

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

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JUL 10 2014

S.C. Supreme Court

David Carroll Respondent,

v.

Toyota of Greenville, Inc. Petitioner.

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI**

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

Toyota of Greenville, Inc. Appellant,

v.

David Carroll Respondent.

NOTICE OF APPEAL

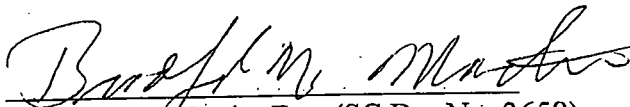
Toyota of Greenville, Inc. appeals that portion of the order of The Honorable Doyet A. Early, III dated October 23, 2013, denying its Motion to Alter or Amend the Court's earlier order filed October 10, 2013, which found that David Carroll is both required to participate in bilateral arbitration and is acting in a representative capacity as a private attorney general. Toyota of Greenville does not appeal the remainder of the October 10th Order compelling bilateral arbitration. Copies of both orders are enclosed with this Notice. The parties received notice of the entry of the order denying Defendant's Motion to Alter or Amend on November 5, 2013.

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SC Court of Appeals

December 5, 2013



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

Toyota of Greenville, Inc. Appellant,

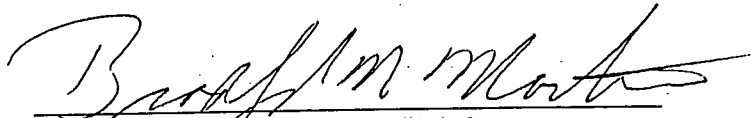
v.

David Carroll Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Notice Appeal by depositing a copy in the U.S. Mail, postage prepaid, on December 5, 2013, addressed to Respondent's attorneys, Terry E. Richardson, Jr., Esq., Brady R. Thomas, Esq., James David Butler, Esq., Richardson, Patrick, Westbrook & Brickman, LLC, P.O. Box 1368, Barnwell, South Carolina 29812; A. Camden Lewis, Esq., Lewis & Babcock, LLP, PO Box 11208, Columbia, SC 29211; Gedney M. Howe, III, Esq., Gedney M. Howe, III, PA, Post Office Box 1034, Charleston, South Carolina 29402; Michael E. Spears, Esq., Michael E. Spears, PA, Post Office Box 5806, Spartanburg, South Carolina 29304; and Richard A. Harpootlian, Esq., Richard A. Harpootlian, PA, Post Office Box 1090, Columbia, South Carolina 29211.

December 5, 2013

A handwritten signature in cursive script, appearing to read "Bradford N. Martin", written over a horizontal line.

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

FORM 4

JUDGMENT IN A CIVIL CASE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
CASE NO. 2012 CP-23-7156
Toyota of Greenville Inc

David Carroll

2013 OCT 10 P 1:20

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of Oct, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Oct, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Bradford Neal Martin

Laura Wilcox Howle Teer

Evan Bristow

ATTORNEY(S) FOR THE PLAINTIFF(S)

Terry Richardson Jr

James David Butler

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

Copy to Judge Early

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER

IN THE COURT OF COMMON PLEAS

THE 13TH JUDICIAL CIRCUIT

2013 OCT 10 P 1:20

C.A. No. 2012-CP-23-7156

David Carroll,

Plaintiff,

vs.

Toyota of Greenville, Inc.,

Defendant.

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS BASED ON
ARBITRATION

This matter comes before the Court by way of Defendant's Motion to Dismiss based on Arbitration. This Motion was argued before me on July 8, 2013, with Terry E. Richardson and Brady R. Thomas appearing on behalf of Plaintiff, David Carroll, and Bradford N. Martin and Laura W.H. Teer appearing on behalf of Defendant, Toyota of Greenville.

The Court entered an order granting the Defendant's motion on August 9, 2013. The Plaintiff thereafter timely filed a Rule 59(e) motion to alter or amend, seeking to amend Section F of the August 9, 2013 order as it pertains to "private attorneys general" findings but not to amend the substantive result of the order compelling arbitration. The Court grants Plaintiff's Rule 59(e) motion, withdraws its order of August 9, 2013, and submits this order in its place.

This case involves a binding arbitration clause in a contract between a car dealer and its customer. It requires me to consider the relationship of state and federal law and the concept of preemption in this context.

I must consider, in light of the United States Supreme Court's decisions in *AT&T Mobility, LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2011), *Marmet Health Care Center, Inc. v. Brown*, __ U.S. __, 132 S. Ct. 1201 (2012), and *American Express Co. v. Italian Colors Rest.*, __ U.S. __, 133 S. Ct. 2304 (2013), whether the Federal Arbitration Act ("FAA") (codified

[Signature]
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as amended at 9 U.S.C. §§ 1-2 *et seq.*), preempts South Carolina state law and public policy invalidating a contract provision, in an arbitration agreement, banning class action suits.

My decision turns on an interpretation of the meaning and breadth of these recent Supreme Court opinions. After analyzing *AT&T Mobility*, *Marmet Health Care*, and *American Express*, I am bound by the *Supremacy Clause* of the United States Constitution to conclude that the Supreme Court has limited the FAA's saving clause, 9 U.S.C. § 2, and therefore find that: 1) the FAA preempts South Carolina's public policy to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act; 2) the saving clause does not apply in the present case to prevent FAA preemption; and 3) preemption applies to Carroll's claim that he is acting as a private attorney general. I grant Defendant's Motion, and order this case be stayed and compel the parties to enter bilateral arbitration. I will start with the facts of this case and then turn to applicable law.

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND

A. Origin of this Action.

Four Plaintiffs filed their original Complaint in Aiken County against 51 dealers located in 13 counties on August 29, 2006. Plaintiffs filed a "Corrigenda" correcting the original Complaint on September 1, 2006. Plaintiffs then filed their First Amended Complaint on October 31, 2006, with 8 Plaintiffs suing some 324 dealerships ("Defendants" or "Dealers") located in 41 counties. Michael Watts was the Plaintiff who purchased a car from Defendant Toyota of Greenville.

As set forth more fully in the First Amended Complaint, Plaintiffs alleged that: 1) Defendants charged closing fees in violation of the South Carolina Regulation of Manufacturers, Distributors and Dealers Act (the "Dealers Act") contained in South Carolina Code Ann. § 56-15-10 *et seq.* and failed to comply with the requirements in South Carolina Code Ann. § 37-2-

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307 (2002) (the "Closing Fee Statute"); 2) Defendants engaged in a civil conspiracy; and 3) Plaintiffs were entitled to declaratory relief.

Plaintiffs then filed a Rule 41(a) Motion to Voluntarily Dismiss Certain Defendants and Defendants filed certain Motions to Dismiss on several grounds. In my Order dated January 31, 2008, I granted the Motion to Dismiss all but seven Defendants. Toyota of Greenville remained as one of the seven. Plaintiffs sought to establish public interest standing which I denied and found that "[this] lawsuit is an action by private individual plaintiffs against private corporate defendants." (January 31, 2008 Order, p. 11).¹

I further found that no party had waived any substantive or procedural rights or arguments relating to arbitration agreements, including the right to move to dismiss to arbitration. I found that Defendants had been careful throughout the litigation to preserve all rights related to the enforcement of arbitration agreements, which was acknowledged on several occasions by Plaintiffs and this Court. (January 31, 2008 Order, p. 14).

Plaintiffs then filed a Motion to Dismiss Watts and Substitute David Carroll ("Carroll") as to Toyota of Greenville. I issued my Order dated October 7, 2009, allowing Carroll to replace Watts as the named representative as to Toyota of Greenville. At that time, I found that the case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act. Toyota of Greenville filed a Motion to Alter or Amend on January 19, 2010, specifically objecting to the "private attorneys general" finding on several grounds. This Motion was denied by my Order of February 5, 2010.

On August 31, 2012, I signed an Order severing Carroll's claims against Toyota of Greenville and transferring the case to Greenville County. On July 11, 2012, the Chief Justice of

¹ Plaintiffs filed no Rule 59(e) Motion objecting to this finding.

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the South Carolina Supreme Court assigned to me all the severed cases, including *Carroll v. Toyota of Greenville*.

B. The Facts Underlying Carroll's Claims.

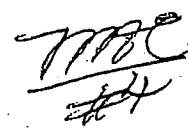
Carroll, through the First Amended Complaint, is suing "for the benefit of all South Carolina car buyers whom paid administrative fees to [Toyota of Greenville] ... in the past four years..."² In 2005, Carroll began looking for a car to purchase for his life-partner, Kathy Steading. Carroll was a former General Manager of a large corporation and was the Office Manager for a large, prominent South Carolina law firm. Steading, who accompanied him to Toyota of Greenville, was a paralegal at the same firm with 15 years of experience. Carroll gave Toyota of Greenville a bottom line price of \$27,000, which Toyota of Greenville accepted.

Carroll decided to finance the purchase, and Toyota of Greenville presented him with a Retail Installment Sales Contract. The contract was between Carroll and Toyota of Greenville and later assigned to World Omni.

On the front page, the contract contained two paragraphs, in bold print, labeled "ARBITRATION CLAUSE - IMPORTANT - PLEASE REVIEW - PROTECT YOUR LEGAL RIGHTS..." The Arbitration Clause provided that any dispute between Carroll and Toyota of Greenville would be decided by arbitration and not in a court or by jury trial. The Clause further stated that the parties agreed that the transaction involved interstate commerce and that the contract was subject to and governed by the FAA.

The Clause also provided in bold and all capital letters that Carroll would give up his right to participate as a class representative or class member in any class claim he may have against Toyota of Greenville, including any right to class arbitration or any consolidation of individual arbitrations.

² First Amended Complaint dated October 28, 2006, ¶¶ 398-99, pp. 63-64.



The Clause further provided:

...to the extent permitted by law, the arbitrator shall not have any authority to award punitive damages in any Dispute... If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.³

Toyota of Greenville requested Carroll to initial right underneath the Arbitration Clause, and Carroll admitted he did.⁴ Carroll then signed the Contract in full under highlighted language where he acknowledged receiving a completely filled in copy on October 29, 2005.⁵ Carroll stated he did not read the Arbitration Clause prior to signing,⁶ but admitted that if he had, he would have understood the implications of arbitrating any disputes or would have asked someone to explain the Clause.⁷

II. CONCLUSIONS OF LAW

A. Arbitration

The question of arbitrability is an issue for the courts. *Partain v. Upstate Auto. Group*, 386 S.C. 488, 689 S.E.2d 602 (2010). At the outset, I recognize that there is a strong presumption in favor of the validity of arbitration agreements, because both federal and state policy favor them. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010) [Herron I]. Anyone challenging the enforceability of an arbitration agreement bears the burden of proving the provision is unenforceable. *Green Tree Fin. Corp. - Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

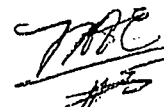
³ Carroll also signed an Arbitration Agreement on October 6, 2007 when he purchased a second car from Toyota of Greenville. There is a dispute between the parties as to the scope of this action; however, I need not answer that question at this time. The analysis of the 2005 Clause applies equally to the 2007 Arbitration Agreement, with the exception that the 2007 Arbitration Agreement did not have the same punitive damages language.

⁴ Carroll Dep., p. 65, ll. 20-25.

⁵ Carroll Dep., p. 54, l. 23 - p. 55, l. 22. Carroll did not have to agree to arbitration. He admitted that he could have paid cash or arranged his own financing. Carroll Dep., p. 105, ll. 15-18. Toyota of Greenville also said arbitration was not required, and it had other lenders available that did not request arbitration. Rick Turk Dep., p. 8, ll. 8-16.

⁶ Carroll Dep., p. 59, l. 12-13; p. 97, ll. 17-20. Because Steading wanted a gold colored car, Toyota of Greenville had to locate one with another dealer. Carroll Dep., p. 50, ll. 10-17. Carroll had ample opportunity to read the paperwork in the several days before the car actually arrived.

⁷ Carroll Dep., p. 59, l. 1 - p. 64, l. 19.



B. Adhesion Contract.

The parties dispute whether the Arbitration Clause is a contract of adhesion. Whether a contract is one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. See *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct.App.1998). The interpretation of this Arbitration Clause is not affected by the issue of adhesion.

C. Scope of the Arbitration Clause.

The Arbitration Clause covers "any dispute" between the parties. Since Carroll does not dispute that this action is within its scope, I find Carroll's action is within the scope of the Clause. See *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct.App.1999) (any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration).

D. 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 accept them. *Herron I*, 387 S.C. at 532, 693 S.E.2d at 398.

1. Absence of Meaningful Choice.

Absence of meaningful choice speaks to the fundamental fairness of the bargaining powers in entering into the contract. *Id.* Therefore, I must 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.*

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Carroll is an educated man who has managed other people and held positions of responsibility in substantial business and professional concerns. He has not established that he lacked the business judgment necessary to make him aware of the implications of the Arbitration Agreements. His decision not to read the Arbitration Clause does not affect his meaningful choice in entering into the Clause.

Since Carroll purchased the car for Steading, it was not his primary form of transportation. He does not allege that he was subject to any duress in signing and admits that he had time to read along with the Finance & Insurance Manager before signing.⁸

Carroll's injuries are very small as the amount at stake is a \$189 closing fee. The Clause is highlighted in the Agreement with bold, capitalized letters and Carroll was required to initial immediately below the Clause. The Clause was labeled as an arbitration clause in bold, capital font; so it is conspicuous and there is no surprise in its enforcement.

Therefore, I find that Carroll had a meaningful choice in entering into the Arbitration Clause.

2. Oppressive One-Sided Terms.

Upon review of the Arbitration Clause, I do not find that it contains "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). The Clause provides for a mutuality of remedies between the parties, with each able to pursue self-help remedies in court or to pursue action in small claims court.

The only limitation in the Clause is a limitation on punitive damages. The Clause only limits punitive damages, however, to the extent allowed by law. In the present case, the limitation is simply not allowed. Furthermore, the severance clause removes the provision

⁸ Carroll Dep., p. 81, ll. 11-23; p. 82, ll. 21-23.

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limiting punitive damages, allowing the rest to survive. Carroll will have the right to punitive damages to the same extent they would be available outside of arbitration.⁹ Therefore, I find that the Arbitration Clause is not unconscionable.

E. **Preemption of the Public Policy Rule that Class Actions cannot be Prohibited in Dealers Act Cases.**

Having found the Arbitration Clause is not unconscionable, I must now turn my attention to Carroll's argument that the Clause is against South Carolina public policy. The *Supremacy Clause* provides that "the Laws of the United States ... shall be the supreme Law of the Land", *U.S. Const. art. VI, cl. 2*, and any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted by the *Supremacy Clause*. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

1. **The FAA and the Saving Clause.**

As federal substantive law, the FAA preempts contrary state law. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967); see also *AT&T Mobility*, 131 S. Ct. at 1748. Congress enacted the FAA in response to widespread judicial hostility to arbitration. See *AT&T Mobility*, 131, S. Ct. at 1757. The Act provides:

A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. As stated by the United States Supreme Court in *American Express*:

This text reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms, including terms that "specify with whom [the parties] choose to arbitrate their disputes," and "the rules under which that arbitration will be conducted." That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been "overridden by a contrary congressional command."

⁹ Punitive damages are not limited under Carroll's 2007 Agreement.

American Express, 133 S. Ct. at 2309 (internal citations omitted).

