendant never provided expert testimony that Plaintiffs' damages were incorrect.
117. Even assuming that fees are only awarded in extreme cases, Plaintiffs assert that this is an extreme case. Multiple acts of fraud were committed resulting in damage to Plaintiffs. Defendant's actions were not accidents. They were calculated actions designed to cheat people and businesses out of their money which caused a dangerous car to be on the roads. Based on these facts, Midlands Honda refused to fully settle this matter on the incredible grounds that the punitive damages cause of action should be thrown in for free on a less than full offer to settle Plaintiffs' UTPA claim.
118. In light of the law and the extreme egregious nature of the fraud perpetrated on

Plaintiffs, it was stunning to read in paragraphs 7 and 9 of Mr. Reibold's affidavit that he thinks \$15,000 and reasonable attorney's fees would be a "fantastic" and an "outstanding" result for this case even under the common law claims. His statements show no appreciation of how extreme and egregious Midlands Honda's actions were.

119. In paragraph 8 of Mr. Reibold's affidavit, he argues policy reasons to overrule Kuykendall which North Carolina has rejected. (See Plaintiffs' Brief Regarding Defendant's Response to Plaintiffs' Election of Remedies pages 2-3.)
120. In paragraph 10 of Mr. Reibold's affidavit, he tries to shift the burden to Plaintiffs to show they were reasonable in the manner they conducted settlement negotiations. The burden is actually on Defendant to show it reasonably tried to fully resolve the issues in the case<sup>19</sup>. Furthermore, Mr. Reibold ignores Rhyne v. K-Mart Corp., 149 N.C. App. 672, 562 S.E. 2d 82 (N.C. App., 2002) which states that Due Process requirements are satisfied by North Carolina's punitive damages statute.
121. In paragraph 11 of Mr. Reibold's affidavit, he states that attorney's fees should not be awarded to prevailing Plaintiffs unless they compromise their claims, in essence unless they accept less than what it would take to fully resolve Plaintiffs' claims. Defendant's counsel also ignores North Carolina's statute requiring Defendant to show that it reasonably tried to fully settle all of the claims against it. Mr. Reibold's statement attempts to shift the burden to Plaintiffs to show that Plaintiffs were willing to take less than what it would take to fully resolve Plaintiffs' claims in order for them

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<sup>19</sup> N.C.G.S. 75-16.1 Attorney's fees are allowed "upon a finding by the presiding judge that: (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; (Emphasis added.)

to be awarded attorney's fees. That is not the criteria.

122. Mr. Walker's Brief in Opposition to Plaintiffs' Motion for Attorney's Fees on page 13 claims that Plaintiffs' counsel's fees are excessive. Mr. Walker claims this case "was cookie cutter". This is a common theme used by Mr. Walker. He makes a broad statement about the facts or the law and then he leaves it to Plaintiffs to disprove his assertion. This causes opposing counsel to have to work more and deal with irrelevant issues. Consequently, the fees go up based on Defendant's conduct. In this argument, Mr. Walker tries to use similarities in the pleadings with two other cases that Plaintiffs' counsel is currently handling to buttress this position that the case was simple and did not require the work put into this case. Again, he simply makes the allegation and leaves it to current counsel to disprove his assertions.

123. While it is true I handle a number of fraud and UTPA cases, they are not cases that can be run through a mill like debt collection or foreclosure cases. In almost every case, the Defendant denies liability. The witnesses who know the truth are under the influence of the Defendant or are in league with the Defendant. These cases also tend to be document intensive requiring in depth analysis and corroboration. Many cases have to be proven by circumstantial evidence to a clear and convincing standard. The information needed is the same in most of the cases. That is why the requests for documents and other information in discovery is similar. What information is produced by a Defendant, what it means in the case, and how to find what is missing is not the same in each case.

124. Mr. Walker is simply attempting to bias the Court against an award of fees. Based on Mr. Walker's position, to correctly resolve this issue, the Court must now go

behind every case in which Mr. Walker claims I have run up fees, review material from those matters, ignore findings by other judges that my fees were proper and warranted, and then determine if fees in those other cases were warranted. In other words, his comments require mini trials on attorney's fees applications in those other cases that have already been or are yet to be resolved by other judges.

125. Mr. Walker fails to address his defense of this case as the cause of the amount of the attorney's fees. He does not mention the summary judgment motion and argument in October 2015 dealing with the North Carolina damage disclosure statute and the economic loss rule. At trial in April 2016, Defendant continued to make the same losing arguments to the Court. In fact, most of the directed verdict motion at the end of Plaintiffs' case was spent on that non-issue.
126. Even when Defendant had the opportunity to stipulate to the facts Nationwide would testify to, it refused to do so. At Nationwide's request, I prepared a stipulation of facts so I would be able to introduce how the Civic was damaged, Nationwide's estimate of repair, the photographs of the damaged Civic, and the value of the loss. (Exhibit 35.) Mr. Walker refused to consent to the stipulated information. Thus, I was required to subpoena a Nationwide representative and take up valuable judicial time and resources to present very simple testimony.
127. Mr. Walker was aware of North Carolina's punitive damages statute. He knew Defendant's exposure. Rhyne had been decided with a holding that the North Carolina punitive damages statute, which limits punitive damages to 3 times the actual damages or \$250,000.00 which ever is greater, satisfies constitutional Due Process requirements. Defendant just unreasonably believed a jury would not reach that level.

128. During this litigation, Mr. Walker did not mention any concerns about Due Process until the second day of trial when the Court raised the issue in chambers. It is hard to believe that had Due Process concerns been present, they would not have been mentioned before the middle of the trial. Defendant simply does not want to resolve this case, so it has raised another non-issue. This is just another example of Defendant's unwarranted refusal to fully settle the entire case.
129. In paragraph 16 of his affidavit, Mr. Walker, like Mr. Reibold, argues that Plaintiffs should have bid against themselves in an effort to settle this case. Mr. Walker makes no room for the possibility that North Carolina courts have read the punitive damages statute to not preempt Kuykendall. He then argues facts not raised or considered by Defendant until the time of trial, such as actual and reasonable reliance, which were not alleged as affirmative defenses.
130. Mr. Walker states in the last sentence of paragraph 16 that the issues regarding liability were enough for the Defendant to not have offered any money to settle this case. One can assume that if the case had been brought using South Carolina law, Midlands Honda would not have made any offer in the case. Because, North Carolina law requires settlement discussions to cut off an attorney fee application. Mr. Walker attempted to trap the Plaintiffs with the smallest offer he thought he could make to eliminate the fee issue as it pertains to the UTPA claim.
131. Further evidence that Defendant felt this was a minor case it would win at trial comes from the depositions of Mr. Threatt, Mr. Farrell, Mr. Austin and Ms. Watkins. Portions of these witnesses depositions were handed to the Court at the post trial motion hearing. (Exhibit 36, 37, 38, and 39.) These excerpts show neither Defendant nor defense counsel contacted these witnesses until approximately

March 2015, two years after the filing of this action and two months after Defendant sent its offer of judgment. In other words, Defendant did not care to know the facts during the litigation or when it proposed its settlement offer.

132. It was obvious to me that Midlands Honda had no intention of settling this case. It did not speak to its former employees until 2015. It did not try to inspect the vehicle until January 23, 2015. It did not actually inspect the car until June 19, 2015. After the inspection, Defendant's expert gave Midlands Honda bad news about the condition of the Civic. Based on that bad news, Defendant chose not to use an expert at trial. Even then Defendant, knowing how severe the damage was to the Civic, failed and refused to make any settlement offers to fully resolve this matter. It did not know what testimony Mr. Ecklund or ADESA would provide until July 2015. Thus, it did not have enough information to value properly the case at the time it sent its offer of judgment. After receiving additional information from each witness, Defendant failed to update its offer to settle. Instead, it relied on its ill-informed offer of January 27, 2015.

133. In paragraph 18 of his affidavit, Mr. Walker continues to admit he was only trying to settle exposure under the UTPA. Nowhere does he state that he valued any other claim or that his offers were to fully settle all of Plaintiffs' claims. Mr. Walker claims Defendant was "prepared to consider a reasonable counteroffer". Again, Mr. Walker makes a broad sweeping statement without any specifics. In other words, what is a "reasonable counteroffer"? He does not say. Is that a "reasonable counteroffer" under only the UTPA? In essence, Mr. Walker is again stating that Plaintiffs had to continue reducing their demand until they got to a level satisfactory to Defendant before Defendant would negotiate full settlement of the case. Of



course, we have no idea what those figures are as they have not been provided by Mr. Walker.

134. In paragraph 24 of his affidavit, Mr. Walker states that on April 7, 2015 he reached out to me about contacting a mediator. His initial contact requested the Parties' consent to continue the case so he could spend time with his girlfriend and his son. (Exhibit 26.) I had no objection. To receive a continuance, the Parties had to have a status conference with Judge Manning, the Chief Administrative Judge. On April 7, Mr. Walker sent a letter to Judge Manning asking for a status conference. He did not mention anything about mediation. (Exhibit 27.) During the day, Mr. Walker and I emailed each other regarding our schedules. (Exhibit 28.) In one email, Mr. Walker mentioned trying to agree on a mediator simply to be prepared for the status conference with Judge Manning. There was no urgency in his mentioning of mediation. He suggested two mediators I was not familiar with. I could not agree at that moment as I was not sure whether these men could help move the case forward. (Exhibit 40.)
135. Additionally, scheduling a mediation then was problematic as I still had not been able to depose Mr. Threatt, Mr. Farrell, Mr. Austin or Ms. Watkins. It appeared their depositions might be put off even further.<sup>20</sup> Additionally, I was in negotiations with

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**Austin**

January 8, 2015 @ 1:00pm (rescheduled)  
January 28, 2015 @ 12:30pm (rescheduled)  
April 10, 2015 @ 3:00pm (conducted)

**Farrell**

January 8, 2015 @ 3:00pm (rescheduled)

**Threatt**

January 9, 2015 @ 9:00am (rescheduled)  
January 28, 2015 @ 1:30pm (rescheduled)  
April 10, 2015 @ 1:00pm (rescheduled)  
April 23, 2015 @ 2:00pm (conducted)

**Watkins**

Nationwide regarding settlement. Whether Nationwide was still in the case may have influenced who I thought would be a good mediator for this case.

136. On April 9, 2015, Mr. Reibold attended the status conference in person. Sean Cox and I tried to attend by phone. Judge Manning did not hold the status conference as he has a rule that only one party may attend by phone.
137. On April 10, 2015, Mr. Walker notified Judge Manning of the conflicts in his schedule. Mr. Walker never mentioned mediation as a basis to continue the case or that he thought mediation was needed. (Exhibit 29.)
138. In June and July 2015, I was trying to depose Mr. Ecklund and ADESA Auto Auction for use at trial. Without having their testimony, mediation would have been difficult. While Mr. Walker discussed mediation on July 6, 2015, it was clear that he was interested in mediating to avoid issues with the Court not in earnest negotiations. (Exhibit 41.)
139. On July 8, 2015, without consulting me as required by Rule 11, Mr. Walker filed his motion to compel arbitration.
140. On July 10, 2015, when I received the motion, I contacted a lawyer in Columbia who does consumer law. He recommended Thomas Lydon, a defense lawyer with McAngus Goudelock & Courie in Columbia, as he has experience as a Plaintiff's and a defense lawyer in consumer matters. I hoped that Mr. Lydon would be able to persuade Defendant to make significant offer to settle this matter.

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January 28, 2015 @ 3:30pm (rescheduled)

April 10, 2015 @ 4:00pm (conducted)

April 10, 2015 @ 10:00am (rescheduled)

April 23, 2015 @ 11:00am (conducted)

141. On July 10, 2015, I contacted Mr. Lydon's office to see if he had any availability to mediate this matter, but I had to leave a message.
142. On July 13, 2015, I called Mr. Lydon again. He stated he could mediate the case on August 3 or 4.
143. On July 16, 2015, I notified Mr. Walker of Mr. Lydon's availability. (Exhibit 30 and 31.) I received an auto-response stating Mr. Walker was out of town from July 9-16. (Exhibit 32.)
144. I called Mr. Walker on July 17 and he agreed to mediate the case on August 4. We also agreed to depose Mr. Ecklund prior to the mediation.
145. Mr. Walker now seeks to use the August 4 mediation to support his argument that Defendant made reasonable settlement offers. This is improper for 2 reasons, first, the ADR rules make mediation discussions confidential. Second, Defendant seeks to use that confidential process against Plaintiffs, implying it made great settlement offers during the mediation. This argument is much like claiming during trial that a Defendant has made an offer to settle to show Defendant admits liability. Had Defendant sought to use its settlement offer at this stage of the trial, it could have and should have renewed its offer after the mediation. Instead, it chose to rest on its one and only offer of \$15,000 and reasonable attorney's fees. As stated, Defendant has refused to attempt to fully resolve this matter after January 2015 and even after being invited three times by the Court to try to settle this matter. The implication is that Defendant's mediation offer was no better than its prior offer of judgment.
146. Defendant seeks to introduce evidence of negotiations during the mediation of this case. There was no record made of the settlement offers. Based on Defendant's

dispute of the facts in this case, it is very likely that Defendant will claim it offered amounts that may or may not have been passed on to Plaintiffs. As a result, the Court may have to contact the mediator to find out the true status of the offers made. The ADR rules were designed to prevent this type of occurrence.

147. The court in Printing Services v. American Cap. Group, 637 S.E. 2d 230, 180 N.C. App. 70 (N.C. App. 2006) agreed that there was some evidence that the Defendant had attempted to resolve the matter; however, "any attempt was only in partial satisfaction of defendant's obligations under the Loan Broker Act." Id. at 236. Although the court cited several examples of the defendant's failure to fully resolve the matter, the most telling was the fact that "resolution [of the dispute between the parties] could have been had for less than \$1,447.72." As in Printing Services, Defendant's offer was, at best, a partial settlement of Plaintiffs' UTPA claim. North Carolina says the settlement attempts must be to fully resolve the matter. This matter could have been settled for \$5,200 when Mr. Whitley initially demanded the return of his money. Defendant refused to fully resolve this case by offering enough money.

148. Defendant's economic loss rule defense has been a red herring since July 2015. This rule does not apply to fraud and UTPA claims. In Tradewinds Airlines, Inc. v. C-S Aviation Services, 733 S.E.2d 162 (N.C. App., 2012), the court found that the economic loss rule does not apply to fraud and UTPA claims. The court provided three reasons for this conclusion. "First, an unfair trade practices action 'is neither wholly tortious nor wholly contractual in nature[.]' Bernard, 68 N.C. App. at 230, 314 S.E.2d at 584. It is therefore not controlled by the four specific exceptions to the prohibition of bringing a tort claim in the context of a breach of contract action. Ports

Authority, 294 N.C. at 82, 240 S.E.2d at 350–51. Second, our Courts have allowed a Plaintiff to maintain a Chapter 75 action based upon fraudulent inducement of a contract. Media Network, 197 N.C. App. at 453, 678 S.E. 2d at 684. Third, as discussed in Section III E of this opinion, where there is fraud in the inducement, defenses based upon the contract are not applicable.”

149. In Tradewinds, Section III E states, “Where there is a claim for fraud in the inducement, defenses based upon the fraudulently induced contract will not bar the claim. In Laundry Machinery Co. v. Skinner, 225 N.C. 285, 34 S.E.2d 190 (1945), our Supreme Court held that parol evidence could be introduced in contravention of an integration clause in a contract, where there was fraud in the inducement, which “vitiates the contract.” Laundry Machinery Co., 225 N.C. at 288–89, 34 S.E.2d at 192–93; accord Godfrey, 165 N.C. App. 68, 598 S.E.2d 396.” Tradewinds Airlines, Inc. v. C–S Aviation Servs., 733 S.E.2d 162 at 169-170 (N.C. App. 2012).
150. Defendant’s continuous argument to the Court regarding the economic loss rule wastes time and judicial resources. Bringing it up again and again only serves to line the pockets of defense counsel.
151. In Appendix 3 of his Brief Opposing Attorney’s Fees, Mr. Walker asserts that any work done regarding punitive damages should not be included as part of the Court’s award of attorney’s fees. The law does not support this position.
152. South Carolina<sup>21</sup> and North Carolina<sup>22</sup> recognize that when the facts, issues and

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<sup>21</sup> Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 57 691 S.E.2d 135, 153 (2010)

<sup>22</sup> Whiteside Estates, Inc. v. Highlands Cove, L.L.C., 146 N.C. App. 449, 467, 553 S.E.2d 431, 443 (2001) (explaining that where all claims “arise from the same nucleus of operative facts and each claim was inextricably interwoven with the other claims, apportionment of fees is unnecessary” (citation and quotation marks omitted)), appeal dismissed and disc. review denied, 356 N.C. 315, 571 S.E.2d 219 (2002); see also Currituck Club Prop. Owners Ass’n, Inc. v. Mancuso Dev., Inc., 768 S.E. 2d 200 (N.C. App. 2014).

claims are so intertwined they cannot be separated, fees are awardable for all the time spent on the case.

