IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Case No. 2012-CP-23-07156

CHRISTINE WATTS

Respondent,

v.

SONIC AUTOMOTIVE 2752 LAURENS ROAD, GREENVILLE, INC. d/b/a CENTURY BMW

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

STATEMENT OF ISSUE ON APPEAL

1. Was the Trial Court Correct in Denying Appellant's Motion to Compel Arbitration Based on AT&T Mobility and Preemption when the South Carolina Supreme Court Has Ruled in this Case that "the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted"?

STATEMENT OF THE CASE

This action was initiated on August 29, 2006. (R. p. 77). Ms. Watts alleges that Century BMW d/b/a Sonic Automotive ("Century BMW") was charging illegal closing fees in violation of S.C. Code Ann. § 37-2-307 and § 56-15-10, *et seq* and did engage in one or more of the following illegal acts:

a. failed to register with the Department of Consumer Affairs;
b. failed to individually register annually with the Department of Consumer Affairs;
c. charged illegal "administrative fees" in excess of the amount for which it registered;
d. failed to disclose the illegal "administrative fees" on sales contracts;
e. charged illegal "administrative fees" in excess of their costs;
f. failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;
g. advertised deceptively and illegally by failing to include the "administrative fees" in the advertised price; and
h. created a closing procedure to illegally add "administrative fees."

(R. p. 98). Ms. Watts contends that the conduct of Century BMW violates the South Carolina Dealer's Act, S.C. Code Ann. § 56-15-10. (R. p. 98).

Over six years ago, Century BMW filed a motion to compel arbitration, claiming arbitration was required by an agreement under which Ms. Watts waived the right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. (R. p. 182; R. p. 189). This motion was denied by the trial court in an order dated March 10, 2008. (R. p. 4).

On March 12, 2008, the Century BMW filed a notice of appeal to the South Carolina Court of Appeals. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued an order holding that the provision of the arbitration agreement relied upon by Century

BMW was invalid, unenforceable, and in violation of the public policy of South Carolina, specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows:

> The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:
>
> > When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.
>
> Section 56-15-110(2). The Dealers Act further provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." Section 56-15-130.
>
> Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit, violates our State's public policy and is void and unenforceable. . . . We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See* Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

(R. p. 27 at pp. 33-34) ("Herron I").[1]

Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement at issue, Century BMW filed a Petition for Rehearing. (R. p. 852). By order dated June 9, 2010, the South Carolina Supreme Court denied the Petition for Rehearing. (R. p. 35).

On August 31, 2010, Century BMW petitioned the United States Supreme Court for a writ of certiorari. (R. p. 905). While that petition was pending, the United States Supreme Court issued its decision in AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1742, 179 L. Ed. 2d

[1] While the South Carolina Supreme Court used the term "class action" presumably as a matter of convenience it has been recognized that a group action under the Dealers Act is not the same as a class action under Rule 23, and that the prerequisites of Rule 23 do not apply. (R. p. 17 at pp. 20-21).

742 (2011). The United States Supreme Court then remanded this case to the South Carolina Supreme Court for further consideration in light of AT&T. (R. p. 39).

After supplemental briefing and oral argument centering on preemption, the South Carolina Supreme Court issued its opinion, dated December 19, 2011. In its opinion, the South Carolina Supreme Court stated: "we find the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted." (R. p. 59 at p. 65) ("Herron II"). Century BMW did not file a Petition for Rehearing challenging this ruling.

Century BMW then filed a Petition for a Writ of Certiorari to the United States Supreme Court arguing that the South Carolina Supreme Court's ruling that Century BMW had "forfeited" the preemption argument by failing to raise it to any prior court was unfair because it would "deprive [Century BMW] of a 'reasonable opportunity' to assert its federal rights." (R. p. 990, at p.1010).

On May 21, 2012, the United States Supreme Court denied certiorari. (R. p. 66). Thus, the controlling opinion in this case is the South Carolina Supreme Court holding that, in Century BMW's words, Century BMW "forfeited its preemption argument." This is the law of the case.