The FAA's preemption power has an exception: it does not require the enforcement of arbitration agreements on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (also known as the "saving clause"). This saving clause preserves generally applicable contract defenses, such as fraud or duress and ensures that they are not preempted. See *Kilgore v. KeyBank, Nat'l Ass'n*, Nos. 09-16703, 10-15934, 2013 U.S. App. LEXIS 7312 (9th Cir. April 11, 2013); see also *AT&T Mobility*, 131 S. Ct. at 1746.

Carroll does not argue such general contract defenses; rather, he argues that the saving clause applies because it takes away "statutory rights vested in consumers by the Dealers Act." In particular, Carroll claims that the Arbitration Clause takes away "(1) the right to bring a private attorney general action on behalf of all affected purchasers; (2) his statutory right to seek group injunctive relief; and (3) his statutory right to seek punitive damages." (Carroll's Memorandum in Opposition, p. 8).

The holding of *AT&T Mobility* "plainly prohibited application of the general contract defense of unconscionability to an otherwise valid arbitration agreement." *Muriithi v. Shuttle Express*, 712 F.3d 173 (4th Cir. 2013). As the Ninth Circuit Court of Appeals has recently stated:

Parties have often cited the savings clause in an attempt to defeat a motion to compel arbitration. The United States Supreme Court has been moved to step in and stop some efforts to avoid FAA preemption, most notably in its [*AT&T Mobility*] decision.

Mortensen v. Bresnan Commc'ns, LLC, No. 11-35823, 2013 U.S. App. LEXIS 14211 (9th Cir. July 15, 2013).

2. *AT&T Mobility and its Progeny.*

J. J. O'Connell
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AT&T Mobility directly addressed whether the FAA's saving clause preempted a California state rule, known as the *Discover Bank* rule,¹⁰ which invalidated the majority of class action waivers in contracts as unconscionable. The plaintiff in that case purchased mobile phone service from AT&T. The service contract signed by the class members included a provision requiring all disputes to be arbitrated individually and not collectively.

The Ninth Circuit had earlier found that the FAA did not preempt the *Discover Bank* rule, but the United States Supreme Court reversed, and held that even general contract defenses, such as unconscionably, are preempted if they "stand as an obstacle to the accomplishment" of "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility*, 131 S. Ct. at 1748. The United States Supreme Court concluded for the first time that even generally applicable state law rules are preempted if in practice they have a "disproportionate impact" on arbitration or "interfere with fundamental attributes of arbitration and thus create a scheme inconsistent with the FAA" *Id.* at 1747-48.

In *Marmet Health Care Center, Inc., v. Brown*, __ U.S. __, 132 S. Ct. 1201 (2012), the Supreme Court once again limited the saving clause as it did in *AT&T Mobility*. The Supreme Court held that the FAA preempted a West Virginia law invalidating arbitration clauses in nursing home admission agreements adopted before an occurrence of negligence resulting in a personal injury or wrongful death:

When state law prohibits... the arbitration of a particular type of claim, the analysis is straight forward: The conflicting rule is displaced by the FAA.

Id. at 1203 (quoting *AT&T Mobility*, 131 S. Ct. at 1747).

¹⁰ Carroll argues that *AT&T Mobility* is distinguishable from the present case because it does not address state statutory rights. I disagree. The U.S. Supreme Court in *AT&T Mobility* addressed a judicial interpretation of Cal. Civ. Code Ann. § 1668, which rendered contracts unenforceable if they were unconscionable. The Court then specifically held that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility*, 131 S. Ct. at 1748.

The fact that the Dealers Act expressly permits collective actions does not alter the FAA's preemption. The Supreme Court held in *American Express Co. v. Italian Colors Rest.*, __ U.S. __, 133 S. Ct. 2304 (2013):

A pair of our cases brings home the point. In *Gilmer* [*v. Interstate / Johnson Lane Corp.*, 500 U.S. 20 (1991)], we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination and Employment Act, expressly permitted collective actions. We said that statutory permission did "not mean that individual attempts at conciliation were intended to be barred." *Id* at 32.

American Express, 133 S. Ct. at 2311.

Therefore, these Supreme Court cases stand for the proposition that any state law contract defense based on unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA.¹¹ The FAA's saving clause will not bar preemption in such cases. I am bound by the *Supremacy Clause* to apply United States Supreme Court precedent and do so here.

3. **The South Carolina Public Policy Rule Invalidating Class Action Waivers in Dealers Act Cases.**

I must apply the Supreme Court precedent to South Carolina's public policy rule invalidating class action waivers in Dealers Act cases.

The South Carolina rule arose in the context of this case when the parties were still joined in one action. Christine and Michael Watts entered into a contract with Co-Defendant, Century BMW, for the purchase of a car. The transaction included the execution of an arbitration agreement. I found that the arbitration agreement was unconscionable and unenforceable and denied the Motion to Compel Arbitration. Century then appealed, and the South Carolina

¹¹ Courts across the country are following the *AT&T Mobility* line of cases in compelling arbitration in class action waiver cases, including the Fourth Circuit Court of Appeals. See *Murlithi v. Shuttle Express, Inc.*, 712 F.3d 173 (4th Cir. 2013).

Supreme Court held that the agreement was not unconscionable.¹² However, the Court reasoned that the arbitration provision prohibiting class actions was against public policy. The arbitration provision would ordinarily be severed pursuant to the severance clause; however, since Century insisted it did not want class action arbitration, the Supreme Court affirmed in result my original order denying the Motion to Compel Arbitration. *Herron I*, 387 S.C. at 525, 693 S.E.2d at 394.

The Court in *Herron I* interpreted the Dealers Act as providing consumers with a non-waivable right to bring class action suits for violations. The Court held that any contract prohibiting a class action suit violated the state's public policy and was void and unenforceable. The Court focused on the fact that the Legislature expressly granted the right to collective action in the Dealers Act. It was further concerned that the consumers would be discouraged from bringing cases with small damages if they couldn't bring collective actions.

The decision was appealed to the United States Supreme Court, which vacated the decision and remanded it for reconsideration in light of *AT&T Mobility*. Because the issue of preemption was not originally brought before me, and not preserved for review in the South Carolina proceedings, the South Carolina Supreme Court reinstated their initial opinion. *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) [*Herron II*].

4. **The Effect of *AT&T Mobility* on the Public Policy Rule Invalidating Class Action Waivers in Dealers Act Cases.**

Carroll contends that the public policy decision in *Herron I* invalidating class action waivers should be applied in the present case. He argues that the Clause is void *ab initio* because it conflicts with South Carolina statutory law. Toyota of Greenville contends that the public policy holding "stand[s] as an obstacle to the accomplishments" of "ensur[ing] that private

¹² In analyzing the facts, the South Carolina Supreme Court held that the Watts had a meaningful choice in signing the contract. *Id.* at 533, 693 S.E.2d at 398. It also reasoned that South Carolina jurisprudence forbade allowing the Watts to invalidate the enforceability of the arbitration agreement by claiming they did not read it. *Id.*

arbitration agreements are enforced according to their terms." *AT&T Mobility*, 131 S. Ct. at 1748.

Toyota of Greenville also contends that the public policy holding disproportionately affects arbitration agreements and thus is preempted by the FAA, following *AT&T Mobility*. I agree. The rationale in *Herron I* of the Dealers Act providing a non-waivable right for class arbitration was rejected by the United State Supreme Court in *Gilmer*¹³ and once again in *AT&T Mobility*. See *AT&T Mobility*, 131 S. Ct. at 1749 n.5. I find that the Arbitration Clause is not rendered void because of a conflict with South Carolina statutory law where, as here, that law is preempted by the FAA.

Carroll argues that the text of the Dealers Act shows the South Carolina Legislature intended to preclude a waiver of classwide arbitration, citing to S.C. Code Ann. § 56-15-130. The text of the Dealers Act does not restrict a waiver of collective action with the clarity necessary to avoid preemption by the FAA.¹⁴ I find as the Court did in *American Express* that statutory permission does "not mean that individual attempts at conciliation were intended to be barred." *American Express*, 133 S. Ct. at 2311. Additionally, this argument overlooks S.C. Code Ann. § 56-15-80 which provides that the Act applies to agreements "between a manufacturer, wholesaler or distributor with a motor vehicle dealer", and not the consumer.

Finally, *Herron I*'s reasoning that class actions cannot be waived under the Dealers Act because damages are typically small was expressly rejected in *American Express*:

...But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.

¹³ *Gilmer v. Interstate / Johnson Lane Corp.*, 500 U.S. 20 (1991).

¹⁴ When Congress has restricted the use of arbitration, it has done so with clarity. See 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV) (No arbitration agreement shall be valid if the agreement requires arbitration arising under this section); 15 U.S.C. § 1226(a)(2) (2006 ed.) (Motor vehicle franchise contracts that provide for arbitration may only be used if all parties consent in writing).

WAC
AB

American Express, 133 S. Ct. at 2311. Additionally, insofar as Carroll has the right, should he prevail in arbitration, to recover attorneys' fees and costs, he does not forfeit this right by pursuing arbitration. See, e.g., *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 n. 1 (4th Cir. 2002) (citing *Gilmer*, 500 U.S. at 27-28).

Therefore, I must find that *Herron I* is no longer applicable law following *AT&T Mobility* and its progeny.

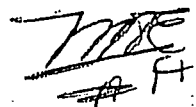
F. Preemption of a Private Attorney General Action.

Carroll claims FAA preemption does not apply because he is acting as a private attorney general. I find that Carroll's status as a private attorney general does not prohibit the enforcement of the Arbitration Clause as written.

The FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Thus the existing ruling that Plaintiff Carroll is acting as a private attorney general under the Dealers Act does not impede the application of the FAA.

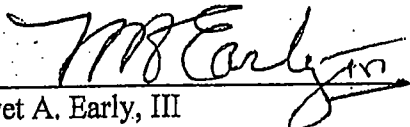
III. CONCLUSION

This is not an easy case as it requires me to interpret Supreme Court authority and apply it to an established South Carolina precedent that its public policy does not allow for class action waivers. The Supreme Court in *AT&T Mobility* and the subsequent cases has instructed me to find that the FAA preempts all laws that do not enforce the intent of the parties, and that have any disproportionate impact on arbitration agreements. Given this directive, I am required by the *Supremacy Clause* of the United States Constitution to find that the South Carolina public policy of no class action waivers in Dealers Act cases is preempted by the FAA. I therefore grant Toyota of Greenville's Motion, and order this case be stayed and compel the parties to enter bilateral arbitration.

Handwritten signature and initials, possibly "ME" and "FH", with a checkmark.

Based on the foregoing and after full consideration of the issues herein, IT IS HEREBY
ORDERED that Toyota of Greenville's Motion is GRANTED.

AND IT IS SO ORDERED.



Doyet A. Early, III
Presiding Judge

 _____, South Carolina This 1st day of October, 2013.

Comp

FORM 4

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

FILED - CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

JUDGMENT
CIVIL CASE
CASE NO. 2012 CP-23-7156

David Carroll

2013 OCT 30 PM 3 01

Toyota of Greenville, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Toyota of Greenville's Motion to Alter or Amend is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

0136
Judge Code

10/23/13
Date

This judgment was entered on the 30 day of Oct, 20 13 and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of Oct, 20 13 to attorneys of record or to parties (when appearing pro se) as follows:

James David Butler
Terry E Richardson Jr
ATTORNEY(S) FOR THE PLAINTIFF(S)

Bradford Neal Martin
Laura Wilcox Howle Teer
Evan Brook Bristow
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Lined area for additional information regarding the decision by the court.

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No.: 2012-CP-23-7156
South Carolina Court of Appeals Case No.: 2013-002599

RECEIVED

JAN 09 2014

SC Court of Appeals

Toyota of Greenville, Inc.....Appellant,

v.

David Carroll.....Respondent.

MOTION TO DISMISS APPEAL

Respondent files this motion pursuant to Rule 240, SCACR, and respectfully asks the Court to dismiss the appeal. The appeal is from an order granting the Appellant's motion to compel arbitration. Per the clear and unambiguous terms of South Carolina Code Section 15-48-200 (2005), the order is not immediately appealable, and therefore, the appeal should be dismissed.

PROCEDURAL BACKGROUND

This action was commenced by four plaintiffs in 2006. The original complaint has been amended a number of times since then and the parties have changed since the action was initiated. The gravamen of the complaint is that the Appellant charged car purchasers closing fees in violation of the South Carolina Regulation of Manufacturers, Distributors and Dealers Act, S.C. Code Ann. §56-15-10 *et seq.*, and that the car purchasers were entitled to a refund of

these illegal fees and other remedies as provided by statute. In 2012, Chief Justice Toal assigned to Circuit Court Judge Early this case and all related cases. By motion filed on September 13, 2011, the Appellant moved to dismiss the action and compel arbitration, pursuant to an arbitration clause contained in the Retail Installment Sales Contract, between the Respondent and the Appellant. Judge Early heard argument on the motion on July 8, 2013, and by order filed August 9, 2013, the Circuit Court granted the Appellant's motion. Respondent later filed a motion pursuant to Rule 59(e), SCRCPP, asking the court to amend the August 9 Order to remove *dicta* that had no bearing on the substantive issue decided in the Order. The court granted the Rule 59(e) motion in an order filed on October 10, 2013. The October 10 Order did not change the result of the August 9 Order, but removed the *dicta* raised in the 59(e) motion. Appellant then filed its own Rule 59(e) motion essentially asking the judge to reinsert the *dicta*. In a Form 4 Order filed on October 30, 2013, the court denied the Appellant's Rule 59(e) motion, and this appeal followed.

THE ORDER IS NOT IMMEDIATELY APPEALABLE

The sole substantive issue decided in the Order from which Appellant's now appeal was whether to dismiss the action and compel arbitration pursuant to the Retail Installment Sales Contract. The court granted the Appellant precisely the relief for which it asked: an order compelling arbitration and dismissing the action.

South Carolina Code Section 15-48-200 provides for immediate appeal of certain orders deciding issues involving arbitration agreements. The section provides that

- (a) An appeal may be taken from:
 - (1) An order denying an application to compel arbitration made under § 15-48-20;
 - (2) An order granting an application to stay arbitration made under § 15-48-20(b);
 - (3) An order confirming or denying confirmation of an award;
 - (4) An order modifying or correcting an award;
 - (5) An order vacating an award without directing a rehearing; or

- (6) A judgment or decree entered pursuant to the provisions of this chapter.
- (b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

S.C. Code Ann. § 15-48-200. The Supreme Court has strictly interpreted the statute.

By application of the rule of statutory construction “expressio unius est exclusio alterius” (the mention of one is the exclusion of another), all other orders related to arbitration are not immediately appealable. Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct.App.1984). Therefore, the order in this case, which stays this action and compels arbitration, is not immediately appealable under § 15-48-200.

Heffner v. Destiny, Inc., 321 S.C. 536, 537-38, 471 S.E.2d 135, 136 (1995). The Court cited Heffner and reaffirmed its holding in Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co., Inc., 355 S.C. 605, 586 S.E.2d 581 (2003). “The court’s order compelling arbitration is not immediately appealable under South Carolina law because Heffner held all orders relating to arbitration not mentioned in S.C. Code Ann. § 15-48-200(a) (Supp.2002) are not immediately appealable.” Toler’s Cove Homeowners Ass’n, Inc., at 610, 586 S.E.2d at 584. “Section 15-48-200 does not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending arbitration. Therefore, the order compelling arbitration of the claims . . . is not immediately appealable.” Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004).