153. The burden is on Defendant to prove what time is not recoverable. Again Defendant simply makes a statement without any support. In this instance, Defendant expects the Court to do its work and parse out what time should be deducted from the various contested entries. Defendant has not given the Court any guidance as to how much time has been spent on these items. Since Defendant has failed to provide the required information, its request should be denied.
154. In Appendix 4 of his Brief Opposing Attorney's Fees, Mr. Walker attempts to reduce the fees owed by Midlands Honda by trying to attach Nationwide to the disputed time. The South Carolina Supreme Court in Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992) held "when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding." I have excluded the time related to the claims against Nationwide that could be separated.
155. The time set forth in Appendix 4 relates to investigating the case to understand what happened to the Civic, time intertwined preparing the complaint, discussing the matter with the Court, preparing my clients to testify regarding the facts of the case, not simply as their testimony relates to one Party, being present when my clients testified regarding the facts that are the basis of the suit against Midlands Honda,

determining damages, and communicating with both Defendants simultaneously. Defendant again makes an assertion that because Nationwide had some contact with the time I spent on the case, Defendant should get a reduction of 50% of the fees incurred. Once again, Defendant makes an assertion without any legal support for it. Since the facts, issues, and claims were so intertwined as to not be divisible, the Court should award the full amount requested.

156. In Appendix 5, Defendant tries to exclude my travel time. Under North Carolina law, travel time is 100% compensable. Travel time is compensable at the lodestar hourly rate. Spell v. McDaniel, 616 F. Supp. 1069, 1099 (E.D.N.C. 1985) rev'd on other grounds 824 F.2d 1380 (4th Cir. 1987). The Court in Spell stated and held with respect to travel time involving counsel: "Any argument that travel, per se is uncompensable is incorrect. Counsel retained by clients who pay on a regular hourly basis customarily charge for travel time ... should be treated no differently. Craik v. Minnesota State University Board, 738 F.2d at 350. As Judge Posner recently stated for the Seventh Circuit in Henry v. Webermeier, 738 F.2d 188, 194 (1984): When a lawyer travels for one client he incurs an opportunity cost that is equal to the fee he would have charged that or another client if he had not been traveling. That is why lawyers invariably charge their clients for travel time and usually at the same rate they charge for other time ... And if they charge their paying clients for travel time they are entitled to charge the Defendants for that time in a case such as this where the Plaintiffs have shown a statutory right to reasonable attorney's fees ... the presumption ... should be that a reasonable attorney's fee includes reasonable travel time billed at the same hourly rate as the lawyer's normal working time."

157. North Carolina continues to use the Spell rationale.<sup>23</sup>
158. Numerous courts take the same position as North Carolina.<sup>24</sup>
159. Furthermore, Defendant does not understand what travel was involved in this case. On November 14, 2013, Plaintiffs came to Charleston to meet with me. I had a second office at the time which offered more space. I drove from one office to the other. Travel time between these offices is approximately 10 minutes, not 3.5 hours.
160. On July 27, 2015, I drove to Charlotte so I could be at the ADESA representative's deposition at 10:00AM. Travel was necessary as ADESA would not send a representative to Columbia for the trial. To have its testimony, I had to take its deposition for use at trial.
161. On July 28, the date of the contested time, I drove from my hotel to ADESA's attorney's office where the deposition took place. Since I was deposing ADESA, I

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<sup>23</sup> Irwin Industrial Tool Company et al v. Worthington Cylinders Wisconsin, LLC et al, No. 3:2008cv00291 - Document 334 (W.D.N.C. 2010)

<sup>24</sup> Rose v. Heintz, 671 F. Supp. 901, 903 (D. Conn. 1987) (awarding 100% of an attorney's time spent traveling because the request was modest, and the representation so able and successful, that it would "denigrate the judicial process to expend public funds on a further quibble over this amount to which she is so clearly entitled"). See also, McInnis v. Town of Weston, 458 F. Supp. 2d 7, 21 (D. Conn. 2006). Haak v. Hulst Ford-Mercury, Inc., 79 F. Supp. 2d 1020, 1022 (W.D. Wis. 1999) (The presumption is that a reasonable attorney's fee includes reasonable travel time billed at the same hourly rate as the lawyer's normal working time.) Pearson v. Green Tree Servicing, LLC, 2015 WL 632457, at \* 9 (N.D. Cal. 2015) (holding generally, courts in this [9th] Circuit do not compensate travel time at a lower rate than time billed for other tasks, so long as the travel time is considered reasonable.) See, e.g., Defenbaugh v. JBC & Assocs., 2004 WL 1874978, at \* 12 (N.D. Cal. 2004) (compensating travel time at full professional rate); Ilick v. Miller, 68 F. Supp. 2d 1169, 1178 (D. Nev. 1999) (compensating travel time at the full professional rate because attorneys are entitled to bill for lost productivity during travel, but limiting billable travel time to six hours within any 24-hour period, for "in the court's experience, most attorneys would be satisfied with six hours of billable time at the end of any working day"); Allen v. City of Los Angeles, 1995 WL 433720, at \* 10 (C.D. Cal. 1995) ("The Court does not believe an arbitrary percentage reduction on all hours claimed for travel is appropriate. Rather, the Court has either allowed or disallowed travel time depending upon the purpose for the travel."). Matter of Pine, 705 F.2d 936, 938 (7th Cir. 1983) (Travel time involves an opportunity cost which is approximated by the lawyer's normal billing rate multiplied by the time spent in travel.). In re Raytech Corp., 241 B.R. 785, 789 (D. Conn. 1999) (court is to determine whether attorneys in the relevant market or community are customarily compensated by their clients at their full hourly rate for such travel time.); Crumbaker v. Merit Systems Protection Board, 781 F.2d 191, 193-94 (Fed. Cir. 1986) (reasonable travel time should be compensated at the same rate as other working time).



had to be there. While I was there, I meet with my clients, inspected the Civic, and spoke to Brian Allen, my expert. Afterwards, I drove back to Charleston. Thus, that travel time was necessary.

162. On April 17, 2016, I drove to Columbia so I could be on time for the docket sounding on April 18. My travel on April 18, the date of the contested time, was from my hotel to the court house, approximately 15 minutes, not 1.75 hours.
163. On April 22, 2016, I drove home after the trial. This time was necessary as it was not necessary for me to stay in Columbia.
164. Certainly, Mr. Walker charged for his travel time. Should the Court have questions about this, it should require Mr. Walker to produce his time records so the Court may determine if he charged for traveling.
165. Defendant's appendices seek to double dip on cutting my time. Defendant has included the following, which if followed, would effectively nullify my time spent on these dates. This is not a correct application of the law and it is not appropriate to receive such a double deduction.

| Date     | Time | Appendix 4                                                                  | Appendix 5                                                |
|----------|------|-----------------------------------------------------------------------------|-----------------------------------------------------------|
| 11/14/13 | 7    | Defendant claims time should be split between Midlands Honda and Nationwide | Defendant claims 3.5 hours travel time should be removed. |
| 11/19/13 | 8.3  | Defendant claims time should be split between Midlands Honda and Nationwide | Defendant claims 3.5 hours travel time should be removed. |

#### **AWARD OF COSTS**

166. Defendant objects to an award of costs, however, N.C.G.S. 7A-305(d) states: "The following expenses, when incurred, are assessable or recoverable, as the case may

be. The expenses set forth in this subsection are complete and exclusive and constitute a limit on the trial court's discretion to tax costs pursuant to G.S. 6-20:

- (1) Witness fees, as provided by law.
- (2) Jail fees, as provided by law.
- (3) Counsel fees, as provided by law.
- (4) Expense of service of process by certified mail and by publication.
- (5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
- (6) Fees for personal service and civil process and other sheriff's fees, as provided by law. Fees for personal service by a private process server may be recoverable in an amount equal to the actual cost of such service or fifty dollars (\$50.00), whichever is less, unless the court finds that due to difficulty of service a greater amount is appropriate.
- (7) Fees of mediators appointed by the court, mediators agreed upon by the parties, guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
- (8) Fees of interpreters, when authorized and approved by the court.
- (9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.
- (10) Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.
- (11) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.
- (12) The fee assessed pursuant to subdivision (2) of subsection (a) of this section upon assignment of a case to a special superior court judge as a complex business case."

167. Defendant should be held responsible for Plaintiffs' costs under paragraphs 1, 3, 4, 6, 7, 10, and 11, as it is the Defendant's actions which caused this suit to begin with

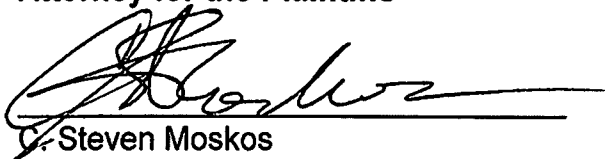
and which caused this case to go to trial.

## **CONCLUSION**

168. Defendant has repeatedly refused to fully settle this matter since Mr. Whitley called Mr. Farrell in the fall of 2010. The time line is replete with opportunities for Defendant to resolve this matter, however, it unjustifiedly believed its worse day in court would be approximately \$40,000, actual damages of about \$4,000 and no more than nine times actual damages as punitive damages. Defendant chose to roll the dice. It lost.
169. The UTPA law in North Carolina, which is the law the Defendant demanded be used, says that a losing Defendant is responsible for a Plaintiff's attorney's fees if there was an unwarranted refusal to fully settle the matter. Midlands Honda's refusal to properly value this case and resolve it accordingly makes it liable for the fees requested by Plaintiffs.
170. Defendant has requested offsets that are not allowed by North Carolina law. Such requests should be denied.
171. Had Defendant paid \$280,000, this matter would not have gone to Court. Defendant, however, controls its purse strings. It chose to make an unreasonable offer. It decided to stop negotiating a settlement. It chose to pay its lawyers instead of Plaintiffs. It is now responsible for Plaintiffs' attorney's fees.
172. I would ask the Court to use its discretion to award as costs the full amount of attorney's requested as well as the time incurred through the supplemental attorney's fee application.

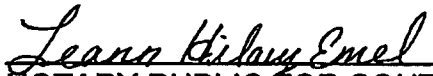
C. STEVEN MOSKOS, P.A.  
Attorney for the Plaintiffs

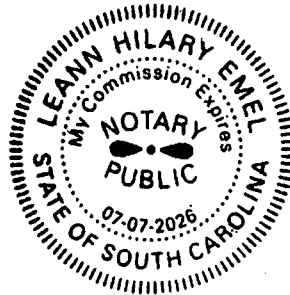
BY:



C. Steven Moskos  
4000 Faber Place Drive, Suite 300  
N. Charleston, SC 29407  
Telephone: (843) 763-5297  
Email: csmoskos@earthlink.net

SWORN TO BEFORE ME THIS  
30 DAY OF August 2016.

  
NOTARY PUBLIC FOR SOUTH CAROLINA  
MY COMMISSION EXPIRES: 07/07/2026



# C. STEVEN MOSKOS, P.A.

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March 7, 2012

Walker & Reibold, LLC  
Attn: Robert Reibold  
P. O. Box 61140  
Columbia, SC 29260

**Re: Henderson v. Summerville Ford-Mercury, Inc. and Capital One Auto Finance, Inc.**

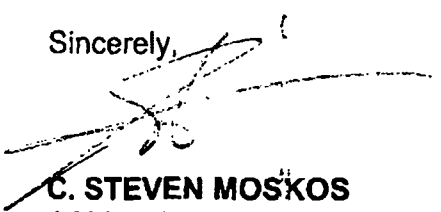
**Case No: 09-CP-18-111**

Dear Rob:

Please be advised that I have received your client's notice of intent to appeal. Please understand that we take this as a frivolous appeal. Should the Court of Appeals affirm the lower court's ruling, we will be applying for attorney's fees under the UTPA. Ms. Henderson has been trying to resolve this matter with Summerville Ford for years. For what ever reason, Summerville Ford has fought her every step of the way. Now that it has paid, it is continuing this litigation, costing Ms. Henderson more time, money and aggravation. Please inform your client that when the Court of Appeals affirms Judge Dickson's Order, it will then face a fee petition from Ms. Henderson. Surely, Summerville Ford must be tired of paying lawyers, but, if not, it can continue the litigation as it sees fit. It just needs to be aware of the ramifications.

If you have any questions, please do not hesitate to contact me.

Sincerely,



**C. STEVEN MOSKOS**  
CSM/aml

cc: Diane Henderson

Exhibit 1

**LAW OFFICE OF BROOKS R. FUDENBERG**

1004 Anna Knapp Blvd., Suite 3

Mt Pleasant, SC 29464

Tel. (843) 416-2558

BRF@Fudenberglaw.com

September 30, 2013

Robert Reibold, Esq.  
Walker Reibold  
Post Office Box 61140  
Columbia SC 29260

VIA EMAIL

Dear Rob,

Re: Henderson, Diane, Respondent, v. Summerville Ford-Mercury, Inc., Appellant  
Appellate Case No: 2012-207606

It was good speaking with you today. Per your request, I am putting into writing a brief summary of the reasons that Steven Moskos and I plan to request the lower court to award us our fees and costs for the appeal, and for the time Mr. Moskos spent preparing for, writing a memorandum regarding, and appearing at the hearing on the motion to confirm the arbitral award.

It is clearly established in South Carolina that where a statute awards attorney fees, all fees relating to the matter are to be awarded. This rule specifically applies to appellate fees and to fees incurred in seeking a fee award.

See McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991), wherein the Supreme Court held it was reversible error for a lower court to refuse to award such fees.

There, the Supreme Court stated (emphasis added),

Third, the trial judge held appellant was entitled only to \$ 750 for the appeal under Supreme Court Rule 38.<sup>2</sup> Rule 38, however, does not preempt an award of attorney's fees to which one is otherwise entitled. We reverse the trial judge's ruling and hold appellant is entitled to attorney's fees under § 15-77-300 for fees incurred on appeal.

The Court reiterated,

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<sup>2</sup> "Now Rule 222, SCACR."

(Footnote is the Court's).

Exhibit 2

Mr. Robert Reibold

9/30/13

p. 2

Finally, appellant is entitled to attorney's fees under § 15-77-300 for this litigation and appeal seeking to secure such fees.

Thus, were your client to fight us on fees, it would become responsible for the fees we will incur in that fight as well, in addition to any fees you were to charge.

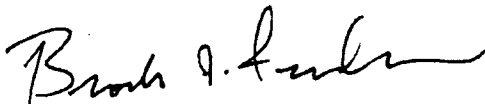
Our fees would include preparing the motion and a full-fledged memorandum; preparing for any hearing on the fees issue; travel time to and from the hearing, which will most likely be at the Dorchester County Courthouse in St. George, appearing at the hearing, and so. This would be in addition to any time you spend researching and drafting a return to our memorandum, your travel to the Courthouse and so on; and any time we spend drafting a reply memorandum.

If we do have litigation regarding our fees, one of two things will happen. Your client will win or we will win. If we win, your client will have spent thousands of dollars for nothing. If your client wins, we will appeal – resulting in another appellate decision reminding people of the way Summerville Ford treated Ms. Henderson and her teenage daughter.

If your client agrees not to fight us on fees, we will of course not incur those charges and there will not be another appeal of this matter. We will put our efforts on hold to give your Client two days from the date of this letter to inform us whether it agrees. If additional time is required, please so inform us.

Thank you.

With kind regards,



Brooks R. Fudenberg

enc.: McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991)

cc: C. Steven Moskos, Esq.  
Ms. Diane Henderson

|                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                        |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>STATE OF SOUTH CAROLINA<br/>COUNTY OF DORCHESTER</p> <p><b>Diane R. Henderson</b><br/>f/k/a Diane M. Reed,<br/>Plaintiff,</p> <p>vs.</p> <p><b>Summerville Ford-Mercury, Inc.</b><br/><b>and Capital One Auto Finance,</b><br/><b>Inc.,</b><br/>Defendants.</p> | <p>IN THE COURT OF COMMON PLEAS<br/>FOR THE FIRST JUDICIAL CIRCUIT<br/>CASE NO. 09-CP-18-111</p> <p><b>Order Granting Plaintiff's<br/>Motion for Statutory Attorney<br/>Fees and Costs</b></p> <p><i>Diane Henderson</i><br/>CLERK OF COURT<br/>DORCHESTER COUNTY</p> <p>2014 OCT -6 PM 4:37</p> <p>CERTIFIED COPY</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

This matter came before me for a hearing on February 18, 2014 in the Dorchester County Courthouse. After due deliberation, review of the memoranda, case law, exhibits and arguments of counsel, I hereby grant the Plaintiff's Motion for Statutory Fees and Costs.