Despite correctly admitting in previous briefing that the South Carolina Supreme Court determined that Century BMW "forfeited its preemption argument" by knowingly failing to raise the argument, Century BMW then filed another motion to compel arbitration based on preemption on May 11, 2012. (R. p. 1092). The trial court held oral argument on this motion on November 28, 2012.

By Order dated January 8, 2013, the Honorable Doyet A. Early, III held:

> First, I DENY Defendant Century BMW's Motion (in the alternative) to Compel Arbitration. The S.C. Supreme Court's opinion in *Herron II* held, Century BMW could not continue to re-litigate the enforceability of the arbitration agreement by raising arguments it chose not to argue, when the motion to compel arbitration was first argued.
>
> ...
>
> Century BMW admitted in its briefing to the United States Supreme Court that the South Carolina Supreme Court's ruling means that Century BMW forfeited the ability to raise preemption.
>
> ...
>
> Century BMW was correct; the South Carolina Supreme Court ruled that Century BMW forfeited the ability to raise preemption, a position echoed by this Court.

(R. p. 67 at pp. 71-73).

Century BMW then filed a motion for reconsideration which was denied by an Order entered on March 11, 2013. (R. p. 75; R. p. 1198). Century BMW filed the instant appeal on March 15, 2013 again asserting arguments based on AT&T Mobility and preemption despite the South Carolina Supreme Court's ruling in this case that: "the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted." (R. p. 59 at p. 65).

ARGUMENT

1. The Trial Court was Correct The South Carolina Supreme Court in Herron II Held that Century BMW Forfeited the Ability to Argue Preemption By Not Raising This Known Argument on the First Motion to Compel Arbitration.

Century BMW's attempt to re-litigate whether this case should be remanded for arbitration is improper and contrary to the South Carolina Supreme Court's holding in Herron II. The South Carolina Supreme Court in Herron II held that Century BMW cannot continue to re-litigate the enforceability of the arbitration agreement by raising arguments it chose not to argue when the first motion to compel arbitration was first argued. The South Carolina Supreme Court opinion in Herron II provides in part:

> **Moreover, it is clear preemption was neither a novel nor an unknown argument to Appellant. Significantly, Appellant did raise the issue of preemption to the trial court, albeit in a different context.** Respondents initially challenged the arbitration agreement on the basis that it lacked certain formatting requirements under the South Carolina Arbitration Act. However, Appellant successfully defeated that state law challenge based on preemption, specifically arguing that the FAA preempted state law due to the presence of interstate commerce. The voluminous record is otherwise silent as to any claim of preemption, until the petition for rehearing filed with this Court.

(R. p. 59 at p. 65) (emphasis added).

> As this Court observed, **issue preservation rules "prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case**." I'On, 338 S.C. at 406, 526 S.E.2d at 724. Here, intentionally or by chance, Appellant kept the ace card of preemption up its sleeve until after this Court filed its opinion. Under **even the most liberal approach to issue preservation principles, we could not treat Appellant's preemption argument as preserved in our courts as a matter of state law.**
>
> Because the matter of preemption was not raised to and ruled upon in any of the South Carolina proceedings, **we find the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted**. We reinstate our original opinion and decline to revisit it.

(R. p. 59 at p. 65) (emphasis added).

Importantly, the South Carolina Supreme Court held that the preemption argument was not "preserved in our **courts** as a matter of state law." (emphasis added). Use of the phrase "our courts" shows that the Supreme Court specifically meant all South Carolina courts and not just the South Carolina Supreme Court.

Additionally, the South Carolina Supreme Court held that "the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted." (R. p. 59 at p. 65).

If the Supreme Court had intended to rule that the issue of preemption was not proper on that appeal but instead should now be raised so that the trial court could give consideration to the

issue in light of AT&T Mobility, it could have remanded the case for further determination. It chose not to do so. Instead, the Supreme Court properly decided that the issue would not be remanded for further review and that "further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted." (R. p. 59 at p. 65). The Supreme Court reinstated its original opinion holding that the arbitration clause at issue was unenforceable. Again, the South Carolina Supreme Court's language was clear it held that this issue was "procedurally barred as a matter of state law." This pronouncement is more than simply saying the issue was not preserved for that appeal and should now be raised for the trial court's consideration.

