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

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael Blease and Michael Watts, 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' FINAL BRIEF IN OPPOSITION TO REVERSAL AFTER REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Re Op No 26805

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STATEMENT OF FACTS

This case was initiated on August 29, 2006 ROA, p 39 Plaintiffs allege that Appellant Century BMW d/b/a Sonic Automotive ("Century BMW") and the other Car Dealers are charging illegal procurement fees (often referred to as an "administrative fee," "recording and processing fee," "closing fee," or "dealer documentation and closing fees" (collectively "administrative fees")) Appellant Century BMW's invoice provides in part

PRICE (including Transportation & Service Charges)	32980
Additional Options	$1,604 50
TOTAL	34,375 50
Allowance on Trade-in	
Cash Difference	
SC Sales Tax	300
Balance Owed on Trade-in	
Title and License ☐ New ☑ Trade ☐ Term	25
Recording & Processing Fees	$299 50
TOTAL	32,000
Service Agreement	
Insurance	
TOTAL	
Cash on Delivery	
BALANCE DUE	

ROA, p 1104 The pre-printed and typed-in "Recording and Processing Fees" of $299 50 is an illegal administrative fee

These illegal administrative fees are typically positioned on the bill of sale (Buyer's Order From) immediately adjacent to the truly mandatory fees, such as taxes, tags, and title As here, this tactical positioning implies that the illegal administrative fees, like the fees for taxes, fees for tags, and fees for obtaining title, are mandatory set fees and that there is no option but to pay the administrative fee with every car purchase [1]

Respondents have alleged that the Car Dealers are charging administrative fees in violation of statutory law, *inter alia*, S C Code Ann § 37-2-307 ("the Closing Fee Statute") S C Code Ann § 37-2-307 is a consumer protection statute as to car dealers that allows a dealership to do what would otherwise be illegal – charge administrative fees – only if the dealership follows strict rules S C Code Ann § 37-2-307 provides

> 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

This statute is tailored to protect car- buying consumers from unscrupulous car dealers and sets forth strict rules that Respondents allege the Car Dealers have not followed

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[1]The Car Dealers' conduct is not unlike that found to be an unfair trade practice by an Ohio Court in *Motzer Dodge Jeep Eagle Inc v Ohio Attorney General* 642 N E 2d 20 (Oh Ct App 1994) In 1996, the South Carolina Supreme Court also suggested that charging administrative fees is an unfair trade practice "[W]e do not imply that such [C]losing fees may not be attacked on other grounds, such as claims for fraud, misrepresentation or unfair trade practices" *Fanning v Fritz Pontiac-Cadillac Buick*, 322 S C 399, n 8, 472 S E 2d 242, n 8 (1996)

Respondent Christine Watts and the other Plaintiffs in this case are South Carolina consumers who paid illegal administrative fees Respondents filed an Amended Complaint which alleges that Appellant violated S C Code Ann § 56-15-110, *et seq* ("Dealers Act"), engaged in civil conspiracy, and declaratory judgment as the rights and legal relations under S C Code Ann § 56-15-110 and/or S C Code Ann § 37-2-307 ROA, pp 77-147 Respondents brought the action both individually and pursuant to S C Code Ann § 56-15-110 for the benefit of all others who paid "administrative fees" or "closing fees" to the Car Dealers *Id*

The Closing Fee Statute, S C Code § 37-2-307, authorizes motor vehicle dealers to register the amount of the fee with the Department of Consumer Affairs (hereinafter the "Department") and charge closing fees to consumers The Statute imposes three specific requirements on dealers charging closing fees

1 the fee must be *disclosed to* the consumer on the sales contract or invoice,

2 some notice of the fee must be *displayed in* a conspicuous place in the dealership, and

3 the fee must be *included in* the advertised price of the motor vehicle

The Closing Fee Statute does not further define the terms "closing fee" or "advertised price "

The Car Dealers have posted signs approved by the Department of Consumer Affairs that state

