

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM AIKEN COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Doyet A Early, III, Circuit Court Judge

Circuit Court Case No 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, individually and for the benefit of all car buyers who paid "administrative fees" as described below to Defendants, **Respondents,**

v

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc , Galeana Chrysler Plymouth, Inc , a/k/a Galeana Chrysler Jeep, Inc , J L H Investments LP a/k/a Hendrick Honda, Overland, Inc , d/b/a Land Rover of Columbia, Taylor Toyota a/k/a Taylor Investments, and Toyota of Greenville, Inc , **Defendants,**

OF WHOM

Century BMW d/b/a Sonic Automotive is the

Appellant

Supplemental Record

Steven W Hamm
C Jo Anne Wessinger Hill
RICHARDSON PLOWDEN & ROBINSON, P A
P O Drawer 7788
Columbia, South Carolina 29202
(803)771-4400
(803)779-0016 (facsimile)
Email shamm@richardsonplowden com
jhill@richardsonplowden com

Dennis M Black (*pro hac vice admitted*)
Ryan L VanGrack (*pro hac vice admitted*)
WILLIAMS & CONNOLLY LLP
725 Twelfth St , N W
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (facsimile)
Email dblack@wc com
rvangrack@wc com

ATTORNEYS FOR APPELLANT CENTURY
BMW D/B/A SONIC AUTOMOTIVE, WHOSE
TRUE NAME IS SONIC AUTOMOTIVE 2752
LAURENS RD , GREENVILLE, INC D/B/A
CENTURY BMW

Other Counsel of Record

A Camden Lewis, Esq
LEWIS & BABCOCK, LLP
1513 Hampton Street
P O Box 11208
Columbia, SC 29211
803-771-8000
803-733-3534 (facsimile)
Email acl@LewisBabcock.com

Michael E Spears, Esq
MICHAEL E SPEARS, P A
P O Box 5806
Spartanburg, SC 29304

Gedney M Howe, III, Esq
GEDNEY M HOWE, III, PA
P O Box 1034
Charleston, SC 29402

Richard A Harpootlian, Esq
RICHARD A HARPOOTLIAN, P A
P O Box 1090
Columbia, SC 29202
ATTORNEYS FOR RESPONDENTS

James Y Becker, Esquire
Mary M Caskey, Esquire
HAYNESWORTH SINKLER BOYD, PA
1201 Main Street, 22nd Floor (29201-3226)
P O Box 11889
Columbia, S C 29211-1889
(803)779-3080
(803)765-1243 (fax)
Email jbecker@hsblawfirm.com
mcaskey@hsblawfirm.com
ATTORNEYS FOR GALEANA CHRYSLER-JEEP, INC AND
J L H INVESTMENTS, LP, D/B/A HENDRICK
HONDA OF EASLEY

J Gregory Studemeyer, Esquire
1804 Bull Street
P O Box 12201
Columbia, SC 29211-2201
(803)779-3363
(803)779-3364
Email GEsquire@sc rr com
ATTORNEY FOR DICK DYER & ASSOCIATES, INC

Bradford N Martin, Esq (SC Bar No 3658)
Laura W H Teer, Esq (SC Bar No 16698)
Keely M McCoy, Esq (SC Bar No 72575)
BRADFORD NEAL MARTIN & ASSOCIATES, PA
PO Box 10410
Greenville, South Carolina 29603
(864)552-9990
Email bmartin@bnmlaw com
lteer@bnmlaw com
kmccoy@bnmlaw com

ATTORNEYS FOR DEFENDANTS OVERLAND, INC D/B/A LAND
ROVER OF COLUMBIA AND TOYOTA OF GREENVILLE, INC ,
D/B/A TOYOTA OF GREENVILLE

H Clayton Walker, Jr , Esquire
Robert L Reibold, Esquire
WALKER & REIBOLD, LLC
P O Box 61140
Columbia, SC 29260
(803) 454-0955
(803) 454-0956 (facsimile)
Email cwalker@walkerreibold net
rreibold@walkerreibold net
ATTORNEYS FOR DEFENDANT TAYLOR INVESTMENTS,
INC , D/B/A TAYLOR TOYOTA

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of which Century BMW d/b/a Sonic Automotive is the

Appellant

APPELLANT'S PETITION FOR REHEARING
PURSUANT TO RULE 221, SCACR

Re Opinion 26805
Heard January 20, 2010 – Filed April 19, 2010

Steven W. Hamm
C. Jo Anne Wessinger Hill
RICHARDSON PLOWDEN & ROBINSON, P.A.
P.O. Drawer 7788
Columbia, South Carolina 29202
(803)771-4400
(803)779-0016 (facsimile)

Dennis M. Black (*pro hac vice admitted*)
Ryan L. VanGrack (*pro hac vice admitted*)
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (facsimile)

ATTORNEYS FOR APPELLANT CENTURY
BMW D/B/A SONIC AUTOMOTIVE, WHOSE
TRUE NAME IS SONIC AUTOMOTIVE 2752
LAURENS RD., GREENVILLE, INC. D/B/A
CENTURY BMW

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Pursuant to Rule 221, SCACR, Appellant Century BMW d/b/a Sonic Automotive, whose true name is Sonic Automotive 2752 Laurens Rd, Greenville, Inc d/b/a Century BMW ("Century BMW"), hereby respectfully moves for reconsideration of this Court's April 19, 2010 decision (Opinion No 26805) affirming in result the trial court's order denying Century BMW's motion to compel arbitration

INTRODUCTION

Eight days after this Court's April 19th Opinion, the Supreme Court of the United States decided *Stolt-Nielsen SA v Animalfeeds Int'l Corp*, No 08-1198, --- U S ----, 2010 WL 1655826 (April, 27, 2010), which changed the legal landscape governing Century BMW's appeal. This Court held that Century BMW could not arbitrate unless it did so as part of a class arbitration. *Stolt-Nielsen*, however, holds that the Federal Arbitration Act ("FAA") requires individual – and not class – arbitration unless a party has *agreed* to class arbitration. Century BMW never agreed to class arbitration. To the contrary, the parties expressly agreed not to arbitrate as a class. Requiring Century BMW to arbitrate in a class arbitration—or not at all—violates the FAA as announced in *Stolt-Nielsen*. The Court, therefore, should withdraw its opinion, reverse the Circuit Court, and remand with instructions to compel Ms Watts to arbitrate her claim individually.

Even were it not for the intervening *Stolt-Nielsen* opinion, this Court should reconsider its opinion. The Court found that the agreement's class action waiver was unenforceable because the South Carolina Legislature intended the Dealers Act to provide a non-waivable right to bring a collective action under the Act. *Herron v Century BMW*, No 26805, --- S E 2d ----, 2010 WL 1541297 (S C Apr 19, 2010). Ms Watts never cited the statutory provision upon which the Court rested its opinion (S C Code § 56-15-130) and, therefore, Century BMW never had a reason to discuss it. The text of the Dealers Act and the legislative history of the collective

action provision demonstrate that the legislature did not intend any collective action right to be non-waivable. Moreover, the Court's rationale was limited to the Dealers Act, as Ms. Watts's second and third causes of action do not arise under the Dealers Act, even under the Court's reasoning, the Court should have compelled individual arbitration of Counts II and III.

BACKGROUND

On October 31, 2006, Respondent Christine Watts, along with the other plaintiffs below, brought this lawsuit as a representative action against hundreds of South Carolina car dealerships, alleging that in connection with her purchase of a vehicle, Century BMW impermissibly charged her an administrative fee. *See Am. Compl.* ¶¶ 384-85.

On December 29, 2006, pursuant to the FAA and the arbitration agreement that Ms. Watts executed, Century BMW moved to compel arbitration of Ms. Watts's claims and to dismiss this action. The arbitration agreement included a provision in which the parties waived "their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." [R. p. 1100, Arbitration Agreement]. On March 10, 2008, Judge Early denied Century BMW's Motion to Compel Arbitration of Ms. Watts's claims on the ground that the arbitration agreement was unconscionable. Century BMW timely appealed.

This Court subsequently certified Century BMW's appeal for review on July 6, 2009. After hearing oral argument, the Court on April 19, 2010, affirmed in result the trial court's order. The Court held that the arbitration agreement was not unconscionable, but held that the provision precluding class actions was unenforceable because, according to the Court, language in the Dealers Act created a non-waivable right to bring a class action suit.

ARGUMENT

I THIS COURT'S OPINION IS INCONSISTENT WITH THE SUPREME COURT OF THE UNITED STATES'S RECENT DECISION IN *STOLT-NIELSEN SA V ANIMALFEEDS INTERNATIONAL CORP*

A *Stolt-Nielsen SA v Animalfeeds International Corp* Holds that the FAA Precludes Class Arbitration Absent An Agreement To Do So

This Court held that the Dealers Act requires parties to submit to class arbitration even if they have agreed otherwise. In *Stolt-Nielsen*, the Supreme Court of the United States held that the FAA¹ embodies a federal policy precisely to the contrary – precluding class arbitration unless the parties affirmatively agreed to arbitrate on a class basis. The FAA clearly preempts South Carolina law, as this Court construed it. See, e.g., *Toler's Cove Homeowners Ass'n Inc v Trident Constr Co*, 355 S C 605, 611, 586 S E 2d 581 (S C 2003) (“the FAA will preempt any state law that completely invalidates the parties’ agreement to arbitrate”), *Blanton v Stathos*, 351 S C 534, 539, 570 S E 2d 565 (S C App 2002) (“The FAA preempts state laws that invalidate the parties’ agreement to arbitrate”), *Tritech Elec Inc v Frank M Hall & Co*, 343 S C 396, 400, 540 S E 2d 864 (S C App 2000) (“FAA preempts conflicting state arbitration law”).

In *Stolt-Nielsen*, plaintiffs sought to pursue a class action in arbitration against various shipping companies. *Stolt-Nielsen*, 2010 WL 1655826 at *4. The parties agreed that

¹ Ms. Watts does not dispute that the FAA governs the arbitration agreement, indeed the Agreement says so expressly. [R p 1100, Arbitration Agreement (“The parties acknowledge and agree that the Federal Arbitration Act shall govern any arbitration under this Agreement.”)] The FAA and the United States Supreme Court decisions interpreting it bind this Court. See *Zabinski v Bright Acres Assocs*, 346 S C 580, 590, 553 S E 2d 110, 115 (2001), *South Carolina v Yetter*, 192 S C 1, 5 S E 2d 291 (1939) (State courts look to decisions of the United States Supreme Court in determining issues involving a federal question), *US v Gilbert*, 345 U S 361, 363 (1953) (“the meaning of a federal statute is for [the United States Supreme Court] to decide”), see also *Atlantic Coast Line RR Co v Wannamaker Chem Co*, 216 S C 226, 233, 57 S E 2d 311 (1950) (South Carolina Supreme Court bound by the terms of the Interstate Commerce Act “and the decisions of the United States Supreme Court construing same”).

their arbitration clause was “silent” on the issue of class arbitration. *Id.* The arbitration panel held that the arbitration clause allowed for class arbitration. The United States Supreme Court disagreed, holding that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding all parties to the pertinent arbitration provision agreed to arbitrate on a class basis. *Id.* at *13

The Court held that under the FAA courts and arbitrators must “give effect to the contractual rights and expectations of the parties.” *Id.* at *11. The parties’ “intentions control,” and they are “generally free to structure their arbitration agreements as they see fit.” *Id.* at *11-12. Therefore, the parties may agree to limit the issues arbitrated and may agree to the rules under which an arbitration will proceed. *Id.* at 12. Additionally, “parties may specify *with whom* they choose to arbitrate their disputes.” *Id.* (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002)). Under the FAA it “falls to courts and arbitrators to give effect to these contractual limitations.” *Id.* When doing so, “courts and arbitrators must not lose sight of the purpose of the exercise to give effect to the intent of the parties.” *Id.*

The Supreme Court therefore concluded that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Id.* at *13 (emphasis in original). The Court found that the “differences between bilateral and class-action arbitration are too great for arbitrators to presume that the parties’ mere silence on the issue of class-arbitration constitutes consent to resolve their disputes in class proceedings.” *Id.* Because the parties had reached “no agreement” on the issue of class arbitration, the parties could not “be compelled to submit their dispute to class arbitration.” *Id.*

If a party cannot be compelled to class arbitration absent an agreement to arbitrate as a class, a fortiori the FAA preempts any public policy requiring class arbitration even where

the parties agreed *not* to arbitrate as a class. See *Toler's Cove Homeowners Ass'n*, 355 S.C. at 605, 611. Indeed, after *Stolt-Nielsen* class action waivers are superfluous because courts and arbitrators cannot compel class arbitration unless parties affirmatively agree to that procedure. *Stolt-Nielsen*, 2010 WL 1655826, at *13.

The *Stolt-Nielsen* decision mandates reversal of the Circuit Court's opinion and a remand directing the Circuit Court to compel Ms. Watts to arbitrate her claim on an individual basis as the agreement requires. Indeed, there are more compelling reasons to reject class arbitration here than in *Stolt-Nielsen*. Whereas the parties in *Stolt-Nielsen* reached "no agreement" on the issue of class arbitration, here, the parties expressly agreed *not* to arbitrate on a class basis. As a result, if class arbitration is precluded where the arbitration agreement is silent on the issue, then certainly a court cannot compel class arbitration where the parties explicitly agreed *not* to arbitrate on a class basis.

Century BMW insisted on remaining in a judicial forum only if this Court held that Century BMW had to arbitrate on a class basis, which is precisely what *Stolt-Nielsen* now prohibits. This Court should therefore withdraw its Opinion, reverse the Circuit Court's ruling and remand with directions to compel Ms. Watts to arbitrate her claims on an individual basis.

B Under *Stolt-Nielsen*, Class Arbitration Is Impermissible Because Absent Class Members Would Not Be Bound To a Result

As this Court noted, virtually all of Century BMW's customers signed the arbitration agreement, in which the parties agreed not to arbitrate as a class. As a result, in addition to Century BMW and Ms. Watts, none of the absent class members has contractually agreed to class-wide arbitration. Given the Supreme Court's holding in *Stolt-Nielsen* that a party cannot be compelled to class arbitration absent an agreement, sending Century BMW and absent class members into class arbitration (1) would violate due process by seeking to compel the

absent class members into class proceedings against their will, and (11) would violate Century BMW's due process rights by compelling it to defend a representative action where the absent class members would not be bound to a result in Century BMW's favor

One of the most basic expected benefits of arbitration is that it will lead to a "mutual, final and definite award" 9 U.S.C. § 10(a)(4). From a defendant's perspective, the principal advantage of a class action is finality—obtaining a judgment that will bind the entire class. See e.g. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound"), *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980) (avoiding inconsistent judgments is a principal protection that class actions afford defendants). Such finality cannot be achieved without ensuring adequate due process protections for absent class members. *Shutts*, 472 U.S. at 811-12 ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection"). Compelling absent class members to a class arbitration to which they did not agree would deny the members due process and confront Century BMW with the prospect of class litigation without the assurance of finality.²

Where, as here, absent class members have not agreed to arbitrate as a class, *Stolt-Nielsen* precludes an adjudicator (whether a judge or an arbitrator) from compelling them into

² Moreover, although the court below purported to allow Ms. Watts to proceed in a representative capacity, it has not defined the group she purports to represent, has not found that her claims are typical of the group's claims, has provided the group with no notice, and has provided no procedure for group members to opt out. Nor has the court evinced any intent to do or address any of these issues in the future. These blatant due process problems underscore Century BMW's continuing concern that any class-wide arbitral award or settlement would lack finality.

class arbitration. Moreover, because the absent class members expressly agreed not to participate in a class arbitration, the members could cite *Stolt-Nielsen* for the proposition that they cannot be bound by an award resulting from an arbitration proceeding to which they never agreed.³ See *Volt Info Scis. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (arbitration “is a matter of consent, not coercion”). Indeed, because a party cannot be compelled to class arbitration absent an agreement to do so, and none of the absent class members agreed to arbitrate as a class, a court or arbitrator would lack any basis to give a class-wide arbitral award or settlement *res judicata* effect. Compelling Century BMW to a class arbitration would thus deprive it of the certainty that, if it wins or settles the case, all of the absent class members would be bound by the outcome.

As a result, compelling Century BMW to arbitrate in a class arbitration would violate absent class members’ due process rights and eliminate Century BMW’s ability to achieve finality in arbitration.

II THE SOUTH CAROLINA LEGISLATURE DID NOT INTEND TO CREATE A NON-WAIVABLE RIGHT TO BRING A CLASS ACTION UNDER THE DEALERS ACT

Even were it not for the intervening *Stolt-Nielsen* opinion, this Court should reconsider its decision because the South Carolina legislature did not intend to create a non-waivable class action right under the Dealers Act.

³ Even were absent class members given the ability to opt out of a class (which the Circuit Court has shown no intention of providing), that would not remedy this concern. *Stolt-Nielsen* held that “silence” could not constitute “consent to resolve [a] dispute in class proceedings.” *Id.* at *14. As a result, an absent class member’s failure to opt out—presumably by remaining silent—does not mean, as a matter of law, that he or she “agreed to authorize class arbitration.” *Id.* That is particularly true here because the absent class members expressly agreed *not* to arbitrate as a class.

A Ms Watts Has the Burden of Proving that the Right to Collective Action Is Non-Waivable

A party opposing waiver of a statutory right has the burden of proving that the legislature “intended to preclude waiver” *See e g Gilmer v Interstate/Johnson Lane Corp* , 500 U S 20, 26 (1991), *Adkins v Labor Ready Inc* , 303 F 3d 496, 503 (4th Cir 2002), *Randolph v Green Tree Fin Corp* , 244 F 3d 814, 818 (11th Cir 2001) If the legislature intended to preclude “waiver of the right that intention will be deducible from text [of the statute] or [its] legislative history” *See, e g, Gilmer*, 500 U S at 28 (quoting *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* , 473 U S 614, 628, (1985)), *Long John Silver s Rests , Inc v Cole*, 514 F 3d 345, 350 (4th Cir 2008)

On the face of the pleadings, Ms Watts did not meet her burden, having failed to allege that the statutory right to bring a collective action under S C Code Ann § 56-15-110(2) is non-waivable Even if this Court were inclined to disregard Ms Watts’s failure even to allege that the right to collective action is non-waivable, the text of the Dealers Act and the legislative history of § 56-15-110(2) provide no indication or support that the legislature intended to create a non-waivable right To the contrary, the legislature was capable of making the class action right non-waivable, but declined to do so

B Neither the Text of the Dealers Act, Nor the Legislative History of the Collective Action Provision Evinces Any Legislative Intent to Create a Non-Waivable Right

1 That a Legislature Confers a Statutory Right Does Not Mean that It Intended to Preclude Parties From Bargaining Around the Right

As this Court reaffirmed in *Simpson v MSA of Myrtle Beach Inc* , “parties are always free to contract away their rights” 373 S C 14, 28 644 S E 2d 633 (2007) This is no less true in the context of arbitration Indeed, the “primary” purpose behind the FAA is “to

ensure that private agreements to arbitrate are enforced according to their terms ” *Stolt-Nielsen*, 2010 WL 1655826, at *11

As a result, parties generally may enter into agreements extinguishing or limiting statutory provisions that confer a right on one or both parties. See *Gilmer*, 500 U S at 26-32. Consistent with this contractual freedom, courts have long distinguished between a statutory right and a *non-waivable* statutory right. Courts across the country—including the Supreme Court of the United States—have concluded that absent a legislature’s clear intention to preclude waiver, parties are free to waive their right to participate in a representative action.