### I. BACKGROUND

On October 25, 2006, Plaintiff Diane Henderson ("Customer") went to the sales lot of Defendant Summerville Ford-Mercury, Inc. ("Dealer") to buy a vehicle for her teenage daughter. Dealer sold Ms. Henderson a previously-wrecked vehicle even though Ms. Henderson had repeatedly stressed the need for something safe and reliable. Ms. Henderson brought suit in this Court, further alleging the vehicle had been presented as a single-owner vehicle, when in reality it was a multiple-owner, former commercial rental. Dealer successfully moved to compel arbitration and to stay the matter in this court. The arbiter found that Dealer had violated both the South Carolina Unfair Trade Practices Act and the South Carolina Dealer's Act, each of which forbid deceptive practices by car

Exhibit 3



dealerships.<sup>1</sup> Dealer promptly paid the award. Ms. Henderson requested Dealer consent to the confirmation of the award by the Court. Dealer refused. Ms. Henderson moved to confirm the award. Dealer opposed the motion, arguing that confirmation automatically turns the award into a judgment of the court, and it did not want its name tarnished in the record.

This Court confirmed the award. Dealer appealed. The Supreme Court certified the case pursuant to Rule 204, SCACR. It unanimously affirmed.

Following the Supreme Court remittitur of September 27, 2013, the parties then litigated before me the matter of Plaintiff's entitlement to statutory fees and costs, via hundreds of pages of memoranda and exhibits, arguments of counsel at the hearing, and numerous emails to this Court.

## II. MERITS

### A. The Entitlement to Fees and Costs

This matter was "stayed pending arbitration." Arbitration concluded after the arbiter entered his award, lifting the stay and bringing this matter back within the jurisdiction of this Court. Plaintiff sought confirmation, and Dealer chose to oppose rather than consent to confirmation. This Court confirmed the award and Dealer appealed. The Supreme Court eventually affirmed this decision. Plaintiff's counsel

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<sup>1</sup> The South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. Sections 39-5-10 to -560, forbids "unfair or deceptive acts or practices in the conduct of any trade or commerce," *id.*, Section 20. The South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealer's Act"), codified at S.C. Code Ann. Sections 56-15-10 to -600, bans "unfair or deceptive acts or practices" on the part of automobile dealers specifically, *id.*, Section 30, including acts that are arbitrary, in bad faith, or unconscionable, *id.*, Section 40.

continued to represent Ms. Henderson's interests throughout the process, as they would be expected to do, and are therefore entitled to compensation for their efforts.

Since arbitration has concluded, the matter of awarding attorney's fees is rightfully before this Court. This Court rules accordingly, that "[u]pon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." S.C. Code Ann. § 39-5-140(a).

An arbitration clause does not preclude this statutory provision, and this Court will award such fees for the entire representation of the claim. Dealer pursued this claim all the way up to the appellate courts, and should not be surprised that Plaintiff's counsel would defend the claim to protect Ms. Henderson, as well as the public's interest in condemning unfair trade practices. Therefore, Ms. Henderson is entitled to reasonable attorney's fees and costs from Dealer.

#### **B. The Amount Of The Awards**

I am awarding \$184,230.00 in fees and \$2,583.67 in costs. As explained below, I find that, with two exceptions, Plaintiff's attorneys have substantially justified their hours and their rates are in keeping with those charged by other members of the Bar. However, I decline to award a multiplier. Further, the parties agree that Dealer is entitled to a credit of \$1,095.91 for funds already paid pursuant to the Supreme Court order on Rule 222 fees.

In determining reasonable attorney fees, a court should consider six factors:

(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5)

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beneficial results obtained; and (6) customary legal fees for similar services. Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997).

### **1. Nature, Extent and Difficulty of the Legal Services Rendered**

This is a consumer arbitration case, brought pursuant to the UTPA and the Dealer's Act. Litigation occurred in four stages: the initial dispute about Dealer's wrongdoing; the proceedings in this Court to confirm the award; the appeal to the Court of Appeals of the Circuit Court's decision, followed by Supreme Court certification; and the current litigation regarding fees and costs. Fees are awarded here for the final three stages.

The litigation concerning confirmation before the circuit court and before the Supreme Court involved a novel issue of law, requiring nationwide research and analysis,<sup>2</sup> and subsequently, there was a hard-fought battle over fees. This recent litigation over fees involves numerous issues, including challenges by Dealer to 100

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<sup>2</sup> Among the issues litigated on appeal (with some overlap among the various issues) were: (1) whether Dealer's desire to keep the judgment out of the Court's records, in order to preserve its image and in order to stymie future UTPA plaintiffs who could utilize the finding to establish an element of an UTPA cause of action, counted in its favor or against it; whether Ms. Henderson had standing to represent the countervailing interests of the general public in learning of the Dealer's adjudicated wrongdoing, and whether she had standing to represent the more specific interests of future UTPA litigants, due to the UTPA's ban on litigation in a "representative" capacity; (2) whether the Dealer's proposed alternative of a mandatory dismissal under Rule 41(a), SCRCP was appropriate; (3) whether the South Carolina Uniform Arbitration Act or the Federal Arbitration Act applied, as Federal law would apply unless State law confirmation was (a) procedural, and (b) not in conflict with or undermining the purposes of the FAA; (4) whether Ms. Henderson had waived her right to argue that, if the FAA applied, confirmation would still have been proper; (5) whether the Dealer had waived any claim for reversal if the FAA applied, due to its argument that the Court need not reach the question of whether confirmation was appropriate under the FAA; (6) whether the analysis was identical under the two acts; (7) whether a court could, in its discretion, decline to confirm an award because it had already been satisfied; (8) whether the initial finding of justiciability for the underlying case sufficed to confer justiciability on the confirmation motion; (9) whether confirmation was purely ministerial, thus mooted any requirement for justiciability; (10) whether Dealer's arbitration clause contained the requisite language that would allow for any confirmation, even if it refused to pay the award; (11) the weight, if any, to be given to the apparent majority of jurisdictions that had decided the "mootness" issue in a manner favorable to Dealer; and (12) whether the Dealer had in fact deceived Ms. Henderson.

specific time entries of Plaintiff's counsel, challenges to entire categories of work, and challenges to Plaintiff's entitlement to any statutory fees or costs at all.

**2. Time and Labor Necessarily Devoted to the Case**

After reviewing the submissions regarding costs and fees, it appears that Plaintiff's counsel have accurately reported, and substantially justified their hours, except for those for which they admit they cannot provide sufficient detail. Those entries are to be deducted from the total of each attorney's time sheets. (0.1 from Mr. Fudenberg and 0.3 from Mr. Moskos). I thus find Plaintiff entitled to compensation for 433.2 (433.3-0.1) hours for Mr. Fudenberg and 180.9 (181.2-0.3) hours for Mr. Moskos.

**3. Professional Standing of Counsel**

I find that Mr. Fudenberg and Mr. Moskos are respected members of the South Carolina Bar. Mr. Fudenberg was graduated from law school 24 years ago and has been a member of the South Carolina bar for more than a decade. Mr. Fudenberg's practice consists largely of appellate and similar matters brought to him by other attorneys in South Carolina and other states; he is also a published constitutional scholar. Mr. Moskos has been a member of the South Carolina Bar for twenty-eight years, and is highly experienced in vehicle sales litigation. His practice consists largely of such cases which are referred to him by attorneys throughout South Carolina. This team was highly qualified to handle this litigation.

**4. Contingency of Compensation**

Ms. Henderson provided an unchallenged affidavit stating that she would have been unable to afford to hire attorneys to pursue the matters at issue here, see Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991) (contingency of compensation refers

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to whether the party for whose benefit the services were rendered could have afforded to pay her attorneys without fee-shifting), and Dealer has not challenged the truth of her affirmation. The case was thus contingent in this respect.

#### **5. Customary Fees for Similar Legal Services**

The rates charged by Plaintiff's counsel, \$300 an hour, appear to be reasonable and in line with customary legal fees for similar services rendered by other members of the Bar, so the Court will not make any adjustment in that respect.

#### **6. Beneficial Results Obtained**

Plaintiff's counsel prevailed at every stage, and did so unanimously at the Supreme Court on every question reached by that Court.<sup>3</sup> They also prevailed on

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<sup>3</sup> Noting that "This is a novel question in this state," 405 S.C. 440, 451, and "a matter of first impression," id. at 444, the Supreme Court unanimously agreed with Ms. Henderson in result, and on every issue it reached. On the question of which jurisdiction's law applies, state or federal, the Court agreed with Ms. Henderson that confirmation was procedural, id. at 448-451; that confirming paid awards did not conflict with or undermine the purposes of the FAA, id., and thus state law applied; id. at 450. On the question of whether Dealer's arbitration clause contained the language necessary to allow any confirmation, even of unpaid awards, the Court agreed with Ms. Henderson. Id. at 451. On the questions of whether the analysis would be identical under the law of either jurisdiction, and whether confirmation would have been proper even under the FAA, the Court agreed with Ms. Henderson. Id. at 450 (outcome the same); at 452-54 (outcome would be in favor of Ms. Henderson). On the question of whether Rule 41, SCRCP, was the proper vehicle for resolving this matter, the Court agreed with Ms. Henderson that it was not. Id. at 451. On the question of whether the only purpose for confirmation of an award is to obtain a judgment for enforcement purposes, the Supreme Court agreed with Ms. Henderson that it was not. Id. at 452.

On the question of whether confirmation is a separate judicial process requiring separate justiciability apart from the underlying dispute, the Court agreed with Ms. Henderson that it was not. Id. It further agreed that under the relevant statutes confirmation is ministerial, thus mooting any requirement for justiciability, id. at 453.

It further held that confirmation is mandatory, and thus that this Court could not properly have refused to confirm the award even had it otherwise been so inclined. Id. at 454.

The Court found it unnecessary to rule on two sets of issues, stating as to the first of these, "We find Dealer's arguments as to how the confirmation and entry of a judgment here could potentially be used by other parties asserting UTPA claims is irrelevant to the award's confirmation," id. at 454; and as to the second, stating that Dealer may have inadvertently waived its claim for reversal if the FAA did apply, thus making the question moot, id. at 447-48; but deciding the merits of the issue rather than resolving the preservation question, id. at 448-51.

substantially all the questions raised before me, with the exception of the multiplier. I find that Plaintiff's counsel obtained beneficial results.

However, this Court does not believe a multiplier is appropriate. In Layman v. State, the Supreme Court stated that a "lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended" on the case. 658 S.E.2d 320, 376 S.C. 434 (2008). The Court then went on to say that a multiplier would be added due to the "exceptional circumstances" of the case. Id. at 334. This court finds that this case does not present the exceptional circumstances present in cases allowing a multiplier. This Court recognizes that this case presented novel issues, as well as commends the efforts and success of counsel all the way up to the Supreme Court. However, this Court finds that the "novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee." Blum v. Stenson, 465 U.S. 886, 898 (1984). Therefore, this Court finds that a multiplier shall not be applied to the attorney's fees in this case.

#### **Costs**

Pursuant to S.C. Code Ann. §39-5-140(a), the prevailing party in an unfair trade practices claim shall be awarded not only reasonable attorney fees but also costs. See also Rule 54, SCRCP. Via her filings, Ms. Henderson has documented \$2,583.67 in reasonable costs.

I thus find that Ms. Henderson is entitled to \$184,230.00 in fees, after the deductions mentioned above, and \$2,583.67 in costs. Since the parties agree that Dealer is entitled to a credit of \$1,095.91 previously paid pursuant to the Supreme Court Order

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on Rule 222, SCACR, fees and costs, I find that Ms. Henderson is entitled to \$183,230.00 in fees and \$2,487.76 for costs. Therefore, it is,

Ordered that the Clerk of Court enter judgment against Dealer in the amount of \$185,717.76.

**AND IT IS SO ORDERED!**

  
Edgar W. Dickson  
Judge, First Judicial Circuit

*September 19*  
August, 2014

8/18 

# C. STEVEN MOSKOS, P.A.

Attorney and Counselor at Law

C. Steven Moskos  
Board Certified Civil Trial Attorney  
Board Certified Civil Pretrial Advocate  
By the National Board of Trial Advocacy  
Board Certified Circuit Court Mediator

M

4000 Faber Place Drive, Suite 300  
North Charleston, SC 29405  
Telephone: (843) 763-5297  
www.moskoslawfirm.com  
csmoskos@earthlink.net

January 29, 2016

Hoover Chrysler Jeep  
Attn: General Manager  
195 Marymeade Dr.  
Summerville, SC 29483

## SETTLEMENT DEMAND

Re: Richard M. Allen  
VIN: 1J4RS5GG5BC577734  
Date of Purchase: 11-2-13

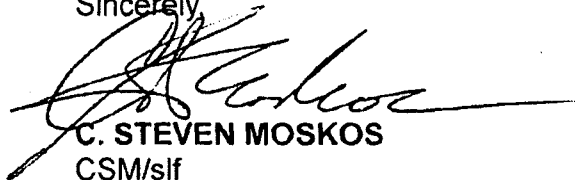
Dear Sir:

Please be advised that I represent Mr. Allen regarding the above referenced Jeep. This vehicle was wrecked prior to Mr. Allen purchasing it. It is our understanding that Hoover's employees knew about the prior wreck damage to the driver's side of the Jeep before the Jeep was sold to Mr. Allen. Hoover's employees, when asked, told Mr. Allen it had never been wrecked. This conduct violates the South Carolina Dealers Act. Therefore, we are making a demand that Hoover pay five times \$30,489.50, the purchase price of the vehicle, and pay his attorney's fees. This is an effort to settle this matter prior to filing suit. Please direct all future communications to me and not Mr. Allen.

Additionally, if you have not done so already, please cancel the Zurich service contract associated with this vehicle.

If you have any questions, please do not hesitate to contact me.

Sincerely,

  
C. STEVEN MOSKOS  
CSM/slf

cc: Richard M. Allen

Exhibit 4



# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803)454-0955

Fax (803)454-0956

[cwalker@walkerreibold.net](mailto:cwalker@walkerreibold.net)

February 23, 2015

C. Steven Moskos, Esq.  
C. Steven Moskos, PA  
4000 Faber Place Drive – Ste. 300  
North Charleston, SC 29405

RE: *Kincer v. Midlands Automotive, LLC*  
Case No. 2015-CP-28-033

Dear Steven:

I write to inform you that our client is electing arbitration of this matter subject to the terms of the Arbitration Agreement they signed at the time of the transaction, which is attached. We are willing to conduct arbitration through the American Arbitration Association as discussed in the Arbitration Agreement. We might also be willing to consent to another arbitrator if you have any suggestions.

Thank you for your attention to this matter.

Very truly yours,



H. Clayton Walker Jr.

HCWjr/tea

Exhibit 5

# Arbitration Agreement

Customer Name

Billy KINCE  
DEBORAH KINCE

Deal Number

VIN

Date

3/22/2014

## 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.

In this Arbitration Agreement, "you" refers to the buyer(s) signing below. "We," "us," and "our" refer to the Dealer signing below and anyone to whom the Dealer assigns this Arbitration Agreement.

Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Agreement, 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, lease, or condition of this vehicle, your purchase, lease agreement, or financing contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing 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 Agreement 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](http://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 contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the seller of the vehicle is a party to the claim or dispute, in which case the hearing will be held in the federal district where this Arbitration Agreement was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of \$2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Agreement, then the provisions of this Arbitration Agreement shall control. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is \$0 or against a party is in excess of \$100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. The parties agree that the transaction between them involves interstate commerce. Whether or not the transaction involves interstate commerce, the parties select the Federal Arbitration Act (9 U.S.C. § 1 et. seq.) as the governing law concerning arbitration. While this agreement may call for application of state law to resolve substantive legal issues in an arbitration commenced under this Agreement, no state law related to arbitration will be given effect.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract. If any part of this Arbitration Agreement, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Agreement shall be unenforceable. Notwithstanding any other provision of this Arbitration Agreement, the validity and scope of the waiver of class action rights shall be decided by the court and not by the arbitrator.