Respectfully, this Court should reject Century BMW's attempt to now raise the issue of preemption in light of AT&T Mobility because the issue is "procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted." (R. p. 59 at p. 65). Quite simply, Century BMW, in its own words, "forfeited"[2] the ability to make this argument by choosing not to make this argument when they moved for arbitration.

Notably, Century BMW admitted in briefing to the United States Supreme Court that the South Carolina Supreme Court's ruling meant that it "forfeited" the ability to raise preemption. Century BMW's brief provides in part:

> In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited that argument by failing to raise it earlier.

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[2] Webster's Dictionary online defines the term "forfeit" as meaning: "to lose or lose the right to especially by some error..." See http://www.merriam-webster.com/dictionary/forfeit (last checked 6/5/13). Here, the Supreme Court ruled that Century BMW lost the right to argue preemption by knowingly failing to raise this issue on the first motion to compel arbitration. *See* (R. p. 59 at p. 65).

(R. p. 990 at p. 1008).

> The South Carolina Supreme Court's determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law on the preservation arguments.

(R. p. 990 at p. 1009.).

> [The forfeiture rule] is inequitable because it would deprive [Century BMW] of a "reasonable opportunity" to assert its federal rights."

(R. p. 990 at p. 1010).

Similarly, Century BMW's Reply Brief to the United States Supreme Court stated:

> In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration.

(R. p. 1082 at p. 1084).

> [T]here is no valid justification for the South Carolina Supreme Court's subsequent forfeiture determination—a determination that unjustly deprived [Century BMW] of a "reasonable opportunity" to assert its federal rights.

(R.p. 1082 at p. 1088).

Century BMW should be bound by these admissions and not permitted to now argue the opposite position. *See* Quinn v. Sharon Corp., 343 S.C. 411, 416, 540 S.E.2d 474, 476 (Ct. App. 2000) (j. Anderson concurring) ("A court must be able to rely on the statements made by the parties because truth is the bedrock of justice. Therefore, a litigant cannot "blow both hot and cold."). Century BMW now argues that "the South Carolina Supreme Court said nothing about Century BMW being permanently barred from raising the issue of federal preemption with the trial court; rather, it held that, as a matter of appellate procedure, Century BMW could not raise the issue *in that appeal* because it had not allowed the trial court an opportunity to rule on the

issue first." See Century BMW brief, initial brief page 12. This argument completely contradicts the prior admissions to the United States Supreme Court wherein Century BMW admitted the ruling was a "forfeiture determination" that would deprive Century BMW of a "reasonable opportunity" to assert its rights. Quite simply, if Century BMW believed, as it now argues, that Herron II meant for it to go back to the trial court and raise federal pre-emption for further consideration in light of AT&T Mobility it would not have argued that this was a "forfeiture determination." In light of the prior admissions to the United States Supreme Court, Century BMW should be estopped from now arguing that the South Carolina Supreme Court's ruling is anything other than a finding that Century BMW has "forfeited" its ability to argue preemption in all South Carolina courts.

Importantly, the South Carolina Supreme Court's ruling that Century BMW is "procedurally barred as a matter of state law" from arguing preemption based on AT&T Mobility is a just ruling. Century BMW knew that it had a preemption argument and chose not to raise it before the trial court in the initial hearing on November 30, 2007.[3] Century BMW lost the motion and then filed an appeal which effectively delayed further prosecution of the case until the United States Supreme Court denied certiorari on May 21, 2012. This is the second motion to compel arbitration which is now on a second appeal, almost six years after the first hearing