The Supreme Court of the United States’s decision in *Gilmer v Interstate/Johnson Lane Corp*, 500 U S 20 (1991), is directly on point. There, an employer moved to compel arbitration of an employee’s lawsuit alleging that the employee’s termination violated the Age Discrimination in Employment Act (“ADEA”). The employee opposed arbitration, arguing the arbitral forum did not adequately further the purposes of the ADEA because arbitration did not *inter alia*, provide for a “class action.” Although the ADEA explicitly provided a right to sue collectively, see 29 U S C § 626(b) (referencing the remedies in 29 U S C § 216 (“An action may be maintained against any employer by any one or more employees for and on behalf of himself or themselves and other employees similarly situated”)), the Court ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of a class action.

But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id at 32 (internal quotation omitted) Because nothing in the text or legislative history of the ADEA indicated that Congress intended to make the class action right non-waivable, the *Gilmer* Court compelled the parties to arbitration pursuant to their arbitration agreement ⁴

Numerous courts have echoed *Gilmer*'s holding that providing a statutory right to pursue a class action does not create a non-waivable class action right

In *Bowen v First Family Fin, Servs* , 233 F 3d 1331 (11th Cir 2000), plaintiffs filed a class action lawsuit, claiming that the defendant-lender's practice of requiring customers to sign arbitration agreements before obtaining a consumer loan violated the Equal Credit Opportunity Act ("ECOA"), 15 U S C § 1691 et seq , and the Truth in Lending Act ("TILA"), 15 U S C § 1601 et seq Plaintiffs contended that the ECOA and the TILA granted consumers a non-waivable right to litigate any claims arising under the statutes through a class action The Eleventh Circuit observed that the ECOA provided a party with a statutory right to pursue a class action *See id* (citing 15 U S C § 1691e) ⁵ Moreover, the court recognized that a "class action is an available, important means of remedying violations of the TILA," noting that the TILA contained (1) a provision regarding class action remedies, 15 U S C § 1640(a), and (2) a legislative history "which stresses the importance of class action procedures in the TILA scheme" *Id* at 1337 The court found, however, that "there exists a difference between the availability of the class action tool, and possessing a blanket right to that tool under any circumstance" *Id* at 1337 (quoting *Wood v Cooper Chevrolet, Inc* , 102 F Supp 2d 1345,

⁴ That the ADEA was enacted "to further important social policies" did not change the Court's conclusion that arbitration was permissible despite the parties' inability to pursue claims on a class-wide basis *Id* at 27

⁵ "Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class " 15 U S C 1691e(a)

1349 (N D Ala 2000)) Despite the statutory importance of the class action right, the court could not glean “an intent to create [a] non-waivable right to litigate by class action from the text and the legislative history” *Id.* at 1338. Although “the legislative history of § 1640” revealed that “Congress thought class actions were a significant means of achieving compliance with the TILA, *see* S. Rep. 93-278 (1973), it d[id] not indicate that Congress intended to confer upon individuals a non-waivable right to pursue a class action nor does it even address the issue of arbitration.” *Id.* As a result, “Congress did not create a non-waivable right to pursue TILA claims through a class action.” *Id.*⁶

Similarly, in *Johnson v. West Suburban Bank*, the plaintiff argued that the TILA created a non-waivable right to bring a class action. 225 F.3d 366, 369 (3d Cir. 2000). The Third Circuit disagreed, holding that arbitration “clauses are effective even though they may render class actions to pursue statutory claims under the TILA unavailable.” *Id.* The court found that nothing in the text of the TILA created a non-waivable right to bring a class action. Although the plaintiff argued that the legislative history “demonstrates the centrality of class actions to the TILA’s effective enforcement,” the court concluded that such history did not demonstrate legislative intent to create a non-waivable right “simply because judicial remedies are part of a law does not mean that Congress meant to preclude parties from bargaining around their availability.” *Id.* at 377. The Third Circuit thus held that Congress did not intend to preclude parties from contracting away their ability to seek class action relief under the TILA. *Id.* at 378.

⁶ See also *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-19 (11th Cir. 2001) (finding that Congress did not intend to preclude parties from contracting away their ability to seek class action relief under the TILA, and therefore, “a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA.”)

The Fourth Circuit adopted this rationale in *Adkins v Labor Ready Inc*, 303 F 3d 496 (4th Cir 2002). There, an employee brought a class action alleging that a temporary employment agency violated the Fair Labor Standards Act (“FLSA”). The court found that the employee failed to “carry his burden of proof” that “Congress intended to confer a nonwaivable right to a class action under [FLSA]” *Id* at 503. Citing *Johnson*, the Fourth Circuit confirmed that “simply because judicial remedies are part of a law does not mean that Congress meant to preclude parties from bargaining around their availability” *Id*. Because the employee pointed to “no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute [h]is inability to bring a class action [could not] suffice to defeat the strong congressional preference for an arbitral forum” *Id*.⁷

2 The Text of the Dealers Act Does Not Evince Any Legislative Intent To Create a Non-Waivable Right to Collective Action

The text of the Dealers Act demonstrates that the legislature did not intend to create a non-waivable right to pursue a collective action.

First, nothing in the Dealers Act states that the right to collective action is non-waivable. When interpreting a statute, this Court looks to the “plain language of the statute

⁷ Similarly, in *Gipson v Cross Country Bank*, 294 F Supp 2d 1251 (M D Ala 2003), the plaintiff argued that an arbitration clause’s prohibition on class actions rendered the entire clause unenforceable because it limited remedies that were available to her under the Fair Credit Billing Act (“FCBA”), 15 U S C § 1666. The court observed that the FCBA permits plaintiffs to “seek classwide relief pursuant to the TILA’s general civil liability provision,” which provides a statutory right to pursue a class action. *Id* at 1258 (citing 15 U S C § 1640(a)(2)(B) (stating that “any creditor who fails to comply with the requirements imposed under [the FCBA] is liable to such person in an amount equal to the sum of [the amount of the debt] in the case of a class action, such amount as the court may allow [the amount of the debt]”)). Despite this statutory right, the court concluded that the prohibition on class actions was “enforceable” because the plaintiff was unable to establish a congressional intent to create a non-waivable right. *Id* at 1260.

itself” *King v Am Gen Fin, Inc*, 386 S C 82, 90, 687 S E 2d 321 (2009) (internal quotation omitted) Here, this Court relied on § 56-15-130 to conclude that the collective action right was non-waivable, but § 56-15-130 will not bear that weight Section 56-15-130 states that any contract “in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable” (emphasis added) That a contract waives a provision does not mean that the contract “violat[es]” the provision See *Browning v Hartvigsen*, 307 S C 122, 125, 414 S E 2d 115, 117 (1992) (statutes “must receive a practical, reasonable, and fair interpretation”) Indeed, the South Carolina legislature recognizes that “waiver” and “violation” are two different things, having included both concepts in S C Code § 27-32-110 it “is a violation of this chapter to include in a contract a provision purporting to waive a right or benefit provided for purchasers pursuant to this chapter” § 27-32-110(10) (emphasis added) By contrast, § 56-15-130 does not state that a waiver of a right provided by the Dealers Act constitutes a violation of the Act

Moreover, an interpretation conflating “violate” with “waive” would openly ignore the plain language of the statute (since “violate” is not synonymous with “waive”), and lead to absurd results See *Lancaster County Bar Ass’n v S C Comm on Indigent Defense*, 380 S C 219, 670 S E 2d 371 (2008) (courts should avoid a statutory construction that would lead to an absurd result), *McLeod v Montgomery*, 244 S C 308, 314, 136 S E 2d 778, 782 (1964) For example, § 56-15-110(1) grants a party the right to “sue in the court of common pleas” Every arbitration agreement between a dealership and a customer waives the parties’ right to sue in court under the Dealers Act As a result, if “violate” means “waive,” then any agreement to

arbitrate under the Dealers Act would be unenforceable⁸ Yet this Court recognizes—as it must under the FAA—that agreements to arbitrate Dealers Act claims are enforceable See *Herron*, 2010 WL 1541297, at *5 (finding Century BMW’s arbitration agreement “enforceable,” except for the class action waiver) Just as an agreement to arbitrate does not “violate” § 56-15-110(1), an agreement to waive a party’s right to bring a class action does not “violate” § 56-15-110(2)

Third, other provisions within the Dealers Act make clear that § 56-15-130 was not enacted to preclude waiver of all rights provided under the Act See *Higgins v South Carolina*, 307 S C 446, 449, 415 S E 2d 799 (1992) (“In construing statutory language, the statute must be read as a whole ”) The Dealers Act contains several subsections that specifically limit the types of provisions that can go into a contract See e g S C Code Ann §§ 56-15-40(3)(k) (precluding manufacturer from requiring a motor vehicle dealer “to assent to a release [or] waiver which would relieve any person from liability imposed by this Chapter), (i) (precluding manufacturer from preventing a dealer from selling or transferring his interest), (h) (precluding manufacturer from preventing a dealer from changing the capital structure of his dealership), 56-15-40(4)(a) (dealer cannot require new motor vehicle buyer to also purchase special features not already installed on the vehicle when received by the dealer), 56-15-70 (manufacturer cannot impose unreasonable restrictions on motor vehicle dealer regarding right to renew, transfer, etc), 56-15-140 (venue must be in South Carolina for any action brought under the Dealers Act) By enacting § 56-15-130, the legislature provided an enforcement mechanism to ensure compliance with these limitations any contractual provision that contravenes these specific requirements “violat[es]” the Act and therefore, is unenforceable Unlike the above

⁸ Indeed, if a “waiver” constitutes a “violation,” then most agreements to arbitrate a civil damages claim under the FAA would “violate” the Seventh Amendment to the United States Constitution U S Const Amend VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ”)

provisions, § 56-15-110(2) does not specifically prohibit a party from waiving its right to pursue a collective action

Finally, the lack of a provision in the Dealers Act precluding waiver of the right to collective action demonstrates that the South Carolina legislature did not intend to create a non-waivable right. When the legislature creates non-waivable rights, it says so expressly, including in the consumer protection context. The South Carolina code is replete with examples

- § 33-44-103, which regulates operating agreements for a limited liability company, delineates seven “nonwaivable provisions,” including that an operating agreement “may not eliminate the duty of loyalty” or “eliminate the obligation of good faith and fair dealing ”
- § 33-44-203(c), regarding articles of organization of a limited liability company, states that the article of organization “may not vary the nonwaivable provisions of § 33-44-103(b) ”
- § 37-1-107 of the Consumer Protection Code states that “[e]xcept as otherwise provided in this title, a buyer, lessee or debtor may not waive or agree to forego rights or benefits under this title ”
- § 37-3-410 of the Consumer Protection Code states that “An agreement may not limit or waive the claims or defenses of a debtor under this section ”
- § 36-9-602, pertaining to secured transactions, states that “[e]xcept as otherwise provided in Section 36-9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections ”
- § 27-32-110, which addresses vacation time sharing plans, states that it “is a violation of this chapter for a seller of vacation time sharing plans to include in a contract a provision purporting to waive a right or benefit provided for purchasers pursuant to this chapter ”
- § 27-29-160, regarding remedies for purchasers of subdivided land, provides that “[a]ny stipulation or provision purporting to bind any person acquiring subdivided to waive compliance with the chapter or any rule or order under it is void ”
- § 56-31-30, which regulates the rates and fees a rental car company can charge, provides that a “waiver of the requirements of the provisions of this section is unenforceable as contrary to public policy ”

This sample of South Carolina statutes confirms that the legislature knows how to make a right “non-waivable.” Because in the Dealers Act the legislature did not restrict a party’s ability to waive its right to collective action, the text of the Act plainly establishes that the legislature did not intend to create a non-waivable right.

3 Nothing in the Legislative History of § 56-15-110(2) Suggests that the Legislature Intended to Confer a Non-Waivable Right to Collective Action

The legislative history of § 56-15-110(2) contains no indication that the legislature intended to create a non-waivable right to pursue a collective action. Instead, the language of the statute and the prevailing law on class actions at the time the statute was enacted demonstrate that the only purpose of § 56-15-110(2) was to remove a then-existing impediment to filing a class action for personal damages.

The law at the time of the statute’s enactment sheds light on its purpose. Section 56-15-110, adopted in 1972, predated Rule 23 and the other South Carolina Rules of Civil Procedure. Before the adoption of Rule 23, SCRPC, class actions were governed by state statute (e.g., § 15-5-50). Indeed, the wording in subsection (2) closely mirrors this statutory predecessor to Rule 23, SCRPC. *Compare* S.C. Code Ann. § 56-15-110(2) (“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”) *with* S.C. Code Ann. § 15-5-50 (repealed 1985) (“When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.”)

At the time, however, the “general rule as developed by case law in the State [was] that actions at law for personal remedies [could] not be brought as class actions.”

General Supplies Inc v Southwire Co 276 S C 55, 58, 275 S E 2d 579, 580 (1981) As a result, state law prevented the plaintiffs in *General Supplies* from bringing a class action for damages under the state antitrust act

Consistent with *General Supplies*, if the legislature had not included subsection (2), which permits a plaintiff to bring an action for damages as a class action, then no such action would have been allowed under the Dealers Act As the *General Supplies* Court noted, “[a]bsent a statutory direction to the contrary, the personal remedy provided for at Section 39-3-30 may not be sought through a class suit” *General Supplies*, 276 S C at 59, 275 S E 2d at 581 Section 56-15-110(2) supplied the statutory direction that this Court found lacking in the state antitrust act and thus permitted class actions under the Dealers Act before Rule 23 was adopted But nothing suggests the legislature intended the class action vehicle to be non-waivable

In 1985, the South Carolina Rules of Civil Procedure were adopted and the Legislature simultaneously repealed various Code portions relating to procedural rules Act No 100, 1985 S C Acts 277 (effective July 1, 1985), Rule 86, SCRPC (Rules effective July 1, 1985) The Legislature explicitly provided that, upon taking effect, the Rules would control procedures in a civil lawsuit in the event of any conflicts between the new rules and existing statutes As provided in Act No 100

In event of conflict between any provision of the South Carolina Rules of Civil Procedure and *any other statutory provisions as to practice and procedure not repealed by this act, the provision of the rules shall control* However, neither the promulgation of the rules nor this act may be construed to affect the substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of practice and procedure

Act No 100 § 3, 1985 S C Acts at 280 (emphasis added) South Carolina courts immediately recognized that the Rules control matters of procedure, regardless of previously enacted statutes

See McGann v Mungo, 287 S C 561, 568, 340 S E 2d 154, 156 (1986) (new civil procedure rules, not former statutes, applied in lawsuit), *Harper v Ethridge*, 290 S C 112, 121, 348 S E 2d 374, 379 (1986) (new rules of civil procedure replaced statute) Section 56-15-110(2) is a pre-Rules statute that allowed the filing of a class action against a manufacturer, dealer or distributor in appropriate circumstances After the adoption of the Rules, § 56-15-110(2) is merely a vestige of a prior procedural regime

Taken together, the language of the Dealers Act and the legislative history of § 56-15-110(2) clearly demonstrate that the South Carolina legislature did not intend to create a non-waivable right to pursue a collective action under the Dealers Act

III EVEN UNDER THIS COURT’S RATIONALE MS WATTS’S SECOND AND THIRD CAUSES OF ACTION, WHICH DO NOT ARISE UNDER THE DEALERS ACT, SHOULD BE COMPELLED TO INDIVIDUAL ARBITRATION

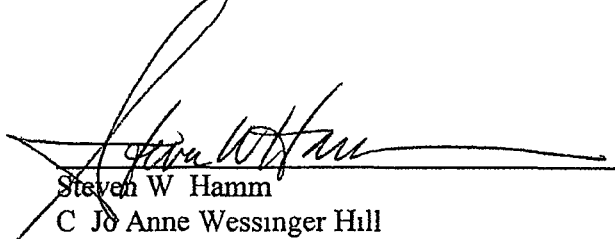
The Court’s rationale in affirming the trial court’s denial of Century BMW’s motion to compel arbitration was limited to the Dealers Act *Herron*, 2010 WL 1541297, at *5 (the legislature provided “consumers with a non-waivable right to bring class action suits for violations of the Dealers Act”) Only one of Ms Watts’s claims, however, arises under the Dealers Act

The Complaint asserts three causes of action The first cause of action seeks damages under § 56-15-110(2) based on violations of the Dealers Act *See* First Amended Complaint at ¶¶ 391-401 By contrast, the second and third claims (for civil conspiracy and declaratory judgment) do not arise under the Dealers Act As a result, even if there were a non-waivable class action right under the Dealers Act, the Court identified no similar non-waivable right that applied to a claim for common law conspiracy or declaratory judgment Even under the Court’s rationale, therefore, it should compel individual arbitration of Counts II and III

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court withdraw its opinion, reverse the Circuit Court, and remand with instructions to compel Respondent Watts to arbitrate all of her claims individually

Respectfully submitted,



Steven W. Hamm
C Jo Anne Wessinger Hill
RICHARDSON PLOWDEN & ROBINSON, P A
P O Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 (facsimile)

Dennis M. Black (*pro hac vice admitted*)
Ryan L. VanGrack (*pro hac vice admitted*)
WILLIAMS & CONNOLLY LLP
725 Twelfth St, N W
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (facsimile)

ATTORNEYS FOR APPELLANT CENTURY
BMW D/B/A SONIC AUTOMOTIVE, WHOSE
TRUE NAME IS SONIC AUTOMOTIVE 2752
LAURENS RD, GREENVILLE, INC D/B/A
CENTURY BMW

May 3, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A Early, III, Circuit Court Judge

Circuit Court Case No 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, individually and for the benefit of all car buyers who paid "administrative fees" as described below to Defendants, **Respondents,**

v

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc , Galeana Chrysler Plymouth, Inc , a/k/a Galeana Chrysler Jeep, Inc , J L H Investments LP a/k/a Hendrick Honda, Overland, Inc , d/b/a Land Rover of Columbia, Taylor Toyota a/k/a Taylor Investments, and Toyota of Greenville, Inc , **Defendants,**

of whom Century BMW d/b/a Sonic Automotive is the **Appellant**

PROOF OF SERVICE

The undersigned employee of RICHARDSON PLOWDEN & ROBINSON, P A , attorneys for Appellant, does hereby certify that service of the foregoing Petition for Rehearing in the above-captioned matter was made upon all counsel of record this 3rd day of May, 2010, by depositing a copy of same in the U S Mail, postage prepaid, addressed as follows

Richard A Harpootlian, Esq
RICHARD A HARPOOTLIAN, P A
P O Box 1090
Columbia, SC 29202

Michael E Spears, Esq
MICHAEL E SPEARS, P A
PO Box 5806
Spartanburg, SC 29304

Gedney M Howe, III, Esq
GEDNEY M HOWE, III, PA
P O Box 1034
Charleston, SC 29402

and by hand delivery upon

A Camden Lewis, Esq
Peter Protopapas, Esq
LEWIS & BABCOCK, LLP
1513 Hampton Street
Columbia, SC 29201



Kathy J Templeton

May 3, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Circuit Court Case No. 2006-CP-02-1230

Court of Appeals Docket No. 03-27371

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael
Blease and David Carroll,¹ individually and for the benefit of all car buyers whom paid
“administrative fees” as described below to Defendants, Respondents,

v

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc., Galeana Chrysler
Plymouth, Inc. a/k/a Galeana Chrysler Jeep, Inc., J L H Investments, LP a/k/a Hendrick Honda,
Overland, Inc., d/b/a Land Rover of Columbia, Taylor Toyota a/k/a Taylor Investments, Inc., and
Toyota of Greenville, Inc., Defendants,

of whom Century BMW d/b/a Sonic Automotive is the Appellant

**RESPONDENTS' RETURN TO THE
APPELLANT'S PETITION FOR REHEARING**

Michael E. Spears
MICHAEL SPEARS, PA
Post Office 5806
Spartanburg, SC 29304
(864)583-3235

¹ David Carroll was substituted for Michael Watts as the named Plaintiff for Toyota of Greenville by Order of the Circuit Court dated October 12, 2009

RECEIVED
MAY 24 2010

Gedney M Howe, III
GEDNEY M HOWE, III, PA
Post Office Box 1034
Charleston, SC 29402
(843)722-8048

Richard A Harpootlian
RICHARD A HARPOOTLIAN, P A
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848

A Camden Lewis
Peter D Protopapas
Ariail E King
LEWIS & BABCOCK, L L P
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Attorneys for the Respondents

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Respondents file this Return to the Appellant's Petition for Rehearing. For the reasons set forth herein, the Petition should be denied.