> This Dealership charges closing fees as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation It is a charge that is permitted but not required by law The full cash price charged at any dealership depends on many factors, including all products and services bought with the vehicle

ROA 1174 Respondents allege that the Appellant and other Car Dealers have not availed themselves of the limited exceptions in S C Code Ann § 37-2-307 and that every Car Dealer did, *inter alia* one of the following illegal acts

a charged illegal "administrative fees" in excess of their costs ROA, p 1186 (chart showing how some car dealers unreasonably charge administrative fees solely for profit),

b created a closing procedure to illegally add "administrative fees" as an add on ROA p 31, 1175,

c failed to include the administrative fees in the advertised price ROA 1178-1184

In an Order dated, January 11, 2010, the Honorable Doyet A Early issued a declaratory judgment interpreting S C Code § 37-2-307 Judge Early held

> The more reasonable interpretation is that S C Code Ann §37-2-307 authorizes the charging of "closing fees" which are for the reimbursement of set overhead costs arising from automobile closings such as document retrieval and document preparation This interpretation protects consumers because it mandates that the charge is for the actual cost associated with a closing, which can be predetermined, and does not allow a dealer to name a fee a "closing fee" and then use the fee to make a hidden profit

Herron v Dick Dyer, Inc et al , C/A 06-CP-02-1230, Order of January 10, 2010 The court then concluded that a "closing fee" was "a pre-determined set fee for the reimbursement of closing costs" and that a dealer could only charge closing fees that were actually incurred and necessary [2] *Id*

[2]Judge Early also broadly defined "advertised price" as "notice given by the seller of a product or service to the general public for the purpose of attracting customers by means of printed announcements in handbills, signs, catalogs, or letters or announcements paid by or on behalf of the seller in newspapers, radio, television, or electronic media " *Herron*, January 10, 2010 Order, p 13

The South Carolina General Assembly has expressly provided that Respondents can bring this action on behalf of all persons who paid an administrative fee that did not comply with S C Code § 37-2-307 [3] S C Code Ann § 56-15-110 provides

> (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 pleas and shall recover double the actual damage 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 benefit of the whole, including actions for injunctive relief**

S C Code Ann §56-15-110 (emphasis added) The clear intent of the statute is to allow a group or representative action for permanent injunctive relief (among other things) to protect all car-buying consumers, not just the named plaintiff, from the illegal actions of car dealers Permanent injunctive relief is not necessary or effective if it applies only as to one plaintiff and one car dealer

On December 29, 2006, Appellant Century BMW filed the motion to compel arbitration at issue, claiming that the FAA governed [4] ROA, p 151 On March 10, 2008, the circuit court denied

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[3] At the time the complaint was filed, Respondents' counsel's investigation had revealed that the charging of the illegal administrative fees was an industry-wide cheating technique Because the charging of illegal administrative fees was industry-wide and the action was of "common or general interest to many persons," it was therefore appropriate under S C Code Ann §56-15-110(2) for Respondents to bring the action against multiple defendants

[4] The arbitration agreement provides that "the Parties are waiving their right to a jury trial and their right to bring or participate in any class action **or multi-plaintiff or claimant action** in court or through arbitration " ROA 1100, 1120 (emphasis added) Thus, not only is Appellant imposing a waiver on a class action, it is trying to impose a strict "one plaintiff, one dealer" requirement Such a requirement flies in the face of judicial or arbitral economy

Century BMW's motion to compel arbitration ROA, p 1 Century BMW served its notice of appeal on March 12, 2008

This Court then issued an opinion on April 19, 2010 In that opinion, this Court found that

> 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

Herron v Century BMW, 387 S C 525, 535, 693 S E 2d 394, 399 (2010), reh'g denied (June 9, 2010), cert granted (May 2, 2011), cert granted, judgment vacated sub nom *Sonic Auto Inc v Watts*, 131 S Ct 2872 (U S S C 2011) [5] This Court properly held that