[3] Century BMW is trying to re-litigate rulings already made by the South Carolina Supreme Court. For example, Century BMW's brief states: "the trial court's interpretation of Herron II is erroneous because it would lead to the illogical and unjust result that Century BMW waived a preemption argument that was not known to it when it filed its initial Motion to Compel." This argument was already rejected by the South Carolina Supreme Court in Herron II which definitively stated: "Moreover, it is clear preemption was neither a novel nor an unknown argument to Appellant." (R. p. 59 at p. 65). This argument by Century BMW is another example of how it is abusing our system of justice by continually trying to re-litigate issues and unfairly delaying this case by several years.

before the trial court. It would be inequitable to adopt a rule that a party can knowingly hold back arguments, test each individual argument on separate appeals, and effectively prevent a case from ever progressing forward.

Respectfully, this Court should affirm the trial court's ruling, follow the South Carolina Supreme Court Order in Herron II, and rule that "the issue of preemption is procedurally barred as a matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted."

2. The South Carolina Supreme Court's decision in Herron I is based on state contract and statutory law and does not conflict with the Supreme Court's holding in *AT&T Mobility*. [4]

Even if the trial court's ruling was in error, which is denied, the motion to compel arbitration should be denied because the Herron I opinion holding that the arbitration clause at issue is not enforceable does not conflict with the United States Supreme Court's holding in AT&T.

South Carolina applies state law to determine the interpretation of a contract formed in the State of South Carolina. Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 551-52, 436 S.E.2d 182, 184 (Ct. App. 1993)("Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be deter-mined by the law of the state in which the contract was made."). [5] Under state law principles, a "contract is void *ab initio* and

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[4] This argument is made pursuant to Rule 220 (c), SCACR which provides: "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."

[5] Even if the FAA is involved, state law governs contract formation. *See,* Hill v. Peoplesoft USA, Inc., 412 F.3d 540 (4th Cir. 2005) (noting that the FAA requires and this Court directs the use of "ordinary state-law principles that govern the for-mation of contracts.");

unenforceable [if] it violates statutory law and public policy" and will not be enforced. Berkebile v. Outen, 311 S.C. 50, 54, 426 S.E.2d 760, 762, n. 2 (1993) (recognizing that an illegal contract has always been unenforceable and that South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the constitution). Where a statute is enacted to protect the public, the statutory provisions become part of any contract, and override any conflicting contractual provisions. *See, e.g*, Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 120, 659 S.E.2d 158, 165 (2008) (Court recognized that the underlying goals of the Procurement Code served important public interests and held that contracts formed pursuant to the Procurement Code were deemed to incorporate the applicable statutory provisions, with the statutory provision prevailing over conflicting contract provisions); Kay v. State Farm Mut. Auto. Ins. Co., 349 S.C. 446, 450, 562 S.E.2d 676, 678 (Ct. App. 2002) (holding that uninsured motorist insur-ance coverage was controlled by statute and any policy "inconsistent therewith [is] void, and the rele-vant statutory provisions prevail as if embodied in the policy.").

The state-law rule that the United States Supreme Court found to be preempted in AT&T is distinguishable from the substantive state law protection in this case. AT&T concerns the preemption of unconscionability determinations for class action waivers but did not purport to deal with the validity of a contract that conflicts with a state statutory right such as the group action in the Dealers Act. AT&T specifically deals with the rule in Discover Bank v. Superior Court, 36 Cal 4th 148, 113 P.3d 1100 (2005) and addresses whether the Federal Arbitration Act (FAA) preempted the Discover Bank rule "classifying most collective-arbitration waivers in consumer contracts as uncon-scionable." AT&T, 131 S.Ct. at 1746. The AT&T case was about unconscionability, while this case is about the effect of a purported contractual waiver of an

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Adams v. Suozzi, 433 F.3d 220, 227 (2d Cir. 2005)) "[w]hen contract formation is at issue in an FAA case, we generally apply state-law principles.").

unwaivable right to a group action under state law, regardless of unconscionability, which renders the contract void *ab initio* under South Carolina law.