ARGUMENT

I The main argument concerning preemption has never been raised before and it is not appropriate in a petition for rehearing

In its rehearing petition, Appellant Century ("Century") argues for the first time that "[t]he FAA clearly preempts South Carolina law" to the extent that our state law allows classwide proceedings in this case (Pet for Rehearing at 3-4). This argument has never been raised before the trial court or during the appeal in this Court, and therefore, cannot be raised at this time.

An argument may not be presented for the first time in a rehearing petition. *See Kennedy v South Carolina Retirement System*, 349 S.C. 531, 532 (S.C. 2001). "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Id.* (citing Rule 221(a), SCACR). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999). In declining to entertain an argument presented for the first time in a rehearing petition, *Kennedy* "reiterate[d] this Court's longstanding principle of error preservation." 349 S.C. at 532. Following that approach, "South Carolina cases clearly hold that one cannot present

and try a case on one theory and then attack the result below by presenting another theory on appeal ” *Id* (citing *See Butler v Town of Edgefield*, 328 S C 238, 493 S E 2d 838 (1997)) ¹

In its briefs to this Court, Century’s arguments included only the following there is presumption in favor of arbitration, the agreement was not unconscionable due to oppressive or one-sided terms, the agreement was not a contract of adhesion, there was equal bargaining power, arbitration provided an effective forum, Respondents had an opportunity to read the agreement, and Respondents had the opportunity to make a meaningful choice Neither the Final Brief nor the Final Reply Brief of Appellants raised a preemption argument Preemption was never mentioned For this reason alone, the petition for rehearing should be denied

II The case upon which Century relies involves the interpretation of a federal statute, and not preemption, and does not apply here

The Petition for Rehearing relies heavily on the Supreme Court’s recent decision in *Stolt-Nielsen S A v Animalfeeds International*, ___ U S ___, 2010 WL 1655826 (Apr 27, 2010) However, a recent case addresses the same argument made here In *McArdle v AT&T Mobility, LLC*, 2010 WL 1875812 (N D Calif May 10, 2010), a California district court considered whether the *Stolt-Nielsen* decision mandated a reconsideration of its ruling that a prohibition on class actions was unconscionable In that case, as here, the defendant argued that *Stolt-Nielsen* created “a substantial question as to whether the FAA would pre-empt any holding” that state law would not enforce the arbitration agreement In response, the court stated

The Court disagrees The issue presented in *Stolt-Nielsen* was “whether imposing class arbitration on parties whose arbitration clauses are ‘silent’ on that issue is consistent with the Federal Arbitration Act (FAA)” The Supreme Court did not

¹The fact that the *Stolt-Nielsen* opinion was issued after this Court’s decision does not change this analysis because federal courts in various circuits have addressed preemption under the FAA, and Appellant could have raised issue through those cases

address FAA preemption. Nor did it overrule its precedent upon which the Ninth Circuit relied in *Shroyer v. New Cingular Wireless Services, Inc.*, which held that a California law on unconscionability could render an arbitration clause unenforceable. *Stolt-Nielsen* is distinguishable on both the facts and the law, and therefore, does not require this Court to reconsider its order on Defendants' Motion to stay this action pending their appeal.

Id. (internal citations omitted). *Stolt-Nielsen* did not even mention *Shroyer*, which found that the FAA does not prevent courts from applying generally applicable state law principles in refusing to enforce a class action waiver.²

Stolt-Nielsen--which discussed neither unconscionability nor preemption--has no bearing on this case and does not undermine this Court's opinion. *Stolt-Nielsen* merely found that where an arbitration agreement was silent as to classwide arbitration, the parties could not, under the Federal Arbitration Act 9 U.S.C. §1 et seq. ("FAA"), be forced into classwide arbitration

a party may not be compelled under the FAA to submit to class arbitrations unless there is a contractual basis for concluding that the parties *agreed* to do so.

Id. (emphasis in original). The Supreme Court also stated that

an implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator can infer solely from the fact of the parties' agreement to arbitrate.

Id. The issue raised in *Stolt-Nielsen* is not remotely present in this case, and does not bear on the question presented. Here, there is no dispute that Century BMW's arbitration agreement addresses classwide arbitration.³ The issue here is not (as in *Stolt-Nielsen*) whether a party may be compelled to participate in class arbitration in the face of an agreement that is silent as to classwide arbitration, but rather whether the agreement itself must be interpreted under generally

²*Shroyer*, 498 F.3d 976, 987 (9th Cir. 2007).

³The clear question answered by this Court is what happens when a consumer protection law clashes with an arbitration agreement.

applicable South Carolina contract law. The Supreme Court did not address that issue in *Stolt-Nielsen*, and no party raised it. Indeed, the Supreme Court made clear that the arbitral decision under review there did not rest on general contract law at all. Slip op. at 8 (panel “did not attempt to determine what rule would govern under either maritime or New York law”).

In addition, *Stolt-Nielsen* simply did not resolve the question of whether the FAA preempts general principles of state contract law that would render unconscionable class arbitration bans. However, every federal circuit and state court of last resort to have decided the question has reached the same conclusion. The FAA does not preempt court holdings that strike down particular class-action bans under state law. This Court’s decision is consistent with the courts of last resort in at least nine states--Alabama, California, Illinois, Massachusetts, New Jersey, New Mexico, North Carolina, Washington, and West Virginia. *See, Feeney v. Dell, Inc.*, 908 N.E.2d 753, 762-68 (Mass. 2009) (holding that the FAA did not preempt a finding that a class action ban was unenforceable because it violated state public policy), *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008) (invalidation of the ban on class relief based on violation of public policy or unconscionability, a doctrine that exists for the revocation of any contract, is not preempted by the FAA), *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008) (determination that state common law principles, such as unconscionability, make a contract unenforceable is not preempted by FAA), *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008-09 (Wash. 2007) (FAA did not preempt state law finding class action waiver unenforceable as against public policy), *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006) (Finding no preemption where a state court applies state law on unconscionability to a question of the enforceability of a class action waiver), *Muhammad v. County Bank of*

Rehoboth, Del , 912 A 2d 88, 94-96 (N J 2006), *cert denied*, 127 S Ct 2032 (2007) (FAA does not preclude an examination as to whether arbitration agreement is unconscionable under state law), *Discover Bank v Superior Court of Los Angeles*, 113 P 3d 1100, 1110-17 (Cal 2005)(FAA does not preempt finding of unconscionability on class actions bans, whether the ban in arbitration agreement or other contract), *Leonard v Terminix Int'l Co , L P* , 854 So 2d 529, 535-36 (Ala 2002)(Under FAA, a state can find agreement enforceable based on general contract law), *State ex rel Dunlap v Berger*, 567 S E 2d 265, 272 n 3 (W Va 2002)(FAA does not bar a state court from examining the conscionability of a contract that limits remedies afforded under state law)⁴

The federal circuits that have decided the question presented have come to the same conclusion The First, Third, Ninth, and Eleventh Circuits have all held that the FAA does not preempt determinations that class-action bans are invalid under state law *See, e g* , *Homa v Am Express Co* 558 F 3d 225, 231 (3d Cir 2009) (New Jersey law), *Lowden v T-Mobile USA*, 512 F 3d 1213, 1219-22 (9th Cir 2008) (Washington law), *cert denied*, 129 S Ct 45 (2008), *Skirchak v Dynamics Research Corp* , 508 F 3d 49, 57-59 (1st Cir 2007) (Massachusetts law), *Shroyer v New Cingular Wireless Services, Inc* , 498 F 3d 976, 987-93 (9th Cir 2007)

⁴Intermediate courts in states including Missouri, Oregon, and Wisconsin have agreed *See Vasquez-Lopez v Beneficial Oregon, Inc* , 152 P 3d 940, 944 (Or App 2007), *Coady v Cross Country Bank, Inc* , 729 N W 2d 732, 746 (Wis App 2007), *review denied*, 737 N W 2d 432 (Wis 2007), *Whitney v Alltel Communications, Inc* , 173 S W 3d 300, 308, 310 (Mo App 2005)

(California law), *Dale v Comcast Corp* , 498 F 3d 1216, 1219 (11th Cir 2007) (Georgia law), *see also Pendergast v Sprint Nextel Corp* , 592 F 3d 1119 (11th Cir 2010) (certifying question whether a class ban is enforceable under Florida law to the Florida Supreme Court)

The fact that one arbitration agreement that is silent on class actions cannot impose class arbitration (which is all *Stolt-Nielsen* held) does not mean that all arbitration agreements that contain class bans are automatically valid Century is disingenuous in suggesting *Stolt-Nielsen*'s holding extends that far

Clearly, the *Stolt-Nielsen* decision did not address whether the FAA would preempt any state law that could render an arbitration clause unenforceable The cases that have addressed the issue have found that the FAA does not effect such a preemption *See*, p 4-5, *supra* As in *McArdle*, "*Stolt-Nielsen* is distinguishable on both the facts and the law" and thus, has no application here

III This Court properly held that the class action prohibition in the arbitration agreement is against public policy and unenforceable

In the opinion issued April 19, 2010, this Court found that the ban on class action was against public policy because § 56-15-110 *et seq* ("the Dealers Act") expressly provides a right to a class action ⁵ The Dealers Act specifically states that if the Act is violated, "one or more [persons] may sue for the benefit of the whole " Code Ann §56 15-110(2) Section 56-15-30

states that “[a]ny 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 ”

This Court’s opinion recognized that the arbitration agreement, which took away a substantive right under the Dealers Act, violated public policy. In other words, an arbitration agreement (contract) cannot prohibit class actions in the face of a statutory provision that explicitly provides a public policy substantive right

This Court’s holding is not inconsistent with other courts’ holdings. Various courts have held that class action waivers are unenforceable. *See, e.g., Johnson v Tele-Cash, Inc.*, 82 F Supp 2d 264, 270 (D Del 1999) (holding that inherent conflict existed between TILA right to class action and arbitration clause and refusing to enforce), *Lozada v Dale Baker Oldsmobile, Inc.*, 91 F Supp 2d 1087, 1105 (W D Mich 2000) (refusing to enforce arbitration agreement prohibiting class remedies that were expressly permitted by state consumer laws), *Shaffer v Royal Gate Dodge, Inc.*, 300 S W 3d 556, 561 (Mo App E D ,2009)(In light of the strong public policy authorizing class actions in state consumer law, the court held that an arbitration agreement that prohibited class actions was unenforceable), *Schwartz v Alltel Corp.*, 2006-Ohio-3353 ¶ 36, 2006 WL 2243649 (Ohio Ct App)(holding that the elimination of a consumer's right to proceed through a class action hindered the state consumer protection statute and therefore

⁵While that provision could have been severed, Century stated that it did not wish to invoke the severance clause and expressed its intent for the arbitration agreement to stand or fall as a whole. *Herron, Shearouse Adv Sh No 15*, p 23

was unenforceable) *See also, Ting v AT & T*, 319 F 3d 1126, 1150 (9th Cir 2003), *Skarchak v Dynamics Research Corp*, 508 F 3d 49(1st Cir 2007), *Edwards v Blockbuster Inc*, 400 F Supp 2d 1305, 1309 (E D Okla.2005), *Luna v Household Fin Corp III*, 236 F Supp 2d 1166, 1178 (W D Wash 2002), *Leonard v Terminix Int'l Co , L P*, 854 So 2d 529, 538 (Ala 2002), *Discover Bank v Superior Court of Los Angeles*, 113 P 3d 1100 (Cal App 2005), *Powertel, Inc v Bexley*, 743 So 2d 570, 576 (Fla Dist Ct App 1999), *Kinkel v Cingular Wireless, L L C*, 306 Ill Dec 157 (Ill 2006), *Whitney v Alltel Commc'ns Inc*, 173 S W 3d 300, 314 (Mo Ct App 2005), *Muhammad v County Bank of Rehoboth Beach*, 912 A 2d 88 (N J 2006), *Vasquez-Lopez v Beneficial Or , Inc*, 152 P 3d 940 (Or App 2007), *Thibodeau v Comcast Corp*, 912 A 2d 874 (Pa 2006) ⁶ This Court's decision is also fully consistent with federal law. The plain text of the FAA makes arbitration agreements enforceable unless "such grounds as exist in law or equity for the revocation of any contract" 9 U S C § 2. Under that savings clause, "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Associates, Inc v Casarotto*, 517 U S 681, 687 (1996). In its analysis, this Court determined that the ban on classwide arbitration was in violation of public policy because the ban took away substantive rights given by the Dealers Act, which is consistent with the FAA. *Herron*, Shearouse Adv Sh No 15, p 22-23

⁶Additional cases finding class actions bans unenforceable are in light of state laws

IV This Court has already found that Appellants had a non-waivable substantive right under the Dealers Act and Century does not get another bite at the apple

Century argues that the General Assembly did not intend to convey a substantive, non-waivable right to class actions. However, this Court has already considered this argument⁷ and ruled that

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 any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable

Herron v Century BMW, Shearouse Adv Sh No 15, p 22 (April 19, 2010). A petition for rehearing is not for the purpose of having the case tried for the second time. *Kennedy v South Carolina Retirement Sys*, S C Sup Ct Order, dated July 23, 2001.

Furthermore, courts across the country have found the right to a class action is nonwaivable. See, *Johnson v Tele-Cash, Inc*, *Lozada v Dale Baker Oldsmobile Inc*, and *Schwartz v Alltel Corp*, supra, p 7.

Finally, the cases upon which Century relies do not apply. For example, *Gilmer v Interstate/Johnson Lane Corporation*, 500 U S 20 (1991) does not involve a clause banning classwide arbitration in the arbitration agreement. In *Adkins v Labor Ready Inc*, 303 F 3d 496 (4th Cir 2002), not only was there no express ban on class actions in the agreement, the court did

and/or remedies are listed on pp 4-5 herein

⁷Century included this argument in its Final Brief, p 25

not even consider the issue, finding that other defects in the plaintiff's case rendered "his further complaint about the inability to bring a class action moot" Id at 503 In contrast, as this Court clearly held, the issue here involves an arbitration agreement that specifically prohibits classwide arbitration despite statutes that explicitly permits a suit for the benefit of a group and which states that any contract in violation of any provision of the chapter is against public policy S C Code §§ 56-15-110 and 56-15-130 ⁸

V The remaining argument is without merit

Century claims that Appellants' second and third causes of action, for civil conspiracy and declaratory judgment, do not arise under the Dealers Act and thus, Century is entitled to individual arbitration on those claims These arguments are moot, because Century has already agreed to forego any individual arbitration rights in light of the court's ruling that the classwide arbitration ban is unenforceable

[C]ounsel for Century unambiguously stated at oral argument that Century did not wish to invoke the severance clause and sever the provision banning class actions from the remainder of the agreement Counsel unequivocally expressed its intent for the arbitration agreement to stand or fall as a whole

Herron, Shearouse Adv Sh No 15 at 23

⁸With the exception of one (S C Code § 56-31-30), none of the statutes cited by Century as containing express waivers even mention public policy Section 56-31-30 is similar to the statute here, §56-15-30, except this statute uses the word violate instead of waive Century is arguing semantics

CONCLUSION

For the reasons set forth herein, Respondents respectfully submit that the Petition for Rehearing should be denied

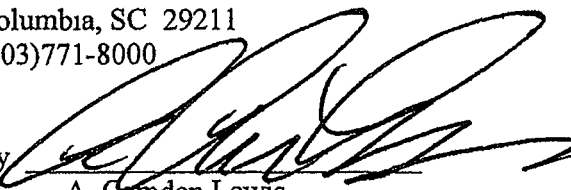
MICHAEL SPEARS, PA
Michael E Spears
Post Office 5806
Spartanburg, SC 29304
(864)583-3235

GEDNEY M HOWE, III, PA
Gedney M Howe, III
Post Office Box 1034
Charleston, SC 29402
(843)722-8048

RICHARD A HARPOOTLIAN, PA
Richard A Harpootlian
P O Box 1090
Columbia, SC 29202
(803)252-4848

LEWIS & BABCOCK, L L P
A Camden Lewis
Peter D Protopapas
Ariail E King
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
(803)771-8000

By


A Camden Lewis

Columbia, SC
May 21st, 2010

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A Early, Circuit Court Judge

Circuit Court Case No 2006-CP-02-1230

Court of Appeals Docket No 03-27371

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael Blease and David Carroll,¹ individually and for the benefit of all car buyers whom paid “administrative fees” as described below to Defendants, Respondents,

v

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc , Galeana Chrysler Plymouth, Inc a/k/a Galeana Chrysler Jeep, Inc , J L H Investments, LP a/k/a Hendrick Honda, Overland, Inc , d/b/a Land Rover of Columbia, Taylor Toyota a/k/a Taylor Investments, Inc , and Toyota of Greenville, Inc , Defendants,

of whom Century BMW d/b/a Sonic Automotive is the Appellant

PROOF OF SERVICE

I, Margarita Sosa, secretary to the law firm of Lewis & Babcock, L L P , attorneys for the Respondents, do hereby certify that I have served counsel specified below with copies of **Respondents’ Return to the Appellant’s Petition for Rehearing** by mailing a copies thereof by United States Mail, postage prepaid, on May 21, 2010 to the following addresses

¹ David Carroll was substituted for Michael Watts as the named Plaintiff for Toyota of Greenville by Order of the Circuit Court dated October 12, 2009

J Gregory Studemeyer, Esquire
Attorney at Law
Post Office Box 12201
Columbia, South Carolina 29211

James Y Becker, Esquire
Mary M Caskey, Esquire
Haynsworth Sinkler Boyd, P A
1201 Main Street, 22nd Floor
Columbia, South Carolina 29201

Steven W Hamm, Esquire
C Jo Anne Wessinger Hill, Esquire
Richardson, Plowden, Carpenter & Robinson, P A
Post Office Drawer 7788
Columbia, South Carolina 29202

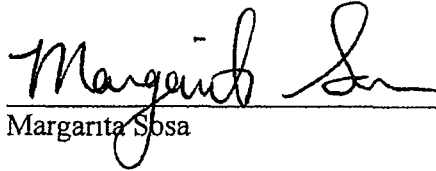
H Clayton Walker, Jr , Esquire
Walker & Reibold
Post Office Box 61140
Columbia, South Carolina 29260

Bradford N Martin, Esquire
Laura W H Teer, Esquire
Bradford, Neal, Martin & Associates, PA
Post Office Box 10410
Greenville, South Carolina 29603-0410

Dennis M Black, Esquire
Ryan L VanGrack, Esquire
Williams & Connolly, LLP
725 Twelfth St , N W
Washington, D C 20005

Columbia, South Carolina

May 21, 2010


Margarita Sosa

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A Early, III, Circuit Court Judge

Circuit Court Case No 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, individually and for the benefit of all car buyers who paid "administrative fees" as described below to Defendants, **Respondents,**

v

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc , Galeana Chrysler Plymouth, Inc , a/k/a Galeana Chrysler Jeep, Inc , J L H Investments LP a/k/a Hendrick Honda, Overland, Inc , d/b/a Land Rover of Columbia, Taylor Toyota a/k/a Taylor Investments, and Toyota of Greenville, Inc , **Defendants,**

of which Century BMW d/b/a Sonic Automotive is the **Appellant**

**APPELLANT'S REPLY IN SUPPORT OF ITS PETITION FOR REHEARING
PURSUANT TO RULE 221, SCACR**

**Re Opinion 26805
Heard January 20, 2010 – Filed April 19, 2010**

Steven W Hamm
C Jo Anne Wessinger Hill
RICHARDSON FLOWDEN & ROBINSON, P A
P O Drawer 7788
Columbia, South Carolina 29202
(803)771-4400
(803)779-0016 (facsimile)

Dennis M Black (*pro hac vice admitted*)
Ryan L VanGrack (*pro hac vice admitted*)
WILLIAMS & CONNOLLY LLP
725 Twelfth St, N W
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (facsimile)

ATTORNEYS FOR APPELLANT CENTURY
BMW D/B/A SONIC AUTOMOTIVE, WHOSE
TRUE NAME IS SONIC AUTOMOTIVE 2752
LAURENS RD , GREENVILLE, INC D/B/A
CENTURY BMW

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OTHER

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Respondent's Return to the Petition for Rehearing (1) misconstrues *Stolt-Nielsen*, (2) entirely ignores the Due Process problems that would permeate class proceedings if this Court's opinion could lawfully co-exist with *Stolt-Nielsen*, (3) provides no evidence that in the Dealers Act the legislature intended to create a non-waivable right to collective action, and (4) does not dispute that *Herron* allows the parties to arbitrate the second and third causes of action on an individual basis

ARGUMENT

I *Stolt-Nielsen* Mandates Reconsideration and Reversal

A Century BMW's Argument Regarding the Impact of *Stolt-Nielsen* Is Timely

Respondent's waiver argument is wholly without merit. Century BMW has argued consistently that the Federal Arbitration Act ("FAA") governs this dispute and that the FAA requires enforcement of arbitration agreements according to their terms. See Appellant's Final Br. at 11 ("This Court should therefore reverse the circuit court's order as inconsistent with federal law and enforce the arbitration agreement") & 27 (requesting the Court enter an order compelling arbitration "in accordance with the terms of the arbitration agreement"), Appellant's Reply Br. at 4 ("Ms. Watts's arbitration agreement is governed by the Federal Arbitration Act"). To the extent Respondent's argument is predicated on Century BMW's failure to raise previously the holding of *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, No. 08-1198, --- U.S. ---, 2010 WL 1655826 (U.S. April 27, 2010), Century BMW obviously could not cite a decision that the Supreme Court of the United States had not yet authored. Moreover, Century BMW brought *Stolt-Nielsen* to this Court's attention less than a week after the Supreme Court issued the decision.

