THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

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

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

v.

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

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

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STATEMENT OF CASE

The Appellant, Century BMW a/k/a Sonic Automotive, the true name of which is Sonic Automotive 2752 Laurens Rd., Greenville, Inc. d/b/a Century BMW ("Century BMW"), appeals the Order of the Honorable Doyet A. Early, III, dated and received March 10, 2008, denying Century BMW's Motion to Compel Arbitration of Plaintiff Christine Watts's claims and to dismiss those claims. [R.p. ___; Order; R.p. ___; Motion.] Judge Early's Order, finding that Ms. Watts's arbitration agreement is unconscionable and unenforceable, relies on an erroneous reading of the facts and a misapplication of the law. [R.p. ___; Order.] The record demonstrates that Ms. Watts did not lack a meaningful choice in signing the arbitration agreement. In addition, binding precedent establishes that the agreement does not contain any oppressive, one-sided terms.

Factual Background

In Spring 2005, Christine Watts[1] and her father, Michael Watts,[2] were looking for a car for Ms. Watts as a present for her upcoming graduation from the University of South Carolina with a master's degree in accounting. [R.p. ___; Christine Watts Deposition at 9:10-14:2,

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[1] Ms. Watts is a twenty-six-year-old auditor with a bachelor's and master's degree in accounting. [R.p. ___; Christine Watts Deposition at 9:10-14:2, Jan. 29, 2008.] At the time of the transaction, Ms. Watts had interned at the renowned accounting firm of PricewaterhouseCoopers—where she was set to work upon graduation—and was on the verge of completing her master's degree. [R.p. ___; Christine Watts Deposition at 11:4-13:4.] As an auditor, Ms. Watts spends much of her time examining documents and working with numbers, and has been trained to review documents carefully. [R.p. ___; Christine Watts Deposition at 60:11-61:7.]

[2] Michael Watts is a fifty-two-year-old sales manager who has purchased a dozen cars from dealerships in his lifetime. [R.p. ___; Michael Watts Deposition at 16:1-21:2, Jan. 29, 2008.] From this experience, he knows that he can negotiate the price of any vehicle, that there are many places from which he can purchase a vehicle, that he does not have to buy additional product enhancements from the dealership, and that he can obtain financing from sources other than the dealership. [R.p. ___; Michael Watts Deposition at 20, 22, 24, 32, 44.]

20:22-24.] Although Ms. Watts was driving a fully operable Mitsubishi Montero, she wanted a luxury convertible. [R.p. ___; Christine Watts Deposition at 60:1-10; R.p. ___; Michael Watts Deposition at 24:4.] After visiting a number of other dealerships in their search for a car and engaging in price negotiations with them, they test drove a 2004 BMW Z4 ("Z4") convertible at Century BMW. [R.p. ___; Michael Watts Deposition at 25:17 – 26:14.] They then left the dealership to deliberate on the Z4 purchase and check on financing with Mr. Watts's credit union. [R.p. ___; Michael Watts Deposition at 31:20-24.]

Mr. Watts obtained financing from his credit union. [R.p. ___; Michael Watts Deposition at 38:6-18.] Then, from the comfort of his home, he telephoned a Century BMW saleswoman to negotiate the price of the Z4; Ms. Watts did not participate in the negotiations. [R.p. ___; Michael Watts Deposition 33:18-36:7; R.p. ___; Christine Watts Deposition 27:23-24, 30:25-31:2.] Mr. Watts had multiple phone calls with the saleswoman, hoping to pay no more than a total of $32,000, which he had established as their bottom-line purchase price. [R.p. ___; Michael Watts Deposition 36:10-38:5; R.p. ___; Christine Watts Deposition 30:25-32:19.] During these negotiations, Mr. Watts knew he could walk away at any time, as he had done in the past, if he did not like any of the terms and conditions the dealership offered. [R.p. ___; Michael Watts Deposition 36:19-24.] Ultimately, they agreed on his bottom-line price of $32,000, a figure that included any and all taxes, fees, and additional charges. [R.p. ___; Christine Watts Deposition 33:10-12.]

A few days later, the Wattses returned to Century BMW to go through the paperwork with an F&I manager. [R.p. ___; Michael Watts Deposition 40:11-18; R.p. ___; Christine Watts Deposition 34:1-38:13.] As with the price negotiations, Mr. Watts did all of the talking while Ms. Watts was a detached observer. [R.p. ___; Christine Watts Deposition 39:10-14.]

The F&I manager did not overload the Wattses with a large number of documents to sign. Mr. Watts testified that he recalled signing five or six documents, while Ms. Watts signed six documents. Michael Dep. 50:18-24; R.p. ___; Christine Watts Deposition 46:15-17.] Moreover, only fourteen documents were handed to the Wattses during their meeting with the F&I manager. Bobby Bishop Dep. 65:14-15, 67:18-20, 68:3-4, 82:13-86:3, Jan. 30, 2008 (Attached as Exhibit C).] Mr. Watts confirmed that he did not receive a large stack of documents. Michael Dep. 51:4-6.]