> 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, 387 S C at 536, 693 S E 2d at 399 This Court denied Appellant's Petition for Rehearing

On August 31, 2010, Appellant petitioned the United States Supreme Court for a writ of certiorari While that petition was pending, the United States Supreme Court issued its decision in *AT&T Mobility, LLC v Concepcion*, No 09-893 593 U S __, 131 S Ct 1740 (April 27, 2011) The Supreme Court then remanded this case to this Court for further consideration in light of *AT&T* Appellant now claims that *AT&T Mobility LLC v Concepcion* is indistinguishable from this case, and that the lower court's rejection of Appellant's preemption argument cannot be reconciled with *AT&T* case However, as set forth herein, the ruling in *AT&T* does not extend to this case, because

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[5]While this Court used the term "class action," presumably as a matter of convenience, it has been recognized that a group action under the Dealers Act is not the same as a class action under Rule 23, and the prerequisites of Rule 23 do not apply *Herron v Century BMW*, Order on Motion to Dismiss and Substitute as to Toyota of Greenville, Inc , October 12, 2009

this case involves a substantive, statutory right under state law, to a group action The Dealers Act is a narrowly drawn statute, created to protect a certain subset of consumers – car-buyers – from car dealers that engage in unfair and deceptive practices Thus, this Court can (and should) still rule that the Appellant's contract, which attempts to prohibit a group suit which is expressly provided for under a state statute, violates our State's public policy and is void and unenforceable

ARGUMENT

I *AT&T Mobility, LLC v Concepcion* does not apply here

A *AT&T* has no effect on a statutory right to a group action

The Supreme Court's holding in *AT&T* does not affect this Court's previous ruling that consumers have a non-waivable right to bring a representative action to benefit the whole under the Dealers Act and that any contract provision prohibiting such an action violates our State's public policy and is void and unenforceable The only issue in *AT&T* was whether the Federal Arbitration Act, 9 U S C A 1, *et seq* , (FAA) preempted "California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable " *AT&T*, 131 S Ct at 1746 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)

Before the decision in *AT&T*, the court in *Discover Bank* considered a California law that instructed courts to refuse to enforce any contract found to have been unconscionable at the time it was made or to limit the application of any unconscionable clause *See*, Cal Civ Code § 1670 5(a) In *Discover Bank* the California Supreme Court applied that statute to class-action waivers in arbitration agreements and held that a class-action waiver in an arbitration agreement constituted a deliberate scheme to cheat large numbers of consumers from relatively small amounts of money and

to protect businesses from responsibility for their own fraud Thus, the court created the *Discover Bank* rule, which held that class action waivers in consumer contracts of adhesion were unenforceable, and found that the FAA did not preempt that rule [6]

In *AT&T* the Supreme Court merely held that, generally, states may not adopt rules of contract interpretation that undermine the "overarching purpose" of the FAA, which is to ensure enforcement of arbitration agreements *AT&T* at 1748 In other words, the court in *AT&T* rejected the judicially created rule that class-action waivers in all consumer arbitration agreements were unconscionable However, the court in *AT&T* did not address a representative action expressly and narrowly provided for by statute, which is at the heart of this matter

This case involves a substantive, statutory right, which states that when an "action is one of common or general interest to many persons one or more may sue for benefit of the whole, including actions for injunctive relief" S C Code Ann § 56-15-110 [7] Justice Thomas stated, in his concurrence in *AT&T*, that courts cannot refuse to enforce arbitration agreements simply because the state has a "public policy against arbitration" *AT&T*, 131 S Ct at 1753 Here, there is not a general

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[6]Appellant claims that preemption is more appropriate here because the Dealers' Act creates an even greater obstacle to the FAA's objectives than the *Discover Bank* rule Appellant argues that the *Discover Bank* rule was not "a blanket prohibition on class action waivers is consumer contracts" because it only applied to consumer claims brought 1) under adhesion contracts, 2) with predictably small damages, and 3) with allegations of a scheme to cheat consumers Appellant's Brief, p 8 However, as Justice Scalia noted, those requirements are "toothless and malleable" and have "no limiting effect" *AT&T*, 131 S Ct at 1750 In contrast, the Dealers Act does have a limiting effect, it is narrowly tailored to provide a specific right to a group action for a small subset of consumer actions --those against car dealers