B *Stolt-Nielsen* Moots All Prior Debate Regarding the Enforceability of Class Action Waivers

Respondent cites a number of pre-*Stolt-Nielsen* cases finding class action waivers unenforceable under a variety of theories. Century BMW can cite just as many finding such waivers enforceable, indeed the majority of courts addressing the issue found such waivers enforceable before *Stolt-Nielsen*. See, e.g., *Caley v Gulfstream Aerospace Corp*, 428 F 3d 1359, 1378 (11th Cir 2005), *Livingston v Assocs Fin, Inc*, 339 F 3d 553, 559 (7th Cir 2003), *Snowden v Checkpoint Check Cashing*, 290 F 3d 631, 638 (4th Cir 2002), *Johnson v W Suburban Bank*, 225 F 3d 366, 374 (3d Cir 2000), *Morgan v Advance Am*, 2008 WL 4191754, at *16 (D S C Sept 5, 2008), *Pomposi v Gamestop, Inc*, 2010 WL 147196, at *8-11 (D Conn Jan 11, 2010), *Coffey v Kellogg Brown & Root*, 2009 WL 2515649, at *10-13 (N D Ga Aug 13, 2009), *Nayal v Hip Network Servs IPA, Inc*, 620 F Supp 2d 566, 573 (S D N Y 2009), *Stephens v Wachovia Corp*, 2008 WL 686214, at *6-7 (W D N C Mar 7, 2008), *Milligan v Comcast Corp*, 2007 WL 4885492, at *2 (N D Ala. Jan 22, 2007), *Pyburn v Bill Heard Chevrolet*, 63 S W 3d 351, 364-65 (Tenn Ct App 2001). What Respondent does not grapple with is that *Stolt-Nielsen* moots this debate.¹ *Stolt-Nielsen*'s holding that the FAA precludes forcing a party to participate in a class arbitration absent that party's contractual agreement to do so made state law on the subject of class arbitration waivers irrelevant. Respondent is effectively arguing that the federal law's presumption violates state public policy, turning the Supremacy Clause on its head. If a party cannot be compelled to class arbitration absent contractual

¹ It is undisputed that *Stolt-Nielsen* applies to this case. See, e.g., *Harper v Va Dep't of Taxation*, 509 U S 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.")

evidence that it agreed to do so, it follows that a party cannot be forced to class arbitration where the parties expressly agreed *not* to arbitrate as a class

C The FAA Preempts South Carolina Law as *Herron* Construed It

The FAA, as *Stolt-Nielsen* construed it, preempts any South Carolina public policy requiring class arbitration under the Dealers Act. Under *Stolt-Nielsen*, an arbitration clause that is silent as to class arbitration cannot be construed to allow this procedure, yet under *Herron*, an arbitration clause is per se invalid if it does not permit class arbitration. Thus, for *Herron* and *Stolt-Nielsen* to co-exist, South Carolina law would effectively require arbitration agreements – and only arbitration agreements – to include an explicit provision allowing for class arbitration. Under well-established Supreme Court of the United States and South Carolina precedent, however, the FAA precludes States from imposing unique requirements on arbitration agreements. See *Doctor's Assocs, Inc v Casarotto*, 517 U S 681 (1996) (FAA preempts state law conditioning enforceability of arbitration agreements “on compliance with a special notice requirement not applicable to contracts generally”), *Soil Remediation Co v Nu-Way Environmental, Inc*, 323 S C 454 (1996) (holding that the “FAA preempts” South Carolina’s requirement that contracts with arbitration agreements provide notice on the first page of the contract), see also *Munoz v Green Tree Fin Corp*, 343 S C 531, 539 (2001) (a state law that “places arbitration clauses on an unequal footing with contracts generally” is preempted if the FAA applies”). State law therefore cannot condition the enforceability of arbitration agreements on the inclusion of a provision permitting class arbitration. Yet the *Herron* decision would void all agreements to arbitrate under the Dealers Act unless the parties expressly agree to class arbitration. By imposing this additional requirement on arbitration agreements under the Dealers Act, this Court’s decision “singles out arbitration agreements,” *Soil Remediation*, 323 S C at 459, and therefore, is preempted by the FAA.

D Ms Watts Ignores the Significant Due Process Problems this Court's Decision Would Create In Light of *Stolt-Nielsen*

Ms Watts may want to arbitrate on a class basis, but *Stolt-Nielsen* holds that the absent class members presumptively do not and that their silence does not equal consent to a class arbitration. Ms Watts's Return does not contest that forcing the absent class members into class arbitration raises significant due process problems that Century BMW identified in its petition. Instead, Ms Watts responds with silence. Given the Supreme Court's holding in *Stolt-Nielsen* that a party cannot be compelled to class arbitration absent an agreement, sending Century BMW and absent class members into class arbitration—even though virtually all of them expressly agreed *not* to arbitrate as a class—would violate due process by (1) compelling absent class members into class proceedings against their will, and (2) compelling Century BMW to defend a representative action in which the absent class members would not be bound to the result.

E Subsequent Supreme Court Precedent Confirms that *Stolt-Nielsen* Mandates Reversal

The actions of the Supreme Court of the United States subsequent to *Stolt-Nielsen* demonstrate that this Court should reconsider the *Herron* decision.

First, in *American Express Co. v. Italian Colors Restaurant*, No. 08-1473, ___ S. Ct. ___, 2010 WL 1740528 (U.S. May 3, 2010), the Supreme Court granted certiorari, vacated the opinion of the United States Court of Appeals for the Second Circuit, and remanded the case for reconsideration in light of *Stolt-Nielsen*. The similarities between the Second Circuit's decision in *American Express* and this Court's decision in *Herron* are striking. In *American Express*, the Second Circuit held that class actions were necessary to allow parties to vindicate their statutory rights in arbitration, rather than relying on a finding of unconscionability. *In re Am. Express Merchants Litig.*, 554 F.3d 300, 304, 320 (2d Cir. 2009). Likewise, in *Herron*, this Court adopted a statutory rights analysis, rather than relying on unconscionability. *Herron v. Century*

BMW, No 26805, --- S E 2d ----, 2010 WL 1541297 (S C Apr 19, 2010) (finding the arbitration agreement was not unconscionable) Moreover, just as in *Herron*, the Second Circuit effectively forced the defendant to choose between proceeding in class arbitration or remaining in court *In re Am Express Merchants Litig*, 554 F 3d at 321

The Supreme Court's decision to grant certiorari, vacate the judgment in *American Express* and remand the case for reconsideration means that because of the intervening *Stolt-Nielsen* decision, the Court believes that there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" and that "such a redetermination may determine the ultimate outcome of the litigation" *Lawrence v Chater*, 516 U S 163, 167 (1996) Thus, the Supreme Court clearly found that *Stolt-Nielsen* directly impacts—and likely invalidates—the Second Circuit's holding that the class action waiver was unenforceable under a statutory rights analysis This Court should similarly reconsider its decision

Second, on May 24, 2010, the Supreme Court granted certiorari in *Laster v AT&T Mobility LLC*, 584 F 3d 849 (9th Cir 2009) In *Laster*, the Ninth Circuit held that an arbitration provision was unconscionable under California law because it required customers to arbitrate on an individual basis *AT&T Mobility LLC v Concepcion*, No 09-893, --- S Ct ----, 2010 WL 303962 (U S May 24, 2010) In seeking certiorari, AT&T Mobility relied on *Stolt-Nielsen* to argue that the FAA preempts States from conditioning enforcement of an arbitration agreement on the availability of class arbitration See *Reply Brief for the Petitioner, AT&T Mobility LLC v Concepcion*, No 09-893 at 3-5 (May 3, 2010), *Petition for Writ of Certiorari, AT&T Mobility LLC v Concepcion*, No 09-893 at 34 (Jan 25, 2010)

Third, the United States District Court of Colorado recognized in *Stender v Cardwell*, 2010 WL 1930260, at *5 (D Colo May 12, 2010), that *Stolt-Nielsen* eviscerated plaintiffs' argument that barriers to class arbitration made the arbitration agreement unenforceable. Indeed, the consequences of *Stolt-Nielsen* were so apparent that plaintiffs abandoned their class arbitration argument altogether. *Id.*

Finally, Respondent's reliance on *McArdle v AT&T Mobility LLC* is disingenuous. Not only does Respondent's Return ignore the Supreme Court's decision in *American Express*, but also *McArdle* is inapposite. Unlike *Herron* and *American Express*, the court in *McArdle* invalidated the arbitration agreement based on its finding that the class arbitration waiver was unconscionable. See *McArdle v AT&T Mobility LLC*, No. C 09-1117, 2010 WL 1875812, at *1 (N.D. Cal. May 10, 2010). *McArdle* also held that the class arbitration waiver was not severable from the rest of the arbitration provision, and therefore, the entire arbitration provision was unenforceable. Moreover, as noted, the Supreme Court has now granted certiorari in the Ninth Circuit case upon which *McArdle* principally relied. See *McArdle*, 2010 WL 1875812, at *1 n.1 (citing *Laster v AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009)).

In light of *Stolt-Nielsen*, the Supreme Court's decision in *American Express*, and the *Herron* Court's reliance on a similar statutory rights argument, this Court should reconsider its decision.

II Ms. Watts Failed to Meet Her Burden of Establishing that the Right to Collective Action is Non-Waivable

Other than the ipse dixit argument that the difference between "waive" and "violate" is a semantic one (something that is clearly untrue), Ms. Watts's Return does not offer any argument that the South Carolina legislature intended to create a non-waivable right to pursue a collective

action under the Dealers Act. As discussed in Century BMW's petition, neither the text of the Dealers Act nor the legislative history of § 56-15-110(2) support this Court's holding. The Court should therefore reconsider its decision.

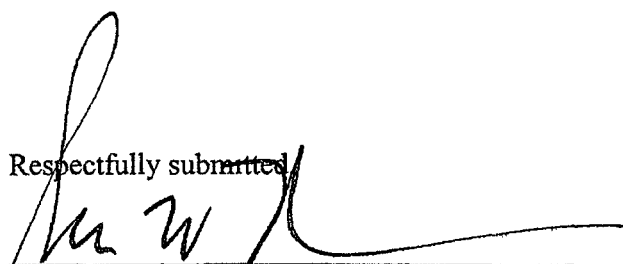
III Ms. Watts Concedes that the Second and Third Causes of Action Do Not Arise Under the Dealers Act

Ms. Watts does not dispute that (1) this Court's rationale in *Herron* was limited to the Dealers Act, and (2) her second and third causes of action do not arise under the Dealers Act. As a result, Ms. Watts does not contest the merits of Century BMW's argument that it can arbitrate the second and third causes of action on an individual basis even under this Court's rationale. Instead, Ms. Watts side-steps the issue by claiming that the argument is moot because Century BMW opted not to sever the class action waiver from the arbitration agreement. Century BMW, however, never waived its ability to arbitrate the second and third causes of action on an individual basis. Rather, Century BMW only waived its right to arbitrate on a *class basis*. Because the second and third claims do not arise under the Dealers Act, this Court's decision does not require class arbitration of those causes of action and Century BMW is amenable to arbitrating those claims on an individual basis.

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court withdraw its opinion, reverse the Circuit Court, and remand with instructions to compel Respondent Watts to arbitrate all of her claims individually.

Respectfully submitted,



Steven W Hamm

C Jo Anne Wessinger Hill
RICHARDSON PLOWDEN & ROBINSON, P A
P O Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 (facsimile)

Dennis M Black (*pro hac vice admitted*)
Ryan L VanGrack (*pro hac vice admitted*)
WILLIAMS & CONNOLLY LLP
725 Twelfth St , N W
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (facsimile)

ATTORNEYS FOR APPELLANT CENTURY
BMW D/B/A SONIC AUTOMOTIVE, WHOSE
TRUE NAME IS SONIC AUTOMOTIVE 2752
LAURENS RD , GREENVILLE, INC D/B/A
CENTURY BMW

May 28, 2010
Columbia, South Carolina

No

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD , GREENVILLE,
INC , D/B/A CENTURY BMW, PETITIONER

v

CHRISTINE WATTS, ET AL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

PETITION FOR A WRIT OF CERTIORARI

STEVEN W HAMM
C JO ANNE WESSINGER HILL
RICHARDSON PLOWDEN &
ROBINSON, P A
P O Box 7788
Columbia, SC 29202

KANNON K SHANMUGAM
Counsel of Record
DANIEL F KATZ
DENNIS M BLACK
RYAN L VANGRACK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N W
Washington, DC 20005
(202) 434 5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement

(I)

**PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE STATEMENT**

Petitioner is Sonic Automotive, 2752 Laurens Rd , Greenville, Inc , doing business as Century BMW Petitioner is wholly owned by Sonic Automotive, Inc , a publicly held company Sonic Automotive, Inc , has no parent corporation, and no publicly held company owns 10% or more of its stock

Respondents are Christine Watts, Natalie Armstrong, Michael Blease, Alison Dannert, Julie Freeman, Heather Herron, Michael Ritz, and Michael Watts

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(III)

In the Supreme Court of the United States

No

SONIC AUTOMOTIVE, 2752 LAURENS RD , GREENVILLE,
INC , D/B/A CENTURY BMW, PETITIONER

v

CHRISTINE WATTS, ET AL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

PETITION FOR A WRIT OF CERTIORARI

Sonic Automotive, 2752 Laurens Rd , Greenville, Inc ,
doing business as Century BMW, respectfully petitions
for a writ of certiorari to review the judgment of the Su-
preme Court of South Carolina in this case

OPINIONS BELOW

The opinion of the South Carolina Supreme Court
(App , *infra*, 1a-12a) is reported at 693 S E 2d 394 The
South Carolina Supreme Court's order denying rehear-
ing (App , *infra*, 13a-15a) and the trial court's order de-
nying petitioner's motion to compel arbitration (App ,
infra, 16a-29a) are unreported

(1)

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on April 19, 2010. A petition for rehearing was denied on June 9, 2010 (App., *infra*, 13a-15a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). See *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides in relevant part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

1. Petitioner is an automobile dealer in Greenville, South Carolina. In 2005, respondent Christine Watts, accompanied by her father, purchased a 2004 BMW Z4 convertible from petitioner. In the course of doing so, Watts executed an arbitration agreement. Under the terms of that agreement, which was expressly governed by the Federal Arbitration Act (FAA), any dispute between the parties would be subject to arbitration. At Watts's option, the arbitration would take place either in the federal district in which she resided or in the district in which the car was purchased. If Watts initiated the

claim, petitioner agreed to pay the portion of the filing fee that exceeded the amount she would have had to pay if the claim had been filed in court, under the agreement and the underlying rules governing the arbitration, petitioner also agreed to pay the arbitrator's fees. Of critical relevance here, the arbitration agreement provided that the parties "waiv[ed] their right to * * * bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." App, *infra*, 7a-8a, S C C A App 94, 136, 659-666, 1100, Pet S C C A Br 1-7.

2 On October 31, 2006, respondents, including Watts, filed a class action in South Carolina state court against petitioner and more than 300 other automobile dealers. S C C A App 68-147. They contended, *inter alia*, that the dealers had improperly charged "administrative fees" in connection with the sale of vehicles in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S C Code Ann §§ 56-15-10 to 56-15-140 (2009).¹

Pursuant to the terms of the arbitration agreement, petitioner moved to compel arbitration of Watts's claim. The trial court denied the motion. App, *infra*, 16a-29a. The court held that the arbitration agreement was "unconscionable and unenforceable" on the grounds that "[respondent] Watts had an absence of meaningful choice when she entered into the arbitration agreement" and that "[t]he Century BMW arbitration agreement

¹ Because the other respondents besides Watts all purchased vehicles from other dealers besides petitioner, they were nominal parties in the court below and are nominal parties here. See S C C A App 135 136.

contains oppressive and one-sided terms” *Id* at 24a, 28a

3 Petitioner appealed to the South Carolina Court of Appeals, contending, *inter alia*, that the trial court’s order “violated the federal policy favoring arbitration” Pet SC CA Br 11. The South Carolina Supreme Court *sua sponte* certified the appeal for its own review and then affirmed in result App, *infra*, 1a-12a. As a preliminary matter, the South Carolina Supreme Court agreed with petitioner that the trial court had erred in holding that the arbitration agreement as a whole was unconscionable *Id* at 5a-8a. The court first determined that respondent Watts “had a meaningful choice in signing the [arbitration agreement],” because the agreement was “a separate, one-page document” that was “clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font” *Id* at 6a. The court further determined that most of the terms of the arbitration agreement were “neither oppressive nor one-sided,” because “[s]everal provisions favor the customer” and “nothing in the agreement prevents the arbitrator from awarding punitive damages or * * * limit[s] any available statutory remedies” *Id* at 8a.

The South Carolina Supreme Court nevertheless held that the provision of the arbitration agreement precluding the availability of class arbitration was invalid on a ground not advanced by respondent Watts *viz*, because it violated a provision of the Dealers Act allowing Dealers Act claims to be brought as class actions. See App, *infra*, 9a-10a (citing S C Code Ann § 56-15-110(2) (2009)). Although the provision at issue did not state that the right to file a class action was non-waivable, the court concluded that “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" *Id* at 10a. Because counsel for petitioner had stated at oral argument that petitioner would prefer not to arbitrate rather than to proceed with class arbitration, and because respondent had indicated her desire to "avoid the arbitration agreement and proceed in court," the court invalidated the arbitration agreement in full and therefore affirmed the denial of the motion to compel arbitration *Id* at 11a.