The Court of Appeals has on one occasion permitted a party opposing a motion to compel arbitration to immediately appeal an adverse ruling. In Widener v. Fort Mill Ford, this Court held that an order dismissing the plaintiff’s complaint and compelling arbitration could be immediately appealed by the losing party. 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009). The Widener court relied on S.C. Code Ann. § 14-3-330¹ to conclude the order was immediately

¹ Section 14-3-330 provides:

appealable. The court reasoned that because some of the plaintiff's claims were subject to arbitration and some were not, the trial court's order dismissing the case without prejudice was immediately appealable because it had the effect of finally determining issues without affording the plaintiff the opportunity to later appeal. The court "note[d] a potential for injustice. If a plaintiff's court action be dismissed to enforce an arbitration agreement, but, through no fault of the plaintiff's, the arbitration be not concluded or some of the plaintiff's claims be not arbitrated, a statute of limitations could bar a refiling of the unarbitrated claims in court." *Id.* at 525, 674 S.E.2d at 174. "Here . . . there is a potential the statute of limitations could bar refiling of any unarbitrated claims in court." *Id.* The court remanded with instructions to stay the case, rather than dismiss it without prejudice, pending arbitration.

The potential for such a harsh result does not exist in this case and the distinctions between Widener and this case are obvious. The appellant in Widener was the party that lost the motion to compel arbitration. Here, the Appellant won its motion to compel – in fact, Appellant received the precise relief from the trial court that it now seeks to challenge on appeal. "As a

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

general rule, the right of appeal is accorded only to an aggrieved party.” Courie v. Courie, 288 S.C. 163, 167, 341 S.E.2d 646, 648 (Ct. App. 1986) (citing Wilson v. Southern Ry., Carolina Division, 123 S.C. 399, 115 S.E. 764 (1923)). Appellant is not an aggrieved party: Appellant sought and received an order compelling arbitration.

Further, unlike in Widener, the Respondent’s complaint only raises issues arising out of the Retail Installment Sales Contract which contained the arbitration agreement; Respondent raises no claims that do not arise out of the contract. Therefore, Respondent has no separate claim that might later be prejudiced by the Order compelling arbitration, and the reasoning of Widener is not implicated by the facts giving rise to this action.

Furthermore, the South Carolina Supreme Court has expressly held that Section 15-48-200, the specific statute dealing with appeals from arbitration orders, trumps the more general code section 14-3-330. See Heffner, at 536, 471 S.E.2d at 136 (“Appellants’ assertion that S.C. Code Ann. § 14-3-330 should be applied to determine the appealability of this order is without merit. To apply the general appealability provisions of § 14-3-330 would conflict with the more specific provisions of § 15-48-200 regarding the appealability of orders relating to arbitration.”).

CONCLUSION

The Order Appellant now seeks to appeal is not described in Section 15-48-200, and it is not subject to immediate appeal. All of the cases on point support this conclusion. Further, Appellant was the prevailing party below and cannot appeal an Order in its favor. Because Appellant was the prevailing party and because the trial court’s Order granting Appellant’s motion to compel arbitration is not specifically mentioned in § 15-48-200, the appeal should be dismissed.

January 9, 2014.

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No.: 2012-CP-23-7156

Court of Appeals Case No.: cTracking NCpi

RECEIVED

JAN 09 2014

SC Court of Appeals

Toyota of Greenville, Inc.....Appellant,

v.

David Carroll.....Respondent.

CERTIFICATE OF SERVICE

I, Heather Hardy, Paralegal to RICHARD A. HARPOOTLIAN, P.A., attorney for the Respondent David Carroll, do hereby certify that I have served the below listed document, Via U.S. Mail and Electronic Mail, on January 9, 2014, to the individuals listed below:

Document: 1) *Motion to Dismiss Appeal.*

Served: Bradford N. Martin
Laura W. H. Teer
Brook Bristow
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603


Heather Hardy

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

RECEIVED

JAN 24 2014

SC Court of Appeals

Toyota of Greenville, Inc. Appellant,

v.

David Carroll Respondent.

RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Appellant respectfully requests that this Court deny Respondent's Motion to Dismiss. This appeal is not from an Order compelling arbitration, but from the portion of the Order deciding a question of fact: Respondent was acting as a private attorney general; and applying the law to the facts: the Dealers Act allowed Respondent to act as a private attorney general. All of this is in violation of his written agreement to proceed only in an individual capacity. Therefore, Appellant is being denied its right to arbitrate with Respondent alone, which is immediately appealable under § 15-48-200(a)(1).

Also, the court's deciding a question of fact and applying that fact to the law makes this a final judgment. See *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942). Further, the finding is a decree entered pursuant to the provisions of the Uniform Arbitration Act from which an appeal can be taken under § 15-48-200(a)(6). Finally, this is a

novel issue affecting a substantial right (and many parties) that should be heard in the interest of judicial economy.

PROCEDURAL HISTORY OF ISSUES PRESENTED ON APPEAL

On June 23, 2009, Respondent moved to be substituted as the named Plaintiff against Appellant in the Aiken County case of *Heather Herron, et al. v. Century BMW, et al.*, No. 06-CP-02-1230. Neither Respondent's pleadings, the Motion, nor Memorandum claimed he was acting as a private attorney general. Nevertheless, the Motion was granted on October 12, 2009. Appellant objected and filed a Motion to Alter or Amend on October 29, 2009, which was denied on February 22, 2010.

Appellant then filed its Amended Priority Motion to Dismiss based on Arbitration on June 14, 2012.¹ Respondent filed his Memorandum in Opposition on June 28, 2013, requesting the Motion be denied because "[a]llowing a private attorney general action under the Dealer's Act to move forward does not conflict with the purposes behind the FAA."²

The lower court fully addressed the issue raised by Respondent and found that Respondent was not acting as a private attorney general in its order of August 19, 2013. This finding was not dicta. Respondent filed a Motion to Alter or Amend on August 26, 2013, arguing that neither party had requested a ruling on the private attorney general issue. The lower court issued an amended Order on October 10, 2013 reiterating its finding that Respondent was "... acting as a private attorney general under the Dealers Act ..." ³ and further finding that he could proceed in that capacity despite the fact that his arbitration clause requires bilateral (one on

¹ Appellant had previously reserved its right to demand arbitration in its Answer filed March 10, 2008, and had filed a Motion for Arbitration on September 19, 2011.

² Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss Based on Arbitration of June 28, 2013, p.1, ¶ II.

³ Order Granting Defendant's Motion to Dismiss Based on Arbitration, filed October 10, 2013, p. 14.

one) arbitration. This appeal followed on the narrow issue of the lower court's factual finding that Respondent was a private attorney general under the Dealers Act (applying fact to law), and could proceed in that capacity in a bilateral arbitration.

ARGUMENT

I. THE ORDER COMPELS BILATERAL ARBITRATION, BUT ALSO FINDS RESPONDENT IS ACTING IN A REPRESENTATIVE CAPACITY AS A PRIVATE ATTORNEY GENERAL, WHICH MAY HAVE THE EFFECT OF DENYING BILATERAL ARBITRATION

Respondent agreed that he would arbitrate only on an individual basis, and Appellant moved to enforce the arbitration clause as written. Now, with the lower court finding that Respondent can arbitrate on behalf of the State of South Carolina, Appellant is being denied the arbitration as agreed.

Respondent argues the private attorney general finding is *dicta* and has no bearing on the substantive issue decided in the Order. Respondent further argues that all claims addressed by the Order arise out of the arbitration clause and, therefore, there are no claims that might later be prejudiced by the Order compelling arbitration. Respondent omits the fact that he claimed to act as a private attorney general in his Motion to Substitute and again during the Motion to Compel Arbitration, thus altering his agreement to proceed only in an individual capacity.

Had the lower court not ruled on the issue, the Order would simply be an order compelling arbitration. Whether the arbitration proceeds with Respondent as a private attorney general on behalf of the State or in an individual capacity, however, affects substantial rights of the Appellant. See *Vaughn v. Saint Francis Hosp.*, 815 N.Y.S.2d 307 (N.Y. App. Div. 2006) (“[A]n order that limits the scope of issues to be tried, affecting the merits of the controversy or

substantial rights of a party, is appealable.”).⁴ In *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2006), this Court held that the circuit court’s finding that plaintiff was neither a statutory employee nor a borrowed servant and therefore the worker’s compensation exclusivity provision did not apply was a final determination of a substantial matter forming a part of the defendant’s defense and thus, the order was appealable. Likewise, the private attorney general finding affects Appellant’s defense that all claims are limited to Respondent in his individual capacity.

S.C. Code Ann. § 15-48-200(a)(1) provides that an order denying an application to compel arbitration made under S.C. Code Ann. § 15-48-20(2) is immediately appealable. It is well-settled that a party may not be compelled to submit to class arbitration absent an agreement. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013). See, e.g., *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) (“[T]he Court must enforce the parties’ Arbitration Agreement even if this might prevent Plaintiffs from acting as private attorneys general.”).

The lower court specifically found that the arbitration agreement between Respondent and Appellant requires bilateral arbitration. Therefore, the private attorney general finding may have the effect of ordering arbitration in a representative capacity, thus denying Appellant’s motion that arbitration can only proceed in a bilateral manner.⁵ Therefore, an immediate appeal is proper and Respondent’s Motion to Dismiss should be denied.

⁴ The lower court’s Order determined that Respondent is acting on behalf of the State as a private attorney general. This case is therefore analogous to *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct.App.2009) in which this Court found that it had jurisdiction to hear the appeal pursuant to S.C. Code Ann. § 14-3-330 because the lower court had finally determined the rights of the parties by dismissing the action and compelling arbitration.

⁵ The lower court’s Order provides no guidance as to what it means to be a “private attorney general.” South Carolina does not have a private attorney general statute and the South Carolina Manufacturers and Dealers Act does not refer to a private attorney general.

II. THE ORDER FINDS THAT RESPONDENT IS TO ARBITRATE AS A PRIVATE ATTORNEY GENERAL, WHICH IS A JUDGMENT OR DECREE FROM WHICH AN APPEAL CAN BE TAKEN

S.C. Code Ann. § 15-48-200(a)(6) provides that an appeal may be taken from “a judgment or decree entered pursuant to the provisions of this chapter.” Statutes and rules of court should be construed liberally in favor of the right of appeal. *Stroup v. Duke Power Co.*, 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1949); *Haughton v. Order of United Commercial Travelers of Am.*, 108 S.C. 73, 74-75, 93 S.E. 393, 394 (1917); *O’Rourke v. Atl. Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912). The lower court specifically found that Respondent can proceed as a private attorney general in a bilateral arbitration in which Respondent has agreed to not act in a representative capacity.⁶ That finding is a decree entered pursuant to the provisions of the Uniform Arbitration Act and one from which an appeal may be taken.

III. THE LOWER COURT’S FACTUAL FINDING THAT RESPONDENT IS A PRIVATE ATTORNEY GENERAL UNDER THE DEALER’S ACT MAY HAVE THE EFFECT OF FINALLY DETERMINING THE PARTIES’ RIGHTS.

Intermediate orders involving the merits may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(1). An order which involves the merits is one that “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct.App.2006) (quoting *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). See also Jean Hoefer Toal, et al., *Appellate Practice in South Carolina*, 87 (2d. Ed. 2002). Additionally, interlocutory orders affecting a substantial right may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(2). Orders affecting a substantial right

⁶ The lower court lacked jurisdiction to make the finding that Respondent is acting as a private attorney general. Contract interpretation and procedural matters are issues for the arbitrator. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

“discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” *Mid-State Distribs., Inc.*, 310 S.C. at 335 n.4, 426 S.E.2d at 780 n.4.

Appellant’s right to have the Respondent proceed against it only in an individual capacity, rather than in a representative capacity, is a substantial right forming part of the cause of action that has been determined by the lower court.⁷ An arbitrator may feel bound to apply the lower court’s finding that Respondent is a private attorney general and can proceed in a bilateral arbitration in that capacity.

IV. THIS IS A NOVEL ISSUE AFFECTING A SUBSTANTIAL RIGHT THAT SHOULD BE HEARD IN THE INTEREST OF JUDICIAL ECONOMY

Moreover, this issue presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar. *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008). Immediate appeals have been granted in cases where arbitration was compelled. See *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct.App.2013); *Toler’s Cove Homeowners Ass’n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003); *Episcopal Housing Corp. v. Fed. Ins. Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979) (granting an appeal from an order consolidating two arbitration proceedings); *McKinney v. Greenville Ice & Fuel Co.*, 232 S.C. 257, 101 S.E.2d 659 (1958) (allowing an appeal from an order denying a motion to consolidate two tort actions).

The issue presented is capable of repetition and needs to be addressed, making it appropriate for the Court to review. See *Toler’s Cove Homeowners Ass’n v. Trident Constr. Co.*,

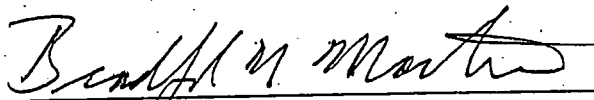
⁷ The lower court lacked jurisdiction to make the finding that Respondent is acting as a private attorney general. Contract interpretation and procedural matters are issues for the arbitrator. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). “[A]n order that is not directly appealable will nevertheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation.” *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).

355 S.C. 605, 586 S.E.2d 581 (2003). Hundreds of defendants in *Herron* were involuntarily dismissed from that case after being named as Defendants in the Aiken County case of *Adams, et al. v. Action Ford, et al.* No. 2007-CP-02-1232. The lower court has both cases under a complex case designation. The *Adams* case has been stayed pending determinations in *Herron*. The same issue will be raised by many of the defendants in *Adams* with arbitration provisions.

CONCLUSION

Appellant is seeking to appeal the narrow issue of the lower court's finding that Respondent is a private attorney general and can proceed in that capacity in a bilateral arbitration when his arbitration clause allows him to arbitrate only in an individual capacity. For the foregoing reasons, Respondent's motion should be denied and the appeal allowed to proceed.

January 21, 2014



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**ATTORNEYS FOR APPELLANT TOYOTA
OF GREENVILLE, INC.**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

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SC Court of Appeals

Toyota of Greenville, Inc. Appellant,

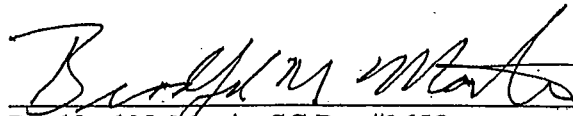
v.

David Carroll Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Return to Respondent's Motion to Dismiss Appeal by depositing a copy in the U.S. Mail, postage prepaid, on January 21, 2014, addressed to Respondent's attorneys, Terry E. Richardson, Jr., Esq., Brady R. Thomas, Esq., James David Butler, Esq., Richardson, Patrick, Westbrook & Brickman, LLC, P.O. Box 1368, Barnwell, South Carolina 29812; A. Camden Lewis, Esq., Lewis & Babcock, LLP, PO Box 11208, Columbia, SC 29211; Gedney M. Howe, III, Esq., Gedney M. Howe, III, PA, Post Office Box 1034, Charleston, South Carolina 29402; Michael E. Spears, Esq., Michael E. Spears, PA, Post Office Box 5806, Spartanburg, South Carolina 29304; and Richard A. Harpootlian, Esq., Richard A. Harpootlian, PA, Post Office Box 1090, Columbia, South Carolina 29211.

January 21, 2014



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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No.: 2012-CP-23-7156

Toyota of Greenville, Inc.....Appellant,

v.