Buyer

Buyer

By:

|                             |   |                                |
|-----------------------------|---|--------------------------------|
| STATE OF SOUTH CAROLINA     | ) | IN THE COURT OF COMMON PLEAS   |
|                             | ) | FOR THE FIFTH JUDICIAL CIRCUIT |
| COUNTY OF RICHLAND          | ) | CASE NO. 13-CP-40-0319         |
|                             | ) |                                |
| DANIEL O'SHIELDS AND ROGER  | ) |                                |
| W. WHITLEY A PARTNERSHIP    | ) |                                |
| D/B/A O&W CARS              | ) |                                |
|                             | ) | <b>TIME LINE</b>               |
|                             | ) |                                |
| Plaintiffs                  | ) | <b>EXHIBIT SIX</b>             |
|                             | ) |                                |
| vs.                         | ) |                                |
|                             | ) |                                |
| COLUMBIA AUTOMOTIVE         | ) |                                |
| COMPANY, LLC D/B/A MIDLANDS | ) |                                |
| HONDA                       | ) |                                |
|                             | ) |                                |
| Defendant                   | ) |                                |

|                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| September-October, 2010 | Roger Whitley called Brent Farrell, Midlands Honda's used car manager and demands the return of his money for the fraudulent sale of the 2003 Honda Civic. No response from Midlands Honda.                                                                                                                                                                                                                                                                                                        |
| January 17, 2013        | Summons and Complaint filed against Midlands Honda and Nationwide Insurance Company in Richland County.                                                                                                                                                                                                                                                                                                                                                                                            |
| February 14, 2013       | Rob Reibold called Plaintiffs' counsel stating he was representing Midlands Honda. Mr. Reibold asked what the difference in value was to the Civic on the day of purchase between what Plaintiffs paid for the vehicle and what it was actually worth. Mr. Reibold asked that the damages be limited to \$75,000. Plaintiffs' counsel did not agree to such a request. Mr. Reibold was asked if Midlands Honda had a settlement offer for Plaintiffs. He stated that he did not have a number yet. |
| February 25, 2013       | Midlands Honda served its Motion to Dismiss demanding Plaintiffs use North Carolina law.                                                                                                                                                                                                                                                                                                                                                                                                           |
| May 9, 2013             | Amended Complaint filed with the court.                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| October 21, 2013        | Plaintiffs served Midlands Honda with Interrogatories and Request for Production. Nationwide is also served with discovery.                                                                                                                                                                                                                                                                                                                                                                        |
| November 18, 2013       | Filed date for Consent Order for Extension of Time to Mediate.                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| November 19, 2013       | Defendants depose Plaintiffs.                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

|                   |                                                                                                                                                                                                                                                                                                                                                    |
|-------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| December 4, 2013  | Plaintiffs' counsel sent email to defense counsel requesting Defendant's discovery responses.                                                                                                                                                                                                                                                      |
| December 16, 2013 | Plaintiffs' counsel sent second email to defense counsel requesting Defendant's discovery responses. Mr. Walker responded that he would "get something to you first of next week."                                                                                                                                                                 |
| February 10, 2014 | Plaintiffs' counsel sent third email to defense counsel requesting Defendant's discovery responses. Mr. Walker responded that he was in Philadelphia until February 17 helping his girlfriend following a skiing accident in Jackson Hole, Wyoming. He stated he was working on his client's discovery responses.                                  |
| February 20, 2014 | Plaintiffs' counsel sent fourth email to defense counsel requesting Defendant's discovery responses. Plaintiffs' counsel received Mr. Walker's Auto-Reply stating he was out of the office until February 24.                                                                                                                                      |
| February 26, 2014 | Nationwide responded to Plaintiffs' Interrogatories and Request for Production.                                                                                                                                                                                                                                                                    |
| March 4, 2014     | Plaintiffs' counsel sends second letter to Mr. Walker requesting Midlands Honda's discovery responses. This is Plaintiffs' fifth attempt to obtain discovery responses from Midlands Honda.                                                                                                                                                        |
| April 2, 2014     | Plaintiffs filed Motion to Compel Midlands Honda to respond to Plaintiffs' discovery requests.                                                                                                                                                                                                                                                     |
| April 25, 2014    | Mr. Walker emails Plaintiffs' counsel stating discovery responses will be sent first of the following week.                                                                                                                                                                                                                                        |
| April 30, 2014    | Consent Order to Extend Mediation expires without Midlands Honda having provided any discovery. Plaintiffs' counsel sends second letter to Mr. Walker requesting Midlands Honda's discovery responses.                                                                                                                                             |
| May 1, 2014       | Plaintiffs' counsel sent fifth email to defense counsel requesting Defendant's discovery responses.                                                                                                                                                                                                                                                |
| May 6, 2014       | Plaintiffs' counsel sent sixth email to defense counsel requesting Defendant's discovery responses. Mr. Walker responded six days later on May 12 stating, "Deal records have been emailed to you. I will review the attached and advise in the morning. I may give myself much of the rest of today off after settling my Federal trial this am." |

|                             |                                                                                                                                                                                                                                                                                                                                           |
|-----------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| May 12, 2014                | Plaintiffs' counsel telephones Mr. Walker regarding discovery. Parties agree to a consent order requiring Midlands Honda to respond to discovery within 10 days.                                                                                                                                                                          |
| May 16, 2014                | Consent Order regarding Motion to Compel filed with the Court. Order requires Midlands Honda to "fully answer all interrogatories propounded by Plaintiffs and produce all requested documents by May 23, 2014".                                                                                                                          |
| May 23, 2014                | Midlands Honda served its Answers to Plaintiffs' First Interrogatories and Plaintiffs' First Request for Production on Plaintiffs.                                                                                                                                                                                                        |
| December 12, 2014           | Plaintiffs notice the deposition of Midlands Honda's 30b6 (January 8, 2015). Plaintiffs also notice the deposition of Scott Austin (January 8, 2015), Brent Farrell (January 8, 2015), and Charles Ecklund (January 5, 2015 video deposition).                                                                                            |
| December 23, 2014           | Plaintiffs notice the deposition of Randy Threatt (January 9, 2015).                                                                                                                                                                                                                                                                      |
| December 31, 2014           | Plaintiffs notice the deposition of ADESA Auto Auction 30b6 witness (January 30, 2015 video deposition).                                                                                                                                                                                                                                  |
| January 14, 2015            | Plaintiffs served first amended notice to depose Midlands Honda's 30b6 representative, Scott Austin, Randy Threatt, and Brent Farrell all on January 28, 2015.                                                                                                                                                                            |
| January 14, 2015            | Plaintiffs notice the inspection of Midlands Honda's dealership.                                                                                                                                                                                                                                                                          |
| January 23, 2015<br>8:51 AM | Clay Walker called Plaintiffs' counsel to discuss settlement. He states Midlands Honda believes the car is worth \$1500-\$1800. He asked for a settlement demand.                                                                                                                                                                         |
| January 23, 2015<br>3:59 PM | Plaintiffs' counsel called Mr. Walker and made a demand of \$350,000. Mr. Walker stated "we aren't going to settle." Mr. Walker stated that this was in an uninsured claim with no indemnity. Plaintiffs' counsel asked for a settlement offer from Midlands Honda. Mr. Walker stated that Midlands Honda had not given him a number yet. |
| January 26, 2015            | Defendant served its Offer of Judgment on Plaintiffs. Defendant's offer was \$15,000 and reasonable attorneys fees.                                                                                                                                                                                                                       |
| January 27, 2015            | Defendant objected to Plaintiffs inspection of Midlands Honda's dealership.                                                                                                                                                                                                                                                               |
| February 4, 2015            | Plaintiffs served Plaintiffs' Offer of Judgment on Midlands Honda. Plaintiffs' offer was \$280,000.                                                                                                                                                                                                                                       |

|                |                                                                                                                                                                                                                                                                                                                                                       |
|----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| March 25, 2015 | Plaintiffs served second amended notice to depose Scott Austin, Randy Threatt, Brent Farrell, and Nancy Watkins all on April 10, 2015.                                                                                                                                                                                                                |
| April 7, 2015  | Mr. Walker sends a request to Judge Manning for a status conference to continue the case.                                                                                                                                                                                                                                                             |
| April 7, 2015  | Mr. Walker sent Plaintiffs' counsel an email regarding status conference with Judge Manning and issues to discuss for said conference. Potential mediators were mentioned as was time to complete discovery and dismissing the case under SCRCP 40(j).                                                                                                |
| April 21, 2015 | Dismissal with Prejudice as to All Claims Against Nationwide Mutual Insurance Company filed with the Richland County Clerk of Court.                                                                                                                                                                                                                  |
| June 5, 2015   | Clay Walker requests access to the Civic for an inspection by an undisclosed expert.                                                                                                                                                                                                                                                                  |
| June 9, 2015   | Plaintiffs notice the taking of Charles Ecklund's deposition July 3, 2015 in Chicago.                                                                                                                                                                                                                                                                 |
| June 15, 2015  | Plaintiffs agree to inspection of Civic by Defendant's undisclosed expert. Inspection set for June 19, 2015 at 1:00pm.                                                                                                                                                                                                                                |
| June 19, 2015  | Inspection of Civic by Defendant's undisclosed expert in the presence of Defendant's counsel.                                                                                                                                                                                                                                                         |
| June 26, 2015  | Midlands Honda moved to amend its answer to assert additional affirmative defenses related to North Carolina statutes.                                                                                                                                                                                                                                |
| July 8, 2015   | Midlands Honda served Motion to Compel Mediation and to Stay Pending Completion of Mediation.                                                                                                                                                                                                                                                         |
| July 10, 2015  | Midlands Honda served its Motion for Summary Judgment. Midlands Honda asserts that 1) no duty to disclose arose under the North Carolina vehicle damage disclosure statute, 2) the economic loss rule applied, 3) constructive fraud did not apply, 4) negligence and negligent misrepresentation were barred by Plaintiffs' contributory negligence. |
| July 10, 2015  | Plaintiffs' counsel contacts Thomas Lydon's office about mediating this matter.                                                                                                                                                                                                                                                                       |
| July 13, 2015  | Thomas Lydon agrees to mediate case on August 3 or 4.                                                                                                                                                                                                                                                                                                 |
| July 15, 2015  | Plaintiffs' counsel sent letter to Mr. Walker identifying Mr. Lydon as a potential mediator and the dates of his availability.                                                                                                                                                                                                                        |
| July 17, 2015  | Clay Walker agrees to mediate case on August 4.                                                                                                                                                                                                                                                                                                       |

|                    |                                                                                                                                                                |
|--------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|
| July 17, 2015      | Plaintiffs served notice of 30 B6 videotape deposition of ADESA Auto Auction in Charlotte for July 9, 2015.                                                    |
| August 4, 2015     | Parties mediate the case unsuccessfully.                                                                                                                       |
| September 17, 2015 | Plaintiffs send Request for Admissions and Second Request for Production to Midlands Honda. Midlands Honda never sends a response to either discovery request. |
| October 1, 2015    | The Honorable Tanya Gee granted Defendant's motion to amend its Answer and denied Defendant's Motion for Summary Judgment                                      |
| March 28, 2016     | Midlands Honda moved for a continuance which is granted.                                                                                                       |
| April 12, 2016     | Defendant consents to Plaintiffs filing Second Amended Complaint.                                                                                              |
| April 15, 2016     | Midlands Honda filed its Motion to Dismiss . Midlands Honda also files its Answer to Plaintiffs' Second Amended Complaint.                                     |
| April 18, 2016     | Trial of the case                                                                                                                                              |
| April 19, 2016     | Court grants Plaintiffs' in Court Motion to Amend. Plaintiffs submit Second Amended Complaint to the Court. Court asks if Parties can settle the case.         |
| April 20, 2016     | Court asks a second time if Parties can settle the case.                                                                                                       |
| April 21, 2016     | Jury returns verdict for actual damages in the amount of \$6,645.                                                                                              |
| April 22, 2016     | Jury returns verdict for punitive damages in the amount of \$2,381,888.                                                                                        |
| July 27, 2016      | Court conducts post trial motions hearing. Court asks a third time if Parties can settle the case.                                                             |

STATE OF SOUTH CAROLINA                    ) COURT OF COMMON PLEAS  
                                                  )  
COUNTY OF RICHLAND                        ) C/A #: 2013-CP-40-5319

Daniel O'Shields and Roger W.                )  
Whitley, a partnership d/b/a                )  
O&W Cars,                                        )  
                                                  )  
          Plaintiffs,                            )  
                                                  )  
v.                                                 )  
                                                  )  
PSC Automotive Group d/b/a Midlands        )  
Honda and Nationwide Mutual                )  
Insurance Company,                            )  
                                                  )  
          Defendants.                            )  
\_\_\_\_\_ )

DEPOSITION OF

ROGER W. WHITLEY

\*\*\*\*\*

Tuesday, November 19, 2013

10:02 a.m. - 12:24 p.m.

The deposition of Roger W. Whitley, taken on behalf of the Defendant Nationwide Mutual Insurance Company at the law offices of Walker & Reibold, LLC, 3321 Forest Drive, Suite One, Columbia, South Carolina, on the 19th day of November, 2013, before Andrea R. Taylor, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.



## APPEARANCES

1  
2 C. Steven Moskos, Esquire  
C. STEVEN MOSKOS, P.A.  
3 4000 Faber Place Drive, Suite 300  
North Charleston, South Carolina 29405  
4 Attorney for the Plaintiffs

5 H. Clayton Walker, Jr., Esquire  
WALKER & REIBOLD, LLC  
6 3321 Forest Drive, Suite 1  
Columbia, South Carolina 29204  
7 Attorney for the Defendant,  
PSC Automotive Group d/b/a  
8 Midlands Honda

9 Sean B. Cox, Esquire  
GOODMAN, MCGUFFEY, LINDSEY & JOHNSON, LLP  
10 3340 Peachtree Road, NE  
Suite 2100  
11 Atlanta, Georgia 30326  
Attorney for the Defendant,  
12 Nationwide Mutual Insurance Company

13 Also present:  
Daniel O'Shields  
14 Donna Whitley

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## EXHIBITS

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1 A: Uh-huh (affirmative response).

2 Q: Is that a yes?

3 A: Yes, I'm sorry.

4 Q: That's all right.

5 A: I'm an uh-huh person.

6 Q: I'm sure if I ever give a deposition I'll be  
7 the same way. Hope I never have to. So you  
8 got the Midlands Honda's name, correct?

9 A: Did.

10 Q: What did you do next?

11 A: I contacted Midland Honda, and I asked for the  
12 sales representative, Brent -- his last name  
13 doesn't come to me. The guy came to the  
14 telephone, and I asked if he were the -- if he  
15 was a used car salesman. And Brent, I don't --  
16 his last name doesn't come to me, but he said  
17 he was. I told him that I had a salvaged  
18 vehicle, a clipped vehicle, and I assumed he  
19 understood what I was talking about, in my  
20 possession. I gave him the serial number of  
21 the car, and I told him he needed to pick it  
22 up.

23 Q: And I assume give you your money back?

24 A: Well, yeah, that was the insinuation. And he  
25 took the serial number of the car down and

1        says, I'll get back to you. That was the end  
2        of the conversation.

3        Q: Did you ever contact Midlands after that?

4        A: I was very clear to him to start with, and I  
5        felt like that was -- no, I didn't. Did not.

6        Q: What happened next?

7        A: I just started looking for answers. Nothing  
8        happened until I contacted an attorney.

9        Q: Did you pull a title history of the vehicle?

10       A: I did. I did.

11       Q: When did you do that?

12       A: I can't give you a specific date, but I went to  
13       DMV.

14       Q: Which one?

15       A: North Carolina DMV. And pulled the title  
16       history up on the car.

17       Q: And what did you learn from that?

18       A: Been involved in three wrecks and been totaled  
19       once.

20       Q: When were those three wrecks?

21       A: They were in South Carolina, as far as I know.  
22       Far as I recall.

23       Q: Do you know who -- do you know what years those  
24       wrecks were in?

25       A: 2004 and 2005.

**From:** C Steven Moskos  
**To:** "Sean B. Cox"; "Clay Walker"  
**Subject:** O'Shields, Whitley v Midlands Honda and Nationwide  
**Date:** Wednesday, December 04, 2013 9:40:00 AM

---

Gentlemen,

Any word on when I might be able to get the documents I requested in October?

**PLEASE NOTE THAT, TO BETTER SERVE OUR CLIENTS, WE  
HAVE MOVED. OUR NEW ADDRESS IS BELOW. OUR  
TELEPHONE NUMBER HAS NOT CHANGED.**

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
Charleston, SC 29405  
843-763-5297 Office

Exhibit 8

**From:** Clay Walker  
**To:** "C Steven Moskos"  
**Subject:** RE: Whitley v Midland Honda and Nationwide  
**Date:** Monday, December 16, 2013 9:59:26 PM

---

Plan to meet with them Wednesday and get something to you first of next week.

clay

---

**From:** C Steven Moskos [mailto:csmoskos@earthlink.net]  
**Sent:** Monday, December 16, 2013 10:03 AM  
**To:** 'Sean B. Cox'; 'Clay Walker'  
**Subject:** Whitley v Midland Honda and Nationwide

Sean and Clay,

As of this date, I still have not received your responses to my discovery. Please let me know when it is coming. As I understood our last conversation, there were documents you knew you were going to produce so you were going to send those to me. Please let me know when I will receive them. Thanks.

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
Charleston, SC 29405  
843-763-5297 Office

Exhibit 9

**From:** Clay Walker  
**To:** "C Steven Moskos"; "Sean B. Cox"  
**Subject:** RE: Whitley v Midlands Honda and Nationwide  
**Date:** Monday, February 10, 2014 1:32:35 PM

---

I am in Philadelphia helping my girlfriend following a ski accident in Jackson Hole. I will be here through Monday the 17<sup>th</sup> and will be working on these while I am here.

clay

---

**From:** C Steven Moskos [mailto:csmoskos@earthlink.net]  
**Sent:** Monday, February 10, 2014 8:39 AM  
**To:** 'Sean B. Cox'; 'Clay Walker'  
**Subject:** Whitley v Midlands Honda and Nationwide

Gentlemen,  
As of today, I still have not received any discovery responses from you. I understand that Nationwide wishes to have a protective order in place, but I need the discovery to prepare my case. Please forward your responses to me as soon as possible.  
Thank you.