Before the decision in AT&T, the court in Discover Bank considered a California law that instructed courts to refuse to enforce any contract found to have been unconscionable at the time it was made or to limit the application of any unconscionable clause. *See* Cal. Civ.Code § 1670.5(a). In Discover Bank, the California Supreme Court applied that statute to class-action waivers in arbitration agreements and held that a class-action waiver in an arbitration agreement constituted a deliberate scheme to cheat large numbers of consumers from relatively small amounts of money and to protect businesses from responsibility for their own fraud. Thus, the court created the Discover Bank rule, which held that class action waivers in consumer contracts of adhesion were unenforceable, and found that the FAA did not preempt that rule.

In AT&T, the holding was limited and found that, generally, states may not adopt rules of contract interpretation that undermine the "overarching purpose" of the FAA, which is to ensure enforcement of arbitration agreements. AT&T at 1748. In other words, the court in AT&T rejected the judicially created rule that class-action waivers in all consumer arbitration agreements were unconscionable. However, the court in AT&T did not address a representative action expressly provided for by statute, which is at the heart of this matter. Individual actions of "one plaintiff, one dealer" (as Century BMW would try to impose) would eviscerate the protections provided by the Dealers Act, which was enacted to safeguard the public as the South Carolina Supreme Court previously recognized:

> . . unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary **to the underlying statutes' very purposes of punishing acts that adversely affect the public interest.**

Simpson v. MSA of Myrtle Beach, Inc , 373 S.C. 14, 30, 644 S.E.2d 663, 671 (2007) (emphasis added).

In Herron I, the South Carolina Supreme Court adopted the reasoning in Simpson, *supra*, and found that the arbitration agreement violated "statutory law" because it prevents Christine Watts from "receiving the mandatory statutory rights" provided by the South Carolina Dealers Act. In other words, the formation of the contract was defective from its inception because it was in conflict with South Carolina statutory law. This conflict rendered the arbitration contract void *ab initio*. As Justice Thomas recognized in AT&T, an agreement to arbitrate should not be enforced if a "party successfully challenges the formation of the agreement " AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753, 179 L. Ed. 2d 742 (2011) J. Thomas concurring. The South Carolina Supreme Court's ruling is based on state contract law and a substantive state statute and does not conflict with AT&T.

Century BMW asserts that other cases decided after AT&T have reached similar conclusions as to pre-emption. However, those cases are distinguishable from the case at bar because those cases do not involve a substantive, non-waivable right granted by a state statute. *See* R. p. 27 ("Herron I") at p. 34 ("[T]he Legislative has made clear that the public policy of this state is to provide consumers with a non-waivable right to bring a class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit, violates our state's public policy and is void and unenforceable.").

In addition, Century BMW ignores a case almost on point with the case here. In Brown v. Ralphs Grocery Co., 197 Cal.App. 4th 489 (Cal. App. 2011) *review denied*, October 19, 2011, the court held:

> We also hold that the recent decision of the United States Supreme Court in *AT & T Mobility LLC v Concepcion et ux.* (2011) __ U.S.__ , 131 S.Ct. 1740 (*AT & T*), holding that California decisional law invalidating class action waivers in consumer arbitration agreements is pre-empted by the Federal Arbitration Act (9 U.S.C. 1 et seq. (FAA)), **does not apply to representa-tive actions under the [Private Attorney General Act], and thus the trial court correctly ruled that the waiver of plaintiff's right to pursue a representative action under the PAGA was not enforceable under California law.**

Brown at 494. (emphasis added). In that case, the plaintiff brought both a class action and a representative action under the Private Attorney General Act, against her employers for labor violations.[6] The court in that case also noted that previous case law had determined that class actions were distinct from representative PAGA actions because "class action requirements do not apply to representative actions brought under the PAGA." Id at 499.

The court in Brown noted that AT&T did not purport to deal with the possible preemption of contractual efforts to eliminate a statutory right to a representative action: "AT&T does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law." Id at 500. Furthermore, as the court in Brown recognized:

> . . . a representative action has "significant institutional advantages" over a single claimant arbitration. The representative action is a means for public enforcement of the labor laws. Thus, assuming it is authorized, a single claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code.