David Carroll.....Respondent.

REPLY IN SUPPORT OF MOTION TO DISMISS

Respondent submits this memorandum in reply to the Appellant's Return to the Motion to Dismiss Appeal. The Order is not immediately appealable and the appeal should therefore be dismissed.

Appellant raises four arguments why the Order is immediately appealable but all of the arguments are meritless. Appellant asserts that it "is being denied its right to arbitrate with Respondent alone, which is immediately appealable under §15-48-200(a)(1)." Return to Respondent's Motion to Dismiss Appeal, p. 1. Section 15-48-200(a)(1) provides that "[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration made under § 15-48-20." The Order clearly does not fall within this subsection because the order **granted** Appellant's application and compelled arbitration. The argument is without merit.

To the extent Appellant argues the Order somehow compels class-wide arbitration, the Appellant's own argument disproves this contention. Appellant asserts "[t]he lower court

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SC Court of Appeals

specifically found that the arbitration agreement . . . requires bilateral arbitration. Therefore, the private attorney general finding **may** have the effect of ordering arbitration in a representative capacity, thus denying Appellant's motion that arbitration can only proceed in a bilateral manner." Return to Respondent's Motion to Dismiss Appeal, p. 4 (emphasis added). Appellant's own argument recognizes the Order does not compel class-wide or representative arbitration. Respondent does not seek to arbitrate the case in a representative capacity and has never sought to do so. Respondent does not and will not attempt to arbitrate on behalf of a class or in a representative capacity.

Appellant's argument that the Order is immediately appealable pursuant to Section 15-48-200(a)(6) likewise fails. Subsection (6) permits appeals from "[a] judgment or decree entered pursuant to the provisions of this chapter." Without citing any authority on point, Appellant argues the Order is a "decree entered pursuant to . . . the Uniform Arbitration Act and one from which an appeal can be taken." Return to Respondent's Motion to Dismiss Appeal, p. 5. The Order is not a judgment and it is not a decree. A "decree" is "the judgment of a court of equity or chancery, answering for the most purposes to the judgment of a court of law." BLACK'S LAW DICTIONARY 410 (6TH ed. 1990). See also, Reid v. McGowan, 28 S.C. 74, 5 S.E. 215 (1888) (The final adjudication of the rights of parties litigant is the judgment of the court, whether it be in a case at law or one involving an equity cause, and the rules enacted and established for the enforcement of liens of judgments apply to all, so that now a decree in chancery is a judgment to all intents and purposes, and is governed by the requirements of the Code and acts on the subject of judgments as fully as a judgment at law.).

Appellant cites Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 21 S.E.2d 209 (1942), for the proposition that "the court's deciding a question of fact and applying that fact to

the law makes this a final judgment.” Return to Respondent’s Motion to Dismiss Appeal, p. 1. That case stands for the proposition that interlocutory orders are not immediately appealable and supports Respondent’s motion to dismiss. Good concludes that

[A] judgment, order, or decree, although determining the law applicable to the issues of an action, yet, leaving questions of fact unsettled, is not final . . . [.] [I]f the question involved will be inherent in the final judgment and can be presented in an appeal from that judgment, it will be treated as an interlocutory order, review of which can only be had upon the general appeal.

Id., 201 S.C. 32, 21 S.E.2d at 212 (internal citations omitted). Later, Good recognizes that “the law frowns upon the practice of bringing cases in fragments to the appellate Courts.” The Court explained that “[t]he rule in restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were otherwise, endless delays would be encountered—delays which are unnecessary . . . , which can be decided upon an appeal from such final judgment as may later be entered by the trial Court.” Id., 201 S.C. 32, 21 S.E.2d at 213.

Good supports Respondent’s motion to dismiss. Nothing in Good remotely suggests the Court should address the interlocutory matters Appellant seeks to raise here. Respondent agrees not to attempt to arbitrate the case in a representative capacity as private attorney general. To the extent the trial court’s even addresses this issue (which is not necessary to the court’s decision compelling arbitration), that portion of the court’s order is not binding on the arbitrator. See Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (2013) (arbitrator determines the scope of an arbitration agreement and whether a party may proceed in a representative capacity). Appellant implicitly recognizes this legal truism where it says that the trial court’s “private attorney general finding **may have the effect of ordering**” representative arbitration. Return to Respondent’s Motion to Dismiss Appeal, p. 4 (emphasis added). Later, Appellant asserts that an “arbitrator

may feel bound to apply the lower court's finding that Respondent is a private attorney general and can proceed in a bilateral arbitration in that capacity." Return to Respondent's Motion to Dismiss Appeal, p. 6 (emphasis added).

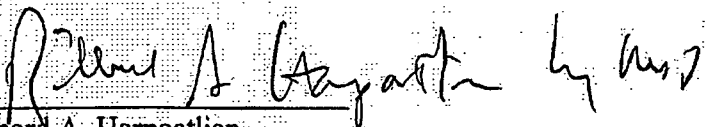
Nothing in the trial court's order addressing Respondent's status as a private attorney general is binding on the arbitrator. Appellant acknowledges this throughout its Response. Respondent expressly agrees not to arbitrate the matter in a representative capacity as a private attorney general. This concession, and the law set forth above, should dispense with the matter.

CONCLUSION

The appeal is from an interlocutory order and should be dismissed. Appellant prevailed in the trial court and received the relief it requested. The arguments Appellant raises in its opposition to the motion to dismiss are completely meritless. Further, Respondent agrees not to attempt to proceed to arbitration as a private attorney general in a representative capacity. For these reasons, and those additional reasons set forth in his motion to dismiss, Respondent respectfully asks the Court to dismiss the appeal.

Respectfully submitted,

January 30, 2014.


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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No.: 2012-CP-23-7156
South Carolina Court of Appeals Case No.: 2013-002599

Toyota of Greenville, Inc.....Appellant,

v.

David Carroll.....Respondent.

CERTIFICATE OF SERVICE

I, Heather Hardy, Paralegal to RICHARD A. HARPOOTLIAN, P.A., attorney for the Respondent David Carroll, do hereby certify that I have served the below listed document, Via U.S. Mail and Electronic Mail, on January 30, 2014, to the individuals listed below:

Document:

1) *Reply to Motion to Dismiss Appeal.*

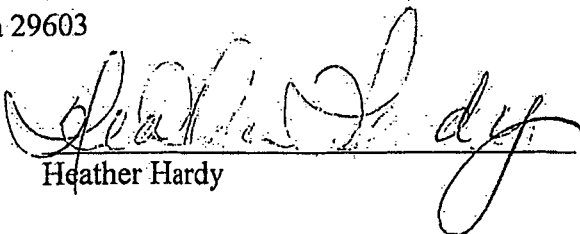
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JAN 30 2014

Served:

Bradford N. Martin
Laura W. H. Teer
Brook Bristow
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603

SC Court of Appeals


Heather Hardy

The South Carolina Court of Appeals

David Carroll, Respondent,

v.

Toyota of Greenville, Inc., Appellant.

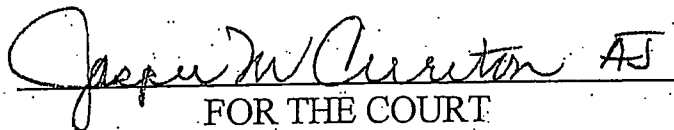
Appellate Case No. 2013-002599

ORDER

Appellant appeals a portion of an order granting Appellant's motion to compel bilateral arbitration and staying the proceeding. Appellant argues the circuit court erred in finding Respondent was a private attorney general, and it contends this finding could have the effect of denying bilateral arbitration. Respondent has filed a motion to dismiss, arguing the order is not immediately appealable. Appellant has filed a return, arguing the order is immediately appealable under sections 15-48-200(a)(1), (6) (2005) and 14-3-330(1), (2) (1976) of the South Carolina Code. Appellant also asserts the appeal should be considered in the interest of judicial economy.

After careful consideration, Respondent's motion to dismiss is granted because the order is not appealable. See *Toler's Cove Homeowner's Assoc., Inc. v. Trident Construction Co., Inc.*, 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003) ("[A]ll orders relating to arbitration not mentioned in [section] 15-48-200(a) [of the South Carolina Code] are not immediately appealable."); S.C. Code Ann. § 15-48-200(a) ("An appeal may be taken from: (1) An order denying an application to compel arbitration . . . ; (2) An order granting an application to stay arbitration . . . ; (3) An order confirming or denying confirmation of an award; (4) An order modifying or correcting an award; (5) An order vacating an award without directing a rehearing; or (6) A judgment or decree entered pursuant to the provisions of this chapter."). We find the order, which granted Appellant's request to compel arbitration and stayed the proceedings, does not fit within section 15-48-200(a). Although this court has held an order dismissing an action and directing the dispute be resolved by arbitration is immediately appealable, the effect of the circuit court's order in

this case was not to dismiss the action, but to stay it. *Widener v. Fort Mill Ford*, 381 S.C. 522, 524, 674 S.E.2d 172, 173 (Ct. App. 2009); *see also Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 754 (2005) (considering the merits of whether the trial court erred in dismissing three causes of action, but finding the trial court's determination that the remaining causes of action should be stayed pending arbitration was not immediately appealable). Finally, because the scope of arbitration is determined by the arbitration agreement, and because the United States Supreme Court recently determined the enforceability of arbitration agreements cannot be conditioned upon the availability of classwide arbitration procedures, we do not find a compelling reason to consider the merits of this appeal. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744, 1750-51 (2011); *id.* at 1752 ("Arbitration is a matter of contract, and the [Federal Arbitration Act] requires courts to honor parties' expectations.").

 AS
FOR THE COURT

Columbia, South Carolina

cc: Bradford Neal Martin, Esquire
Laura Wilcox Howle Teer, Esquire
Evan Brook Bristow, Esquire
Terry E. Richardson, Jr., Esquire
Brady Ryan Thomas, Esquire
James David Butler, Esquire
A. Camden Lewis, Esquire
Gedney M. Howe, III, Esquire
Michael Eugene Spears, Esquire
Richard A. Harpootlian, Esquire

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

Toyota of Greenville, Inc. Appellant,

v.

David Carroll Respondent.

PETITION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS OF SOUTH CAROLINA:

Appellant Toyota of Greenville, Inc., by and through its undersigned counsel, and pursuant to Rule 221 of the South Carolina Rules of Appellate Procedure, respectfully petitions this Court for a rehearing of the above-captioned matter, with an appellate number of 2013-002599, an opinion on which was filed March 24, 2014. This Opinion has the effect of finally deciding Appellants' Appeal. The grounds of this Petition are as follows:

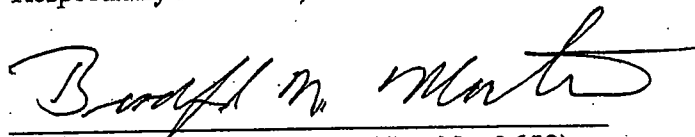
(1) The lower court's Order finally determines a substantial matter and is appealable pursuant to S.C. Code Ann. § 14-3-330(1) as Appellant's right to have the Respondent proceed against it only in an individual capacity, rather than in a representative capacity, is a substantial right forming part of the cause of action, and the court's deciding a question of fact and applying that fact to the law makes this a final judgment.

(2) This appeal is being taken from the lower court's Order finding that Respondent is acting as a private attorney general and not from the separate finding granting arbitration.

(3) The lower court's Order fits within S.C. Code Ann. § 15-48-200(A) as the Order denied the ability to arbitrate in an individual capacity and was a decree entered pursuant to the provisions of the Uniform Arbitration Act from which an appeal can be taken.

(4) There are compelling reasons for this Court to consider the merits of the appeal, including a novel issue of law being present, judicial economy, and the lower court's imposition of group representation on the arbitration process, which has the same effect as denying the application for bilateral arbitration.

Respectfully submitted,



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**ATTORNEYS FOR APPELLANT TOYOTA
OF GREENVILLE, INC.**

April 7, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

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SC Court of Appeals

Toyota of Greenville, Inc. Appellant,

v.

David Carroll Respondent.

MEMORANDUM IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Appellant submits this Memorandum in Support of its Petition for Rehearing and would respectfully show the following:

I. THE COURT MISAPPREHENDED APPLICABLE LAW IN FAILING TO FIND THAT THE ORDER FINALLY DETERMINES A SUBSTANTIAL MATTER AND IS APPEALABLE PURSUANT TO § 14-3-330(1)¹

Intermediate orders involving the merits may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(1).² The lower court did not simply order the underlying case to go to arbitration; the lower court additionally made a separate finding that Respondent is a private

¹ The Court also misapprehended applicable law in finding that the Order does not fit within § 15-48-200(A). As set forth more fully in Appellant's Return to Respondent's Motion to Dismiss, Appellant is being denied its right to arbitrate with Respondent alone, which is immediately appealable under § 15-48-200(a)(1). Additionally, the lower court's finding that Respondent can proceed in bilateral arbitration as a private attorney general is a decree entered pursuant to the provisions of the Uniform Arbitration Act from which an appeal can be taken under § 15-48-200(a)(6).

² An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct.App.2006) (quoting *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). See also Jean Hoefer Toal, et al., *Appellate Practice in South Carolina*, 87 (2d ed. 2002).

attorney general and can act in that capacity. This could radically change the nature of the arbitration with Respondent representing all South Carolinians, rather than resolve his dispute one-on-one as he agreed. The court's deciding a question of fact and applying that fact to the law makes this a final judgment. *See Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942).

Additionally, interlocutory orders affecting a substantial right may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(2). Orders affecting a substantial right "discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Mid-State Distribs., Inc.*, 310 S.C. at 335 n.4, 426 S.E.2d at 780 n.4. The lower court's ruling as to Respondent acting as a private attorney general has the effect of striking out the defense that Respondent can only act in an individual capacity.

This Court correctly cites *Carolina Care Plan, Inc. v. United Health Care Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004) in its opinion; however it misapplies the facts to this case. In *Carolina Care Plan*, the Supreme Court was presented with two questions: 1) whether the trial court erred in dismissing causes of action for fraud, unconscionability, and a violation of public policy pursuant to Rule 12(b)(6); and 2) whether the trial court err in staying the remaining claims pending arbitration. The Supreme Court found that only the order compelling arbitration and staying the proceedings was not immediately appealable. *Id.* at 558, 606 S.E.2d at 759.

Another analogous case is *Episcopal Housing Corp. v. Fed. Ins. Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979) in which the consolidation of two appeals was a separate issue from the granting of the arbitration. The South Carolina Supreme Court accepted the appeal in that case.

This is what Appellant requests this Court to do with the private attorney general issue which is separate from the granting of arbitration.³

In the present case, Appellant has appealed the trial court's order that Respondent is acting as a private attorney general and not the order compelling arbitration. Therefore, the Court should reconsider and deny the Motion to Dismiss.

II. THE COURT MISAPPREHENDED APPLICABLE LAW IN FAILING TO FIND A COMPELLING REASON TO CONSIDER THE MERITS OF THE APPEAL

The Court misapprehended applicable law in finding that this is an appeal from an Order compelling arbitration. The Court states in its opinion:

Finally, because the scope of arbitration is determined by the arbitration agreement, and because the United States Supreme Court recently determined the enforceability of arbitration agreements cannot be conditioned upon the availability of classwide arbitration procedures, we do not find a compelling reason to consider the merits of this appeal....