4 Shortly after the South Carolina Supreme Court's decision, this Court issued its decision in *Stolt Nielsen, S A v AnimalFeeds International Corp*, 130 S Ct 1758 (2010), which held that it would be inconsistent with the FAA for an arbitrator to impose class arbitration on parties who had not agreed to authorize it. Petitioner filed a petition for rehearing, contending, *inter alia*, that *Stolt-Nielsen* supported the proposition that the FAA preempted any state law that invalidates a provision of an arbitration agreement precluding the availability of class arbitration. See S C S Ct Pet for Reh'g 3 (asserting that "[t]he FAA clearly preempts South Carolina law, as this Court construed it").

The South Carolina Supreme Court denied the petition App, *infra*, 13a-15a. The court did not expressly address petitioner's preemption argument, other than to state that *Stolt-Nielsen* was "distinguishable on the law and the facts" *Id* at 15a. Instead, the court simply reiterated that "[its] opinion affirming the trial court's denial of the motion to compel arbitration [was] wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer[s] Act and the public policy of this State" *Ibid*. Although the court had held that the provision of the arbitration agreement precluding the availability of class

arbitration was invalid, the court asserted that it had “not condition[ed] the enforcement of the agreement on the availability of class arbitration or otherwise indicate[d] the plaintiffs could proceed as a class in arbitration” *Ibid*

REASONS FOR GRANTING THE PETITION

In the decision below, the South Carolina Supreme Court held that, notwithstanding the Federal Arbitration Act, state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. After petitioner filed its petition for rehearing in the South Carolina Supreme Court, this Court granted the petition for certiorari in *AT&T Mobility LLC v. Concepcion*, No. 09-893 (May 24, 2010), which presents the question whether the FAA preempts a state-law rule—there, a rule derived from the common-law doctrine of unconscionability—that conditions the enforceability of an arbitration agreement on the availability of class arbitration. Because the question presented in this case is materially identical to the question presented in *AT&T Mobility*, the petition in this case should be held pending the Court’s disposition of *AT&T Mobility*, and then disposed of accordingly.

1 In *AT&T Mobility*, as in this case, the defendant moved to compel arbitration based on an arbitration provision that contained a prohibition on class arbitration, the plaintiff opposed the motion on the ground that the arbitration provision was unconscionable under state law. See Pet. App. at 3a-4a, *AT&T Mobility*, *supra*. The Ninth Circuit upheld the district court’s denial of the motion to compel arbitration, holding, first, that the arbitration provision was unconscionable because it was effectively exculpatory, see *id.* at 11a, and second, that the resulting state-law rule was not preempted by the FAA.

because it was “simply a refinement of the unconscionability analysis applicable to contracts generally in California,” *id.* at 12a-13a. Although this Court’s intervening decision in *Stolt-Nielsen* strongly suggested that the Ninth Circuit’s decision was incorrect, the Court granted the petition in *AT&T Mobility* and set the case for briefing and oral argument.

2 The South Carolina Supreme Court’s decision in this case is erroneous for largely the same reasons as the Ninth Circuit’s decision in *AT&T Mobility*. In each case, the practical effect of the lower court’s decision is the same *viz.*, to render it impossible, as a matter of state law, for parties to agree to commit claims to bilateral arbitration (and thereby to preclude plaintiffs from pursuing claims on behalf of unnamed third parties). Various provisions of the FAA—including, most notably, Section 2—make clear that there is a strong federal policy to “ensure that private agreements to arbitrate are enforced according to their terms.” *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal quotation marks and citation omitted). To be sure, Section 2 contains a narrow exception under which courts may invalidate arbitration provisions “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. As in *AT&T Mobility*, however, the state-law rule at issue here does not qualify as a valid ground for invoking that exception because it is aimed specifically at dispute-resolution agreements. See Pet. Br. at 26-48, *AT&T Mobility*, *supra*. The state-law rule is also preempted because it conflicts with broader policies animating the FAA *viz.*, the federal policies of removing impediments to arbitration.

and allowing parties to select their own dispute-resolution mechanisms. See *id.* at 49-56.²

3 Given the substantial overlap between the questions presented in this case and in *AT&T Mobility*, the Court should hold the petition in this case pending its disposition of *AT&T Mobility*. Should the Court hold in *AT&T Mobility* that the state-law rule at issue is preempted, there would be no valid basis for reaching a different conclusion in this case. The appropriate course would therefore be for the Court to vacate the judgment below and remand, so as to allow the South Carolina state courts to compel arbitration of respondent's claims.

Conversely, even if the Court were to affirm in *AT&T Mobility*, it may still be appropriate for the Court to vacate and remand in this case, depending on the reasoning the Court uses in reaching that result. This case presents a more compelling case for federal preemption than *AT&T Mobility* in one potentially significant re-

² Relying on this Court's recent decision in *Stolt Nielsen*, petitioner advanced its preemption argument as one of its primary bases for rehearing in the South Carolina Supreme Court. See, e.g., S.C. S.Ct. Pet. for Reh'g 3. Curiously, in its order denying rehearing, the South Carolina Supreme Court did not expressly address that argument, beyond its apodictic statement that *Stolt Nielsen* was "distinguishable on the law and the facts." App., *infra*, 15a. Instead, it stated that, in its earlier opinion, it had "not condition[ed] the enforcement of the agreement on the availability of class arbitration or otherwise indicate[d] the plaintiffs could proceed as a class in arbitration." *Ibid.* That statement, however, is utterly bewildering in light of the court's earlier opinion. There, the court squarely and unambiguously held that, in light of the invalidity of the prohibition against classwide arbitration, the only possible remedies were to sever the prohibition (and thereby permit respondent Watts to pursue classwide arbitration) or, as the court ultimately did, to invalidate the arbitration agreement entirely. See *id.* at 10a-12a.

spect Unlike the state-law rule invalidating provisions requiring bilateral arbitration in *AT&T Mobility*—which was at least purportedly derived from the generally applicable common-law doctrine of unconscionability, see Pet App at 12a-13a, *AT&T Mobility, supra*—the South Carolina Supreme Court *refused* to derive its state-law rule from that doctrine, and instead relied on a novel interpretation of a provision of the South Carolina Dealers Act See App, *infra*, 9a-10a Under that interpretation, the provision invalidates provisions prohibiting class treatment only of a *specific class* of claims against automobile dealers (whether in arbitration or in litigation) See *ibid* Should the Court conclude in *AT&T Mobility*, therefore, that the state-law rule at issue qualifies for the exception to preemption in Section 2 of the FAA for cases involving generally applicable principles of contract law, it would still be appropriate for the Court to vacate the judgment below and remand, because the Court’s reasoning in *AT&T Mobility* would not necessarily dictate the outcome here

In either event, it is clear that the decision in *AT&T Mobility* will have a direct and potentially dispositive effect on the preemption argument presented in this case For that reason, consistent with the Court’s ordinary practice, a hold for *AT&T Mobility* is warranted

1

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *AT&T Mobility LLC v Concepcion*, No 09-893, and then disposed of accordingly

Respectfully submitted

STEVEN W HAMM
C JO ANNE WESSINGER HILL
RICHARDSON PLOWDEN &
ROBINSON, P A
P O Box 7788
Columbia, SC 29202

•

KANNON K SHANMUGAM
DANIEL F KATZ
DENNIS M BLACK
RYAN L VANGRACK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street N W
Washington, DC 20005
(202) 434 5000
kshanmugam@wc com

AUGUST 2010

APPENDIX

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APPENDIX A
SUPREME COURT OF SOUTH CAROLINA

No 26805

HEATHER HERRON, NATALIE ARMSTRONG,
MICHAEL RITZ, JULIE FREEMAN, CHRISTINE
WATTS, ALISON DANNERT, MICHAEL BLEASE,
MICHAEL WATTS, INDIVIDUALLY AND FOR
THE BENEFIT OF ALL CAR BUYERS WHO PAID
“ADMINISTRATIVE FEES” AS DESCRIBED BE-
LOW TO DEFENDANTS, Respondents,

v

CENTURY BMW A/K/A SONIC AUTOMOTIVE,
DICK DYER & ASSOCIATES, INC , GALEANA
CHRYSLER PLYMOUTH, INC , A/K/A GALEANA
CHRYSLER JEEP, INC , J L H INVESTMENTS LP
A/K/A HENDRICK HONDA, OVERLAND, INC ,
D/B/A LAND ROVER OF COLUMBIA, TAYLOR
TOYOTA A/K/A TAYLOR INVESTMENTS, AND
TOYOTA OF GREENVILLE, INC ET AL , Defen-
dants,
of whom CENTURY BMW A/K/A SONIC AUTOMO-
TIVE, Appellant

Heard Jan 20, 2010
Decided April 19, 2010
Rehearing Denied June 9, 2010

(1a)

Before TOAL, Chief Judge, BEATTY, and HEARN,
Justices, and MOORE, Acting Justice

KITTREDGE, Justice

This case concerns the enforceability of an arbitration agreement. Respondents Christine and Michael Watts entered into a contract with Appellant Century BMW (Century) for the purchase of a car. The transaction included the execution of an arbitration agreement. Subsequently, the Wattses filed a class action suit against Century alleging the dealership had charged illegal administrative fees. Century moved to compel arbitration. The trial court found the arbitration agreement was unconscionable and unenforceable and denied the motion to compel. Century appealed, and we granted certification pursuant to Rule 204, SCACR.

We hold the arbitration agreement, although an adhesion contract, is not unconscionable. Yet the arbitration provision prohibiting class actions is against public policy, which would ordinarily be severed pursuant to the agreement's severance clause. Century has insisted, however, that if the class action prohibition provision is unenforceable, it will abandon the balance of its rights under the arbitration agreement and consent to the action proceeding in the trial court. Although the arbitration agreement is otherwise enforceable, in accordance with Century's request, we affirm in result the trial court's order denying the motion to compel arbitration.

I

In 2005, Michael Watts began looking for a car to purchase for his daughter, Christine Watts, as a graduation present. He negotiated with Century for the sale of a 2004 BMW Z4 convertible. Michael gave Century a bottom line price of \$32,000, which Century initially re-

jected, but ultimately accepted. On the day of sale, Century presented a packet of documents Michael and Christine were to sign. Within the packet was a document titled “**ARBITRATION AGREEMENT**.” The arbitration agreement provided that any dispute between the parties would be subject to arbitration¹ and that the agreement was governed by the Federal Arbitration Act (FAA). The agreement further provided that the parties were waiving their right to bring or participate in a class action suit.

The Wattses brought a class action suit against Century and numerous other car dealerships in South Carolina, alleging the dealers charged an illegal administrative fee in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (“Dealers Act”) S.C. Code Ann. § 56-15-10 *et seq.* (2005). Century filed a motion to compel arbitration pursuant to the terms of the agreement. Relying heavily on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the trial court found the arbitration agreement was unconscionable because there was an absence of a meaningful choice and the agreement contained oppressive and one-sided terms. Accordingly, the trial court found the arbitration agreement was unenforceable and denied Century’s motion to compel.

II

A

Arbitration

The question of arbitrability of a claim is an issue for the courts. *Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010) (Shearouse Adv. Sh. No.

¹ The Wattses have never contended that this dispute is not within the scope of the arbitration agreement.

6 at 28) The determination of whether a claim is subject to arbitration is subject to de novo review, but a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings *Id*

At the outset, we recognize that there is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes *Heffner v Destiny, Inc*, 321 S C 536, 537, 471 S E 2d 135, 136 (1995) At the same time, general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause governed by the FAA *Munoz v Green Tree Fin Corp*, 343 S C 531, 539, 542 S E 2d 360, 364 (2001) (citing *Doctor's Assoc, Inc v Casarotto*, 517 U S 681, 685 (1996)) To this end, if a court as a matter of law finds any clause of a contract involving the sale of goods to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result S C Code Ann § 36-2-302(1) (2003)

B

Adhesion Contract

The Wattses and Century dispute whether this contract is an adhesion contract Century argues the transaction was thoroughly negotiated and the sale was not conditioned upon the Wattses agreeing to sign the arbitration agreement The Wattses, on the other hand, argue there is evidence to support the trial court's finding that this was an adhesion contract, including the fact that this was a standard form contract It appears that one customer (and certainly no more than a few customers) out of approximately six thousand failed to sign the arbitration agreement

We agree with the trial court that this is an adhesion contract. This was a contract on a standard form, presented on a take-it-or-leave-it basis. The Wattses did not contribute to the drafting of the contract or possess the bargaining power to negotiate the terms of the contract.² See *Lackey v Green Tree Fin Corp*, 330 S C 388, 394, 498 S E 2d 898, 901 (Ct App 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, although this Court has approached adhesion contracts between a consumer and automobile retailer with “considerable skepticism,” adhesion contracts are not per se unconscionable. *Simpson*, 373 S C at 27, 644 S E 2d at 669. Finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. *Lackey*, 330 S C at 395, 498 S E 2d at 902.

C

Unconscionability

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson*, 373 S C at 25, 644 S E 2d at 668.

1 Absence of Meaningful Choice

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *Id.* at 25, 644

² Although the Wattses negotiated the *price of the car* they did not have the power to negotiate the *terms of the contract*.

S E 2d at 669 In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause *Id*

We are firmly convinced and find the Wattses had a meaningful choice in signing the contract We recognize that this was a contract for the sale of a vehicle Christine Watts planned to use as her primary means of transportation, "which is critically important in modern day society" *Id* at 27, 644 S E 2d at 670 We also recognize that there was an inherent disparity in bargaining power between the parties, as this was a transaction between a consumer and a commercial entity³ However, the arbitration agreement is a separate, one-page document which both Michael and Christine Watts signed It is clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font The important terms and provisions of the agreement appear in the body of the contract and again in capital letters just above the signature line

The Wattses both admitted they did not read the arbitration agreement, and their deposition testimony confirmed the failure to read the documents was solely attributed to them and not to Century's actions Our jurisprudence forbids us to allow the Wattses to invalidate the enforceability of the arbitration agreement by claim-

³ Contrary to Century's assertion, we find no significance in the fact that this was a luxury vehicle or that Christine Watts was "highly educated" These factors do not change the "consumer/business nature" of the transaction

ing they did not read it *Regions Bank v Schmauch*, 354 S C 648, 663, 582 S E 2d 432, 440 (Ct App 2003) (citing *Sims v Tyler*, 276 S C 640, 643, 281 S E 2d 229, 230 (1981)) (“A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it ”)

This arbitration agreement and the actions of Century surrounding the transaction are markedly different from the actual agreement as well as surrounding circumstances in *Simpson*. The *Simpson* arbitration agreement was inconspicuously buried in the sales contract, on the opposite page from the customer’s signature, in paragraph “10” of sixteen other paragraphs. Additionally, the *Simpson* customer alleged the contract was “hastily” presented for her signature.

The significant features that impacted the unconscionability determination in *Simpson* are not present here. We hold the Wattses had a meaningful choice in making the decision to enter into this contract with Century.

2 *Oppressive One Sided Terms*

First, we will address the provisions in the arbitration agreement, save for the provision prohibiting a customer from bringing a class action suit against Century.

Under the agreement, all claims must be brought within the applicable statute of limitations, the arbitrator shall be an attorney or retired judge, and each party is responsible for his or her own attorney’s fees. Additional terms include no arbitration is required if the claim is brought in small claims court, the arbitration shall be conducted, at the customer’s option, in the federal district in which the customer resides or in which the vehicle was purchased, the arbitrator shall apply governing local, state or federal laws and award damages or other relief allowed by such governing laws, if the customer

initiates a claim, Century will pay the portion of the filing fee which exceeds the court filing fee, if Century initiates the claim, it will pay the entire filing fee, Century will pay up to \$1,500 of the arbitrator's fees, and parties shall equally share fees in excess of \$1,500

In our view, these terms are neither oppressive nor one-sided. Moreover, nothing in the agreement prevents the arbitrator from awarding punitive damages or double or treble compensatory damages, nor does the agreement limit any available statutory remedies. Several provisions favor the customer, such as allowing the customer a choice of venue and Century's obligation to pay certain fees. Moreover, both the customer and Century are subject to the same terms in the arbitration agreement, thus there is no lack of mutuality of remedy. *See Simpson*, 373 S.C. at 32, 644 S.E.2d at 672 (adhering to previous holdings in that lack of mutuality of remedy will not invalidate an arbitration agreement, but finding the provision dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies was one-sided and oppressive).

These terms stand in sharp contrast to the terms present in *Simpson*. In *Simpson*, the arbitration provision required the customer to waive her right to mandatory statutory remedies, including the right to punitive damages and double and treble compensatory damages. There was a lack of mutuality of remedies, as the customer was forced to arbitrate all claims she may have had against the dealer, while the dealer reserved its right to judicial remedies in certain circumstances. Further, the scope of the arbitration agreement in *Simpson* was so broad it included non-arbitratable disputes.⁴

⁴ The Court found the scope of the arbitration agreement was broad enough to implicate claims arising under the Magnuson Moss

3 *Ban on Class Actions*

Finding the terms in the arbitration agreement not to be oppressive or one-sided, we next turn to the provision banning class action suits. This provision provides “By entering into this Agreement the Parties are waiving their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration.” The Wattses argue this provision is unenforceable because it is oppressive in that it takes away statutory rights, and it is one-sided in that Century would not bring a class action suit against its customers. While we agree with the Wattses that the provision is unenforceable, we hold the ban on class actions is unenforceable on public policy grounds.

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.

Warranty Act (MMWA), a federal statute that governs warranties on consumer products. The Court noted that federal regulations state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703.5(j) (2006). Accordingly, the Court held “the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy.” *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673.

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 note that courts across the country are split over whether an arbitration agreement may include a waiver of the right to bring a class action suit. *See Scott v Cingular Wireless*, 161 P 3d 1000, 1004 (Wash 2007) (highlighting the split in authority with a list of nationwide cases finding class action waivers enforceable 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*, 361 S C 544, 555, 606 S E 2d 752, 758 (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)

4 Severance

Finding this provision unenforceable would normally not end the inquiry on the enforceability of the remainder of the contract, as courts will attempt to sever an illegal provision in an otherwise valid contract and enforce

the remaining terms.⁵ The parties' arbitration agreement provides that "[i]f any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable."

Nevertheless, counsel for Century unambiguously stated at oral argument that Century did not wish to invoke the severance clause and sever the provision banning class actions from the remainder of the agreement. Century unequivocally expressed its intent for the arbitration agreement to stand or fall as a whole. Obviously, the Wattses seek to avoid the arbitration agreement and proceed in court. We will not provide a remedy that neither party seeks. We treat the issue of severability as abandoned. Therefore, we decline to enforce the arbitration agreement and affirm in result the trial court's denial of Century's motion to compel arbitration.

III

We hold, except for the provision prohibiting customers from bringing class actions, the arbitration agreement is not unconscionable, for the Wattses had a meaningful choice in entering this agreement and the agreement does not contain oppressive or one-sided terms. The arbitration agreement is enforceable except for the ban on class actions, which, under ordinary circumstances, would be severed. However, Century has abandoned its right to severance and seeks to litigate this matter in court if the ban on class actions is unenfor-

⁵ A severable contract is one in its nature and purpose susceptible of division and apportionment with an emphasis on discerning the parties' intent. *Columbia Architectural Group Inc v Barker* 274 S C 639, 641, 266 S E 2d 428, 429 (1980). Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Beach Co v Twillman, Ltd.* 351 S C 56, 64, 566 S E 2d 863, 867 (Ct App 2002).