[7]This statutory right to a group action is not the same as a procedural class action under Rule 23, SCRCP It has already been recognized that the requirements of Rule 23 do not apply here *Herron v Century BMW*, Order of Motion to Dismiss and Substitute as to Toyota of Greenville, Inc , October 12, 2009

state "public policy **against** arbitration' (emphasis added) but one rooted in the state statutory protection **in favor of** car buyers [8] Stated another way, the state public policy in this case is one that does not allow a statutory right to a group suit to be eliminated by a contract provision The Dealers Act does not eliminate arbitration, but simply renders one clause in the arbitration agreement unenforceable [9] As the Court noted in its original decision, the unenforceable provision could have been severed and the remaining terms enforced, however

> 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

Herron v Century BMW, 387 S C at 536-37 The fact that one provision in contradiction with a statute was rendered unenforceable does not indicate a public policy against arbitration The enforceability of such a provision would be against public policy regardless of the type of contract

Furthermore, an agreement to arbitration should not be enforced if a "party successfully challenges the formation of the agreement" *AT&T*, J Thomas concurring, 131 S Ct at 1753 Under South Carolina law, where a statute is enacted to protect the public, the statutory provisions become part of any contract, and override any conflicting contractual provisions *See e g Sloan Const Co Inc v Southco Grassing Inc* , 377 S C 108, 119-20, 659 S E 2d 158, 165 (2008)(Court recognized that the underlying goals of the Procurement Code served important public interests and held that contracts formed pursuant to the Procurement Code were deemed to incorporate the

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[8]Moreover, the statutory protections in the Dealers Act would apply not only to an arbitration agreement, but also to any contract that attempted to eliminate the group action in a judicial setting In other words, the Dealers Act is not designed to frustrate arbitration, but was created to protect car buying consumers, regardless of the forum

[9]Appellant agreed that unenforceable provisions could be severed ROA p 170

applicable statutory provisions, with the statutory provision prevailing over conflicting contract provisions)

Because the Dealers Act was enacted for the benefit of car buying consumers, all contracts between a dealer and a car buyer incorporate the statutory rights (including the right to bring an action for the benefit of the whole) set forth in the Dealers Act As such, Respondent's statutory right to a group suit under the Dealers Act became a part of the contract from its inception, unlike the contract at issue in *AT&T*, which was subject to review to determine if the *Discover Bank* rule applied Because the arbitration agreement here attempted to eliminate the Respondent's statutory right, it was defective from the inception and thus, unenforceable [10]

In other words, Respondents can bring a representative action for the Car Dealers' violations in charging administrative fees in violation of S C Code Ann § 37-2-307 [11] The Dealers Act allows one aggrieved plaintiff to file an action on behalf of others so aggrieved [12] Individual actions of

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[10]As previously noted, the unenforceable provision could have been severed from the arbitration agreement, leaving the remaining provisions enforceable, but Appellant refused to invoke the severability clause

[11]S C Code Ann § 37-2-307 is a consumer protection statute that allows a dealership to do what would otherwise be illegal – charge administrative fees – only if the dealership follows strict rules

[12]As already noted, the Dealers Act contains no specific class certification requirements

"one plaintiff, one dealer" (as Appellant would try to impose)[13] would eviscerate the protections of the Dealers Act, which is to safeguard the public as this Court previously recognized

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

Simpson v MSA of Myrtle Beach Inc, 373 S C 14, 30, 644 S E 2d 663, 671 (2007) (emphasis added) The decision in *Simpson* was supported by earlier decisions, as that opinion noted