Id at 502. The court also noted "that plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA. . . . In short, representative actions under the PAGA do not conflict with the purposes

[6] While the court in Brown also found that the trial court erred in holding the class action waiver was not enforceable, the court's decision was not based on AT&T Instead, the court found that the plaintiff had failed to make the necessary showing (in opposing the petition to compel arbitration), as required by Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007).

of the FAA." Id at 502. Because the AT&T case did not involve waivers of "statutory representative actions," the Brown court concluded that the FAA did not preempt state law regarding the unenforceability of a contractual waiver of the right to pursue a representative action. Id.

Here, the South Carolina Dealers Act, S.C. Code Anno. § 56-15-110 provides that "one or more [persons] may sue for the benefit of the whole, **including actions for injunctive relief.**" (emphasis added). This section is an extension of S.C. Code Anno. § 56-15-40 (5), which creates the Office of Administrator, within the Attorney General's office, for the purpose of regulating the Dealers Act and grants the Administrator the power "to investigate, issue cease and desist orders **and injunctive relief**. . . ." (emphasis added). In other words, the Dealers Act empowers both the State Attorney General and private citizens to seek injunctive relief on behalf of the public. Here, Christine Watts brought an action on behalf of the whole, which seeks injunctive relief preventing car dealers from advertising/charging future customers with administrative fees in a manner which violates S.C. Code Ann. § 56-15-10 and S.C. Code Ann. § 37-2-307.

Because Christine Watts seeks injunctive relief on behalf of the whole as expressly permitted under statute, she is acting as private attorney general. In Brown, the court found that AT&T did not apply to a private attorney general action, which is designed to protect the public and penalize the wrongdoer. Brown at 502.

The trial court in case has already recognized that this case is being pursued as a private attorney general action:

> This case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act. A "private attorney general suit" is a term used by courts when statutes authorize both the Attorney General's office and private citizens, through civil actions, to

> enforce regulations. In this case, the Dealers Act empowers both the State Attorney General and private citizens to seek injunctive relief on behalf of the public. Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general. Plaintiffs' counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices.

(R. p. 17 at p. 22). The court also recognized that an action under the Dealers Act is not the same a class action: "Class certification is not a prerequisite to action to a private attorneys general suit." (R. p. 17 at 22). Since this case is a private attorney general action, and not a class action, AT&T does not apply and this Court should not compel arbitration on that basis. Accordingly, even if the trial court was wrong in following the South Carolina Supreme Court's ruling that "the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted" this Court should still deny the motion to compel arbitration because AT&T Mobility does not apply.

CONCLUSION

Century BMW's motion to compel arbitration based on preemption should be denied because the trial court was correct the South Carolina Supreme Court held that Defendant has forfeited this argument by knowingly failing to raise this argument over five years ago in the initial motion to compel arbitration. As the South Carolina Supreme Court made clear in this case: "the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted." Accordingly, Century BMW's request now for further consideration in light of AT&T Mobility is improper and the trial court's Order denying the Motion to Compel Arbitration should be affirmed.

Respectfully submitted,

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August 6, 2013

Barnwell, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
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The Honorable Doyet A. Early, Circuit Court Judge

Case No. 2012-CP-23-07156

CHRISTINE WATTS

Respondent,

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SONIC AUTOMOTIVE 2752 LAURENS ROAD, GREENVILLE, INC. d/b/a CENTURY BMW

Appellant

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that Respondents' Final Brief complies with Rule 211 (b), SCACR and with the August 13, 2007 Order of the Supreme Court on Personal Data Identifies.

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Case No. 2012-CP-23-07156

CHRISTINE WATTS

Respondent,

v.

SONIC AUTOMOTIVE 2752 LAURENS ROAD, GREENVILLE, INC. d/b/a CENTURY BMW

Appellant

PROOF OF SERVICE

The undersigned employee of the law offices of Richardson, Patrick, Westbrook & Brickman, LLC attorneys for the Respondent, do hereby certify that service of the Final Brief of Respondent was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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