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ceable Accordingly, we affirm in result the trial court's
order denying the motion to compel arbitration
AFFIRMED IN RESULT

APPENDIX B

SUPREME COURT OF SOUTH CAROLINA

HEATHER HERRON, NATALIE ARMSTRONG,
MICHAEL RITZ, JULIE FREEMAN, CHRISTINE
WATTS, ALISON DANNERT, MICHAEL BLEASE,
MICHAEL WATTS, INDIVIDUALLY AND FOR
THE BENEFIT OF ALL CAR BUYERS WHO PAID
“ADMINISTRATIVE FEES” AS DESCRIBED BE-
LOW TO DEFENDANTS, Respondents,

v

CENTURY BMW A/K/A SONIC AUTOMOTIVE,
DICK DYER & ASSOCIATES, INC , GALEANA
CHRYSLER PLYMOUTH, INC , A/K/A GALEANA
CHRYSLER JEEP, INC , J L H INVESTMENTS LP
A/K/A HENDRICK HONDA, OVERLAND, INC ,
D/B/A LAND ROVER OF COLUMBIA, TAYLOR
TOYOTA A/K/A TAYLOR INVESTMENTS, AND
TOYOTA OF GREENVILLE, INC ET AL , Defen-
dants,
of whom CENTURY BMW A/K/A SONIC AUTOMO-
TIVE, Appellant

June 9, 2010

ORDER

Before TOAL, Chief Justice, BEATTY, HEARN,
and KITTREDGE, Justices, and MOORE, Acting Jus-
tice

On April 19, 2010, we issued our opinion in *Herron v Century BMW*, Shearouse Adv Sh No 15 at 14 (April 19, 2010), in which we affirmed the trial court's denial of Century's motion to compel arbitration. Although we found the arbitration agreement was not unconscionable, we held the provision banning class actions was invalid on state law grounds.

Specifically, we held

[T]he 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.

Although the arbitration agreement contained a severance clause, at oral argument, counsel for Century adamantly insisted it was their position that the severance clause not be invoked to sever the provision and repeatedly requested the Court to consider the arbitration as a whole. In honoring Century's position and request, we held the inclusion of the provision banning class action suits rendered the arbitration agreement unenforceable.

Eight days after we issued our opinion, the United States Supreme Court issued *Stolt Nielsen S A v AnimalFeeds Int'l Corp*, 130 S Ct 1758 (2010), in which the Supreme Court held a party cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Century has now filed a petition for rehearing. Century asserts "[t]his Court held that Century BMW could not arbitrate unless it did so as part of a class arbitration," and

argues such a holding is contrary to the holding in *Stolt-Nielsen*

We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State. Although we would have looked to the severance clause of the agreement to sever this invalid provision, Century unequivocally insisted we consider the arbitration agreement as a whole, which we did. Century's attempt to depict our opinion as holding "that Century BMW could not arbitrate unless it did so as part of a class arbitration" is disingenuous to the opinion and a holding we never made. We did not condition the enforcement of the arbitration agreement on the availability of class arbitration or otherwise indicate the plaintiffs could proceed as a class in arbitration. This case is not controlled by *Stolt-Nielsen*, for is distinguishable on the law and the facts.

For these reasons, we deny Century's petition for rehearing.

IT IS SO ORDERED.

APPENDIX C

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

No 06-CP-02-1230

HEATHER HERRON, NATALIE ARMSTRONG,
MICHAEL RITZ, JULIE FREEMAN, CHRISTINE
WATTS, ALISON DANNERT, MICHAEL BLEASE,
MICHAEL WATTS, INDIVIDUALLY AND FOR
THE BENEFIT OF ALL CAR BUYERS WHOM
PAID "ADMINISTRATIVE FEES" AS DESCRIBED
BELOW TO DEFENDANTS, Plaintiffs,

v

CENTURY BMW A/K/A SONIC AUTOMOTIVE,
DICK DYER & ASSOCIATES, INC , GALEANA
CHRYSLER PLYMOUTH, INC A/K/A GAJEANA
CHRYSLER JEEP, INC , T L H INVESTMENTS,
LP A/K/A HENDRICKS HONDA, OVERLAND, INC
D/B/A LAND ROVER OF COLUMBIA, TAYLOR
TOYOTA A/K/A TAYLOR INVESTMENTS, AND
TOYOTA OF GREENVILLE, INC , ET AL , Defen-
dants

March 10, 2008

ORDER DENYING MOTION TO COMPEL ARBITRATION

EARLY, Circuit Court Judge

This matter comes before the Court by way of Century BMW a/k/a Sonic Automotive's ("Century BMW's") Motion to Compel Arbitration. This motion was argued before me on November 30, 2007. After considering the parties' filings, as well as the memoranda and legal arguments of counsel, I have determined that the Motion to Compel Arbitration should be denied.

FACTUAL BACKGROUND

On January 25, 2005, Plaintiff Christine Watts, a twenty-four year old college student, and her father, Michael Watts, a garage door salesman, purchased a car from Defendant Century BMW. The vehicle was a graduation present for Ms. Watts. The car was purchased to be Ms. Watts's primary source of transportation and was needed so that she could get back and forth to work.

After the parties agreed to a price for the car, Century BMW's F&I manager took Ms. Watts and her father into a cubicle to sign paperwork. Christine Watts in her affidavit stated that the documents were "hastily presented." Century BMW refers to this process as "rolling out the paper."

The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign. Century BMW's General Manager testified that it was the F&I manager's custom to place his finger on the individual documents pointing to the place on the documents that needed to be signed and say "sign here."

The Wattses signed multiple documents. Some of the documents were required to be signed by law.

The arbitration agreement at issue was one of the documents included in the packet. This arbitration

agreement is a form contract drafted by Century BMW. The arbitration agreement uses a small font.

The Wattses say there was no discussion with the F&I manager about the arbitration agreement. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." The Wattses also testified that they believed that they were required to sign all of the documents in order to get the car.

On October 31, 2006, Plaintiff Watts initiated the current action against Defendant Century BMW. In the Amended Complaint, Plaintiff Watts alleged causes of action for a declaratory judgment, civil conspiracy, and violation of the Motor Vehicle Dealers Act. On December 29, 2006, Defendant Century BMW filed a motion to compel arbitration.

ANALYSIS

The Plaintiff and Defendant agree that *Simpson v MSA of Myrtle Beach Inc*, 644 S E 2d 663 (S C 2007) is the controlling authority for this motion. The *Simpson* Court held that a car dealer's attempt in a form contract to prevent a consumer from prosecuting statutory rights in arbitration was unconscionable and unenforceable. *Simpson*, 644 S E 2d at 668-671. Application of the *Simpson* test here shows that the Century BMW arbitration agreement is also unconscionable and unenforceable.

A The Century BMW Arbitration is an Adhesion Contract

The Century BMW arbitration agreement is an adhesion contract. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 644 S E 2d at

669 Adhesion contracts “are standard in the automobile retail industry ” *Id*

The arbitration agreement here is a standard form contract drafted by Century BMW. The contract has only blanks that can be filled in depending on the date of the transaction, the VIN number of the vehicle, the name of the customer, and the name of the dealership. Plaintiff Watts did not participate in the drafting of the agreement and had no voice in the formulation of its terms.

Century BMW presents the arbitration agreement on a take-it-or-leave-it basis. Century BMW’s procedures and method of presentation lead to the conclusion that the arbitration agreement must be signed to purchase the car. Century BMW’s General Manager stated that the F&I Manager’s “practice” was to present the individual documents and point to on the paper to where the customer was supposed to sign and say “sign here.” Century BMW had no standard statements to tell purchasers. This practice indicates that signing the document is required in order to purchase a car. This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who ever bought a car without signing the arbitration agreement was Brad Martin, Esq., a lawyer in this case.

The agreement is a standard form contract. Century BMW’s procedures and the Watts’s testimony¹ show that

¹ The Watts’s testimony is the only testimony about the events surrounding the execution of the agreement. The Watts testified they believed they were required to sign the agreement in order to get the car. Century BMW was unable to produce any witness whom remembered the transaction.

the terms of the arbitration agreement were not negotiable. Accordingly, I find that the arbitration agreement is an adhesion contract. Because the Century BMW arbitration agreement is an adhesion contract, the Century BMW arbitration agreement should be viewed with “considerable skepticism.” *Simpson*, 644 S E 2d at 670 (adopting rationale of Ohio Courts in analyzing arbitration agreements by automobile retailers and stating “We proceed to analyze this contract between a consumer and automobile retailer with ‘considerable skepticism’”)

B Absence of Meaningful Choice

I also find that there was an absence of meaningful choice in agreeing to arbitrate and waive the statutory right to participate in a multi-plaintiff action. The *Simpson* case describes absence of meaningful choice as follows

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. In determining whether a contract was “tainted by an absence of meaningful choice,” courts should take into account the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, the relative disparity in the parties’ bargaining power, the parties’ relative sophistication, whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause.

Simpson v MSA of Myrtle Beach Inc, 644 S E 2d 663 (internal citation omitted)

Because an automobile is a “necessity” in everyday life, the *Simpson* Court found this factor should be con-

sidered in determining “whether a consumer had a meaningful choice in negotiating the arbitration agreement ” *Simpson*, 644 S E 2d at 669

Applying this analysis, the *Simpson* Court provided as follow

[T]he contract between Simpson and Addy involved a vehicle intended for use as Simpson’s primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson’s claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S C 531, 542 S E 2d 360 (failing to factor in the weaker party’s status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note that Simpson’s allegation that the contract was “hastily” presented for her signature

Simpson, 644 S E 2d at 670. The facts here support a finding of an absence of meaningful choice by the Plaintiffs.

There was a clear disparity in the parties’ bargaining power and the relative sophistication between the parties. Century BMW argues that Ms. Watts is sophisticated because in 2008 she works as an auditor. However, in 2005, when the vehicle was purchased, Ms. Watts was a student at the College of Charleston. Michael Watts sold garage doors. The Wattses did not have any attorney present when they signed the agreement. The Plain-

tiffs were not sophisticated and obviously not substantial business concerns

Century BMW, on the other hand, is owned by Sonic Automotive, Inc., a large corporation that owns dozens of cars dealerships. Sonic Automotive, Inc. drafted the arbitration agreement and had engaged in thousands of transactions where arbitration clauses were used. Sonic was a sophisticated car dealer with years of arbitration clause use. I find that there was a disparity of bargaining power between the parties.

Additionally, there was unfairness in the bargaining process. Century BMW inconspicuously placed the arbitration agreement within a series of documents that included documents that were required to be signed by law and then had its F&I Manager point on each document (whether required to be signed by law or not) and say sign here. There was nothing telling the Wattses that the arbitration agreement, unlike the documents required to be signed by law, was not mandatory. This procedure indicates that signing all of the documents is mandatory and is indicative of unfairness in the bargaining process. *Simpson*, 644 S.E.2d at 669 (“Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.”)

The Watts stated that there was no discussion of the arbitration agreement. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is “a document providing a remedy for the customer without having to go to court.” This statement, if given by Century BMW, is sorely lacking because the arbitration agreement in actuality takes away remedies and statutory rights. The lack of a Cen-

tury BMW full explanation is further evidence showing the fundamental unfairness of the bargaining process

There was also an element of surprise involved in the inclusion of the arbitration agreement because none of the signatories of the arbitration agreement (the Wattses nor the F&I manager) understood what they were signing. Neither of the Wattses had ever participated in an arbitration nor had any understanding of arbitration. Similarly, Century BMW's General Manager and F&I manager did not have much understanding of the arbitration agreement nor how it worked.

Century BMW's argument that the bargaining process was fair because the Wattses could have read the arbitration agreement is non-availing. The Plaintiff in *Simpson* also could have read the arbitration agreement at issue in that case. Additionally, even if the Wattses had read the arbitration agreement, the bargaining process was unfair because the arbitration agreement was not easily understandable.

Century BMW's Rule 30(b)(6) representative as the person most knowledgeable on the arbitration agreement testified that he did not have much understanding of how the arbitration agreement worked. Century BMW's General Manager has thirty-two years worth of experience in the car industry, has dealt with the subject arbitration agreement since 2002, and does not understand the arbitration agreement. Similarly, the F&I manager, whom presented the arbitration agreement to the Wattses, does not have much understanding of the agreement. It is unfair to expect the Wattses to understand the agreement, when in a little cubicle with the F&I Manager with his finger on the document pointing to the place to sign.

I also find that use of the car was a necessity to Ms. Watts. The car was purchased to be Ms. Watts's primary

source of transportation and was purchased so that she could get back and forth from work. Century BMW argues that the vehicle was not necessary because Christine Watts previously owned a Mitsubishi Montero. The fact that Ms. Watts previously owned another vehicle does not defeat the fact that use of a car is a necessity. The plaintiff in *Simpson*, prior to purchasing the car in that case, owned a 2001 Toyota 4-Runner and the South Carolina Supreme Court expressly found that the car purchased was a necessity. *Simpson*, 644 S.E.2d at 663. The car purchased by Ms. Watts, like the car purchased in *Simpson*, was purchased to be her primary source of transportation. As such, I find that the use of the car was a necessity.

In the end, I find that the facts in this case are similar to those in *Simpson*. These facts, just as they did in *Simpson*, warrant a finding that Plaintiff Watts had an absence of meaningful choice when she entered into the arbitration agreement.²

C One Sided and Oppressive Terms

The Century BMW arbitration agreement contains oppressive and one-sided terms. In analyzing this factor, the *Simpson* Court stated:

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 631 S.C. at 555, 606 S.E.2d at

² In addition to *Simpson*, the North Carolina Supreme Court's decision in *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008) also supports a finding that the arbitration agreement here is unenforceable.

758 In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, 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. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 644 S.E.2d at 671 (citing the "strong public policy notions behind the enactment of the Dealers Act.") The *Simpson* case reasoning is equally applicable here.

One Sided Terms

The prohibition of multi-plaintiff and class action in the Century BMW arbitration agreement is one-sided. Although styled as a mutual prohibition on representative class actions, it is difficult to envision the circumstances on which the provision might negatively impact Century BMW, because car dealers typically do not sue their customers in class action lawsuits. Such a one-sided contract is unconscionable. See *Kinkel v. Cingular Wireless LLC*, 828 N.E.2d 812, 820-821 (Ill. App. 5 Dist. 2005) ("cellular telephone service providers typically do not sue their customers in class action lawsuits. Thus, Cingular's provision barring class arbitration is a one-sided limitation on its customers' ability to seek relief such a one-sided limitation that could effectively deny plaintiffs their day in court is substantively unconscionable").

ble ") *See also Szetela v Discover Bank*, 97 Cal App 4th 1094 (2002)(Holding a similar clause unconscionable and one-sided because "credit card companies typically do not sue their customers in class action lawsuits ") Clearly, the Century BMW arbitration agreement contains one-sided terms

Oppressive Terms

The arbitration agreement contains oppressive terms that violate public policy and statutory law The Century BMW arbitration agreement here, like the arbitration agreement in *Simpson*, attempts to take away Plaintiff Watts's statutory rights The Dealers Act provides substantive rights to those harmed by violations S C Code Ann §56-15-110(2) provides

- (2) 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 benefit of the whole Including actions for injunctive relief

S C Code Ann §56-15-110(2) provides statutory rights to plaintiffs including the right to bring a claim on behalf of a group and injunctive relief on behalf of a group The statute was "[o]bviously enacted because consumers' remedies at common law were deemed inadequate" *See Kucharski v Rick Hendrick Chevrolet, LP*, 2002 WL 313860990 (S C Ct App 2002) As stated by the Supreme Court in *Simpson*, the purpose behind the Dealers Act is to "punish[] acts that adversely affect the public interest " *Simpson*, 644 S E 2d at 671

The Century BMW arbitration agreement's attempted prohibition of group suits prevents Plaintiff Christine Watts from effectively vindicating her statuto-

ry rights in arbitration. The right to bring a claim on behalf of a group under S C Code Ann §56-15-110(2) is significant. This protection is necessary because otherwise parties with nominal individual claims, but significant collective claims, would be left with limited avenues for relief and a wrongdoer car dealer with little checks on its abuses of law. S C Code Ann §56-15-110 makes it economical for a car purchaser who has been harmed by violation of the statute to bring claims against a car dealer. Century BMW's attempt to take this right away is violative public policy.

Similarly, Plaintiff Christine Watts's statutory right, as one harmed Plaintiff, to seek *group injunctive relief*, when an action is of common or general interest to many persons, cannot be effectively vindicated under the Century BMW arbitration Agreement. S C Code Ann §56-15-110(2) is designed so that one person can stop a car dealers from perpetrating wrongdoing against many car purchasers. This right to group injunctive relief was given by the General Assembly to prevent car dealerships from perpetrating mass wrongdoing on the public. This is a significant right that cannot be vindicated in the Century BMW arbitration agreement.

Courts in other jurisdictions have found similar provisions unconscionable and unenforceable. See *Tillman v Commercial Credit Loans, Inc*, 655 S E 2d 362 (N C 2008), *Cooper v OC Financial Services, Inc*, 503 F Supp 2d 1266, 1290 (D Ariz 2007), *Eagle v Fred Martin Motor Co*, 809 N E 2d 1161 (Ohio App 2004) (concluding provision preventing right to proceed through a class action or as a private attorney general were both against public policy and the underlying purpose of the Consumer Sales Practices Act and thus were unenforceable). *Lozada v Dale Baker Oldsmobile Inc*, 91 F Supp 2d 1087 (W D Mich 2000) (arbitration clause in-

volving the sale of automobiles providing for waiver by buyer's or right to proceed by way of a class action was substantially unreasonable and unconscionable), *State Ex Rel Dunlap v Berger*, 567 S E 2d 570, 576 (Fla Dist Ct App 1998)

The South Carolina Supreme Court has stated that it will not enforce this type of arbitration clause "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract" *Bazzle v Green Tree Financial Com*, 569 S E 2d 349, 361 (S C 2002) (*rev'd on other grounds*) Such clauses are unconscionable because they insulate Defendants from significant exposure brought about when otherwise small claims are grouped together

The class action and representative capacity suit prohibitions in the Century BMW arbitration agreement are contrary to the "strong public policy reasons" behind the enactment of the Dealers Act and contrary to the Dealers Act's purpose of "punishing acts that adversely affect the public's interest" *Simpson*, 644 S E 2d at 671 I, therefore, find that the terms of the arbitration agreement are oppressive and violative of public policy and statutory law

CONCLUSION

Like the arbitration agreement at issue in *Simpson*, there was an absence of meaningful choice by the Wattses in entering into the Century BMW arbitration agreement Additionally, the Century BMW arbitration agreement's attempt to take away statutory rights under the Motor Vehicle Dealers Act are one-sided and violative of statutory law I therefore find that the Century BMW arbitration agreement is unconscionable and unenforceable

29a

Based upon the foregoing, the Motion to Compel Arbitration filed by Century BMW is denied
AND IT IS SO ORDERED

No. 10-315

In The
Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD.
GREENVILLE, INC. D/B/A CENTURY BMW

Petitioner

CHRISTINE WATERS ET AL

Respondents

*On Petition for Writ of Certiorari to the
Supreme Court of South Carolina*

BRIEF IN OPPOSITION

A. CAMDEN LEWIS
Counsel of Record
LEWIS & BARCOCK LLP
PO Box 11208
Columbia, SC 29211
(803) 771-8000
acl@lewisbarcock.com

MICHAEL D. SPEARS
MICHAEL SPEARS, P.A.
PO Box 5806
Spartanburg, SC 29304

Counsel for Respondents

October 11, 2010

RICHARD A. HARPOOMILLIAN
RICHARD A. HARPOOMILLIAN, P.A.
PO Box 1090
Columbia, SC 29202

GEDNEY M. HOWE, III
GEDNEY M. HOWE, III, P.A.
PO Box 1034
Charleston, SC 29402

Becker Gallagher, Cincinnati, OH Washington, D.C. 800.890.5000

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**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

Respondent respectfully submits that the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina in this case should be denied

OPINIONS BELOW

The opinions below are as set forth by Petitioner

JURISDICTION

This Court does not have jurisdiction pursuant to 28 U S C § 1257(a) and *Southland Corp v Keating*, 465 U S 1, 6-8 (1984) as contended by Petitioner, because

- 1 Petitioner is in default in the court below, and
- 2 the South Carolina Supreme Court did not decide and was not asked to decide the issue of federal preemption, and
- 3 the issue of preemption, even if preserved, is inapplicable

STATUTORY PROVISIONS INVOLVED

In addition to 9 U S C § 2 cited by Petitioner, also involved are the following

S C Code Ann § 56-15-40 Specific acts deemed unfair methods of competition and unfair or deceptive

acts or practices, Office of Administrator, appointment of personnel, enforcement

(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public

S C Code Ann § 56-15-110 Suits for damages

(1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common please and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee

(2) 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

(3) In an action for money damages, if the jury finds that the defendant acted maliciously, the jury may award punitive damages not to exceed three times the actual damages

(4) A final judgment, order or decree rendered against a person in any civil, criminal or administrative proceeding under the United States

antitrust laws, under the Federal Trade Commission Act, or under this chapter shall constitute prima facie evidence against such person subject to the conditions of the United States Antitrust Law (15 U S C § 16)

S C Code Ann § 56-15-130 Contracts in violation of chapter shall be void

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

S C Code Ann § 37-2-307 Notice of closing fees on motor vehicle sales contract, registration fees

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership

STATEMENT

This action was initiated on August 29, 2006. Respondent alleges that Petitioner 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 "

Respondent contends that the conduct of the Petitioner violates the South Carolina Dealer's Act (S C Code Ann § 56-15-10)

Petitioner filed a motion to compel arbitration, claiming arbitration was required by an agreement under which the Respondent waived the right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. This motion was denied by the trial court in an order dated March 10, 2008 (Pet 16a). The order properly concluded that *Simpson v MSA of Myrtle Beach, Inc*, 644 S E 2d 663 (S C 2007) was "the controlling

authority" for the motion (Pet 18a) Further, as reflected in the order, the motion was decided wholly on state law grounds

On March 12, 2008, the Petitioner filed a notice of appeal to the South Carolina Court of Appeals Once again, the issues presented were primarily state issues As set forth by appellant/petitioner, the statement of issues on appeal to the South Carolina Supreme Court was as follows

- I Did the trial court err in denying the Appellant's motion to compel arbitration when the court violated the federal and South Carolina policies favoring arbitration?
- II Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the arbitration agreement unenforceable despite the Watts's undisputed opportunity to read the agreement?
- III Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement unconscionable?
- IV Did the trial court err in denying the Appellant's motion to compel arbitration when it found Ms Watts lacked meaningful choice in agreeing to arbitrate?
- V Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement was a contract of adhesion?