> This Court has previously recognized the strong public policy notions behind the enactment of the SCUPTA and the Dealers Act *See deBondt v Carlton Motorcars Inc*, 342 S C 254, 263, 536 S E 2d 399, 404 (Ct App 2000) ("It is a violation of the Dealers Act for any manufacturer 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 '" (citing S C Code Ann 56-15-40(1) (1991))), *Young v Century Lincoln-Mercury Inc* 302 S C 320, 326, 396 S E 2d 105, 108 (Ct App 1989) (defining an unfair trade practice as a practice which is "offensive to public policy or which is immoral, unethical, or oppressive"), *aff'd in part rev'd in part, on other grounds* 309 S C 263, 422 S E 2d 103 (1992) (per curiam) The Dealers Act also specifically provides that "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 56-15-130 (2006)

Id at Footnote 7 Indeed, in the original opinion in this case, this Court found that "[t]he purpose of the Dealers Act is consumer protection " *Herron* 387 S C at 536 Clearly, the Dealers Act was drafted to protect car buying consumers and prevent car dealers from inflicting injury on the public

The Dealers Act involves narrow restrictions not against arbitration for all consumer cases, but in favor of a specific protection for a certain type of litigant, in this case, car-buying consumers

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[13]It is important to note that the arbitration agreement in this case is much more onerous than the one in *AT&T* Here the parties allegedly waived their right to any class action **or multi-plaintiff or claimant action** in court or through arbitration " ROA, p 1100, 1120 (emphasis added) Respondent Christine Watts and her father purchased the car jointly, but under the arbitration agreement, they cannot both be plaintiffs in one action against the Car Dealer ROA, p 1104, 1111 The waiver in the *AT&T* arbitration agreement did not include a ban on more than one plaintiff, only on class actions

This statutory protection is incorporated into all contracts with car dealers The decision in *AT&T* did not go nearly so far as to hold that a state, statutory protection for a limited group of consumers could be waived or preempted, even though it is not a "class action" under Rule 23

B *AT&T* has no effect on these private attorney general actions

AT&T does not apply to private attorney general actions *See, Brown v Ralphs Grocery Co* , __ Cal Rptr 3d, __, 2011 WL 2685959 (Cal Ct App July 12, 2011) modified, B222689, 2011 WL 2892118 (Cal Ct App July 20, 2011) In *Brown*, the court held

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

Brown at p *1 (emphasis added) In that case, the plaintiff brought both a class action and a representative action under the Private Attorney General Act (PAGA), against her employers for labor violations [14] The court in that case also noted that previous case law had determined that class actions were distinct from representative PAGA actions because "class action requirements do not apply to representative actions brought under the PAGA " *Id* Class actions in a consumer setting seeking an injunction, as here, are clearly a part of the public interest

The court in *Brown* noted that *AT&T* did not purport to deal with the possible preemption of contractual efforts to eliminate a statutory right to a representative action *AT&T* does not

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[14] While the court in *Brown* also found that the trial court erred in holding the class action waiver was not enforceable, the court's decision was not based on *AT&T* Instead, the court found that the plaintiff had failed to make the necessary showing (in opposing the petition to compel arbitration), as required by *Gentry v Superior Court*, 165 P 2d 556 (Cal 2007)

provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law " *Id* at p *5 [15] Furthermore, as the court in *Brown* recognized

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

Id at p *6 The court also noted that "that plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA In short, representative actions under the PAGA do not conflict with the purposes of the FAA " *Id* at p *6 Because the *AT&T* case did not involve waivers of "statutory representative actions," the *Brown* court concluded that the FAA did not preempt state law regarding the unenforceability of a contractual waiver of the right to pursue a representative action

Here, the South Carolina Dealers Act, S C Code Ann § 56-15-110 provides that "one or more [persons] may sue for the benefit of the whole, **including actions for injunctive relief** " (emphasis added) This section is an extension of S C Code Ann § 56-15-40(5), which creates the Office of Administrator, within the Attorney General's office, for the purpose of regulating the Dealers Act and grants the Administrator the power "to investigate, issue cease and desist orders **and injunctive relief** " (emphasis added) In other words, the Dealers Act empowers both the State Attorney General and private citizens to seek injunctive relief on behalf of the public Respondents brought an action on behalf of the whole, which seeks injunctive relief preventing car