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
Charleston, SC 29405  
843-763-5297 Office

Exhibit 10

**From:** C. Steven Moskos  
**To:** "Sean B. Cox"; "Clay Walker (cwalker@walkerreibold.net)"  
**Subject:** Whitley v Midlands Honda and Nationwide  
**Date:** Thursday, February 20, 2014 7:03:00 PM

---

Gentlemen,

As of today, I still have not received your clients' discovery responses. Please forward them to me as soon as possible. If I don't receive them by February 27, I will have to file a motion to compel. Thanks.

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
Charleston, SC 29405  
843-763-5297 Office

Exhibit 11

**From:** Clay Walker  
**To:** C Steven Moskos  
**Subject:** Auto-Reply from Clay Walker  
**Date:** Thursday, February 20, 2014 7:03:55 PM

---

I will be out of the office with limited access to email until February 24th. If your matter is urgent please contact Rob Reibold at [rreibold@walkerreibold.net](mailto:rreibold@walkerreibold.net) or 803-454-0955.

Thank you

Exhibit 12



**C. STEVEN MOSKOS, P.A.**

Attorney and Counselor at Law

C. Steven Moskos  
Board Certified Civil Trial Attorney  
Board Certified Civil Pretrial Advocate  
By the National Board of Trial Advocacy  
Board Certified Circuit Court Mediator

**M**

4000 Faber Place Drive, Ste. 300  
North Charleston, SC 29405  
Telephone: 843-763-5297  
www.moskoslawfirm.com  
csmoskos@earthlink.net

March 4, 2014

Walker & Reibold, LLC  
Attn: H. Clayton Walker  
P. O. Box 61140  
Columbia, SC 29260

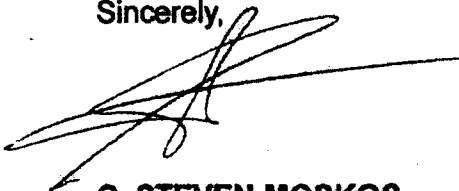
**RE: O'Shields et. al. v. PSC Automotive Group et. al.**  
**Case No: 2013-CP-40-0319**

Dear Clay:

Please be advised that I still have not received your client's responses to my discovery requests sent to you on October 21, 2013. On February 20, 2014, I sent an email asking that you send your responses to me. I received an auto-reply stating that you were out of the office until February 24. I have not received any other response. Please forward your responses to my office by Friday, March 7, 2014, otherwise I will have to file a motion to compel.

If you have any questions, please do not hesitate to contact me.

Sincerely,



**C. STEVEN MOSKOS**

CSM/drc

cc: Sean B. Cox, Esq.  
Roger Whitley

Exhibit 13

**From:** Clay Walker  
**To:** "C Steven Moskos"  
**Subject:** RE: O'Shields and Roger W. Whitley A. Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, and Nationwide Mutual Insurance Company  
**Date:** Friday, April 25, 2014 11:20:41 AM

---

Give me a ring about this when you can. Will get you responses first of the week, please accept my apologies for my getting distracted by other things.

Want to talk about managing this to save us all a trip to a roster meeting for nothing:

Clay

803-454-0955 office  
803-622-8166 cell

---

**From:** C Steven Moskos [mailto:[csmoskos@earthlink.net](mailto:csmoskos@earthlink.net)]  
**Sent:** Thursday, April 24, 2014 8:54 AM  
**To:** 'Sean B. Cox'; [cwalker@walkerreibold.net](mailto:cwalker@walkerreibold.net)  
**Subject:** RE: O'Shields and Roger W. Whitley A. Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, and Nationwide Mutual Insurance Company

Sean,  
Did the letter go out? Have you heard from the judge about a time?

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
Charleston, SC 29405  
843-763-5297 Office

---

**From:** C Steven Moskos [mailto:[csmoskos@earthlink.net](mailto:csmoskos@earthlink.net)]  
**Sent:** Tuesday, April 22, 2014 8:55 AM  
**To:** 'Sean B. Cox'; [cwalker@walkerreibold.net](mailto:cwalker@walkerreibold.net)  
**Subject:** RE: O'Shields and Roger W. Whitley A. Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, and Nationwide Mutual Insurance Company

Sean,  
I agree. There are a number of things that need to be done in this case before it is ready to go. Let me know what the court says about a status conference time.  
Thanks.

C. Steven Moskos

Exhibit 14

4000 Faber Place Dr., Suite 300  
Charleston, SC 29405  
843-763-5297 Office

**From:** Sean B. Cox [<mailto:SCox@GMLJ.com>]

**Sent:** Monday, April 21, 2014 6:49 PM

**To:** [cwalker@walkerreibold.net](mailto:cwalker@walkerreibold.net); C Steven Moskos ([csmoskos@earthlink.net](mailto:csmoskos@earthlink.net))

**Subject:** O'Shields and Roger W. Whitley A. Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, and Nationwide Mutual Insurance Company

Gentlemen,

Attached is a roster notice for May 5, 2014. The notice states that if the parties require a status conference, one should be requested.

I have a pending motion for summary judgment, Steve has a pending motion to compel, and the case has not been mediated. I think we probably need a scheduling conference.

I intend to write the Court administrator tomorrow and request a conference. Please let me know if you disagree.

Sean B. Cox, Esq.  
Goodman McGuffey Lindsey & Johnson, LLP



GOODMAN Direct: (404) 926-4123  
MCGUFFEY Office: (404) 264-1500  
LINDSEY & Fax: (404) 264-1737  
JOHNSON LLP [SCox@GMLJ.com](mailto:SCox@GMLJ.com)  
Licensed in GA & SC

3340 Peachtree Road, NE, Suite 2100, Atlanta, GA 30326-1084

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CONFIDENTIALITY NOTICE: The information contained in this transmittal is legally privileged and confidential information intended only for the use of the individual or entity to which it was intended to be directed. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this transmittal is strictly prohibited. If you receive this transmittal in error, please immediately notify us by reply email and delete the original transmittal. Thank you.

# C. STEVEN MOSKOS, P.A.

Attorney and Counselor at Law

C. Steven Moskos  
Board Certified Civil Trial Attorney  
Board Certified Civil Pretrial Advocate  
By the National Board of Trial Advocacy  
Board Certified Circuit Court Mediator

M

4000 Faber Place Drive, Suite 300  
North Charleston, SC 29405  
Telephone: (843) 763-5297  
www.moskoslawfirm.com  
csmoskos@earthlink.net

April 30, 2014

Walker & Reibold, LLC  
Attn: H. Clayton Walker  
P. O. Box 61140  
Columbia, SC 29260

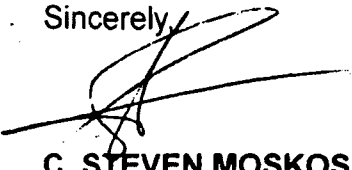
**RE: O'Shields et. al. v. PSC Automotive Group et. al.**  
**Case No: 2013-CP-40-0319**

Dear Clay:

Please let me know when you are going to send me your client's discovery responses.  
Thank you.

If you have any questions, please do not hesitate to contact me.

Sincerely,



C. STEVEN MOSKOS

CSM/slf

Exhibit 15

**From:** C Steven Moskos  
**To:** Clay Walker  
**Cc:** "Sean B. Cox"  
**Subject:** Whitley v Midlands Honda  
**Date:** Thursday, May 01, 2014 4:04:00 PM

---

Clay,

What's the status of your discovery responses? I need to get them so we can move forward with the case either by settling it or trying it. Please let me know. Also, Judge Manning said you would be sending him a letter regarding the status conference, please send me a copy of that letter. Thanks.

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
Charleston, SC 29405  
843-763-5297 Office

Exhibit 16

**From:** C. Steven Moskos  
**To:** Clay Walker  
**Cc:** "Sean B. Cox"  
**Subject:** Whitley v Midlands  
**Date:** Tuesday, May 06, 2014 11:42:00 AM

---

Clay,

As you know, I sent you my clients' discovery requests on October 21, 2013. I have sent emails to you on February 10, February 20, and May 1, 2014 asking when you were going to respond. I also sent you letters on March 4 and April 30, 2014 asking the same thing. I filed my motion to compel April 2, 2014. I have asked several times when I will be getting your answers, but, I have not heard from you. I am again asking that you tell me when you are sending me your discovery. If you are not going to have your responses to me by May 9, I will have to notify Judge Manning that I need my motion heard immediately so we can stay within his scheduling order.

As a second issue, I wrote to you on May 1 asking you to send me a copy of the letter requested by Judge Manning regarding the status conference and the scheduling order. I have not received that letter. Please forward a copy of it to me. Thank you.

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
Charleston, SC 29405  
843-763-5297 Office

Exhibit 17

# C. STEVEN MOSKOS, P.A.

Attorney and Counselor at Law

C. Steven Moskos  
Board Certified Civil Trial Attorney  
Board Certified Civil Pretrial Advocate  
By the National Board of Trial Advocacy  
Board Certified Circuit Court Mediator

M

4000 Faber Place Drive, Suite 300  
North Charleston, SC 29405  
Telephone: (843) 763-5297  
www.moskoslawfirm.com  
csmoskos@earthlink.net

January 23, 2015

Walker & Reibold, LLC  
Attn: H. Clayton Walker  
P. O. Box 61140  
Columbia, SC 29260

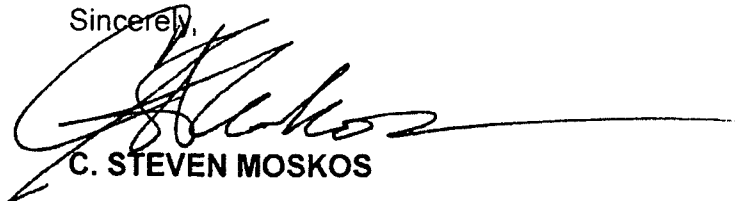
**RE: O'Shields et. al. v. PSC Automotive Group et. al.**  
**Case No: 2013-CP-40-0319**

Dear Clay:

Pursuant to your request, I arrived at a settlement demand of \$350,000.00 which I just conveyed to you. Please communicate this demand to your client. As you know, this matter is moving quickly up the Richland County roster and we have a number of depositions scheduled next week. I would like to avoid the cost of those depositions if at all possible. While I understand your client believes this is a minimal case (most dealers in law suits feel that way), please remind it that it knew about the wreck damage at the time it sold the car to the Plaintiffs and it made written representations that the car had not been damaged more than 25% per cent of the value of the vehicle. They should also know that the vehicle is dangerous to drive as the two parts of separate cars were welded together improperly. Lastly, your clients have exposure of \$250,000.00 in punitive damages under North Carolina law. I am sure a jury will reach that number easily. As you may know, Stokes-Craven Ford paid my client over a million dollars because it refused to pay what was owed. I am sure that PSC Automotive does not want to be in the same boat. Please let me know how your client wishes to proceed.

If you have any questions, please do not hesitate to contact me.

Sincerely,



C. STEVEN MOSKOS

CSM/kdb

cc: Roger Whitley

Exhibit 18

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
  
DANIEL O'SHIELDS AND ROGER W.  
WHITLEY A PARTNERSHIP D/B/A  
O&W CARS

Plaintiffs

vs.

PSC AUTOMOTIVE GROUP D/B/A  
MIDLANDS HONDA, NATIONWIDE  
MUTUAL INSURANCE COMPANY

Defendants

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT  
CASE NO. 13-CP-40-0319

PLAINTIFF'S OFFER OF JUDGMENT  
TO THE DEFENDANT PSC  
AUTOMOTIVE GROUP D/B/A  
MIDLANDS HONDA

RICHLAND COUNTY  
FILED  
FEB -6 AM 10:06  
ANNETTE W. COOPER  
C.C.P. & C.D.

PLEASE TAKE NOTICE that the Plaintiffs above named hereby rescinds all prior offers and now herewith offers, pursuant to South Carolina Code Annotated §15-35-400, to take judgment against the Defendant PSC Automotive Group, d/b/a Midlands Honda in the amount of Two Hundred Eighty Thousand and 00/100 Dollars (\$280,000.00).

PLEASE TAKE NOTICE that to accept this offer, the Defendant PSC Automotive Group, d/b/a Midlands Honda must give notice thereof in writing within twenty days from the date of this notice or within ten days prior to trial, whichever occurs first, by filing notice with the Clerk of Court in the County in which the action is pending that the Defendant PSC Automotive Group, d/b/a Midlands Honda agrees to allow judgment to be filed against it in the amount stated above. Upon the filing, the Clerk shall enter immediately judgment of the stipulation.

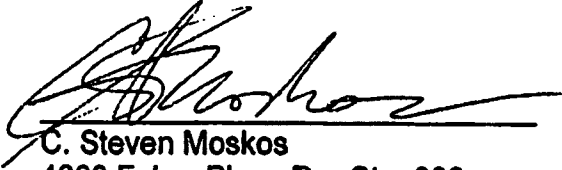
PLEASE TAKE NOTICE that if the offer to accept judgment is not accepted within twenty days after notification or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected and evidence thereof is not



to be admissible except in a proceeding after the trial to fix costs, interests, attorney's fees and other recoverable monies.

PLEASE TAKE NOTICE that if this Offer is not accepted and the Plaintiffs obtain a verdict or determination at least as favorable as the rejected offer, the Plaintiffs shall be allowed to recover from the Defendant PSC Automotive Group, d/b/a Midlands Honda any administrative, filing, or other court costs from the date of the offer until judgment and eight percent interest computed on the amount of the verdict or award from the date of the offer.

**C. STEVEN MOSKOS, P.A.  
ATTORNEY FOR THE PLAINTIFFS**

BY: 

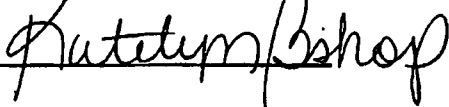
C. Steven Moskos  
4000 Faber Place Dr., Ste. 300  
North Charleston, SC 29405  
Telephone: (843) 763-5297

Charleston, South Carolina  
2/4, 2015

**Certificate of Service**

Undersigned certifies that the pleading or paper to which this certificate is affixed was served upon the party(s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record for such other party(s), in a post office or official depository under the exclusive care and custody of the United States Postal Service, on this 4 day of February, 2015.

C. STEVEN MOSKOS, P.A.

By: 

RICHLAND COUNTY  
FILED  
2015 FEB -6 AM 10:06  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955  
Fax (803) 454-0956  
cwalker@walkerreibold.net  
Reply to Columbia Office

April 7, 2015

**VIA EMAIL AND HAND-DELIVERY**

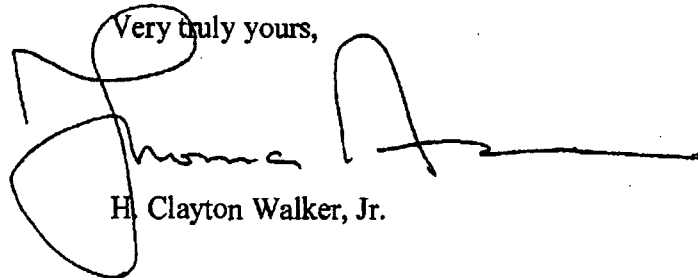
The Honorable L. Casey Manning  
PO Box 192  
1701 Main Street, Room 214  
Columbia, SC 29202-0192

Re: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC  
Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance Company  
C/A No.: 2013-CP-40-0319

Dear Judge Manning:

The parties would request a status conference on this case, which appears on the April 20, 2015 jury trial roster. Discovery is not complete, and I have a personal conflict that week. We welcome the opportunity to discuss this with you at your earliest convenience. Thank you for your prompt attention to this matter. I am,

Very truly yours,



H. Clayton Walker, Jr.

HCW:cnc

cc: C. Steven Moskos, Esq.  
Sean B. Cox, Esq.

Exhibit 20

**From:** Clay Walker  
**To:** "C Steven Moskos"; "Sean B. Cox"  
**Subject:** RE: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, et al. - C/A No.: 2013-CP-40-0319  
**Date:** Tuesday, April 07, 2015 3:36:31 PM  
**Attachments:** image001.png

---

Yes to both, and it would help to clarify what we are trying to do. How much time do you want to complete discovery and mediate before trial date, a heads up will help him prepare.

It may help to go ahead and agree on a mediator so we can tell Casey we are in progress on that. Locally, Danny Crowe and Earl Ellis are good. I am willing to consider others if needed.

What terms can we live under if a continuance is not granted? The exemplar I sent you seems to be the easiest way for everybody to get his needs met. I want to resolve this now—if we are not up in two weeks, I will schedule other things.