VI Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement contained oppressive, one-sided terms that no reasonable person would make or accept?

Petitioner's only possible mention of the Federal Arbitration Act was in passing when Petitioner asserted that the trial court violated federal policy favoring arbitration by resolving doubt against arbitration, Pet S C C A Brief 11 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 its decision wherein it specifically recognized the federal policy in favor of arbitration (Pet 4a) Of significance, the issue of federal preemption of South Carolina law was never raised by the Petitioner The South Carolina Supreme Court held, wholly on state law grounds,¹ that the provision of the arbitration agreement relied upon by Petitioner 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

¹ The order denying the Petition for Rehearing confirms that the South Carolina Supreme Court opinion was "wholly based on state law grounds" (Pet 15a)

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)

Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement at issue, Petitioner filed a Petition for Rehearing pursuant to South Carolina Appellate Court Rule 221. Specifically, a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. The Petition for Rehearing did not contend that the South Carolina Supreme Court overlooked the preemption argument now raised by Petitioner.² Rather, the points raised by Petitioner related to 1) the supposed inconsistency between the opinion and the case of *Stolt Nielson S.A. v. Animalfeed International Corp.*, 2) whether the South Carolina Legislature intended to create a non-waivable right to bring a class action under the Dealers Act and 3) whether arbitration

² The Petitioner argues that *Stolt Nielson, S.A. v. Animalfeeds International Corp.* 130 S.Ct. 1758 (2010) is inconsistent with the South Carolina Supreme Court opinion. Petitioner now argues that the FAA preempts South Carolina law. Petitioner cited three South Carolina cases addressing this proposition. These cases held that the FAA did not preempt South Carolina's procedural rule on appealability of arbitration, that the FAA did preempt a notice provision of the South Carolina Arbitration Act and did preempt a state statute precluding arbitration held outside of South Carolina "under the circumstances presented." None of these cases address whether South Carolina public policy involved in the present case is preempted by the FAA. There is not any argument advanced by Petitioner below that the public policy defense does not qualify as a valid ground for revocation of contracts under the exception to 9 U.S.C. § 2, allowing courts to invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract."

should be required for causes of action for civil conspiracy and declaratory judgment. At no time did the Petitioner raise the very applicable 9 U.S.C. § 2. By order dated June 9, 2010, the South Carolina Supreme Court denied the petition for rehearing stating

We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State.

On June 9, 2010 the South Carolina Supreme Court issued a remittitur to the trial court which became effective on June 24, 2010. Under South Carolina Rules of Civil Procedure, 12(a), Petitioner's answer was required fifteen days after notice of the South Carolina Supreme Court's action denying rehearing and remitting the case. Petitioner did not answer the complaint by July 9, 2010. Respondents filed an affidavit of default, and the Clerk of Court entered default on August 10, 2010. On September 1, 2010, Petitioner filed a Petition for a Writ of Certiorari to this Court and on September 3, 2010 Petitioner filed in the trial court a motion to set aside the entry of default below. As of the present date Petitioner is still in default.

**REASONS WHY THE PETITION
SHOULD NOT BE GRANTED**

Petitioner Century BMW's Petition for Writ of Certiorari to this Court should be denied for three reasons 1) No justiciable case or controversy exists in this matter as a result of Petitioner being in default, 2) Petitioner has clearly failed to preserve and the South Carolina Supreme Court did not address the federal preemption issue for an appeal to this Court, and, 3) it is the longstanding policy of the United States Supreme Court and Congress to permit courts to void arbitration contracts based on state law

**A No justiciable case or controversy exists in
this matter because Petitioner remains in
default**

The Petitioner is in full default in the case below As set forth above, Petitioner's response to the complaint was due fifteen days after notice of the South Carolina Supreme Court's Opinion affirming the denial of the motion to arbitrate, but petitioner defaulted This fact was made to appear by affidavit and the Clerk of Court entered default This is a ministerial act which a clerk of court is required to perform, and the court's entry of default is thus proper *Stark Trust Co , Inc v Superior Constr Corp* , 602 S E 2d 99 (S C App 2004) The Petitioner has now moved to set aside the entry of default but no relief has been granted Accordingly, at the present time Petitioner is in default and under South Carolina law a defaulting party is deemed to have admitted the truth of plaintiff's allegations and to have conceded liability Moreover, after default, the trial court may proceed as appropriate to enter judgment *Roche v*

Young Bros , Inc , of Florence, 504 S E 2d 311 (S C 1998)

Since Petitioner is in default in this case, no justiciable case or controversy exists which would allow Petitioner the requisite standing to petition this Court for A Writ of Certiorari. For this reason Respondents respectfully submit that the Petition herein should be denied.

B The South Carolina Supreme Court never addressed the issue of federal preemption nor did the Petitioner properly present it

The issue upon which Petitioner seeks review here was clearly not addressed by the South Carolina Supreme Court, nor was it raised. Petitioner has not met the burden of showing the preemption issue was properly presented below.³

In the petition herein Petitioner does not, as required by Rule 14(g)(1), specify the stage in the proceeding the issue was raised in the court of first instance. This being so, the issue is not appropriate for appellate review under South Carolina law which provides that

an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge to be preserved for appellate review. Moreover, an objection must

³ When the highest state court is silent on a federal question it is presumed that the issue was not properly presented. *Adams v Robertson*, 520 U S 83, 86 (1977)

be sufficiently specific to inform the trial court of the point being urged by the objector *Wilder Corp v Wilke*, 497 S E 2d 731 (S C 1998)

The Petitioner apparently contends that the preemption issue upon which it now seeks review was raised in its brief to the South Carolina Supreme Court by arguing that the trial court order "violated the federal policy favoring arbitration," (Pet 4) and on petition for rehearing by contending that "*Stolt Nielson* supported the proposition that the FAA preempted any state law that invalidates a provision of an arbitration agreement precluding the availability of class arbitration" (Pet 5)

Petitioners incorrectly argue that they properly raised the pre-emption issue by their contention that the Order on appeal violated federal policy favoring arbitration. This contention, however, in no way raised the issue presented herein. Moreover, the fact that no citation to 9 U S C § 2 and no specific arguments as to the preemption law were made below, as are made in the petition herein, undermines the present assertion that Petitioners presented the issue. The argument, actually made for the first time on petition for rehearing was that, the South Carolina Supreme Court opinion was "inconsistent with" *Stolt Nielson*. That does not clearly present the preemption argument.

Even so, raising the issue for the first time on Petition for Rehearing renders the issue inappropriate for review under South Carolina law. *Kennedy v South Carolina Retirement System*, 564 S E 2d 322 (S C 2001) makes clear that an argument not presented on the appeal and therefore not considered

by the court is not proper for consideration when deciding whether to grant a petition for rehearing

As shown above, Petitioner never presented any preemption issue in the trial court, although the main principles raised by preemption law clearly existed at the time the case was brought. Neither did Petitioner properly raise, with fair precision and in due time, the preemption issue in their brief to the South Carolina Supreme Court or in their Petition for Rehearing. Paraphrasing language set forth in *Adams v Robertson*, 520 U S at 87-88 (1997)

Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal [preemption] claim before the [South Carolina] Supreme Court, or to explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim.⁴

In order to reach the merits here, another question which this Court would have to address is whether the determinations of the South Carolina Supreme Court qualifies as a valid ground under 9 U S C §2, allowing courts to invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract." Further, this question regarding the court's right to invalidate arbitration provisions under

⁴ Policy considerations and principles of comity along with practical reasons counsel strongly in favor of requiring a federal challenge be with fair precision and in a timely manner, presented first to the state court. *Webb v Webb*, 451 U S 493 499 501 (1981)

9 U S C §2 is also an issue which was never preserved because it was never presented below and never decided below. Because this question was not presented below and because this question also is not set forth in the questions presented for review, it is respectfully submitted that this issue should not be considered. *Izumi Seimitsu Kogyo Kabushiki Kaisha v U S Philips Corp*, 510 U S 27, 31-32 (1993) (A question which is merely "complimentary" or "related" to the question presented in the petition for certiorari is not "fairly included therein"), *Andrew v Louisville & N R Co*, 406 U S 320 (1972).

For this reason it is respectfully submitted that the petition herein should be denied.

C It is the longstanding policy of the United States Supreme Court and Congress to allow courts to void arbitration contracts based on state law defenses, which includes agreements in violation of public policy

Contrary to the Petitioner's argument, the decision of the South Carolina Supreme Court did not hold that "notwithstanding the Federal Arbitration Act" state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. Rather, the opinion of the South Carolina Supreme Court narrowly addressed only a single provision of a specific contract which violates Chapter 15 of Title 56 of the South Carolina Code (Dealers Act).

As the opinion makes clear, the provision of the contract at issue violates the clearly enunciated legislatively enacted public policy of South Carolina.

This does not mean, and the court opinion below held, that anti-class action arbitration agreement clauses, across the board, are prohibited, or can be prohibited under state law. The opinion, in fact, is in accord with the accepted proposition under 9 U S C § 2 which states

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

Courts are allowed to consider contract defenses which are generally applicable to all state law contracts, such as the contract being violative of public policy. *Doctor's Assocs Inc v Casarotto*, 517 U S 681, 686-687 (1996). Under South Carolina law it is clearly long-established that individuals may never enter contracts in violation of the expressed public policy of the State, *Dill v Sovereign Camp*, 25 S E 2d 285 (S C 1943), and that contracts in contravention of "public policy" as is found in statute, as here, and the constitution and judicial decisions of this state are void, *White v J M Brown Amusement Co*, 601 S E 2d 342 (S C 2004). There is no debate that the "violation of public policy defense" is generally applicable to all contracts in South Carolina. In fact, the decision below

enunciates this principle very clearly and is now the law of the case as to this issue (Pet 10a)

It is also noteworthy that the action here is truly one of state law and not a true class action with the normal requirements of Rule 23. The case is brought under a specific state statute, limited to Dealers Act cases, with the requirements for bringing the action for the benefit of the whole being that the action is one of common or general interest to many persons, or when the parties are numerous and it is impractical to bring them all before the court. Thus, the anti-class action provision of the arbitration agreement⁶ is not implicated in true class actions and those brought on non Dealer Act causes of action. The enforceability is only implicated in case of a contract which violates the legislatively declared public policy as set forth in the Dealers Act. Contrary to Petitioner's contention, the state law rule invalidating contracts against public policy is not aimed specifically at dispute resolution agreements but instead covers all contracts which are against public policy of South Carolina as enunciated in its statutes, constitution and judicial decisions.

The South Carolina Supreme Court Opinion determined that the provision of the arbitration agreement violates South Carolina legislatively

⁶ This provision also prohibits "claimant action in court or through arbitration," and if enforced would not allow vindication of any claim at all. This is unlike the *AT&T Mobility* case where the question presented was whether the FAA preempts conditioning enforcement of an arbitration agreement when those procedures are not necessary to insure that the parties are able to vindicate their claims. *AT&T Mobility LLC v. Concepcion*, No. 09893 (cert granted May 24, 2010).

enacted public policy. The opinion also held that courts in South Carolina will not enforce contract provisions in violation of public policy (Pet 9a-10a). Both of these determinations are based solely on state law. Both of these determinations are now binding upon all parties both as the law of the case and as precedent. *Ulnner v Ulnner*, 369 S C 486, 632 S E 2d 858 (2006), *Robert E Lee & Co v Comm'n of Pub Works of City of Greenville*, 158 S E 2d 185 (S C 1967). Moreover, these are wholly state law determinations which are not proper for consideration here.

For these reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for a Writ of Certiorari should be denied

Respectfully submitted,

A Camden Lewis
Counsel of Record
Lewis & Babcock, LLP
PO Box 11208
Columbia, SC 29211
(803) 771 8000
acl@lewisbabcock.com

Michael E Spears
Michael Spears, PA
PO Box 5806
Spartanburg, SC 29304

Richard A Harpoothan
Richard A Harpoothan, PA
PO Box 1090
Columbia, SC 29202

Gedney M Howe, III
Gedney M Howe, III, PA
PO Box 1034
Charleston, SC 29402

Counsel for Respondents

October 1, 2010

No 10-315

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD , GREENVILLE,
INC , D/B/A CENTURY BMW, PETITIONER

v

CHRISTINE WATTS, ET AL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

REPLY BRIEF FOR THE PETITIONER

STEVEN W HAMM
C JO ANNE WESSINGER HILL
RICHARDSON PLOWDEN &
ROBINSON, P A
P O Box 7788
Columbia, SC 29202

KANNON K SHANMUGAM
Counsel of Record
DANIEL F KATZ
DENNIS M BLACK
RYAN L VANGRACK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N W
Washington, DC 20005
(202) 434 5000
kshanmugam@wc.com

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In the Supreme Court of the United States

No 10-315

SONIC AUTOMOTIVE, 2752 LAURENS RD , GREENVILLE,
INC , D/B/A CENTURY BMW, PETITIONER

v

CHRISTINE WATTS, ET AL

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

REPLY BRIEF FOR THE PETITIONER

Respondents do not seriously dispute that the question presented in this case is materially identical to that presented in *AT&T Mobility LLC v Concepcion*, No 09-893 (to be argued Nov 9, 2010) *viz* , whether the Federal Arbitration Act (FAA) preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement. Respondents instead offer two reasons why that question is not properly presented here. Those reasons are entirely illusory, and the decision in *AT&T Mobility* will have a direct and potentially outcome-determinative effect on the resolution of this case. The petition for certiorari should therefore be held pending the Court's disposition of *AT&T Mobility*, and then disposed of accordingly.

(1)

1 As explained at greater length in the petition, this case presents a materially identical question to the question presented in *AT&T Mobility*, because the South Carolina Supreme Court held that state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. See Pet 6-8. That state-law rule, like the one at issue in *AT&T Mobility*, is preempted by the strong federal policy, embodied in the FAA, of “ensur[ing] that private agreements to arbitrate are enforced according to their terms.” *Stolt Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773 (2010) (internal quotation marks and citation omitted).

Respondents attempt to distinguish this case from *AT&T Mobility* only in a single footnote, in which they argue that the relevant provision of the arbitration agreement here differs from the relevant provision in *AT&T Mobility*. See Br. in Opp. 16 n.5. That contention, however, rests on a blatant misquotation of the arbitration agreement. Far from “prohibit[ing] ‘claimant action in court or through arbitration,’” *ibid.*, the relevant provision of the arbitration agreement merely prohibits parties from “bring[ing] or participat[ing] in any class action or *multi* plaintiff or claimant action in court or through arbitration.” S.C. C.A. App. 1100 (emphasis added). It is therefore simply wrong to say, as respondents do, that the provision “would not allow vindication of any claim at all,” Br. in Opp. 16 n.5, the provision prohibits only *class* (or other multi-claimant) litigation. And in that respect, the provision is indistinguishable from the provision at issue in *AT&T Mobility*, which provides that “class arbitrations and class actions are not permitted.” Pet. App. at 57a, *AT&T Mobility, supra*. Because there is no legal or factual basis for distinguishing this

case from *AT&T Mobility*, a hold for *AT&T Mobility* is warranted¹

2 Respondents contend (Br in Opp 10-14) that the preemption question is not properly presented in this case for two reasons first, because the preemption argument was not adequately preserved below, and second, because petitioner is in default in proceedings on remand Both of those reasons are invalid

a As noted in the petition, petitioner consistently argued before the lower courts that it would violate the strong federal policy in favor of arbitration to invalidate the prohibition on class arbitration under state law in other words, that any state-law basis for invalidating that prohibition would be preempted See Pet 4 Even before the trial court, petitioner contended that “[t]he FAA embodies the strong federal policy in favor of enforcing arbitration agreements,” Mem in Support of Mot to Compel Arb 4 (internal quotation marks and citation omitted), and that “South Carolina courts give due regard to the federal policy favoring arbitration,” Reply Mem in Support of Mot to Compel Arb 1 n 1 (internal quotation marks and citation omitted) And in its brief before the South Carolina Supreme Court, petitioner unambiguously contended that the trial court’s

¹ Respondents seemingly contend (Br in Opp 16) that, to the extent that they are pursuing claims under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2009), this case does not involve a “true” class action That is a bewildering contention, because the Dealers Act “expressly provide[s] plaintiffs with the right to bring class action lawsuits”—as the South Carolina Supreme Court noted in holding that “any contract prohibiting a class action suit [for violations of the Dealers Act] violates our State’s public policy and is void and unenforceable” Pet App 9a, 10a

holding that the prohibition on class arbitration was unconscionable under state law “violated the federal policy favoring arbitration” Pet SC CA Br 11, see *id* at 1 (contending, in first question presented, that the trial court “violated the federal and South Carolina policies favoring arbitration”)

Respondents do not dispute, moreover, that petitioner raised the preemption argument as its primary argument in its petition for rehearing in the South Carolina Supreme Court. See Pet for Reh’g 3-7, cf *id* at 3 (contending that “[t]he FAA clearly preempts South Carolina law, as this Court construed it”), Return to Pet for Reh’g 1-2 (responding to preemption argument), Reply in Support of Pet for Reh’g 3 (renewing contention that “[t]he FAA, as *Stolt Nielsen* construed it, preempts any South Carolina public policy requiring class arbitration under the Dealers Act”)² Instead, respondents merely contend (Br in Opp 8-9, 12-13) that petitioner’s preemption argument was an improper basis for rehearing.