[15]This finding also supports Respondents' argument in Section I A herein

dealers from advertising/charging future customers with administrative fees in a manner which violates S C Code Ann §56-15-10 and S C Code Ann §37-2-307 ROA 66

Because Respondents seek injunctive relief on behalf of the whole as expressly permitted under statute, they are acting as private attorneys general In *Brown*, the court found that *AT&T* did not apply to a private attorney general action, which is designed to protect the public and penalize the wrongdoer *Brown* at p *4

Our courts have already recognized that this case is being pursued as a private attorney general action

> This case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act A "private attorney general suit" is a term used by courts when statutes authorize both the Attorney General's office and private citizens, through civil actions, to enforce regulations In this case, the Dealers Act empowers both the State Attorney General and private citizens to seek injunctive relief on behalf of the public Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general Plaintiffs' counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices

Herron v Century BMW, Order of Motion to Dismiss and Substitute as to Toyota of Greenville, Inc , October 12, 2009 [16](internal citations omitted) [17] The lower court also recognized that an action

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[16]This Court can take judicial notice of that order, under Rule 201, SCRE However, Respondent will supplement the record if this Court so desires

[17]*See also, Maracich v Spears*,7 09-1651-MJH, Opinion and Order filed August 4, 2010 In that case the plaintiff sued undersigned attorneys alleging violations of the Driver's Privacy Protection Act ("DPPA"), 18 U S C A § 2721, in obtaining personal information pursuant to the Freedom of Information Act, S C Code § 30-4-10, *et seq* , ("FOIA") for use in this case The attorneys argued that the information was also obtained for the permissible use set forth in § 2721(b)(1), the state action exception, because they were acting on behalf of the State as private attorneys general in prosecuting the *Herron* case for the benefit of the whole The district court agreed and granted the attorneys' motion for summary judgment, holding that "[t]he undisputed facts reveal that the [attorneys] obtained and used the personal information for the permitted

under the Dealers Act is not the same a class action "Class certification is not a prerequisite to action to a private attorneys general suit" *Herron* Order of October 12, 2009, p 6 Since this case is a private attorney general action, and not a Rule 23 class action, *AT&T* does not apply

C Summary

In summary, the decision in *AT&T* only addressed the *Discover Bank* rule, a court created rule, which presumed most class action waivers in consumer contracts were unconscionable The *AT&T* decision DOES NOT 1) prevent a state statute from protecting car purchasers, or 2) prevent a consumer from serving as a private attorney general in appropriate cases

II The cases cited by Appellant do not apply to this case

The cases cited by Appellant (on pp 9-10 of its Brief) for the proposition that "every court interpreting *AT&T* has enforced the class action waiver" are not applicable None of those cases involve a substantive, statutory right to a group action like the Dealers Act here (or the PAGA in *Brown*) For example, in *Wallace v Ganley Auto Group*, 2011 WL 2434093 (Ohio App June 16, 2011), the Ohio Court of Appeals merely rejected the appellant's weak argument which consisted of claiming that the class action ban in the arbitration clause was invalid because the Consumer Protection Act supposedly contained an "unexpressed policy" favoring class actions [18] The *Wallace* court found that the practice of disallowing class waivers was extremely broad and not based on any specific statute The opinion in *Zarandi v Alliance Data Systems Corp*, 2011 WL 1827228 (C D Cal May 9, 2011), has few facts and little discussion, and simply contains a conclusory statement

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purposes set forth in 2721(b)(1) " *Id* at p 26