It is precisely because the scope of arbitration is determined by the arbitration agreement that this Court should consider the merits of this appeal. The lower court has interjected a finding not contained in the arbitration agreement and has changed the relationship of the parties to one another. *See Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960) (an arbitrator "has no general charter to administer justice for a community which transcends the parties" but rather is "part of a system of self-government created by and confined to the parties."). Imposing group representation on the arbitration process has the same effect as denying the application for bilateral arbitration.

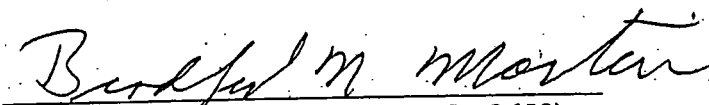
³ Although the issue before the Court is not the granting of arbitration, this Court overlooks the fact that immediate appeals have been granted in cases where arbitration was compelled. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct.App.2013); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003).

Appellant agrees that the enforceability of arbitration agreements should not be conditioned upon the availability of classwide arbitration procedures. The purpose of this appeal is to ask this Court to address the lower court's imposition of Respondent acting in a representative capacity into an arbitration in which the parties only agreed to act on their own behalf. This is a novel issue affecting a substantial right (and many parties) that should be heard in the interest of judicial economy.⁴

CONCLUSION

Appellant is seeking to appeal the narrow issue of the lower court's finding that Respondent is a private attorney general and can proceed in that capacity in a bilateral arbitration when his arbitration clause allows him to arbitrate only in an individual capacity. For the foregoing reasons, Appellant's petition should be granted and the appeal allowed to proceed.

April 7, 2014



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OF GREENVILLE, INC.**

⁴ Moreover, this issue presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar. *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008). The issue presented is capable of repetition and needs to be addressed; making it appropriate for the Court to review. See *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003). Hundreds of defendants in *Herron* were involuntarily dismissed from that case after being named as Defendants in the Aiken County case of *Adams, et al. v. Action Ford, et al.* No. 2007-CP-02-1232. The lower court has both cases under a complex case designation and the same issue will be raised by many of the defendants in *Adams* with arbitration provisions.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

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APR 08 2014

SC Court of Appeals

Toyota of Greenville, Inc. Appellant,

v.

David Carroll Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing and Memorandum in Support by depositing a copy in the U.S. Mail, postage prepaid, on April 7, 2014, addressed to Respondent's attorneys, Terry E. Richardson, Jr., Esq., Brady R. Thomas, Esq., James David Butler, Esq., Richardson, Patrick, Westbrook & Brickman, LLC, P.O. Box 1368, Barnwell, South Carolina 29812; A. Camden Lewis, Esq., Lewis & Babcock, LLP, PO Box 11208, Columbia, SC 29211; Gedney M. Howe, III, Esq., Gedney M. Howe, III, PA, Post Office Box 1034, Charleston, South Carolina 29402; Michael E. Spears, Esq., Michael E. Spears, PA, Post Office Box 5806, Spartanburg, South Carolina 29304; and Richard A. Harpootlian, Esq., Richard A. Harpootlian, PA, Post Office Box 1090, Columbia, South Carolina 29211.

April 7, 2014

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The Honorable Jenny Abbot Kitchings
Clerk of Court, South Carolina Court of Appeals
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Columbia, South Carolina 29211

In re: David Carroll v. Toyota of Greenville, Inc
SC Court of Appeals Case No.: 2013-002599

Dear Ms. Kitchings:

The undersigned counsel for the Respondent are in receipt of Appellant's Petition for Rehearing from the Court's Order dated March 24, 2014, dismissing the appeal of this action. Respondent and his counsel feel as if all issues were addressed adequately within the body of the order of dismissal and no rehearing is necessary. Respondent would point out that Appellant won the motion it now seeks to appeal and received from the trial court all the relief for which it asked.

Should the Court wish us to speak to the points raised by the Appellant in its Petition for Rehearing, we would be happy to do so.

With warm personal regards, I am

Sincerely,


Richard A. Harpootlian

RAH/hmh

cc: *VIA U.S. MAIL ONLY*
Bradford N. Martin, Esquire
Laura W. H. Teer, Esquire

The South Carolina Court of Appeals

David Carroll, Respondent,

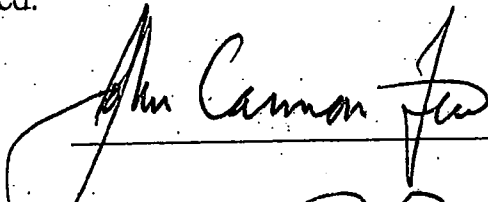
v.

Toyota of Greenville, Inc., Appellant.

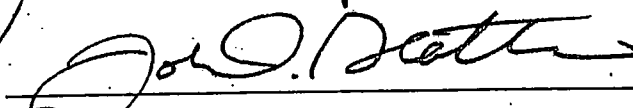
Appellate Case No. 2013-002599

ORDER

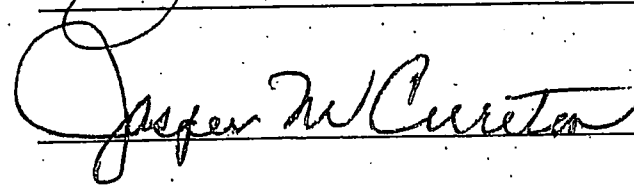
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.

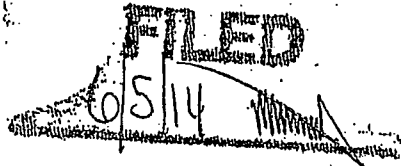


J.



A.J.

Columbia, South Carolina



cc: Bradford Neal Martin, Esquire
Laura Wilcox Howle Teer, Esquire
Evan Brook Bristow, Esquire
Terry E. Richardson, Jr., Esquire
Brady Ryan Thomas, Esquire
James David Butler, Esquire
A. Camden Lewis, Esquire
Gedney M. Howe, III, Esquire
Michael Eugene Spears, Esquire
Richard A. Harpootlian, Esquire

WORLD OMNI FINANCIAL CORP.

RETAIL INSTALLMENT SALE CONTRACT - SIMPLE INTEREST

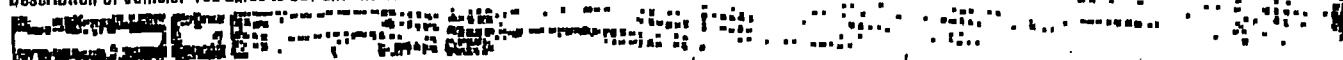


Dealer Number

Account Number

Buyer (and Co-Buyer) - Name(s) and Address(es) (Include County and Zip Code)	Creditor (Seller) - Name and Business Address
DAVID WILLIAM CARROLL 925 CLEVELAND STREET UNIT 71 GREENVILLE SC 29601 CO. GREENVILLE	TOYOTA SCION LEXUS OF GREENVILLE 2660 LAURENS ROAD GREENVILLE SC 29607

Meaning of Words In this contract the words "you", "your" and "yours" refer to the Buyer and Co-Buyer, if any. The word "Creditor" refers to the Creditor (Seller) named above and, after assignment to World Omni Financial Corp. ("WOFC") and any subsequent assignee Who is Bound. You may buy the vehicle described below for cash or on credit. The cash price is shown below as "Cash Price". The credit price is shown below as "Total Sale Price". By signing this contract, you choose to buy the vehicle on credit under the terms on the front and back of this contract and you are individually liable to the Creditor for any amount due Description of Vehicle. You agree to buy and the Creditor agrees to sell the following vehicle



NEW	2006	TOYOTA	HIGHLANDER	JTEDP21A860095475
Primary Use for Which Purchased ☒ personal ☐ business ☐ agricultural ☐				
If business use is checked, Buyer is: ☐ an individual ☐ a corporation ☐ a partnership				

FEDERAL TRUTH IN LENDING DISCLOSURES															
<table border="1"> <tr> <td>ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate</td> <td>FINANCE CHARGE The dollar amount the credit will cost you</td> <td>Amount Financed The amount of credit provided to you or on your behalf</td> <td>Total of Payments The amount you will have paid after you have made all payments as scheduled</td> <td>Total Sale Price The total cost of your purchase on credit, including your downpayment of \$</td> </tr> <tr> <td>5.99 %</td> <td>\$ 4389.60</td> <td>\$ 27000.00</td> <td>\$ 31389.60</td> <td>750.00</td> </tr> <tr> <td></td> <td></td> <td></td> <td></td> <td>\$ 32139.60</td> </tr> </table>	ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate	FINANCE CHARGE The dollar amount the credit will cost you	Amount Financed The amount of credit provided to you or on your behalf	Total of Payments The amount you will have paid after you have made all payments as scheduled	Total Sale Price The total cost of your purchase on credit, including your downpayment of \$	5.99 %	\$ 4389.60	\$ 27000.00	\$ 31389.60	750.00					\$ 32139.60
ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate	FINANCE CHARGE The dollar amount the credit will cost you	Amount Financed The amount of credit provided to you or on your behalf	Total of Payments The amount you will have paid after you have made all payments as scheduled	Total Sale Price The total cost of your purchase on credit, including your downpayment of \$											
5.99 %	\$ 4389.60	\$ 27000.00	\$ 31389.60	750.00											
				\$ 32139.60											

Your Payment Schedule Will Be:

Number of Payments	Amount of Each Payment	When Payments are Due
One deferred downpayment of	N/A	
59 regular payments	523.16	Monthly, beginning 12/13/2005
One final payment of	523.16	

Late Charge If a payment is not paid in full within 10 days after it is due, you will pay a late charge of 5% of the unpaid amount of the late payment or \$14.50, whichever is less.
Prepayment. If you pay off all your debt early, you will not have to pay a penalty.
Security. You are giving a security interest in the vehicle being purchased.
Other Terms. Please read this contract, including the reverse side, for additional information about security interests, nonpayment, default, any required repayment in full before the scheduled date, and penalties.

ITEMIZATION OF THE AMOUNT FINANCED

1 Cash Price (including any accessories, services or taxes)	\$ 27502.00 (1)
2 Total Downpayment = Net Trade-in \$ N/A + Cash Downpayment \$ 750.00 (including deferred downpayment of \$ N/A payable before the due date of the first regularly scheduled payment)	\$ 750.00 (2)
Your Trade-in is a _____ Year _____ Make _____ Model _____	\$ 26752.00 (3)
3 Unpaid Balance of Cash Price (1 minus 2)	
4 Other Charges Including Amounts Paid to Others on Your Behalf (Creditor may be retaining a portion of these amounts)	
A Price of Required Physical Damage Insurance Paid to the Insurance Company Named Below	\$ N/A
B Price of Optional Credit Insurance Paid to the Insurance Company or Companies Named Below	\$ N/A
C Price of Optional Mechanical Breakdown Protection Paid to the MBP Company Named Below	\$ N/A
D Lien Notation Fee Paid to Public Officials	\$ N/A
E Government License and/or Registration Fees (Itemize)	\$ 59.00
F Government Certificate of Title Fees	\$ N/A
G Other Charges (Creditor must identify who will receive payment and describe purpose)	
to TOYOTA SCION LEXUS OF G for ADMIN FEE	\$ 189.00
to N/A for N/A	\$ N/A
to N/A for N/A	\$ N/A
to N/A for N/A	\$ N/A
to N/A for N/A	\$ N/A
to N/A for N/A	\$ N/A
to N/A for N/A	\$ N/A
Total Other Charges and Amounts Paid to Others on Your Behalf	\$ 248.00 (4)
5 Amount Financed - Unpaid Balance (3+4)	\$ 27000.00 (5)

Required Physical Damage Insurance Physical damage insurance is required, but you may obtain it from anyone you want who is reasonably acceptable to the Creditor. If you buy it through the Creditor and are accepted by the insurance company, the policies or certificates issued by the insurance company will describe the terms and conditions. The purchase price of this insurance is shown in 4A of the Itemization above.

Insurance Company N/A Term N/A months

Optional, if desired: ☐ Towing and Labor Costs ☐ Rental Reimbursement ☐ CB Radio Equipment ☐ Deductible Collision and either ☐ \$ N/A Deductible Comprehensive including Fire, Theft and Combined Additional Coverage ☐ Fire, Theft and Combined Additional Coverage

OPTIONAL CREDIT INSURANCE, CREDIT LIFE INSURANCE AND CREDIT DISABILITY INSURANCE ARE NOT REQUIRED TO OBTAIN CREDIT AND WILL NOT BE PROVIDED UNLESS YOU SIGN AND AGREE TO PAY THE ADDITIONAL PURCHASE PRICE, which is shown below and in 4B of the Itemization above. If you want this optional insurance, check the insurance coverage(s) desired and sign below.

Term N/A months

Check the optional insurance coverage(s) desired: ☐ Credit Life, Single Coverage \$ N/A ☐ Credit Life, Joint Coverage \$ N/A
☐ Credit Disability, Single Coverage (Buyer Only) \$ N/A

If you elect optional credit insurance coverage and are accepted by the insurance company, the terms and conditions will be as described in the policies or certificates issued by the insurance company. The original amount of the decreasing term credit life insurance will not exceed \$ N/A. Credit disability insurance payments will equal the monthly payment amount but will not be more than \$ N/A. Insurance Company N/A

APPROVAL: YOU WANT TO OBTAIN THE OPTIONAL CREDIT INSURANCE COVERAGE(S) CHECKED ABOVE.

Buyer Signature _____ Date _____ Co-Buyer Signature _____ Date _____

THE INSURANCE, IF ANY, REFERRED TO IN THIS CONTRACT DOES NOT INCLUDE LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS. BUYER MAY CHOOSE THE PERSON THROUGH WHOM REQUIRED PHYSICAL DAMAGE INSURANCE IS OBTAINED.

Optional Mechanical Breakdown Protection Mechanical breakdown protection is not required to obtain credit and you may purchase it from anyone you want who is reasonably acceptable to the Creditor. You may purchase mechanical breakdown protection under this contract by signing below and agreeing to pay the additional purchase price, which is shown in 4C of the Itemization above.

The term of this protection will be N/A months from the date of delivery or until the odometer of the vehicle shows N/A miles, whichever occurs first. If you purchase this protection, you have reviewed the terms of the contract which describe this protection and you understand that a copy of the completed contract will be sent to you as soon as practicable.

MBP Company N/A Deductible N/A

APPROVAL: YOU WANT TO OBTAIN THE OPTIONAL MECHANICAL BREAKDOWN PROTECTION DESCRIBED ABOVE.

Buyer Signature _____ Date _____ Co-Buyer Signature _____ Date _____

Receipt of Goods and Promise to Pay. You agree that you have received the vehicle and/or services described above, and have accepted delivery of the vehicle in good condition. You promise to pay to the Creditor the Amount Financed shown above, plus a Finance Charge determined by applying a daily periodic rate of 1/365th (1/366th in the case of a leap year) of the Annual Percentage Rate shown above to the unpaid balance of the Amount Financed each day. In addition, you promise to pay to the Creditor all other amounts due under this contract.