As a preliminary matter, even if petitioner had not raised its preemption argument at earlier stages of the litigation, but see pp 3-4, *supra*, petitioner would have been thoroughly justified in doing so for the first time in its petition for rehearing. That is true both because the South Carolina Supreme Court had invalidated the prohibition on class arbitration on a novel state-law ground that was neither adopted by the trial court nor advanced

² Respondents contend (Br in Opp 9, 12, 13 14) that petitioner somehow forfeited its preemption argument because petitioner did not cite 9 U S C 2 in its petition for rehearing. It was hardly necessary for petitioner to do so, however, in light of its unambiguous assertions that the FAA preempts state law—not least because 9 U S C 2 is only one of numerous provisions in the FAA embodying the federal policy in favor of arbitration. See Pet 7.

by respondents, see Pet 4-5, and because petitioner was primarily relying on *Stolt-Nielsen*, a decision of this Court that postdated the South Carolina Supreme Court's decision, see Pet 5. But in any event, the South Carolina Supreme Court plainly thought that the preemption argument had been properly preserved, because, in denying the petition for rehearing, it rejected that argument on the merits—albeit in dismissive fashion. See Pet App 15a (stating that *Stolt-Nielsen* was “distinguishable on the law and the facts”). Because petitioner's preemption argument was both raised and passed upon below, there is no basis for concluding that the argument has been forfeited.

b. Equally meritless is respondents' contention (Br in Opp 11) that there is “no justiciable case or controversy” because petitioner is in default in proceedings on remand. As respondents acknowledge, proceedings are ongoing before the trial court, see *id.* at 10—and that is sufficient to ensure that the question presented to this Court is not moot for Article III purposes.

We add only that respondents' account of proceedings below is seriously misleading. As respondents omit to mention, when petitioner appealed the trial court's initial ruling on its motion to compel arbitration, the parties agreed to stay further proceedings in the trial court for the “duration of [the] appeal.” Mot to Stay 1. Out of an abundance of caution, after the South Carolina Supreme Court denied petitioner's petition for rehearing, petitioner filed a motion to continue the stay pending the filing of its petition for certiorari in this Court. See Mot to Continue in Place the Stay. Although the stay remains in effect (and petitioner's motion remains pending), respondents unexpectedly took the position that petitioner was obligated to file an answer to the complaint—and, on that basis, filed a request for entry of default.

Under South Carolina law, the entry of default is a “ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party,” and the validity of the default is subsequently litigated by means of a motion to set aside the default. *Stark Truss Co v Superior Constr Corp*, 602 S E 2d 99, 102 (S C Ct App 2004). Critically, “while a clerk may make an *entry* of default, a judge is required to enter a default *judgment*” *Wetzel v Woodside Dev Ltd P’ship*, 615 S E 2d 437, 439 n 2 (S C 2005). Consistent with that practice, the clerk of the trial court entered a default and petitioner subsequently filed a motion to set aside the default, which is pending. Under the circumstances, it is exceedingly unlikely that the trial court will deny the motion and enter judgment in respondents’ favor.

In any event, the salient fact is that no final judgment has yet been entered. Because there is therefore a live issue whether the underlying dispute between the parties should be resolved in court or in arbitration, this Court has jurisdiction to consider the question presented. And because that question is materially identical to the question presented in *AT&T Mobility*, a hold for *AT&T Mobility* is warranted.

* * * * *

The petition for a writ of certiorari should be held pending this Court's disposition of *AT&T Mobility LLC v Concepcion*, No 09-893, and then disposed of accordingly

Respectfully submitted

STEVEN W HAMM
C JO ANNE WESSINGER HILL
RICHARDSON PLOWDEN &
ROBINSON, P A
P O Box 7788
Columbia, SC 29202

KANNON K SHANMUGAM
DANIEL F KATZ
DENNIS M BLACK
RYAN L VANGRACK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N W
Washington, DC 20005
(202) 434 5000
kshanmugam@wc.com

OCTOBER 2010

No. 10-315

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD , GREENVILLE,
INC , D/B/A CENTURY BMW, PETITIONER

v

CHRISTINE WATTS, ET AL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

SUPPLEMENTAL BRIEF FOR THE PETITIONER

STEVEN W HAMM
C JO ANNE WESSINGER HILL
RICHARDSON PLOWDEN &
ROBINSON, P.A.
P O Box 7788
Columbia, SC 29202

KANNON K. SHANMUGAM
Counsel of Record
DANIEL F. KATZ
DENNIS M. BLACK
RYAN L. VANGRACK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

In the Supreme Court of the United States

No 10-315

SONIC AUTOMOTIVE, 2752 LAURENS RD , GREENVILLE,
INC , D/B/A CENTURY BMW, PETITIONER

v

CHRISTINE WATTS, ET AL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

SUPPLEMENTAL BRIEF FOR THE PETITIONER

On April 27, 2011, this Court issued its decision in *AT&T Mobility LLC v Concepcion*, No 09-893, holding that the Federal Arbitration Act (FAA) preempts any state-law rule that “stand[s] as an obstacle to the accomplishment of the FAA’s objectives” Slip op 9 The state-law rule that the Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule at issue in this case Like the rule in *AT&T Mobility*, the rule at issue here invalidates a prohibition on class arbitration contained in an arbitration agreement on the ground that it is “unconscionable or unenforceable as against public policy” *Id* at 7 And like the rule in *AT&T Mobility*, the rule at issue here, although it “does not require classwide arbitration,” *id* at 12, contravenes the “overarching purpose” of the

(1)

FAA *viz*, "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" *Id.* at 9. In so doing, the rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Ibid.*

Because the lower court's rejection of petitioner's preemption argument cannot be reconciled with this Court's reasoning in *AT&T Mobility*, the Court should grant the petition for certiorari, vacate the judgment below, and remand the case for further consideration in light of *AT&T Mobility*.

Respectfully submitted

STEVEN W HAMM
C JO ANNE WESSINGER HILL
RICHARDSON PLOWDEN &
ROBINSON, P.A.
P O Box 7788
Columbia, SC 29202

KANNON K SHANMUGAM
DANIEL F KATZ
DENNIS M BLACK
RYAN L VANGRACK
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N W
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

APRIL 2011

No 10-315

IN THE
Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD ,
GREENVILLE, INC , D/B/A CENTURY BMW,
Petitioner,

v

CHRISTINE WATTS, ET AL
Respondent

**On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina**

**SUPPLEMENTAL BRIEF
FOR THE RESPONDENT**

RICHARD A HARPOOTLIAN
RICHARD A HARPOOTLIAN, PA
PO Box 1090
Columbia, SC 29202

GEDNEY M HOWE, III
GEDNEY M HOWE, III, PA
PO Box 1034
Charleston, SC 29402

A CAMDEN LEWIS
Counsel of Record
LEWIS & BABCOCK, LLP
PO Box 11208
Columbia, SC 2921
(803) 771 8000
acl@lewisbabcock.com
MICHAEL E SPEARS
MICHAEL SPEARS, PA
PO Box 5806
Spartanburg, SC 29304

April 29, 2011

IN THE
Supreme Court of the United States

No 10-315

SONIC AUTOMOTIVE, 2752 LAURENS RD ,
GREENVILLE, INC , D/B/A CENTURY BMW,
Petitioner,

v

CHRISTINE WATTS, ET AL
Respondent

**On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina**

**SUPPLEMENTAL BRIEF
FOR THE RESPONDENT**

Petitioner, in its Supplemental Brief, argues that the decision in *AT&T Mobility, LLC v Concepcion*, No 09-893, is indistinguishable from this case, and that the lower court's rejection of Petitioner's preemption argument cannot be reconciled with *AT&T* case. The issue in *AT&T* was whether the Federal Arbitration Act (FAA) preempted "California's *rule* classifying most collective-arbitration waivers in consumer contracts as unconscionable." *AT&T*, p 5 (emphasis added). The California rule was a judicially created rule set forth in *Discover Bank v Superior Court*, 36 Cal 4th 148, 113 P 3d 1100 (2005).

In *AT&T*, the majority did not go so far as to preempt a State's statutorily-mandated, substantive right, which is the issue in this case. 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." The South Carolina Supreme Court held that the Legislature had specifically recognized the need for consumer protection with regard to automobile dealers.

The purpose of the Dealers Act is consumer protection. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act.

Herron v Century BMW, 387 S C 525, 536, 693 S E 2d 394, 400 (2010), reh'g denied (June 9, 2010).
The Court continued:

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.

Herron v Century BMW, 387 S C 525, 536, 693 S E 2d 394, 400 (emphasis added). The *AT&T* case only involved a judicial rule stating that generally, class action waivers were unconscionable. This case involves a substantive right allowing a person to "sue for the benefit of the whole" as expressly provided by a South Carolina statute. Is it the Supreme Court's opinion that the FAA can preempt a consumer's

substantive right conferred by a South Carolina state statute?

A state's statutory laws become part of, and are incorporated in, every contract. See, e.g., *Barnitz v Beverly*, 163 U.S. 118, 127, 16 S.Ct. 1042, 1045, 41 L.Ed. 93 (1896) (stating that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it). Here, there are perceived conflicting provisions: a right under the Dealers' Act, S.C. Code Anno. § 56-15-110, which provides that "one or more [persons] may sue for the benefit of the whole, including actions for injunctive relief" and a prohibition against class actions in the arbitration agreement. The South Carolina Supreme Court specifically found that the right to a group or class action was "a non-waivable right" under the Dealers Act. *Herron v Century BMW*, 387 S.C. 525, 536, 693 S.E.2d 394, 400. The *AT&T* decision cannot be said to have eradicated the protection of a statutory, non-waivable right that is not limited solely to arbitration, but applies to any proceeding involving the Dealers Act.

Also, as Justice Thomas noted in a separate opinion in the *AT&T* case, if there is a defect in the formation of the arbitration agreement, the agreement is not enforceable. The conflict between the South Carolina statute and the arbitration provision creates a defect in the formation of the agreement because the agreement attempts to force a waiver of a non-waivable right.

Furthermore, there is no justiciable case or controversy in this matter because the Petitioner is in full default in the case below. An entry of default has been entered, and while Petitioner has moved to set

aside the entry of default, no relief has been granted. As the defaulting party, Petitioner has admitted all allegations of the complaint and conceded liability, and there is no justiciable case or controversy to provide Petitioner standing to petition for A Writ of Certiorari.

Therefore, Respondents submit that the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD A HARPOOTLIAN
RICHARD A HARPOOTLIAN, PA
PO Box 1090
Columbia, SC 29202

GEDNEY M HOWE III
GEDNEY M HOWE, III, PA
PO Box 1034
Charleston, SC 29402

A CAMDEN LEWIS
Counsel of Record
LEWIS & BABCOCK, LLP
PO Box 11208
Columbia, SC 2921
(803) 771 8000
acl@lewisbabcock.com

MICHAEL E SPEARS
MICHAEL SPEARS, PA
PO Box 5806
Spartanburg, SC 29304

April 29, 2011

MONDAY, MAY 2, 2011

CERTIORARI -- SUMMARY DISPOSITIONS

09-1521 UNITED STATES V EASTERN SHAWNEE TRIBE OF OK

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *United States v Tohono O'odham Nation*, 563 U S ____ (2011). Justice Kagan took no part in the consideration or decision of this petition.

10-315 SONIC AUTOMOTIVE V WATTS CHRISTINE, ET AL

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of South Carolina for further consideration in light of *AT&T Mobility LLC v Concepcion*, 563 U S ____ (2011).

10-398) CELLCO PARTNERSHIP V LITMAN, KEITH, ET AL

10-551) LITMAN, KEITH, ET AL V CELLCO PARTNERSHIP

The petitions for writs of certiorari are granted. The judgment is vacated, and the cases are remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *AT&T Mobility LLC v Concepcion*, 563 U S ____ (2011).

10-1027 MISSOURI TITLE LOANS, INC V BREWER BEVERLY

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of Missouri for further consideration in light of *AT&T*

United States of America, ss
THE PRESIDENT OF THE UNITED STATES OF AMERICA

10-315

SONIC AUTOMOTIVE LLC, dba CENTURY BMW,

Petitioner

v

CHRISTINE WATTS, ET AL

To the Honorable the Justices of the Supreme Court of South Carolina

GREETINGS

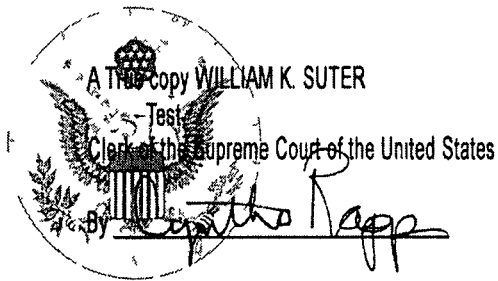
Supreme Court of South Carolina case, HEATHER HERRON, NATALIE ARMSTRONG, MICHAEL RITZ JULIE FREEMAN CHRISTINE WATTS ALISON DANNERT, MICHAEL BLEASE MICHAEL WATTS INDIVIDUALLY AND FOR THE BENEFIT OF ALL CAR BUYERS WHO PAID 'ADMINISTRATIVE FEES AS DESCRIBED BELOW TO DEFENDANTS Respondents, v CENTURY BMW A/K/A SONIC AUTOMOTIVE DICK DYER & ASSOCIATES, INC GALEANA CHRYSLER PLYMOUTH INC A/K/A GALEANA CHRYSLER JEEP INC J L H INVESTMENTS LP A/K/A HENDRICK HONDA, OVERLAND INC D/B/A LAND ROVER OF COLUMBIA, TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS AND TOYOTA OF GREENVILLE, INC ET AL Defendants, of whom CENTURY BMW A/K/A SONIC AUTOMOTIVE Appellant No 26805 was submitted to the **SUPREME COURT OF THE UNITED STATES** on the petition for writ of certiorari the response thereto and the Court having granted the petition

It is ordered and adjudged on May 2, 2011, by this Court that the judgment of the above court in this cause is vacated with costs and the cause is remanded to the Supreme Court of South Carolina for consideration in light of *AT&T Mobility LLC v Concepcion* 563 U S ____ (2011)

THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States

Witness the Honorable **JOHN G ROBERTS, JR** , Chief Justice of the United States, the 2nd day of May in the year Two Thousand and Eleven

Clerk's costs \$300 00



William K. Suter
Clerk of the Supreme Court
of the United States

Supreme Court of the United States

No 10-315

SONIC AUTOMOTIVE, INC , dba CENTURY BMW,

Petitioner

v

CHRISTINE WATTS, ET AL

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of
South Carolina

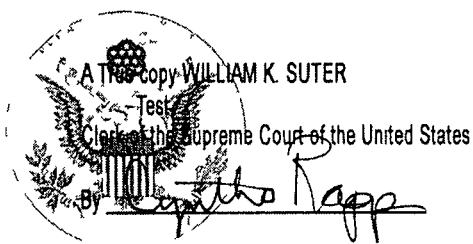
THIS CAUSE having been submitted on the petition for writ of certiorari
and the response thereto

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this
Court that the judgment of the above court in this cause is vacated with costs and the
cause is remanded to the Supreme Court of South Carolina for further consideration in
light of *AT&T Mobility LLC v Concepcion* 563 U S ____ (2011)

IT IS FURTHER ORDERED that the petitioner Sonic Automotive, Inc
dba Century BMW recover from Christine Watts, et al Three Hundred Dollars (\$300 00)
for costs herein expended

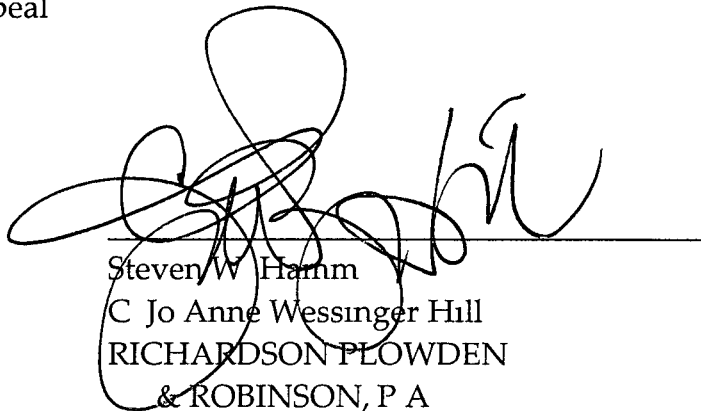
May 2 2011

Clerk's costs \$300 00



CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Supplemental Record contains no matter which is irrelevant to this appeal



Steven W. Hamm
C Jo Anne Wessinger Hill
RICHARDSON FLOWDEN
& ROBINSON, P A

1900 Barnwell Street
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile

Dennis M. Black (*pro hac vice admitted*)
Ryan L. VanGrack (*pro hac vice admitted*)
WILLIAMS & CONNOLLY LLP
725 Twelfth St, N W
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (facsimile)

ATTORNEYS FOR APPELLANT CENTURY BMW
D/B/A SONIC AUTOMOTIVE, WHOSE TRUE NAME
IS SONIC AUTOMOTIVE 2752 LAURENS RD ,
GREENVILLE, INC D/B/A CENTURY BMW

October 20, 2011
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A Early, III, Circuit Court Judge

Circuit Court Case No 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts,
Alison Dannert, Michael Blease Michael Watts, individually and for the benefit of all car
buyers who paid administrative fees" as described below to Defendants,
Respondents,

v

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc , Galeana Chrysler
Plymouth, Inc , a/k/a Galeana Chrysler Jeep, Inc , J L H Investments LP a/k/a Hendrick
Honda, Overland, Inc , d/b/a Land Rover of Columbia, Taylor Toyota a/k/a Taylor
Investments, and Toyota of Greenville, Inc , **Defendants,**

of whom Century BMW d/b/a Sonic Automotive is the **Appellant**

PROOF OF SERVICE

The undersigned employee of RICHARDSON FLOWDEN & ROBINSON, P A , attorneys for
Appellant, does hereby certify that service of the foregoing SUPPLEMENTAL RECORD
in the above-captioned matter was made upon the following counsel of record this 20th
day of October, 2011, by hand delivery to

A Camden Lewis, Esq
LEWIS & BABCOCK, LLP
P O Box 11208
Columbia, SC 29211

and was made upon the following counsel of record this 20th day of October, 2011, by
depositing a copy of same in the U S Mail, postage prepaid, addressed as follows

Michael E Spears Esq
MICHAEL E SPEARS, P A
PO Box 5806
Spartanburg, SC 29304

Richard A Harpootlian Esq
RICHARD A HARPOOTLIAN, P A
P O Box 1090
Columbia, SC 29202

Gedney M Howe, III, Esq
GEDNEY M HOWE, III, PA
P O Box 1034
Charleston, SC 29402

H Clayton Walker, Jr , Esquire
Robert L Reibold, Esquire
WALKER & REIBOLD, LLC
P O Box 61140
Columbia, SC 29260

James Y Becker, Esquire
Mary Caskey Esquire
HAYNESWORTH SINKLER BOYD, PA
1201 Main Street, 22nd Floor (29201-3226)
P O Box 11889
Columbia, S C 29211-1889

J Gregory Studemeyer, Esquire
1804 Bull Street
P O Box 12201
Columbia, SC 29211-2201

Brad Martin, Esq
Laura Teer, Esq
Bradford Neal Martin & Associates, P A
PO Box 10410
Greenville, SC 29603


Kathy J Templeton

October 20, 2011
Columbia, South Carolina