[18]Here, of course, the Dealers' Act contains an express, substantive right to a group action

that the argument that a class action waiver is unconscionable is "no longer viable" after *AT&T*, however, there is nothing in that brief opinion suggesting the presence of substantive statutory right or protection as in this case *D Antuono v Service Road Corp 2011 WL 2175932* (D Conn May 25, 2011) also did not involve a substantive right under a stat statute and as the court noted, did "not ultimately turn on *AT&T*'s holding" In *Bernal v Burnett*, 2011 WL 2182903 (D Colo June 6, 2011), the plaintiffs brought suit under the Colorado Consumer Protection Act which, unlike the Dealers Act, did not contain an express, substantive right to a group action

In short, none of them addressed a specific consumer protection right provided by state statute to limited group of consumers Therefore, the cases Appellant cites are not applicable and provide this Court with no guidance

III Appellant never raised or addressed the issue of federal preemption in the lower court nor in the Supreme Court of South Carolina

Clearly, the Appellant has not met the burden of showing the preemption issue was properly presented below [19]

In its Petition to the U S Supreme Court as well as its brief to the South Carolina Supreme Court, Appellant did not specify the stage in the proceeding that 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

> [A]n 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 be sufficiently specific to inform the trial court of the point being urged by the objector

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[19]When the highest state court, as here, 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)

Wilder Corp v Wilke 497 S E 2d 731 (S C 1998)

Appellant 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)

Appellant incorrectly argues that they properly raised the preemption 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, undermines the present assertion that Appellant presented the issue An argument, actually made for the first time on petition for rehearing was that, the South Carolina Supreme Court opinion was "inconsistent with" *Stolt Nielson* This does not present the preemption argument with fair precision Notwithstanding, the forum in which the argument must be preserved is the trial court, not the appellate court

Even so, raising the issue 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 reconsideration when deciding whether to grant a petition for rehearing

As shown above, Appellant 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 Appellant 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

IV Appellant is in default and cannot contest the Respondent's right to a group suit

The Respondents do not intend that this argument, last in line in this Brief, to also be last in line as to importance or weight It is determinative and dispositive to note that the Appellant has long been in default by failing to timely answer in the lower court

This Court issued its original opinion on April 19, 2010 *Herron v Century BMW*, 387 S C 525, 693 S E 2d 394 (2010), reh'g denied (June 9, 2010), Appellant petitioned for rehearing, and by order dated June 9, 2010, this Court denied the petition and remitted the case to the lower court *Id* Under Rule 12(a), SCRCP, Appellant's answer to the Complaint was due fifteen days after notice of this Court's Opinion denying rehearing and remitting the case, but Appellants failed to file a response The Petition for Writ of Certiorari to the United States Supreme Court was filed on August 31, 2010, unaccompanied by a motion to stay the proceedings below

Appellant argues that there is no default because there was a stay of circuit court proceedings while this matter was on appeal, and claims that the filing of the Petition for Writ of Certiorari was part of the appeal However, Respondent only agreed to stay "during the arbitration appeal " Tr of Nov 24, 2008 hrg, p 4 2-3 [20] The Petition for Certiorari to the United States Supreme Court was not an appellate proceeding, as that Court no longer has appellate jurisdiction over state court decisions

Prior to 1988, the United States Supreme Court had appellate jurisdiction to review certain matters, however, appeal jurisdiction was completely abolished in 1988 *See*, Act of June 27, 1988,

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[20]The recognition of the stay during the appeal was merely an acknowledgment of the rule providing for an automatic stay in civil appeals Rule 241, SCACR

Pub L 100-352, § 3, 102 Stat 662 Now, jurisdiction is available only by certiorari Wright, Miller & Kane, Federal Practice and Proc *Appellate Jurisdiction § 4011* While the Supreme Court's appellate jurisdiction was a matter of right certiorari is completely discretionary 28 U S C A § 1253, Rule 10, United States Supreme Court Rules A petition for a writ of certiorari is merely an application for review *Rodriguez v Westhab*, 833 F Supp 425 (S D N Y 1993) Thus, it is not an appeal