ARBITRATION CLAUSE - IMPORTANT - PLEASE REVIEW - AFFECTS YOUR LEGAL RIGHTS. 1. EITHER YOU OR WE (CREDITOR/SELLER or ASSIGNEE) MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL. 2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS. 3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION. Except as set forth below in the last three sentences of this paragraph, if any dispute, controversy or claim, involving you and us, or any of our respective employees, agents, affiliates, successors or assigns, arises out of or relates to your credit application, this Contract, the breach of this Contract, or any resulting transaction or relationship (including any such relationship with third parties who do not sign this Contract), each a "Dispute", you and we agree that such Dispute shall, at your or our election, be resolved by binding arbitration and not by a court action. Each Dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You and we expressly waive any right that either of us may have to arbitrate a class action. You or we may choose any of the following arbitration organizations and its applicable rules: the American Arbitration Association, 335 Madison Avenue, Floor 10, New York, NY 10017-4805 (www.adr.org) or the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com). You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website. You and we retain any rights to self-help remedies, such as repossession and an action to obtain possession of any vehicle or other property covered by this Contract. Neither you nor we will waive the right to arbitrate by using self-help remedies or filing suit. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless and until such action is transferred, removed or appealed to a different court.

The Arbitrator shall be an attorney or retired judge and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside. To the extent not prohibited by law, the non-prevailing party shall pay, and the arbitrator shall award to the prevailing party, all of the arbitration costs and expenses incurred by the prevailing party, including reasonable attorney's fees. The arbitrator's award shall be final and binding on all parties, except that the losing party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. Judgment on such award may be entered by either party in any court having jurisdiction. These arbitration provisions shall, with respect to such Dispute, survive the termination or expiration of this Contract. Furthermore, to the extent permitted by law, the arbitrator shall not have any authority to award punitive damages in any Dispute. The parties agree that the transactions relating to this Contract involve interstate commerce and that this Contract shall be subject to and governed by the Federal Arbitration Act, 9 U.S.C. Sections 1 et seq., as amended, and not by any state law concerning arbitration. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable. You and we agree to this arbitration paragraph.

Buyer (and Co-Buyer) Initials [Signature]

IMPORTANT: THE ANNUAL PERCENTAGE RATE MAY BE NEGOTIATED WITH THE SELLER. SELLER MAY ASSIGN THIS CONTRACT AND RETAIL ITS RIGHTS TO RECEIVE A PART OF THE FINANCE CHARGE. THE TERMS AND CONDITIONS ON THE REVERSE SIDE OF THIS DOCUMENT ARE PART OF THIS CONTRACT. READ THESE TERMS AND CONDITIONS BEFORE SIGNING BELOW.

You signed this contract and received a completely filled-in copy on OCTOBER 29th, 2005

Signature of Buyer [Signature]

Signature of Co-Buyer [Signature]

Accepted [Signature] CREDITOR

By [Signature]

Signature and Title

TOYOTA SCION LEXUS OF GREENVILLE

This contract is assigned to WOFC subject to repurchase under the terms of the "Seller's Assignment" on the reverse side.

This contract is assigned to WOFC without recourse or with limited recourse under the terms of the "Seller's Assignment" on the reverse side.

Seller _____ By _____ (If Corp. or Partnership) _____ (Title) _____

Seller [Signature] By [Signature] (If Corp. or Partnership) _____ (Title) _____

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael Blease, Michael Watts, Individually and for the Benefit of All Car Buyers Whom Paid "Administrative Fees" as Described below to Defendants

Plaintiffs,

vs.

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 Hendricks Honda; Overland, Inc. d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments; and Toyota of Greenville, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL

CIRCUIT
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for the County of Aiken, South Carolina, do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

OCT 12 2009

Liz Godard
C.C.P. & G. S., Aiken County, S.C.

Anita Knoepfle
~~ORDER ON MOTION TO DISMISS~~
AND SUBSTITUTE AS TO TOYOTA
OF GREENVILLE, INC.

FILED

10-12-9

Liz Godard
C.C.P. & G. S.

Anita Knoepfle 1000
Deputy Clerk

This matter comes before the Court by way of Plaintiffs' Motion to Dismiss and Substitute as to Defendant Toyota of Greenville. This motion was argued before me on October 1, 2009. After considering the parties' filings, as well the legal arguments of counsel, I have determined the motion should be granted and that David Carroll is to replace Plaintiff Michael Watts as the named representative as to Defendant Toyota of Greenville, Inc. Plaintiff Watts's individual claims are dismissed with prejudice.

This a consumer protection action brought against the Defendants based on alleged violations of South Carolina laws, including but not limited to the South Carolina Manufacturers, Distributors, and Dealers Act ("Dealers Act"), codified at S.C. Code Ann. sections 56-15-10, et

MAE
#1

seq. The Dealers Act prohibits motor vehicle dealers from engaging "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. § 56-15-40. In order to protect the public through enforcement of the Dealers Act, the Legislature created a private right of action for damages in section 56-15-110, and in order to further protect the public through private enforcement, added a separate provision enabling a private action to be brought in a representative capacity for "the benefit of the whole." S.C. Code § 56-15-110(2). The specific language of this section reads:

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.

Id. This statute allows one aggrieved car purchaser to sue "for the benefit of the whole," including all persons hurt by the same Defendant's violations of the Dealers Act.

This case was filed on August 29, 2006. On October 31, 2006, Plaintiffs amended the Complaint. The October 31, 2006 amendment added Plaintiff Michael Watts as a named representative under the Dealers Act representing all persons who paid "administrative fees" to Defendant Toyota of Greenville, Inc. Plaintiffs' Amended Complaint defines "administrative fees" as including illegal fees "often referred to as an 'administrative fee,' a 'recording and processing fee,' 'closing fee,' 'dealer documentation and closing fee.'" Plaintiffs allege that Defendants are charging the "administrative fees" in violation of the Consumer Protection Code, S.C. Code Ann. §37-2-307, and the Dealers Act, §56-15-10 *et seq.*¹

¹The Consumer Protection Code, S.C. Code Ann. §37-2-307 uses the term "closing fees" as encompassing all of these fees.

WME
#2

In July 2007, this Court issued an Order confirming a substantive statutory right of the named Plaintiffs to proceed "for the benefit of the whole" under the Dealers Act against all Defendants without "a requirement that the plaintiff plead and prove the class certification requirements of S.C. R. P. Rule 23." This finding certifies that the named plaintiffs could proceed on behalf of the group of car purchasers who paid "administrative fees."

In January 2008, this Court ruled on certain Defendants' Rule 59(e) motions and then held that each named Plaintiff had standing to sue for himself and in a representative capacity for others against the Defendant that transacted business with that named Plaintiff. The January 2008 ruling confirmed that named Plaintiffs, including Plaintiff Watts, who, as alleged in the Amended Complaint, paid "administrative fees," represented a large group of people who had paid the same kind of fee.²

In May 2009, Plaintiff Watts decided that he no longer wished to participate in this case as the named representative plaintiff against Defendant Toyota of Greenville, Inc. Defendant Toyota of Greenville, Inc. refused to consent to Plaintiff Watts's request for a dismissal with prejudice of his claim.

In June 2009, David Carroll, a purchaser who like Plaintiff Watts alleges he paid "administrative fees" to Defendant Toyota of Greenville, Inc., came forward and sought to be substituted as a named representative in this case in order to protect the interests of the group of car purchasers that was represented by Plaintiff Watts. David Carroll has answered written

²As stated by Plaintiffs' counsel at the hearing and confirmed by Defendant Toyota of Greenville's Second Revised Answers to Plaintiffs' First Set of Interrogatories, this Court was correct that there are thousands of car purchases at issue. One purchaser who paid an "administrative fee" has the statutory right to proceed "for the benefit of the whole."

discovery promulgated by Defendant Toyota of Greenville, Inc. and has provided available dates for his deposition.

On June 23, 2009, Plaintiffs' counsel filed this motion seeking to dismiss Plaintiff Michael Watts and substitute David Carroll in this action. In support of the motion, Plaintiffs argue that in representative actions the unnamed group members have an interest that should be protected by allowing the replacement of the named representative. Plaintiffs cite to representative cases for the proposition that "[W]hen a class representative is unable or unwilling to continue as the class representative, the court should permit class members an opportunity to 'substitute themselves as the class representative. By doing so, the court protects the interests of the class, which has a separate and distinct legal status from that of the representative.'" *Citing Birmingham Steel Corp. v. Tennessee Valley Authority*, 353 F.3d 1331 (11th Cir. 2003); *Swan v. Stoneman*, 635 F.2d 97 (2nd Cir. 1980); *Griffith v. Bowen*, 678 F.Supp. 942 (D.Mass. 1988).

Defendant Toyota of Greenville, Inc. opposes the motion. Toyota of Greenville, Inc. argues that replacement of Mr. Watts is not proper because class certification has not occurred. At the hearing, Toyota of Greenville, Inc. conceded that if class certification had occurred in this case, Toyota of Greenville, Inc. would not oppose the requested replacement of Plaintiff Watts with Mr. Carroll.

Toyota Greenville, Inc.'s argument as to the necessity of a class certification order fails. This is not a Rule 23, SCRPC class action. This is a group representative action under the Dealers Act, S.C. Code Ann. Section 56-15-110(2). Nothing under the Dealers Act requires the Plaintiffs to move for class certification. Furthermore, I previously ruled "that a named Plaintiff has standing to pursue all three causes of action, on behalf of himself or others, against the Defendant from which that particular Plaintiff purchased a vehicle...." and that "[P]laintiffs are

not required to plead and prove the requirements pertaining to class actions contained in Rule 23 SCRCF during the liability or litigation phase of this case." January 31, 2008, Order, pp. 5 and 11. This Order confirmed that the named Plaintiffs were prosecuting these cases in a representative capacity on behalf of the group of purchasers who purchased vehicles from the same dealership and paid "administrative fees." No separate class certification order is required under the Dealers Act, as "group representation" has already been granted to the named Plaintiffs. Accordingly, Toyota of Greenville, Inc.'s argument that a class certification order is a prerequisite to allowing Mr. Carroll to replace Plaintiff Watts fails.³

Additionally, I find that the unnamed members of the group have an interest in the case that needs to be protected. See Birmingham Steel Corp. v. Tennessee Valley Authority, 353 F.3d 1331 (11th Cir. 2003); Swan v. Stoneman, 635 F.2d 97 (2nd Cir. 1980); Griffith v. Bowen, 678 F.Supp. 942 (D.Mass. 1988). As pointed out by several commentators, the interest of unnamed members in a representative suit is significant such that Plaintiffs' counsel has a duty when the unnamed members of the group stand to unknowingly lose their claims "to make reasonable efforts to recruit and identify a new representative." The Annotated Manual for Complex Litigation provides in part:

Later replacement of a class representative may become necessary if, for example the representative's individual claim has been mooted or otherwise significantly altered. Replacement also may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation. In such circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements.

Annotated Manual for Complex Litigation, (Fourth), §21.26. Based on the foregoing, I find that the unnamed group members here who paid administrative fees to Defendant Toyota of

³Notably, even in Rule 23 class actions, some courts have allowed the replacement of named plaintiffs prior to class certification. See Griffith v. Bowen, 678 F.Supp. 942 (D.C.Mass. 1988).

Greenville, Inc. have an interest from the inception of the suit that needs to be protected by the replacement of Plaintiff Watts with David Carroll.

Furthermore, this case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act. A "private attorneys 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 regulation. See Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 359, 559 S.E.2d 327, 338 (Ct.App. 2001)(discussing Aurora National Bank v. Tri Star Marketing, 990 F.Supp. 1020 (N.D.Ill.1998) and the "private attorneys general" provision in the Resource Conservation and Recovery Act). In this case, the Dealers Act empowers both the state Attorney General and private citizens to seek injunctive relief on behalf of the public. See §56-15-40(5) (empowering the Attorney General to issue injunctive relief) and §56-15-110(2)(empowering private citizens to bring suit for the benefit of the public interest). Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general. Cf. Davis v. U.S. Bancorp, 383 F.3d 761 (8th Cir. 2004)(referring to Minn.Stat. §8.31, subd. 3a, as a private attorney general statute. Minn.Stat. §8.31, subd. 3a, like the Dealers Act allows individuals to enforce statutes regulating unfair business practices by bringing a civil cause of action). 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. Class certification is not a prerequisite to action to a private attorneys general suit. Moreover, the public interest is protected by allowing the replacement of Plaintiff Watts by David Carroll. Because I find this case is being prosecuted as private attorneys general, this is an additional reason why Plaintiffs' motion should be granted.

Toyota of Greenville, Inc. also argues that Mr. Carroll should not be permitted to replace Plaintiff Watts in this case because there is no rule of civil procedure specifically dealing with this situation. Plaintiffs' counsel contends that Rule 7, SCRPC allows parties to apply for Orders from the Court when the rules do not provide specifically for a motion. *Citing* Wright & Miller, Federal Practice and Procedure, §1190 ("Finally, a party confronted by a situation in which the rules do not provide specifically for a motion, but who can show a need for an order from the court to prevent overreaching or injustice, may make what might be called an 'undifferentiated motion' stating his problem, the grounds for relief, and the remedy desired."). Plaintiffs also point out that replacing named representatives is permitted in other representative lawsuits even though it does not fall within the technical meaning of the terms "substitution" or "intervention" as used in the rules of civil procedure. *Citing Coffey v. Braddy*, 2009 WL 591280, n. 7 (M.D.Fla. 2009)("[N]othing more is required than to permit the original representatives, who apparently have relinquished their duties, to be replaced. Although some of the cases reviewed use the terms 'intervention' and 'substitution,' it appears many courts use both those terms (sometimes interchangeably within the same sentence) to describe the replacement of class representatives, not necessarily meaning to ascribe to the terms the technical meaning under the Federal Rules of Civil Procedure."). Notably, again, at the hearing, Toyota of Greenville, Inc. conceded that if class certification had occurred in this case, Toyota of Greenville, Inc. would not oppose the requested replacement of Plaintiff Watts with Mr. Carroll.

I find Plaintiffs' arguments as to Rule 7, SCRPC and the Coffey case persuasive. This interpretation is in accord with Rule 1, SCRPC which states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." In this case, if I were to deny the motion, Mr. Carroll may be forced to start over and file a separate

lawsuit on behalf of the group already represented in this action. This separate case would be the fourth case dealing with the same issues before the Court in this matter.⁴ The filing of a new lawsuit to replace this existing case is not speedy or inexpensive. Additionally, I find that the replacement of Plaintiff Watts with David Carroll avoids unfair prejudice to all parties and is therefore just. The substitution allows all parties to proceed towards a final determination on the merits after several years of litigation without starting anew. It would be unfair to all to sacrifice the time and expense of this litigation without the certainty of final ruling on the legality of the actions at issue.

I also find that an award of attorneys fees to Toyota of Greenville, Inc. is not warranted. None of the cases cited by Toyota of Greenville, Inc. are representative actions where absent group members needed to be protected. See Shipp v. Richardson Corporation of South Carolina, Inc., 285 S.C. 460, 330 S.E.2d 291 (1985); Mauro v. Clabaugh, 299 S.C. 184, 383 S.E.2d 244 (Ct.App. 1989); McEachern v. Wilson, 165 S.C. 485, 164 S.E.2d 133 (1932). This is a representative action under the Dealers Act and any prejudice to Toyota of Greenville, Inc. is mitigated by the substitution of Mr. Carroll. Mr. Carroll will replace Plaintiff Watts, as the named representative for the group of Toyota of Greenville, Inc. purchasers currently represented in this proceeding. This group will continue to be in the suit and any effort expounded by Toyota of Greenville, Inc. in defending against the group's claims will not be lost. Additionally, the cases cited by Toyota of Greenville, Inc. all involve dismissals without prejudice. By contrast, Plaintiff Watts seeks to dismiss his personal claims with prejudice. Toyota of

⁴In addition to this case the cases of Adams, et al v. Action Ford, et al., Civil Action Number: 07-CP-02-1232 and West-Cox, et al v. Cale Yarborough Honda, Inc., a/k/a Cale Yarborough Motors of SC, et al. Civil Action No.: 2007-CP-1154 also involve allegations of illegal "administrative fees."