Clay

**From:** C Steven Moskos [mailto:[csmoskos@earthlink.net](mailto:csmoskos@earthlink.net)]  
**Sent:** Tuesday, April 07, 2015 3:21 PM  
**To:** 'Clay Walker'; 'Sean B. Cox'  
**Subject:** RE: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, et al. - C/A No.: 2013-CP-40-0319

I can do Thursday at 9:30 so long as I can attend by phone. Clay, are you going to have Rob at the status conference? Will he be up to date on what we are trying to do?

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
North Charleston, SC 29405  
843-763-5297 Office

**From:** Clay Walker [mailto:[cwalker@walkerreibold.net](mailto:cwalker@walkerreibold.net)]  
**Sent:** Tuesday, April 07, 2015 1:50 PM  
**To:** 'Sean B. Cox'; [csmoskos@earthlink.net](mailto:csmoskos@earthlink.net)  
**Subject:** RE: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, et al. - C/A No.: 2013-CP-40-0319

I can have somebody there Thursday as well, and would prefer to do it then so that we have clarity on when we are up.

**Exhibit 21**

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955  
Fax (803) 454-0956  
cwalker@walkerreibold.net  
Reply to Columbia Office

February 26, 2014

The Honorable L. Casey Manning  
Chief Administrative Judge – Richland County  
P O Box 192  
1701 Main Street, Room 214  
Columbia, SC 29202-0192

Re: Richland County

Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC  
Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance  
Company

C/A No.: 2013-CP-40-0319

TD Bank, N.A. vs. Brennan Associates, Inc., et al - C/A No.: 2013-CP-40-2566

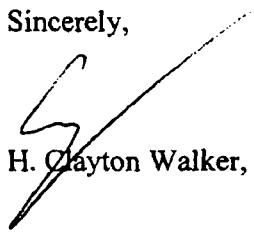
Dear Judge Manning:

Please accept this letter as a request for protection in Richland County for April 11 – 21, 2014 for vacation and July 10 – 18, 2014 to attend the annual meeting of the Uniform Law Commission to represent South Carolina.

I have enclosed the original and one copy of Order of Protection in all of the cases in which I am involved. If the order meets with your approval, I would appreciate your signing them and forwarding to the Clerk to have them filed and returned to me in the self-addressed, stamped envelope provided for your convenience.

By copy of this letter, I have notified all counsel of this request. I appreciate your assistance and consideration of this request.

Sincerely,

  
H. Clayton Walker, Jr.

HCW:cnc  
Enclosures

Exhibit 22

cc: C. Steven Moskos, Esq.  
Sean B. Cox, Esq.  
Jaime Khan, Esq.  
S. R. Anderson, Esq.

STATE OF SOUTH CAROLINA     )  
                                                      )  
COUNTY OF RICHLAND            )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

**ORDER OF PROTECTION**

This matter comes before the Court upon the request of H. Clayton Walker of Walker & Reibold, LLC for protection from all court appearances in any case in which he is involved as counsel from April 11 – 21, 2014 for vacation and July 10 – 18, 2014 to attend the annual meeting of the Uniform Law Commission to represent South Carolina.

IT IS THEREFORE ORDERED that H. Clayton Walker, Esquire will be protected from proceedings and/or hearings in the Court of Common Pleas for Richland County for the period of April 11 – 21, 2014 and July 10 – 18, 2014.

\_\_\_\_\_  
L. Casey Manning  
Chief Administrative Judge  
Richland County Court of Common Pleas

This \_\_\_\_ day of \_\_\_\_\_ 2014

**C. STEVEN MOSKOS, P.A.**

Attorney and Counselor at Law

C. Steven Moskos  
Board Certified Civil Trial Attorney  
Board Certified Civil Pretrial Advocate  
By the National Board of Trial Advocacy  
Board Certified Circuit Court Mediator

4000 Faber Place Drive, Suite 300  
North Charleston, SC 29405  
Telephone: (843) 763-5297  
www.moskoslawfirm.com  
csmoskos@earthlink.net

June 3, 2014

Honorable Casey Manning  
P O Box 192  
1701 Main Street, Room 214  
Columbia, SC 29202-0192

**RE: O'Shields et. al. v. PSC Automotive Group et. al.**  
**Case No: 2013-CP-40-0319**

Dear Judge Manning:

On April 30, 2014, Clay Walker, Sean Cox and I had a status conference with you regarding the above referenced case. At that time, Mr. Walker requested ninety (90) days to prepare this case. You stated that we could have the requested time and that if more was needed we could again ask for more time. You also stated that Nationwide's Summary Judgment motion would be put on hold until the ninety days had run. You then instructed Mr. Walker to send you a letter setting forth your rulings. I have not received a copy of that letter. I have, however, received a notice form the Clerk of Court scheduling Mr. Cox' motion for June 10 before Judge Benjamin. I am writing to request that this motion be postponed as you set forth during the status conference. Mr. Cox does not oppose this request.

If you have any questions, please do not hesitate to contact me.

Sincerely,



**C. STEVEN MOSKOS**

CSM/slf

cc: H. Clayton Walker, Esq.  
Sean Cox, Esq.  
Roger Whitley

Exhibit 23

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955  
Fax (803) 454-0956  
cwalker@walkerreibold.net  
Reply to Columbia Office

July 25, 2014

The Honorable L. Casey Manning  
Chief Administrative Judge – Richland County  
PO Box 192  
1701 Main Street, Room 214  
Columbia, SC 29202-0192

Re: Richland County

Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC  
Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance  
Company  
C/A No.: 2013-CP-40-0319

Shameka Green v. Herman Miller, Inc. - C/A No.: 2014-CP-40-03559

U.S. Bank National Association v. Trenton Court, LP and Wendell F. White  
C/A No.: 2014-CP-40-2844

Dear Judge Manning:

Please accept this letter as a request for protection in Richland County for October 20-31, 2014 for vacation.

I have enclosed the original and one copy of Order of Protection in all of the cases in which I am involved. If the order meets with your approval, I would appreciate your signing them and forwarding to the Clerk to have them filed and returned to me in the self-addressed, stamped envelope provided for your convenience.

By copy of this letter, I have notified all counsel of this request. I appreciate your assistance and consideration of this request.

Sincerely,



H. Clayton Walker, Jr.

Exhibit 24



HCW:cnc

Enclosures

cc: C. Steven Moskos, Esq.  
Sean B. Cox, Esq.  
Everett Hope Garner, Esq.  
Thomas L. Harper, Jr., Esq.

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955  
Fax (803) 454-0956  
cwalker@walkerreibold.net  
Reply to Columbia Office

March 16, 2015

The Honorable L. Casey Manning  
Chief Administrative Judge – Richland County  
PO Box 192  
1701 Main Street, Room 214  
Columbia, SC 29202-0192

Re: Richland County

Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC  
Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance Company  
C/A No.: 2013-CP-40-0319

Shameka Green v. Herman Miller, Inc. - C/A No.: 2014-CP-40-03559

Green Tree Servicing, LLC v. Jennifer Angooraj, et al. - C/A No.: 2014-CP-40-6597

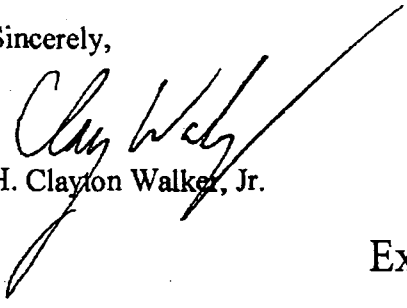
Dear Judge Manning:

Please accept this letter as a request for protection in Richland County for April 2-8, 2015 for Easter vacation; May 7-11, 2015 to attend a college graduation out of state; and July 9-16, 2015 to represent South Carolina on the Uniform Law Commission.

I have enclosed the original and one copy of Order of Protection in all of the cases in which I am involved. If the order meets with your approval, I would appreciate your signing them and forwarding to the Clerk to have them filed and returned to me in the self-addressed, stamped envelope provided for your convenience.

By copy of this letter, I have notified all counsel of this request. I appreciate your assistance and consideration of this request.

Sincerely,

  
H. Clayton Walker, Jr.

HCW:cnc

Exhibit 25

Enclosures

cc: C. Steven Moskos, Esq.  
Sean B. Cox, Esq.  
Everett Hope Garner, Esq.  
Laura R. Baer, Esq.  
(all via email)

**From:** Clay Walker  
**To:** csmoskos@earthlink.net  
**Cc:** "Sean B. Cox"  
**Subject:** o and w trial date  
**Date:** Thursday, April 02, 2015 7:00:09 PM

---

Steve, will you consent to try this the first week of may instead of April 20? My reason for making the request is purely personal. My girlfriend lives in Villanova. For only the third time since June of last year, she is coming to SC on the 22d, and she purchased a nonrefundable plane ticket some time ago. We will celebrate my son's birthday at the end of the week. I for obvious reasons do not want to forego that opportunity.

She will stay until the following Tuesday. I am told there is no jury term that week in any event.

Please advise your position by Monday so that I know how to proceed.

Clay Walker  
Walker & Reibold, LLC  
PO Box 61140  
Columbia, SC 29260

Ph: 803-454-0955  
Fax: 803-454-0956

**CONFIDENTIALITY NOTICE:** This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the intended recipient, you are not authorized to read, print, retain, copy, forward or disseminate this message or any part of it. Disclosure to others may compromise the confidentiality that attaches to privileged communications. If you have received this message in error, please notify the sender immediately either by telephone or by reply to this e-mail and delete and destroy all copies of this message.

Exhibit 26

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955  
Fax (803) 454-0956  
cwalker@walkerreibold.net  
Reply to Columbia Office

April 7, 2015

**VIA EMAIL AND HAND-DELIVERY**

The Honorable L. Casey Manning

PO Box 192

1701 Main Street, Room 214

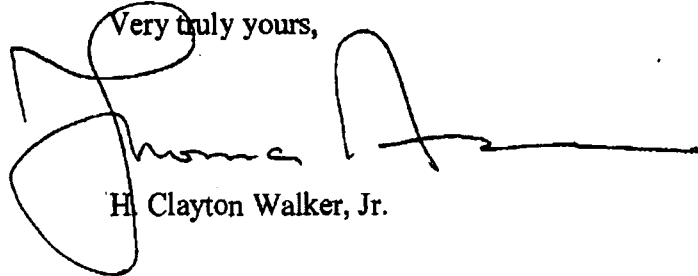
Columbia, SC 29202-0192

Re: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC  
Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance Company  
C/A No.: 2013-CP-40-0319

Dear Judge Manning:

The parties would request a status conference on this case, which appears on the April 20, 2015 jury trial roster. Discovery is not complete, and I have a personal conflict that week. We welcome the opportunity to discuss this with you at your earliest convenience. Thank you for your prompt attention to this matter. I am,

Very truly yours,



H. Clayton Walker, Jr.

HCW:cnc

cc: C. Steven Moskos, Esq.  
Sean B. Cox, Esq.

Exhibit 27

**From:** Clay Walker  
**To:** csmoskos@earthlink.net  
**Cc:** "Sean B. Cox"  
**Subject:** continuance and depo dates  
**Date:** Tuesday, April 07, 2015 12:36:15 PM  
**Attachments:** CO pursuant to 40j and 40k.docx

---

Two things. A letter is going to the court, cc you both, seeking a status conference as that is what Casey likes to do. Steve, I understand that you need time to set up some depositions out of state, and I believe you said that your June is bad.

If the court will not give us the time you want, will an order like the attached work for you? It gets us off the roster, but avoids a long delay in returning to it. Please advise as soon as possible so that I know how to plan. Steve, I thought that I had sent you this order during our chat yesterday, but do not see that note in my sent box. My goal is to either have an agreement now to not go to trial on the 20<sup>th</sup>, or get ready and tee it up.

Second, you asked for some available dates from me. April 30 and 31, May 11-12, 20-22 (cannot travel on the 19<sup>th</sup> if deposition is out of state), 25, 28-29 (cannot travel on the 27<sup>th</sup>), July 8, 21-24 and week of the 27<sup>th</sup>. I did not give June dates as I understood that it is a bad month for you. I now have another trial that has today been set for the week of May 4, and it could run over into the week of May 11. While I doubt that it will go to trial on the 4<sup>th</sup>, I wanted you to be aware that it could disrupt my schedule.

Please advise. Sean has let me know that he is agreeable to whatever we work out about trial scheduling.

Clay Walker  
Walker & Reibold, LLC  
PO Box 61140  
Columbia, SC 29260

Ph: 803-454-0955  
Fax: 803-454-0956

**CONFIDENTIALITY NOTICE:** This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure. If you are not the intended recipient, you are not authorized to read, print, retain, copy, forward or disseminate this message or any part of it. Disclosure to others may compromise the confidentiality that attaches to privileged communications. If you have received this message in error, please notify the sender immediately either by telephone or by reply to this e-mail and delete and destroy all copies of this message.

Exhibit 28

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955  
Fax (803) 454-0956  
cwalker@walkerreibold.net  
Reply to Columbia Office

April 10, 2015

## **VIA EMAIL AND HAND-DELIVERY**

The Honorable L. Casey Manning  
PO Box 192  
1701 Main Street, Room 214  
Columbia, SC 29202-0192

Re: **Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC  
Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance Company**  
C/A No.: 2013-CP-40-0319

Dear Judge Manning:

As counsel for Midlands Honda, I have the following scheduling issues.

**Conflict the week of April 20.** I have a personal problem. My girlfriend, who lives in Philadelphia, has already purchased a plane ticket to fly to Columbia on April 22 to be here to celebrate my son's birthday. This will be only her third trip south since June 2014 -- she has had a lot of other travel commitments for work. I would hope to protect this time for obvious reasons.

**Discovery is not complete.** Both Plaintiff and Midlands want to depose persons who live out of state and have had difficulty getting these depositions taken. I intend to work with Plaintiff's counsel to get writs from this court to get subpoenas issued for these out of state depositions.

My expert also needs to view the vehicle which is the subject of this dispute, and it is in Shelby, North Carolina. His work commitments, and putting on his daughter's wedding on April 25, make it difficult for him to make this trip until after that wedding.

**Other scheduling conflicts.** I understand from Plaintiff's counsel that he is taking vacation in June and that the remainder of his time for that month is already booked. I have to attend the Uniform Law Commission annual meeting to represent South Carolina on July 9-16, and would hope to have the week after that to catch back up with my work.

Exhibit 29

**Scheduling request.** I would be grateful if this case did not appear on the trial roster until or after the week of July 27. Thank you for your prompt consideration of this request. I am,

Very truly yours,



H. Clayton Walker, Jr.

HCW:ldb

cc: C. Steven Moskos, Esq.  
Sean B. Cox, Esq.



**From:** C. Steven Moskos  
**To:** Clay Walker  
**Subject:** Whitley v Midlands Honda  
**Date:** Thursday, July 16, 2015 1:52:00 PM  
**Attachments:** Lt Walker 7-15-2015.pdf

---

Please see attached correspondence.

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
North Charleston, SC 29405  
843-763-5297 Office

Exhibit 30

**C. STEVEN MOSKOS, P.A.**

Attorney and Counselor at Law

C. Steven Moskos  
Board Certified Civil Trial Attorney  
Board Certified Civil Pretrial Advocate  
By the National Board of Trial Advocacy  
Board Certified Circuit Court Mediator

**M**

4000 Faber Place Drive, Suite 300  
North Charleston, SC 29405  
Telephone: (843) 763-5297  
www.moskoslawfirm.com  
csmoskos@earthlink.net

July 15, 2015

Walker & Reibold, LLC  
Attn: H. Clayton Walker  
P. O. Box 61140  
Columbia, SC 29260

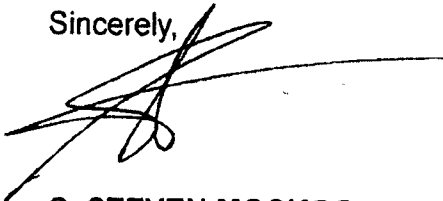
**RE: O'Shields et. al. v. PSC Automotive Group et. al.  
Case No: 2013-CP-40-0319**

Dear Clay:

Please note that I have spoken with Tommy Lydon with McAngus, Goudelock, and Couire, and he is available to mediate this case on August 3<sup>rd</sup> or 4<sup>th</sup>. Upon receipt of this correspondence, please contact my office to let me know which of these two dates will work with your schedule.

Thank you.

Sincerely,



**C. STEVEN MOSKOS**

CSM/drc

Exhibit 31

**From:** Clay Walker  
**To:** C Steven Moskos  
**Subject:** Auto-Reply from Clay Walker  
**Date:** Thursday, July 16, 2015 2:18:56 PM

---

I am attending the annual meeting of the Uniform Law Commission from July 9-16, which may delay my response to your email. Please contact Rob Reibold at [RReibold@walkerreibold.net](mailto:RReibold@walkerreibold.net) in the event of an emergency.