Once the case was remitted by this Court on June 9, 2010, the appeal was over Remittitur is a formal revesting of jurisdiction in the trial court after appellate proceedings *Ackerman v McMillan*, 324 S C 440, 443, 477 S E 2d 267, 268 (S C Ct App 1996)(After the remittitur is sent down from an appellate court, the trial court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling), *Muller v Myrtle Beach Golf & Yacht Club*, 313 S C 412, 438 S E 2d 248 (1993)(same) Once jurisdiction has revested in the trial court, the appellate proceedings are over *Carpenter v Lewis*, 65 S C 400, 43 S E 881 (1903)(After the remittitur is sent down, the case passes beyond the reach of the appellate court, and its jurisdiction is lost) Therefore, any appellate stay expired after this case was remitted to the lower court on June 9, 2010

It is undisputed that after the remittur in this case no responsive pleading was filed until August 26, 2010 By that time, Respondents had already filed two separate affidavits of default Furthermore, the appellant never petitioned the United States Supreme Court nor the Supreme Court of South Carolina for a stay of the proceedings below pending his petition for Certiorari This petition is mandatory under 28 U S C A § 2101 (f) In fact, such a petition has still not been filed as of this date When a party petitions for a writ of certiorari from an adverse ruling by the highest

court in his state, the proceedings below are not stayed unless and until the petitioner requests and obtains a stay from either the U S Supreme Court or The Supreme Court of South Carolina See, 28 U S C A § 2101 (f), Rule 23, United States Supreme Court Rules This has never been done, although the remittitur was handed down some fourteen (14) months ago A defaulting defendant is deemed to have admitted the truth of the allegations and therefore conceded liability After a default, the trial court can proceed as needed to enter judgment *Roche v Young Bros Inc of Florence*, 504 S E 2d 311 (1998) Appellant, as a defaulting defendant, has waived the right to challenge Respondents' right to a group action as pled in the Complaint

CONCLUSION

Neither *AT&T v Concepcion* nor any of the cases cited by Appellant involve a substantive consumer protection statute, such as the representative action expressly permitted by the Dealers Act Under the South Carolina Dealers Act, Respondents "may sue for benefit of the whole " The Dealers Act is a substantive right for a particular subset of consumers, and is not the same as a Rule 23 class action Furthermore, the Dealers Act does not eliminate arbitration, but simply renders one clause in the arbitration agreement unenforceable As this Court noted in its original decision, the unenforceable provision could have been severed and the remaining terms enforced, yet Appellant rejected that approach However, the fact that one provision of an arbitration agreement was rendered invalid by a statutory right does not indicate that this State has a policy against arbitration or that the holding in *AT&T* extends to this case

In addition, under *Brown v Ralph s Grocery Store*, a private attorney general action, such as this one, is not affected by the holding in *AT&T* The court in *Brown* found that where a representative action in a private attorney general case was to obtain relief on behalf of other affected

citizens and the public, and further any waiver of the right to such a an was unenforceable Similarly, this case is proceeding as a private attorney general action to obtain injunctive relief for car buying consumers, as provided for by statute Therefore, *AT&T* does not apply

Moreover, Appellant is in default and has waived the right to challenge the group action alleged in the complaint Therefore, this Court should find that the representative action provided by the Dealers Act is a nonwaivable right that is not affected by the decision in *AT&T*, and hold that arbitration clause is unenforceable

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August 4 2011

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

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael Blease and Michael Watts, 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

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that Respondents' Final Brief complies with Rule 211(b),

SCACR and with the August 13, 2007 Order of the Supreme Court on Personal Data Identifiers

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

PROOF OF SERVICE

The undersigned employee of LEWIS & BABCOCK, LLP, attorneys for Respondents, does hereby certify that service of the foregoing RESPONDENTS' FINAL BRIEF IN OPPOSITION OF REVERSAL FOLLOWING REMAND FROM THE SUPREME COURT OF THE UNITED STATES in the above-captioned matter was made upon the following counsel of record this 4th day of August, 2011, by hand-delivery to

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