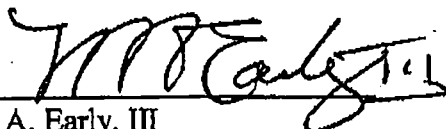
Greenville, Inc. would not automatically be entitled to attorneys fees if Plaintiff Watts's individual claim was lost with prejudice on summary judgment or at trial. Accordingly, it would be inequitable to force Mr. Watts to pay attorneys fees for dismissing only his individual claim with prejudice at this stage.

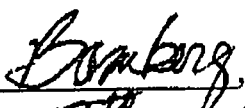
Based on the foregoing and after full consideration of the issues herein,

IT IS HEREBY ORDERED that the Motion to Dismiss Plaintiff Michael Watts and substitute David Carroll by and the same is hereby granted,

IT IS FURTHER ORDERED that the Defendant's Request for Attorneys fees be and the same is hereby denied.

AND IT IS SO ORDERED.


Doyet A. Early, III
Resident Circuit Court Judge
Second Judicial Circuit


This 7th day of Oct., 2009, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

David Carroll,
Plaintiff,

vs.

Toyota of Greenville, Inc.,
Defendant.

FILED-CLERK OF THE COURT OF COMMON PLEAS
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
THE 13TH JUDICIAL CIRCUIT

2013 AUG 19 P 3:22
C.A. No. 2012-CP-23-7156

ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS BASED ON
ARBITRATION

This matter comes before the Court by way of Defendant's Motion to Dismiss based on Arbitration. This Motion was argued before me on July 8, 2013, with Terry E. Richardson and Brady R. Thomas appearing on behalf of Plaintiff, David Carroll, and Bradford N. Martin and Laura W.H. Teer appearing on behalf of Defendant, Toyota of Greenville.

This case involves a binding arbitration clause in a contract between a car dealer and its customer. It requires me to consider the relationship of state and federal law and the concept of preemption in this context.

I must consider, in light of the United States Supreme Court's decisions in *AT&T Mobility, LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2011), *Marmet Health Care Center, Inc. v. Brown*, __ U.S. __, 132 S. Ct. 1201 (2012), and *American Express Co. v. Italian Colors Rest.*, __ U.S. __, 133 S. Ct. 2304 (2013), whether the Federal Arbitration Act ("FAA") (codified as amended at 9 U.S.C. §§ 1-2 *et seq.*), preempts South Carolina state law and public policy invalidating a contract provision, in an arbitration agreement, banning class action suits.

My decision turns on an interpretation of the meaning and breadth of these recent Supreme Court opinions. After analyzing *AT&T Mobility*, *Marmet Health Care*, and *American Express*, I am bound by the *Supremacy Clause* of the United States Constitution to conclude that the Supreme Court has limited the FAA's saving clause, 9 U.S.C. § 2, and therefore find that: 1)

the FAA preempts South Carolina's public policy to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act; 2) the saving clause does not apply in the present case to prevent FAA preemption; and 3) preemption applies to Carroll's claim that he is acting as a private attorney general. I grant Defendant's Motion, and order this case be stayed and compel the parties to enter bilateral arbitration. I will start with the facts of this case and then turn to applicable law.

I. PROCEDURAL POSTURE AND FACTUAL BACKGROUND

A. Origin of this Action.

Four Plaintiffs filed their original Complaint in Aiken County against 51 dealers located in 13 counties on August 29, 2006. Plaintiffs filed a "Corrigenda" correcting the original Complaint on September 1, 2006. Plaintiffs then filed their First Amended Complaint on October 31, 2006, with 8 Plaintiffs suing some 324 dealerships ("Defendants" or "Dealers") located in 41 counties. Michael Watts was the Plaintiff who purchased a car from Defendant Toyota of Greenville.

As set forth more fully in the First Amended Complaint, Plaintiffs alleged that: 1) Defendants charged closing fees in violation of the South Carolina Regulation of Manufacturers, Distributors and Dealers Act (the "Dealers Act") contained in South Carolina Code Ann. § 56-15-10 *et seq.* and failed to comply with the requirements in South Carolina Code Ann. § 37-2-307 (2002) (the "Closing Fee Statute"); 2) Defendants engaged in a civil conspiracy; and 3) Plaintiffs were entitled to declaratory relief.

Plaintiffs then filed a Rule 41(a) Motion to Voluntarily Dismiss Certain Defendants and Defendants filed certain Motions to Dismiss on several grounds. In my Order dated January 31, 2008, I granted the Motion to Dismiss all but seven Defendants. Toyota of Greenville remained as one of the seven. Plaintiffs sought to establish public interest standing which I denied and

found that “[this] lawsuit is an action by private individual plaintiffs against private corporate defendants.” (January 31, 2008 Order, p. 11).¹

I further found that no party had waived any substantive or procedural rights or arguments relating to arbitration agreements, including the right to move to dismiss to arbitration. I found that Defendants had been careful throughout the litigation to preserve all rights related to the enforcement of arbitration agreements, which was acknowledged on several occasions by Plaintiffs and this Court. (January 31, 2008 Order, p. 14).

Plaintiffs then filed a Motion to Dismiss Watts and Substitute David Carroll (“Carroll”) as to Toyota of Greenville. I issued my Order dated October 7, 2009, allowing Carroll to replace Watts as the named representative as to Toyota of Greenville. At that time, I found that the case is being prosecuted pursuant to a “private attorneys general” provision under the Dealers Act. Toyota of Greenville filed a Motion to Alter or Amend on January 19, 2010,² specifically objecting to the “private attorneys general” finding on several grounds. This Motion was denied by my Order of February 5, 2010.

On August 31, 2012, I signed an Order severing Carroll’s claims against Toyota of Greenville and transferring the case to Greenville County. On July 11, 2012, the Chief Justice of the South Carolina Supreme Court assigned to me all the severed cases, including *Carroll v. Toyota of Greenville*.

B. The Facts Underlying Carroll’s Claims.

Carroll, through the First Amended Complaint, is suing “for the benefit of all South Carolina car buyers whom paid administrative fees to [Toyota of Greenville] ... in the past four years...”² In 2005, Carroll began looking for a car to purchase for his life-partner, Kathy Steading. Carroll was a former General Manager of a large corporation and was the Office

¹ Plaintiffs filed no Rule 59(e) Motion objecting to this finding.

² First Amended Complaint dated October 28, 2006, ¶¶ 398-99, pp. 63-64.

Manager for a large, prominent South Carolina law firm. Steading, who accompanied him to Toyota of Greenville, was a paralegal at the same firm with 15 years of experience. Carroll gave Toyota of Greenville a bottom line price of \$27,000, which Toyota of Greenville accepted.

Carroll decided to finance the purchase, and Toyota of Greenville presented him with a Retail Installment Sales Contract. The contract was between Carroll and Toyota of Greenville and later assigned to World Omni.

On the front page, the contract contained two paragraphs, in bold print, labeled **"ARBITRATION CLAUSE - IMPORTANT - PLEASE REVIEW - PROTECT YOUR LEGAL RIGHTS..."** The Arbitration Clause provided that any dispute between Carroll and Toyota of Greenville would be decided by arbitration and not in a court or by jury trial. The Clause further stated that the parties agreed that the transaction involved interstate commerce and that the contract was subject to and governed by the FAA.

The Clause also provided in bold and all capital letters that Carroll would give up his right to participate as a class representative or class member in any class claim he may have against Toyota of Greenville, including any right to class arbitration or any consolidation of individual arbitrations.

The Clause further provided:

...to the extent permitted by law, the arbitrator shall not have any authority to award punitive damages in any Dispute... If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall remain enforceable.³

³ Carroll also signed an Arbitration Agreement on October 6, 2007 when he purchased a second car from Toyota of Greenville. There is a dispute between the parties as to the scope of this action; however, I need not answer that question at this time. The analysis of the 2005 Clause applies equally to the 2007 Arbitration Agreement, with the exception that the 2007 Arbitration Agreement did not have the same punitive damages language.

Toyota of Greenville requested Carroll to initial right underneath the Arbitration Clause, and Carroll admitted he did.⁴ Carroll then signed the Contract in full under highlighted language where he acknowledged receiving a completely filled in copy on October 29, 2005.⁵ Carroll stated he did not read the Arbitration Clause prior to signing,⁶ but admitted that if he had, he would have understood the implications of arbitrating any disputes or would have asked someone to explain the Clause.⁷

II. CONCLUSIONS OF LAW

A. Arbitration.

The question of arbitrability is an issue for the courts. *Partain v. Upstate Auto. Group*, 386 S.C. 488, 689 S.E.2d 602 (2010). At the outset, I recognize that there is a strong presumption in favor of the validity of arbitration agreements, because both federal and state policy favor them. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010) [Herron I]. Anyone challenging the enforceability of an arbitration agreement bears the burden of proving the provision is unenforceable. *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

B. Adhesion Contract.

The parties dispute whether the Arbitration Clause is a contract of adhesion. Whether a contract is one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. See *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901

⁴ Carroll Dep., p. 65, ll. 20-25.

⁵ Carroll Dep., p. 54, l. 23 – p. 55, l. 22. Carroll did not have to agree to arbitration. He admitted that he could have paid cash or arranged his own financing. Carroll Dep., p. 105, ll. 15-18. Toyota of Greenville also said arbitration was not required, and it had other lenders available that did not request arbitration. Rick Turk Dep., p. 8, ll. 8-16.

⁶ Carroll Dep., p. 59, l. 12-13; p. 97, ll. 17-20. Because Steading wanted a gold colored car, Toyota of Greenville had to locate one with another dealer. Carroll Dep., p. 50, ll. 10-17. Carroll had ample opportunity to read the paperwork in the several days before the car actually arrived.

⁷ Carroll Dep., p. 59, l. 1 – p. 64, l. 19.

(Ct.App.1998). The interpretation of this Arbitration Clause is not affected by the issue of adhesion.

C. Scope of the Arbitration Clause.

The Arbitration Clause covers "any dispute" between the parties. Since Carroll does not dispute that this action is within its scope, I find Carroll's action is within the scope of the Clause. See *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct.App.1999) (any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration).

D. 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 accept them. *Herron I*, 387 S.C. at 532, 693 S.E.2d at 398.

1. Absence of Meaningful Choice.

Absence of meaningful choice speaks to the fundamental fairness of the bargaining powers in entering into the contract. *Id.* Therefore, I must 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.*

Carroll is an educated man who has managed other people and held positions of responsibility in substantial business and professional concerns. He has not established that he lacked the business judgment necessary to make him aware of the implications of the Arbitration Agreements. His decision not to read the Arbitration Clause does not affect his meaningful choice in entering into the Clause.

Since Carroll purchased the car for Steading, it was not his primary form of transportation. He does not allege that he was subject to any duress in signing and admits that he had time to read along with the Finance & Insurance Manager before signing.⁸

Carroll's injuries are very small as the amount at stake is a \$189 closing fee. The Clause is highlighted in the Agreement with bold, capitalized letters and Carroll was required to initial immediately below the Clause. The Clause was labeled as an arbitration clause in bold, capital font; so it is conspicuous and there is no surprise in its enforcement.

Therefore, I find that Carroll had a meaningful choice in entering into the Arbitration Clause.

2. Oppressive One-Sided Terms.

Upon review of the Arbitration Clause, I do not find that it contains "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). The Clause provides for a mutuality of remedies between the parties, with each able to pursue self-help remedies in court or to pursue action in small claims court.

The only limitation in the Clause is a limitation on punitive damages. The Clause only limits punitive damages, however, to the extent allowed by law. In the present case, the limitation is simply not allowed. Furthermore, the severance clause removes the provision limiting punitive damages, allowing the rest to survive. Carroll will have the right to punitive damages to the same extent they would be available outside of arbitration.⁹ Therefore, I find that the Arbitration Clause is not unconscionable.

⁸ Carroll Dep., p. 81, ll. 11-23; p. 82, ll. 21-23.

⁹ Punitive damages are not limited under Carroll's 2007 Agreement.

E. Preemption of the Public Policy Rule that Class Actions cannot be Prohibited in Dealers Act Cases.

Having found the Arbitration Clause is not unconscionable, I must now turn my attention to Carroll's argument that the Clause is against South Carolina public policy. The *Supremacy Clause* provides that "the Laws of the United States ... shall be the supreme Law of the Land", *U.S. Const. art. VI, cl. 2*, and any state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted by the *Supremacy Clause*. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

1. The FAA and the Saving Clause.

As federal substantive law, the FAA preempts contrary state law. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967); see also *AT&T Mobility*, 131 S. Ct. at 1748. Congress enacted the FAA in response to widespread judicial hostility to arbitration. See *AT&T Mobility*, 131, S. Ct. at 1757. The Act provides:

A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. As stated by the United States Supreme Court in *American Express*:

This text reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms, including terms that "specify with whom [the parties] choose to arbitrate their disputes," and "the rules under which that arbitration will be conducted." That holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been "overridden by a contrary congressional command."

American Express, 133 S. Ct. at 2309 (internal citations omitted).

The FAA's preemption power has an exception: it does not require the enforcement of arbitration agreements on "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (also known as the "saving clause"). This saving clause preserves generally applicable contract defenses, such as fraud or duress and ensures that they are not

preempted. See *Kilgore v. KeyBank, Nat'l Ass'n*, Nos. 09-16703, 10-15934, 2013 U.S. App. LEXIS 7312 (9th Cir. April 11, 2013); see also *AT&T Mobility*, 131 S. Ct. at 1746.

Carroll does not argue such general contract defenses; rather, he argues that the saving clause applies because it takes away "statutory rights vested in consumers by the Dealers Act." In particular, Carroll claims that the Arbitration Clause takes away "(1) the right to bring a private attorney general action on behalf of all affected purchasers; (2) his statutory right to seek group injunctive relief; and (3) his statutory right to seek punitive damages." (Carroll's Memorandum in Opposition, p. 8).

The holding of *AT&T Mobility* "plainly prohibited application of the general contract defense of unconscionability to an otherwise valid arbitration agreement." *Muriithi v. Shuttle Express*, 712 F.3d 173 (4th Cir. 2013). As the Ninth Circuit Court of Appeals has recently stated:

Parties have often cited the savings clause in an attempt to defeat a motion to compel arbitration. The United States Supreme Court has been moved to step in and stop some efforts to avoid FAA preemption, most notably in its [*AT&T Mobility*] decision.

Mortensen v. Bresnan Commc'ns, LLC, No. 11-35823, 2013 U.S. App. LEXIS 14211 (9th Cir. July 15, 2013).

2. *AT&T Mobility* and its Progeny.

AT&T Mobility directly addressed whether the FAA's saving clause preempted a California state rule, known as the *Discover Bank* rule,¹⁰ which invalidated the majority of class action waivers in contracts as unconscionable. The plaintiff in that case purchased mobile phone

¹⁰ Carroll argues that *AT&T Mobility* is distinguishable from the present case because it does not address state statutory rights. I disagree. The U.S. Supreme Court in *AT&T Mobility* addressed a judicial interpretation of Cal. Civ. Code Ann. § 1668, which rendered contracts unenforceable if they were unconscionable. The Court then specifically held that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility*, 131 S. Ct. at 1748.

service from AT&T. The service contract signed by the class members included a provision requiring all disputes to be arbitrated individually and not collectively.