Exhibit 32

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955  
Fax (803) 454-0956  
cwalker@walkerreibold.net  
Reply to Columbia Office

July 22, 2015

**VIA HAND-DELIVERY**

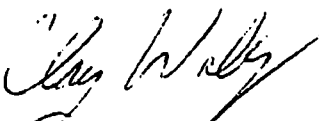
The Honorable Alison Renee Lee  
Chief Administrative Judge – Richland County  
PO Box 192  
1701 Main Street - Room 324  
Columbia, SC 29202-0192

Re: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC  
Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance Company  
C/A No.: 2013-CP-40-0319

Dear Judge Lee:

I would respectfully request protection from court appearances from August 19-25, 2015 and September 4-9, 2015 to travel to Philadelphia. My girlfriend/partner lives there, and I am trying to set this time aside to insure that we can get together as the summer winds down. Please let me thank you in advance for your kind consideration of this request. I enclose a copy of this letter and a self-addressed envelope for your convenience. I am,

Very truly yours,



H. Clayton Walker, Jr.

HCW:cnc  
Enclosures  
cc: C. Steven Moskos, Esq.

Protection Granted:

\_\_\_\_\_  
Alison Renee Lee  
Chief Administrative Judge – Richland County  
Richland County Court of Common Pleas

This \_\_\_\_ day of \_\_\_\_\_, 2015

Exhibit 33

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955  
Fax (803) 454-0956  
cwalker@walkerreibold.net  
Reply to Columbia Office

March 28, 2016

**VIA HAND-DELIVERY**

The Honorable Alison Renee Lee  
Chief Administrative Judge – Richland County  
PO Box 192  
1701 Main Street - Room 324  
Columbia, SC 29202-0192

Re: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC  
Automotive Group d/b/a Midlands Honda, Nationwide Mutual Insurance Company  
C/A No.: 2013-CP-40-0319

Dear Judge Lee:

Attached is a consent motion to have this case tried the week of April 18 instead of April 11 and a supporting affidavit. Both I and my client have serious conflicts the week of April 11 as set forth in the attached. The relief we seek only delays trial for one week, and we would be grateful if the Court could accommodate us. Opposing counsel consents.

I would be glad to prepare an appropriate order. Thank you in advance for your consideration. I am,

Very truly yours,



H. Clayton Walker, Jr.

HCW:cnc

Enclosure

cc: C. Steven Moskos, Esq.

Exhibit 34

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Daniel O'Shields and Roger W. Whitley, a  
partnership d/b/a O&W Cars,  
☐ Plaintiff

v.

Psc Automotive Group D/B/A Midlands Honda  
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-40-0319

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Plaintiff's Attorney:</b><br>C. Steven Moskos, Bar No.<br>Address:<br>4000 Faber Place Drive - Ste. 300<br>phone: (843) 763-5297 fax:<br>e-mail: csmoskos@earthlink.net other:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <b>Defendant's Attorney:</b><br>Harry Clayton Walker, Bar No. 5779<br>Address:<br>PO Box 61140, Columbia, SC 29260<br>phone: 803-454-0955 fax: 803-454-0956<br>e-mail: cwalker@walkerreibold.net other:                             |
| <input type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete SECTIONS I and III)<br><input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete SECTIONS II and III)<br><input checked="" type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete SECTIONS II and III)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                     |
| <b>SECTION I: Hearing Information</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                     |
| Nature of Motion:<br>Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                     |
| <b>SECTION II: Motion/Order Type</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                     |
| <input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief or action by the court as set forth in the attached proposed order.<br><div style="text-align: right; margin-top: 20px;"><u>March 25, 2016</u><br/>Date submitted</div>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                     |
| <b>SECTION III: Motion Fee</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                     |
| <input checked="" type="checkbox"/> <b>PAID - AMOUNT: \$25.00</b><br><input type="checkbox"/> <b>EXEMPT:</b> (check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support<br><input type="checkbox"/> Domestic Abuse or Abuse and Neglect<br><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party<br><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief<br><input type="checkbox"/> Motion for Stay in Bankruptcy<br><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)<br><input type="checkbox"/> Proposed order submitted at request of the court; or,<br>reduced to writing from motion made in open court per judge's instructions<br>Name of Court Reporter: _____<br><input type="checkbox"/> Other: |                                                                                                                                                                                                                                     |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other:                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <div style="border-bottom: 1px solid black; height: 20px; margin-bottom: 10px;"></div> <b>JUDGE</b><br><div style="border-bottom: 1px solid black; height: 20px; margin-bottom: 10px;"></div> <b>CODE:</b> _____ <b>Date:</b> _____ |
| <b>CLERK'S VERIFICATION</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                     |
| Collected by: _____ Date Filed: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                     |
| <input type="checkbox"/> <b>MOTION FEE COLLECTED:</b> _____<br><input type="checkbox"/> <b>CONTESTED - AMOUNT DUE:</b> _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                     |

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND )

Civil Action No. 2013-CP-40-0319

Daniel O'Shields and Roger W )

Whitley, A Partnership d/b/a )

O&W Cars, )

*Plaintiffs,* )

v. )

CONSENT MOTION FOR A CONTINUANCE

PSC Automotive Group d/b/a )

Midlands Honda, )

*Defendant.* )

TO: C. STEVEN MOSKOS, ESQ., ATTORNEY FOR PLAINTIFFS:

You will please take notice that the undersigned counsel for defendant will move before the presiding judge of the court of common pleas for Richland County for an order continuing the trial of this case for one week until the term of April 18, 2016 and for an order shortening the time for that motion to be heard.

The grounds for these motions are that both the defendant and its counsel have conflicts during the week of April 11, 2016, when the case currently appears on the roster. The defendant conducts an annual meeting at which all managers, investors and company officers attend. The 2016 annual meeting has been scheduled for April 13 -- 14, 2016, and that schedule was set months ago. Numerous persons participate in the meeting in Charlotte, North Carolina, and some are coming from as far away as California. This meeting cannot be rescheduled. The general manager of the dealership which is the defendant in this case is required to attend this meeting. This person also has a conflict on April 12. His son is scheduled to interview with a professor at Boston College.

for admission into a specialized program at that school, and his father will accompany him. This event has also been scheduled well in advance and will be difficult to rearrange.

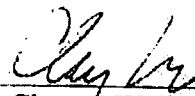
Counsel for the defendant represents Lehmann Maupin Galleries in an action pending in the United States District Court in Charleston, South Carolina. The amended scheduling order in that case requires discovery to be completed by April 15, 2016. The New York counsel with whom the undersigned has been working has finally convinced a reluctant witness to sit for deposition on April 12, 2016. The witness, Teresita Fernandez, is a prominent modern artist who will be deposed in Manhattan. Depositions of several other nonparties will be taken in New York on April 11 -- 14, 2016.

Counsel in that action have been working to arrange these depositions since late February. An effort was made to conduct this discovery during the week of March 21, 2016, but that effort was unsuccessful.

Plaintiff consents to this motion and request for a continuance provided that this action is placed on the roster for the week of April 18 in its normal numerical position.

This motion is based upon the pleadings, the attached affidavit of defendant's counsel, such other affidavits that may be subsequently served and applicable law.

Respectfully submitted,

  
\_\_\_\_\_  
H. Clayton Walker, Jr.  
WALKER | REIBOLD  
Post Office Box 61140  
Columbia, SC 29260  
(803) 454-0955  
(803) 454-0956 Facsimile  
cwalker@walkerreibold.net

ATTORNEYS FOR DEFENDANT  
PSC AUTOMOTIVE GROUP



STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

Daniel O'Shields and Roger W  
Whitley, A Partnership d/b/a  
O&W Cars, )

*Plaintiffs,* )

v. )

PSC Automotive Group d/b/a  
Midlands Honda, )

*Defendants.* )

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-0319

AFFIDAVIT OF CLAY WALKER

Personally appeared before me the undersigned H. Clayton Walker, Jr. who, being duly sworn,  
deposes and says:

1. I am counsel for the defendant in this action.
2. I am also counsel for Lehmann Maupin Galleries in an action pending in the United States District Court in Charleston, South Carolina. My client has art galleries in Manhattan and Hong Kong, and that claim arises from defective materials used to construct six pieces of outdoor art. Almost all of the witnesses are in New York or California. The artist who designed the works is Teresita Fernandez, a prominent modern artist whose studio is in Brooklyn.
3. Beginning on February 24, 2016, efforts were made to schedule the deposition of the artist and others in the state of New York during the week of March 21, 2016. These efforts were unsuccessful, in part because several nonparties were not particularly cooperative even with the employment of subpoenas.

4. The amended scheduling order in the art case requires discovery to be completed by April 15, 2016. The original order was amended to grant additional time.

5. I have been working with a New York lawyer who specializes in representing visual artists and art galleries. He has never appeared in this action, but has assisted me on matters in New York. He has finally persuaded the artist to appear for a deposition in Manhattan on April 12, 2016.

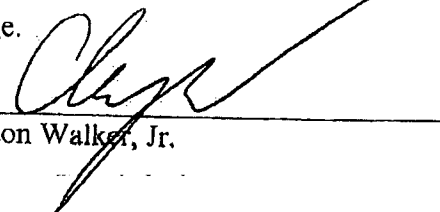
6. The parties in the art case will be taking at least five other depositions during the same week to complete discovery by the deadline set by the court.

7. I am the only partner in my firm who has worked on the art case.

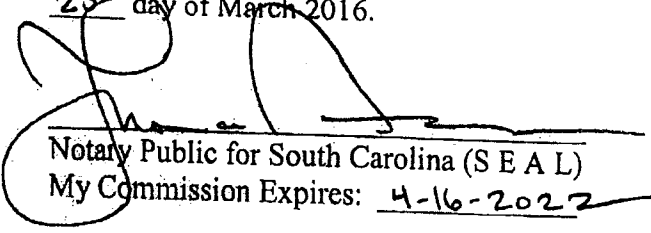
8. When I advised my client about the trial date earlier this week, I learned of additional scheduling complications. Plaintiff's claim is against a car dealership, Midlands Honda. It is part of a group of dealerships which is scheduled to have an annual meeting on April 13 and 14, 2016. This meeting has been scheduled for months. Managers, company officers and investors all attend this meeting, and the general manager of Midlands Honda is scheduled to be at that meeting. The meeting cannot be rescheduled due to the large number of participants and prearranged travel plans.

9. The general manager of Midlands Honda also has a conflict on April 12, 2016. He is scheduled to take his son to Boston College to attend an interview with a professor at that school. The interview is in connection with the son's application to that institution, and has been scheduled for some time.

10. Defendant and its counsel seek to continue the trial for only one week, until April 18, 2016. The request is not interposed for delay or advantage.

  
H. Clayton Walker, Jr.

SWORN to before me this  
25<sup>th</sup> day of March 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina (S E A L)

My Commission Expires: 4-16-2022

|                                 |   |                                  |
|---------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS     |
|                                 | ) | FOR THE FIFTH JUDICIAL CIRCUIT   |
| COUNTY OF RICHLAND              | ) | CASE NO. 13-CP-40-0319           |
|                                 | ) |                                  |
| DANIEL O'SHIELDS AND ROGER W.   | ) |                                  |
| WHITLEY A PARTNERSHIP D/B/A O&W | ) |                                  |
| CARS                            | ) |                                  |
|                                 | ) | <b>STIPULATION OF TESTIMONY</b>  |
|                                 | ) | <b>FROM NATIONWIDE INSURANCE</b> |
|                                 | ) | <b>COMPANY</b>                   |
| Plaintiffs                      | ) |                                  |
|                                 | ) |                                  |
| vs.                             | ) |                                  |
|                                 | ) |                                  |
| PSC AUTOMOTIVE GROUP D/B/A      | ) |                                  |
| MIDLANDS HONDA                  | ) |                                  |
|                                 | ) |                                  |
| Defendant                       | ) |                                  |

On August 3, 2003, Sandra Jackson Gaskin purchased a 2003 Honda Civic. Ms. Gaskin insured the Honda Civic with Nationwide Mutual Insurance Company.

On July 21, 2004 at about 10:30 pm, Mrs. Gaskins daughter was involved in a wreck with the vehicle. She was driving in Charleston County when a deer ran out in front of her. She veered off the road. The Honda Civic struck a tree.

Nationwide sent an adjuster to inspect the Civic. He took pictures of the car which have been introduced into evidence as Exhibits 2-10.

The damage estimate listed \$10,388.10 worth of repairs were needed to fix the car. The estimate has been entered into evidence as Exhibit 11.

Nationwide Insurance declared the vehicle a total loss. Nationwide valued the Civic at \$14,100.00. Ms. Gaskin had a \$500.00 deductible. Nationwide paid Ms. Sandra Gaskins \$13,600.00 for the Civic.

Nationwide then sold the Civic at a salvage auction.

Daniel O'Shields and Roger W. Whitley a Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda  
Case No. 13-CP-40-0319

**STIPULATION OF TESTIMONY FROM NATIONWIDE INSURANCE COMPANY**

**C. STEVEN MOSKOS, P.A.**  
**Attorney for Plaintiffs**

**Walker Reibold**  
**Attorneys for Defendant**

**BY:**

\_\_\_\_\_  
C. Steven Moskos  
4000 Faber Place Drive, Ste. 300  
North Charleston, SC 29405  
Telephone: (843) 763-5297  
Email: [csmoskos@earthlink.net](mailto:csmoskos@earthlink.net)

**By:**

\_\_\_\_\_  
H. Clayton Walker, Jr.  
PO Box 61140  
Columbia, SC 29260  
803-454-0955  
Email: [cwalker@walkerreibold.net](mailto:cwalker@walkerreibold.net)

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

COURT OF COMMON PLEAS

- - -

|                             |   |                   |
|-----------------------------|---|-------------------|
| DANIEL O'SHIELDS AND ROGER: | : |                   |
| WHITLEY, A PARTNERSHIP      | : | CIVIL ACTION NO.: |
| D/B/A O&W CARS,             | : |                   |
|                             | : | 2013-CP-40-0319   |
| Plaintiffs,                 | : |                   |
|                             | : |                   |
| vs.                         | : |                   |
|                             | : |                   |
| PSC AUTOMOTIVE GROUP        | : |                   |
| D/B/A MIDLANDS HONDA AND    | : |                   |
| NATIONWIDE MUTUAL           | : |                   |
| INSURANCE COMPANY,          | : |                   |
|                             | : |                   |
| Defendants.                 | : |                   |

---

DEPOSITION OF RANDY THREATT

---

DATE TAKEN: Thursday, April 23, 2015

TIME BEGAN: 2:48 p.m.

TIME ENDED: 3:44 p.m.

LOCATION: Walker & Reibold, LLC  
3321 Forest Drive, Suite 1  
Columbia, South Carolina

REPORTED BY: Deidre Osborne  
EveryWord, Inc.  
P.O. Box 1459  
Columbia, South Carolina 29202  
803-212-0012

Exhibit 36

1 (It is hereby stipulated and agreed by and  
2 between counsel for the respective parties  
3 that this deposition is being taken in  
4 accordance with the South Carolina Rules of  
5 Civil Procedure and that the deponent waives  
6 reading and signing of this deposition  
7 transcript.)

8 - - -

9 RANDY THREATT, after having been first  
10 duly sworn, was examined and testified as  
11 follows:

12 - - -

13 EXAMINATION

14 - - -

15 BY MR. MOSKOS:

16 Q. Mr. Threatt, my name is Steve Moskos.  
17 I'm an attorney from Charleston. I represent some  
18 folks in an action that's been brought against  
19 Midlands Honda. Are you aware of this litigation?

20 A. I'm aware of it based on being called  
21 here today. That's what I'm aware of.

22 Q. Okay. Prior to to- -- well, I think I  
23 sent you a subpoena a month, two months ago,  
24 something like that.

25 A. Uh-huh.

1 Q. -- about this matter?

2 A. No.

3 Q. All right. Well, since you haven't had  
4 your deposition taken before, I'm assuming  
5 Mr. Walker has explained to you some of the rules  
6 that we follow in this process. I want to make  
7 sure that you and I are talking apples and apples,  
8 so I'm going to go through some of them today.  
9 Okay?

10 First thing is, I need you to verbalize  
11 all of your responses. In other words, say yes or  
12 no. Don't shake your head --

13 A. Got it.

14 Q. -- nod your head. Uh-huh and huh-uh are  
15 real close, and you may say one thing. If the  
16 court reporter doesn't take it down right, then  
17 Mr. Walker and I are going to be arguing about it  
18 later, and it just creates a whole lot of  
19 problems.

20 Second thing is, if you would allow me to  
21 verba- -- excuse me. If you would allow me to  
22 complete my question before you give an answer,  
23 that'll help both of us, but most importantly it  
24 will help this young lady down here, the court  
25 reporter, who has to take everything down, and if

1 Q. Prior to that, receiving that subpoena,  
2 had you talked to anybody about this case?

3 A. No, sir.

4 Q. Okay. All right. Have you ever had your  
5 deposition taken before?

6 A. No, sir.

7 Q. All right. Have you spoken with  
8 Mr. Walker about this matter?

9 A. Briefly.

10 Q. When was that?

11 A. Yesterday.

12 Q. All right. Have you had any  
13 conversations with him prior to yesterday?

14 A. He's called my store and asked to speak  
15 to me, and I told him I was busy and I couldn't  
16 talk to him.

17 Q. Okay. But have you had any conversations  
18 with him of substance regarding the facts of this  
19 case?

20 A. Not that I -- not that I remember, no.

21 Q. Nothing until yesterday; is that correct?

22 A. That's the way I remember it, yeah.

23 Q. Okay. All right. All right. Has anyone  
24 from Midlands Honda called you --

25 A. No.

1 we're talking over each other, she doesn't know  
2 who to -- who to type.

3 A. Yes, sir.

4 Q. Okay. Now, do you understand that you  
5 have been placed under oath today?

6 A. Yes, sir.

7 Q. And if I ask you a question that you  
8 don't understand, just ask me to repeat --

9 A. Yes, sir.

10 Q. -- it or rephrase it. I'll be more than  
11 happy to do so. Okay?

12 A. Yes.

13 Q. Okay. Same thing goes if I ask you  
14 something and you don't understand what I'm  
15 saying. Would you just simply ask me to repeat it  
16 or explain it. I'll be more than happy to do so.  
17 Okay?

18 A. Yes, sir.

19 Q. If I ask you a question and you give me  
20 an answer, is it fair for me to assume that you've  
21 heard my question, understood my question and  
22 given me a complete and truthful answer to that  
23 question?

24 A. Yes, sir.

25 Q. Are you currently under any -- under the

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

COURT OF COMMON PLEAS

- - -

|                             |   |                   |
|-----------------------------|---|-------------------|
| DANIEL O'SHIELDS AND ROGER: | : | CIVIL ACTION NO.: |
| WHITLEY, A PARTNERSHIP      | : |                   |
| D/B/A O&W CARS,             | : |                   |
| Plaintiffs,                 | : | 2013-CP-40-0319   |
| vs.                         | : |                   |
| PSC AUTOMOTIVE GROUP        | : |                   |
| D/B/A MIDLANDS HONDA AND    | : |                   |
| NATIONWIDE MUTUAL           | : |                   |
| INSURANCE COMPANY,          | : |                   |
| Defendants.                 | : |                   |

---

DEPOSITION OF BRENT FERRELL

---

DATE TAKEN: Thursday, April 23, 2015

TIME BEGAN: 11:45 a.m.

TIME ENDED: 2:47 p.m.

LOCATION: Walker & Reibold, LLC  
3321 Forest Drive, Suite 1  
Columbia, South Carolina

REPORTED BY: Deidre Osborne  
EveryWord, Inc.  
P.O. Box 1459  
Columbia, South Carolina 29202  
803-212-0012

Exhibit 37



1 of clubs, Exchange Club, Kiwanis Club, anything  
 2 like that?  
 3 A. No, sir.  
 4 Q. Do you belong to the NADA or the SCADA or  
 5 anything like that?  
 6 A. No, sir.  
 7 Q. Was Midlands a member of the -- of NADA?  
 8 A. I -- I don't know.  
 9 Q. Does your wife belong to any sort of  
 10 organizations, clubs, anything like that?  
 11 A. No, sir.  
 12 Q. Now, I think you said the first time you  
 13 spoke to anybody about this matter, this lawsuit,  
 14 was about a month ago when you spoke to  
 15 Mr. Walker. Is that correct?  
 16 A. That spoke -- yeah. I think we  
 17 received -- I received something in the mail.  
 18 Q. A subpoena.  
 19 A. From you, yeah. And then shortly after,  
 20 Mr. Walker made contact and --  
 21 Q. Okay. So that was the first contact you  
 22 had with the case was when you were served with a  
 23 subpoena?  
 24 A. Correct.  
 25 Q. Okay. How many times have you met with

1 Mr. Walker about this matter?  
 2 A. Once.  
 3 Q. And that was about a month ago?  
 4 A. Or that's when he first approached, but  
 5 it was just two weeks ago or something. It was --  
 6 we -- it was just some timing issues of trying to  
 7 get together.  
 8 Q. All right. So you may have talked to him  
 9 about a month or so ago about this issue, but you  
 10 didn't -- you didn't really talk about the facts  
 11 or anything until about two weeks ago?  
 12 A. Correct.  
 13 Q. Have you spoken with Mr. Threatt about  
 14 this matter, the facts of the case and tried to  
 15 remember it?  
 16 A. Not in detail.  
 17 MR. WALKER: Object to the form.  
 18 BY MR. MOSKOS:  
 19 Q. How about Mr. Austin, did you talk to him  
 20 about it?  
 21 A. I mean, we have talked about it. But  
 22 there's -- you know, there's a lot of -- still a  
 23 lot of question marks, you know, far as, you know,  
 24 remembering --  
 25 Q. Okay.

1 A. -- details.  
 2 Q. Have you spoken with anyone else about  
 3 this matter other than Mr. Walker, Mr. Threatt and  
 4 Mr. Austin?  
 5 A. No, sir.  
 6 Q. Okay. Not your wife? You haven't called  
 7 anybody at Midlands and talked to them about it  
 8 or --  
 9 A. No. My wife knows. Yeah. I'm sorry.  
 10 My wife knows, yeah, but nobody at Midlands or --  
 11 Q. And you didn't call Midlands and say,  
 12 "Hey, what's going on," or anything like that?  
 13 A. No.  
 14 Q. Have you done anything to try to  
 15 reconstruct what happened?  
 16 A. No, sir.  
 17 Q. Have you reviewed any documents for  
 18 today's deposition?  
 19 A. What you -- what do you mean by  
 20 "documents"?  
 21 Q. Well, I understand you got a subpoena  
 22 from me, but what I'm asking you is did you --  
 23 have you gone back and has anybody showed you any  
 24 contracts, looked at any of the documentation from  
 25 any deals when the car was originally brought in,

1 when it was sold, where it went --  
 2 A. Yes, sir.  
 3 Q. -- anything like that?  
 4 A. Yes, sir.  
 5 Q. You have?  
 6 A. Yeah.  
 7 Q. What documents have you looked at?  
 8 A. Some type of message that was left, I  
 9 think a Damage Disclosure, something from the  
 10 auction.  
 11 Q. Anything else?  
 12 A. I don't think.  
 13 Q. And that was done a couple weeks ago?  
 14 A. Correct.  
 15 Q. Okay. Anything else that you've looked  
 16 at?  
 17 A. And I think I did see the Carnal on the  
 18 car.  
 19 Q. Anything else?  
 20 A. I think that's about it.  
 21 Q. Okay. Anything you recall about the  
 22 note?  
 23 A. No. Just something about, "Please have  
 24 Randy call somebody." I don't even know if  
 25 there's --

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS  
                                  ) FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND      ) CASE NO. 13-CP-14-0319

DANIEL O'SHIELDS AND ROGER W.     )  
WHITLEY, A PARTNERSHIP D/B/A     )  
O&W CARS,                             )

Plaintiffs,                         )

vs.                                     )

PSC AUTOMOTIVE GROUP d/b/a     )  
MIDLANDS HONDA AND NATIONWIDE   )  
MUTUAL INSURANCE COMPANY,       )

Defendants.                           )

\* \* \* \* \*

DEPOSITION OF:                   SCOTT AUSTIN  
  
DATE TAKEN:                      Friday, April 10, 2015  
  
TIME:                              2:30 p.m.  
  
PLACE:                            3321 Forest Drive  
                                  Columbia, SC  
  
REPORTED BY:                    TERI L. SAMPSON, RPR,  
                                  Notary Public and Certified  
                                  Live Note Reporter

\* \* \* \* \*

POST OFFICE BOX 21784  
CHARLESTON, SOUTH CAROLINA 29413-1784

Exhibit 38

Carolina Reporting (843) 832-0801  
www.carolina-reporting.com

1 A No, sir.

2 Q Have you ever served in the military?

3 A No, sir.

4 Q Do you have any relatives related by blood or  
5 marriage who live in Richland County? You know, maybe  
6 your wife has a sister or cousin or something in  
7 Richland.

8 A No.

9 Q And who have you spoken to about this case?

10 A My wife, Brent, Randy.

11 Q Anybody else? Did you talk to Mr. Walker  
12 about it?

13 A No -- excuse me. He come by just making sure  
14 going to be there.

15 Q All right.

16 A Pretty much that.

17 Q So what did you talk to your wife about?

18 A I said I had to come to some crazy deposition  
19 that happened four or five years ago and I have no idea  
20 why we are even involved in this.

21 Q So did you-all talk about the facts of the  
22 case?

23 A Sure.

24 Q What did you-all talk about?

25 A I told her just -- she asked me what it was

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS  
                                  ) FIFTH JUDICIAL CIRCUIT  
COUNTY OF RICHLAND      ) CASE NO. 13-CP-14-0319

DANIEL O'SHIELDS AND ROGER W.     )  
WHITLEY, A PARTNERSHIP D/B/A     )  
O&W CARS,                             )

Plaintiffs,                         )

vs.                                     )

PSC AUTOMOTIVE GROUP d/b/a     )  
MIDLANDS HONDA AND NATIONWIDE   )  
MUTUAL INSURANCE COMPANY,       )

Defendants.                         )

\*\*\*\*\*

DEPOSITION OF:                   NANCY LYNN WATKINS  
  
DATE TAKEN:                      Friday, April 10, 2015  
  
TIME:                              4:14 p.m.  
  
PLACE:                            3321 Forest Drive  
                                  Columbia, SC  
  
REPORTED BY:                    TERI L. SAMPSON, RPR,  
                                  Notary Public and Certified  
                                  Live Note Reporter

\*\*\*\*\*

POST OFFICE BOX 21784  
CHARLESTON, SOUTH CAROLINA 29413-1784

Exhibit 39

Carolina Reporting (843) 832-0801  
www.carolina-reporting.com

1           A     Actually Mr. Walker did say that it was --  
2     had to do with the history of the car, whether it was  
3     wrecked or not.

4           Q     And what did you tell him?

5           A     I told him I had no idea that it had been  
6     wrecked.

7           Q     How much -- how much did they give you for  
8     the car, what was the selling price?

9           A     I don't -- I don't remember.

10          Q     But it was more than \$5,000?

11          A     Yes.

12          Q     And has anyone from Midlands contacted you  
13     about the Civic since June of 2008?

14          A     No.

15          Q     I think that's all the questions I have.

16          A     Okay.

17                               EXAMINATION

18     BY MR. WALKER:

19           Q     Miss Watkins, before you bought the car I  
20     understand your son checked it out?

21           A     Yeah, online. He found it online. He was  
22     still in Florida. I was still in Florida. My husband  
23     had already moved here.

24           Q     And I understood somebody test drove it  
25     before the purchase?

**From:** Clay Walker  
**To:** "C Steven Moskos"; "Sean B. Cox"  
**Subject:** RE: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, et al. - C/A No.: 2013-CP-40-0319  
**Date:** Tuesday, April 07, 2015 3:36:31 PM  
**Attachments:** image001.png

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Yes to both, and it would help to clarify what we are trying to do. How much time do you want to complete discovery and mediate before trial date, a heads up will help him prepare.

It may help to go ahead and agree on a mediator so we can tell casey we are in progress on that. Locally, danny crowe and earl ellis are good. I am willing to consider others if needed.

What terms can we 40j under if a continuance is not granted? The exemplar I sent you seems to be the easiest way for everybody to get his needs met. I want to resolve this now—if we are not up in two weeks, I will schedule other things.

Clay

**From:** C Steven Moskos [mailto:[csmoskos@earthlink.net](mailto:csmoskos@earthlink.net)]  
**Sent:** Tuesday, April 07, 2015 3:21 PM  
**To:** 'Clay Walker'; 'Sean B. Cox'  
**Subject:** RE: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, et al. - C/A No.: 2013-CP-40-0319

I can do Thursday at 9:30 so long as I can attend by phone. Clay, are you going to have Rob at the status conference? Will he be up to date on what we are trying to do?

C. Steven Moskos  
4000 Faber Place Dr., Suite 300  
North Charleston, SC 29405  
843-763-5297 Office

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**From:** Clay Walker [mailto:[cwalker@walkerreibold.net](mailto:cwalker@walkerreibold.net)]  
**Sent:** Tuesday, April 07, 2015 1:50 PM  
**To:** 'Sean B. Cox'; [csmoskos@earthlink.net](mailto:csmoskos@earthlink.net)  
**Subject:** RE: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. PSC Automotive Group d/b/a Midlands Honda, et al. - C/A No.: 2013-CP-40-0319

I can have somebody there thrsday as well, and would prefer to do it then so that we have clarity on when we are up.

**Exhibit 40**

**From:** Clay Walker  
**To:** csmoskos@earthlink.net  
**Subject:** mediation  
**Date:** Monday, July 06, 2015 4:40:52 PM

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I write to follow up on our conversation Friday about mediation. I repeated my offer to use Danny Crowe or Earl Ellis, and mentioned the dates that Danny was available later this month. My client has instructed me to pursue mediation, which is long overdue. I welcome other suggestions if you would prefer to use another person. You have had my suggestions for months. We have little time and need to address this immediately. I look forward to hearing from you.

Clay Walker  
Walker & Reibold, LLC  
PO Box 61140  
Columbia, SC 29260

Ph: 803-454-0955  
Fax: 803-454-0956

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Exhibit 41

# WALKER || REIBOLD

ATTORNEYS AT LAW

3321 Forest Drive Suite One, PO Box 61140 Columbia, SC 29260

Clay Walker

(803) 454-0955

Fax (803) 454-0956

cwalker@walkerreibold.net

September 1, 2016

**Via E-Mail and Regular Mail**

The Honorable R. Ferrell Cothran, Jr.  
16 N. Brooks St.  
Manning, SC 29102

Re: Daniel O'Shields and Roger W. Whitley, A Partnership d/b/a O&W Cars v. Columbia Automotive Company, LLC d/b/a Midlands Honda  
C/A No.: 2013-CP-40-0319

Dear Judge Cothran:

We are in receipt of the 43 page affidavit on attorney's fees recently submitted to you by Plaintiffs' counsel in this case. We hesitate to take much of your time on something like this, but out of an abundance of caution and to protect the record, we wanted to register certain objections to this affidavit.

In our view, the affidavit should not be considered for a number of reasons. First, we view the affidavit as untimely. It was our understanding at the hearing that you had granted Mr. Moskos leave to file an affidavit within 10 days of the hearing date. The affidavit came 33 days after the hearing, and after you had advised the parties of your ruling. At this point, additional argument would be improper and the record would presumably be closed.

Second, the affidavit does not appear to be a true affidavit. Affidavits are sworn statements of fact. See *State v. Dunbar*, 361 S.C. 240, 603 S.E.2d 615. They are not vehicles for legal arguments or conclusions, and affidavits which attempt to serve as legal briefs are normally disregarded. 2A C.J.S., *Affidavits*, § 39; *Chen v. Mayflower Transit, Inc.*, 315 F.Supp.2d 886, 923 (N.D.Ill. 2004). The affidavit recently submitted is a legal brief, complete with case citations, discussion of case law, and legal arguments. It should be disregarded.

Third, affidavits are supposed to be made on personal knowledge. There are a number of statements in Plaintiffs' affidavit which attribute various motivations and statements of mind to Defendant's counsel. Mr. Moskos obviously does not, and could not, have personal knowledge of such things. Statements on such subjects are purely speculation, and there are other statements in the affidavit which also appear to be speculative or lacking in foundation.

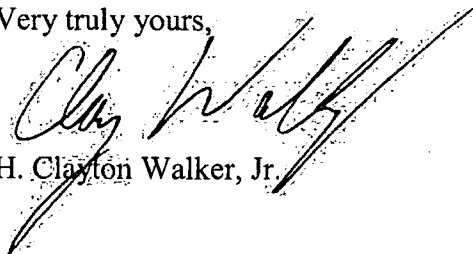


Fourth, we very much disagree with the characterizations of our conduct and motivations, which appear to simply be a form of character assassination. Personal attacks on counsel are irrelevant and not the proper subject of an affidavit like the one submitted in this case.

Finally, were the Court to consider the affidavit on the issue of attorney's fees under North Carolina's statute, as Plaintiffs have requested, we would note that the offer made by the Defendant in this case (\$15,000 plus reasonable attorney's fees as determined by the court) was much closer to the ultimate awards the Court has determined to grant than was the \$280,000 demand made by Plaintiffs.

Thank you for your consideration of this letter. I am,

Very truly yours,



H. Clayton Walker, Jr.

HCW:cnc

cc: C. Steven Moskos, Esq.