The Ninth Circuit had earlier found that the FAA did not preempt the *Discover Bank* rule, but the United States Supreme Court reversed, and held that even general contract defenses, such as unconscionably, are preempted if they “stand as an obstacle to the accomplishment” of “ensur[ing] that private arbitration agreements are enforced according to their terms.” *AT&T Mobility*, 131 S. Ct. at 1748. The United States Supreme Court concluded for the first time that even generally applicable state law rules are preempted if in practice they have a “disproportionate impact” on arbitration or “interfere with fundamental attributes of arbitration and thus create a scheme inconsistent with the FAA” *Id.* at 1747-48.

In *Marmet Health Care Center, Inc., v. Brown*, ___ U.S. ___, 132 S. Ct. 1201 (2012), the Supreme Court once again limited the saving clause as it did in *AT&T Mobility*. The Supreme Court held that the FAA preempted a West Virginia law invalidating arbitration clauses in nursing home admission agreements adopted before an occurrence of negligence resulting in a personal injury or wrongful death:

When state law prohibits... the arbitration of a particular type of claim, the analysis is straight forward: The conflicting rule is displaced by the FAA.

Id. at 1203 (quoting *AT&T Mobility*, 131 S. Ct. at 1747).

The fact that the Dealers Act expressly permits collective actions does not alter the FAA’s preemption. The Supreme Court held in *American Express Co. v. Italian Colors Rest.*, ___ U.S. ___, 133 S. Ct. 2304 (2013):

A pair of our cases brings home the point. In *Gilmer* [*v. Interstate / Johnson Lane Corp.*, 500 U.S. 20 (1991)], we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination and Employment Act, expressly permitted collective actions. We said that statutory permission did “not mean that individual attempts at conciliation were intended to be barred.” *Id.* at 32.

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American Express, 133 S. Ct. at 2311.

Therefore, these Supreme Court cases stand for the proposition that any state law contract defense based on unconscionability or otherwise, that has a disproportionate effect on arbitration is displaced by the FAA.¹¹ The FAA's saving clause will not bar preemption in such cases. I am bound by the *Supremacy Clause* to apply United States Supreme Court precedent and do so here.

3. **The South Carolina Public Policy Rule Invalidating Class Action Waivers in Dealers Act Cases.**

I must apply the Supreme Court precedent to South Carolina's public policy rule invalidating class action waivers in Dealers Act cases.

The South Carolina rule arose in the context of this case when the parties were still joined in one action. Christine and Michael Watts entered into a contract with Co-Defendant, Century BMW, for the purchase of a car. The transaction included the execution of an arbitration agreement. I found that the arbitration agreement was unconscionable and unenforceable and denied the Motion to Compel Arbitration. Century then appealed, and the South Carolina Supreme Court held that the agreement was not unconscionable.¹² However, the Court reasoned that the arbitration provision prohibiting class actions was against public policy. The arbitration provision would ordinarily be severed pursuant to the severance clause; however, since Century insisted it did not want class action arbitration, the Supreme Court affirmed in result my original order denying the Motion to Compel Arbitration. *Herron I*, 387 S.C. at 525, 693 S.E.2d at 394.

¹¹ Courts across the country are following the *AT&T Mobility* line of cases in compelling arbitration in class action waiver cases, including the Fourth Circuit Court of Appeals. See *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173 (4th Cir. 2013).

¹² In analyzing the facts, the South Carolina Supreme Court held that the Wattses had a meaningful choice in signing the contract. *Id.* at 533, 693 S.E.2d at 398. It also reasoned that South Carolina jurisprudence forbade allowing the Wattses to invalidate the enforceability of the arbitration agreement by claiming they did not read it. *Id.*

The Court in *Herron I* interpreted the Dealers Act as providing consumers with a non-waivable right to bring class action suits for violations. The Court held that any contract prohibiting a class action suit violated the state's public policy and was void and unenforceable. The Court focused on the fact that the Legislature expressly granted the right to collective action in the Dealers Act. It was further concerned that the consumers would be discouraged from bringing cases with small damages if they couldn't bring collective actions.

The decision was appealed to the United States Supreme Court, which vacated the decision and remanded it for reconsideration in light of *AT&T Mobility*. Because the issue of preemption was not originally brought before me, and not preserved for review in the South Carolina proceedings, the South Carolina Supreme Court reinstated their initial opinion. *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) [*Herron II*].

4. **The Effect of *AT&T Mobility* on the Public Policy Rule Invalidating Class Action Waivers in Dealers Act Cases.**

Carroll contends that the public policy decision in *Herron I* invalidating class action waivers should be applied in the present case. He argues that the Clause is void *ab initio* because it conflicts with South Carolina statutory law. Toyota of Greenville contends that the public policy holding "stand[s] as an obstacle to the accomplishments" of "ensur[ing] that private arbitration agreements are enforced according to their terms." *AT&T Mobility*, 131 S. Ct. at 1748.

Toyota of Greenville also contends that the public policy holding disproportionately affects arbitration agreements and thus is preempted by the FAA, following *AT&T Mobility*. I agree. The rationale in *Herron I* of the Dealers Act providing a non-waivable right for class arbitration was rejected by the United State Supreme Court in *Gilmer*¹³ and once again in *AT&T Mobility*. See *AT&T Mobility*, 131 S. Ct. at 1749 n.5. I find that the Arbitration Clause is not

¹³ *Gilmer v. Interstate / Johnson Lane Corp.*, 500 U.S. 20 (1991).

rendered void because of a conflict with South Carolina statutory law where, as here, that law is preempted by the FAA.

Carroll argues that the text of the Dealers Act shows the South Carolina Legislature intended to preclude a waiver of classwide arbitration, citing to S.C. Code Ann. § 56-15-130. The text of the Dealers Act does not restrict a waiver of collective action with the clarity necessary to avoid preemption by the FAA.¹⁴ I find as the Court did in *American Express* that statutory permission does "not mean that individual attempts at conciliation were intended to be barred." *American Express*, 133 S. Ct. at 2311. Additionally, this argument overlooks S.C. Code Ann. § 56-15-80 which provides that the Act applies to agreements "between a manufacturer, wholesaler or distributor with a motor vehicle dealer", and not the consumer.

Finally, *Herron I*'s reasoning that class actions cannot be waived under the Dealers Act because damages are typically small was expressly rejected in *American Express*:

...But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.

American Express, 133 S. Ct. at 2311. Additionally, insofar as Carroll has the right, should he prevail in arbitration, to recover attorneys' fees and costs, he does not forfeit this right by pursuing arbitration. See, e.g., *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 n. 1 (4th Cir. 2002) (citing *Gilmer*, 500 U.S. at 27-28).

Therefore, I must find that *Herron I* is no longer applicable law following *AT&T Mobility* and its progeny.

¹⁴ When Congress has restricted the use of arbitration, it has done so with clarity. See 7 U.S.C. § 26(n)(2) (2006 ed., Supp. IV) (No arbitration agreement shall be valid if the agreement requires arbitration arising under this section); 15 U.S.C. § 1226(a)(2) (2006 ed.) (Motor vehicle franchise contracts that provide for arbitration may only be used if all parties consent in writing).

F. Preemption of a Private Attorney General Action.

Carroll claims FAA preemption does not apply because he is acting as a private attorney general. Toyota of Greenville disputes this and I find it necessary to revisit that issue now that I have the benefit of Carroll's deposition testimony. Additionally, I find that whether or not Carroll is acting as a private attorney general, recent U.S. Supreme Court authority compels me to apply the Arbitration Clause as written.

1. Private Attorney General.

The Dealers Act allows the Attorney General to appoint an Administrator to enforce the Act. The Dealers Act states in pertinent part:

(5) There is hereby created the Office of Administrator, within the Attorney General's office, and he shall appoint such personnel within his office for the purpose of regulating this chapter. The Administrator shall have the power to investigate, issue cease and desist orders and injunctive relief on any valid abuse connected with the sale, rental or leasing of a new or used motor vehicle; provided, however, this power shall only apply after reasonable attempts by the consumer have been made with the seller, dealer, manufacturer or lessor of the motor vehicle to alleviate the complaint.

S.C. Code Ann. § 56-15-40(5).

Carroll has neither plead nor presented any evidence that the Administrator has appointed him as a private attorney general. Nor has he presented any evidence that he made reasonable attempts with Toyota of Greenville to alleviate the complaint before purporting to act as a private attorney general, as required by S.C. Code Ann. § 56-15-40(5). Carroll also inherits the three previous pleadings in this case. Nowhere in these pleadings is a claim made that he is acting as a "private attorney general." SCRCP 9(d) requires that any official act be plead as a special matter.

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Further, Carroll asserts that the language of S.C. Code Ann. § 56-15-110(2) empowers private citizens to bring suit for the benefit of the public interest.¹⁵ This is similar to Plaintiff's public interest standing argument that allows standing when an issue is of such public importance as to require its resolution for future guidance.¹⁶ I found in my Order dated January 31, 2008 that Plaintiffs' (including Carroll's predecessor) attempt to establish public interest standing was denied. I ruled:

"... [this] lawsuit is an action by private individual plaintiffs against private corporate defendants."

(January 31, 2008 Order, p. 11).¹⁷

Carroll also admitted in his deposition that he was bringing this case for his own benefit, and for no one else.¹⁸ Finally, Carroll calls attention to a portion of my October 12, 2009 Order regarding the "private attorneys general" provision under the Dealers Act. However, I did not have the benefit of Mr. Carroll's deposition testimony at that time.

Since Carroll has now established that he is bringing the suit for his own benefit, and no one else, and I previously ruled this case is an action by private individual plaintiffs against private corporate defendants, I find that Carroll is not acting as a private attorney general.

2. Preemption.

Even if this Court were to find Carroll was acting as a private attorney general, the action is preempted by the FAA. The FAA preempts any attempt by a court or state legislature to

¹⁵ The language used in S.C. Code Ann. § 56-15-110(2) simply refers to collective action of the kind generally allowed under the Rules of Civil Procedure. See *Evans v. Creech*, 187 S.C. 371, 375, 197 S.E. 365, 366 (1938) (referring to Section 406 of the Code of Civil Procedure, which provided: "When the question is one of a common or general interest of 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 for the benefit of the whole").

¹⁶ The South Carolina Supreme Court has found in numerous cases that standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. *Davis v. Richland County Council*, 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 615 S.E.2d 876 (2009).

¹⁷ Plaintiffs did not file a Motion to Reconsider, so this finding remains the law of the case.

¹⁸ Carroll Dep., p. 74, ll. 5-6.

insulate a particular type of claim from arbitration. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). I find that prohibiting the waiver of the right to act as a private attorney general in an arbitration agreement is an obstacle to enforcement of arbitration agreements governed by the FAA.

Carroll cites *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011) for the proposition that FAA preemption does not apply to private attorney general actions. *Brown* dealt with representative actions under California's Private Attorneys General Act (PAGA). South Carolina does not have a private attorney general statute. The purpose of California's PAGA is to "deputiz[e] citizens as private attorneys general to enforce the Labor Code." *Id.* at 862. "This purpose contrasts with the private individual rights of a consumer to pursue class action remedies in court or arbitration." *Id.* at 861. This purpose is shown by the fact that the individual pursuing PAGA is only entitled to recover 25 percent of the civil penalty.

This is in sharp contrast to the Dealers Act, which does not empower private individuals to bring lawsuits on behalf of a state agency. Instead, it allows the Attorney General's Office to appoint an Administrator with the authority to investigate and regulate the Dealers Act. Unlike PAGA, the Dealers Act does not include a provision for civil penalties, but provides for the recovery of actual damages. Clearly, the purpose of lawsuits under the Dealers Act is to recover monetary damages that inure to the benefit of private individuals; and this is what Carroll testified he was doing in this case.

Furthermore, *Brown* has repeatedly been rejected. See *Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011) ("[The] Court finds that Plaintiff's California Private Attorney General Act claim is arbitrable, and that the arbitration agreement's provision barring him from bringing the claim on behalf of other employees is enforceable."); *Quevedo v. Macy's, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) ("[T]he Court concludes that

Quevedo's PAGA claim is arbitrable, and that the arbitration agreement's provision barring him from bringing that claim on behalf of other employees is enforceable."'). I find that *Brown* is not controlling law in the present case and decline to apply it here.

Even if Carroll were acting as a private attorney general, he would only have the right to injunctive relief. S.C. Code Ann. § 56-15-40(5). I find that Carroll could receive individual injunctive relief without acting as a private attorney general; therefore, he is not denied this by enforcement of his Arbitration Agreement and is not prevented from exercising a right he would otherwise have.

Carroll contends that prosecution of a statutorily created private attorney general action does not conflict with the purpose of the FAA. However, in *Luchini v. Carmax, Inc.*, No. CV-F-12-0417, 2012 U.S. Dist. LEXIS 102198, at *38-39 (E.D. Cal. July 23, 2012), the District Court for the Eastern District of California noted that *Brown* is incompatible with *AT&T Mobility*:

Brown fails to reconcile the U.S. Supreme Court's directives that the FAA displaces outright state law prohibition of "arbitration of a particular type of claim" and that a state is unable to require a procedure inconsistent with the FAA, "even if it is desirable for unrelated reasons." [*AT&T Mobility*], __ U.S. __, 131 S. Ct. at 1748, 1753. Under the FAA, the arbitration agreement, including its class waiver, must be enforced according to its terms, despite the attributes of PAGA. "Indeed, class arbitration was not even envisioned by Congress when it passed the FAA . . ." [*AT&T Mobility*], __ U.S. __, 131 S. Ct. at 1751. Like other courts,¹⁹ this Court views PAGA as an obstacle to enforcement of arbitration agreements governed by the FAA. As such, this Court is not prepared to preclude arbitration based on the SAC's PAGA claims.

Id. at *38-39.

I am bound to enforce the parties' Arbitration Clause even if this prevents Carroll from acting as a private attorney general.

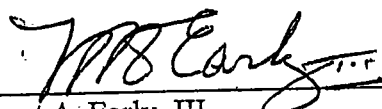
¹⁹ See, e.g., *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012); *Quevedo v. Macy's Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011); *Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159, 1181 (S.D. Cal. 2011); *Valle v. Lowe's HIW, Inc.*, No. 11-1489, 2011 U.S. Dist. LEXIS 93639 (N.D. Cal. Aug. 22, 2011).

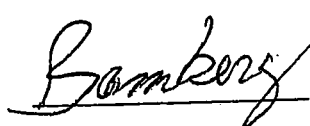
III. CONCLUSION

This is not an easy case as it requires me to interpret Supreme Court authority and apply it to an established South Carolina precedent that its public policy does not allow for class action waivers. The Supreme Court in *AT&T Mobility* and the subsequent cases has instructed me to find that the FAA preempts all laws that do not enforce the intent of the parties, and that have any disproportionate impact on arbitration agreements. Given this directive, I am required by the *Supremacy Clause* of the United States Constitution to find that the South Carolina public policy of no class action waivers in Dealers Act cases is preempted by the FAA. I therefore grant Toyota of Greenville's Motion, and order this case be stayed and compel the parties to enter bilateral arbitration.

Based on the foregoing and after full consideration of the issues herein, IT IS HEREBY ORDERED that Toyota of Greenville's Motion is GRANTED.

AND IT IS SO ORDERED.


Doyet A. Early, III
Presiding Judge

 South Carolina This 9th day of August, 2013.