The F&I manager did not place any duress on the Wattses. He did not prevent them from reading the documents and did not otherwise pressure them to sign anything. [R.p. ___; Michael Watts Deposition 50:13-51:17; R.p. ___; Christine Watts Deposition 44:17-19.] To the extent anyone was in a rush, it was the Wattses. Both explained they were "eager" to leave the dealership to drive the Z4 and tried to keep the meeting as short as possible. [R.p. ___; Michael Watts Deposition 50:1-14, 53:13-18; R.p. ___; Christine Watts Deposition 40:19-23, 46:18-22.] Ms. Watts was particularly removed from the process, admitting she was eager to leave and did not object to signing the documents because she "just wanted the car." [R.p. ___; Christine Watts Deposition 40:19-21, 46:18-47:7.] She claims to have not read *any* of the six documents she signed and did not participate in the meeting with the F&I manager. [R.p. ___; Christine Watts Deposition 43:16-22, 44:14-19.]

As to the arbitration agreement, the Wattses agree that **no one ever stated that they were required to sign the arbitration agreement in order to purchase the car.** [R.p. ___; Christine Watts Deposition 47:12-19; R.p. ___; Michael Watts Deposition 54:6-9.] This is consistent with Century BMW policy, **which is, and was, that the dealership will still sell a car to someone who refuses to sign the arbitration agreement.** [R.p. ___; John Robert

Bishop Deposition 22:24-23:10, 86:4-88:5.] No one prevented the Wattses from reading the arbitration agreement; any rush to sign the paperwork was entirely self-imposed. [R.p. ___; Michael Watts Deposition 50:1-14, 53:13-55:4; R.p. ___; Christine Watts Deposition 40:19-23, 44:17-19, 46:18-22.] Nevertheless, in their haste to leave the dealership, they chose not to ask questions about the arbitration agreement, chose not object to it, and said that they did not read it. [R.p. ___; Michael Watts Deposition 53:15-55:4; R.p. ___; Christine Watts Deposition 43:16-22, 44:14-19, 46:18-47:11.]

Far from feeling pressure to sign whatever the dealership put in front of them, the Wattses expressly declined many agreements that the F&I Manager offered. They refused to agree to or sign at least ten different agreements, including service contracts and dealership financing. [R.p. ___; Michael Watts Deposition at 41:3-45:9; *See* Ex. 1 (Menu of Investment Enhancements).]

Both were capable of reading and understanding the arbitration agreement. Mr. Watts admits that the caption "**ARBITRATION AGREEMENT**" is easy to read, that the bullet points—highlighting certain provisions in all capital letters—are perfectly readable, and that the rest of the agreement is not difficult to read. [R.p. ___; Michael Watts Deposition at 51:14-52:21.] Nevertheless, despite their admitted ability and opportunity to read the arbitration agreement, neither did so because they "wanted to get in and out as quickly as possible." [R.p. ___; Michael Watts Deposition at 50:5-7.]

The agreement provides that at the request of a party, "any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association." [R.p. ___; Arbitration Agreement; R.p. ___; Michael Watts Deposition at Ex. 1.] The agreement defines the "Claim(s)" that the parties agreed to arbitrate as including:

> any and all disputes, claims or controversies between the Parties relating to the Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) the purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, (c) any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair.

[R.p. ___; Arbitration Agreement; R.p. ___; Michael Watts Deposition at Ex. 1] The agreement provides that "once one of the Parties has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all Claims. By entering into this agreement the Parties are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." [R.p. ___; Arbitration Agreement; R.p. ___; Michael Watts Deposition at Ex. 1.] The agreement also provides that the arbitrator shall award "those damages or other relief allowed by [the] governing law," including "fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law." [R.p. ___; Arbitration Agreement; R.p. ___; Michael Watts Deposition at Ex. 1.] Additionally, under the agreement, Century BMW must pay for nearly all arbitration costs, the customer can choose between optional arbitration locations, and the customer can avoid arbitration entirely by bringing an action in small claims court. [R.p. ___; Arbitration Agreement; R.p. ___; Michael Watts Deposition at Ex. 1.]

Procedural Background

On October 31, 2006, Ms. Watts, along with other plaintiffs, brought this lawsuit as a representative action against hundreds of South Carolina car dealerships, alleging that in connection with her purchase of the BMW Z4 convertible, Century BMW impermissibly

charged her an administrative fee. [R.p. ___; Amended Complaint ¶¶ 384-85.][3] She acknowledges that S.C. Code Ann. § 37-2-307 authorizes dealerships to charge such a fee, but alleges that Century BMW did not follow certain statutory requirements—without identifying which requirements were not followed. [R.p. ___; Amended Complaint ¶¶ 337-49.] She further alleges that even if Century BMW fully complied with § 37-2-307, its charging of a closing fee still violates the Dealers Act, S.C. Code Ann. § 56-15-10 *et. seq.* [R.p. ___; Amended Complaint ¶ 350.] Ms. Watts brought one count for violation of S.C. Code Ann. § 56-15-10 and another count for a declaratory judgment with respect to S.C. Code Ann. § 56-15-10 et. seq. and/or § 37-2-307.

On December 29, 2006, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 et seq., and the arbitration agreement that Ms. Watts executed, Century BMW moved to compel arbitration of Ms. Watts's claims and to dismiss this action. . [R.p. ___; Arbitration Agreement.]

In February and March 2007, both parties submitted memoranda regarding the motion to compel arbitration. . [R.p. ___; Def.'s Mem. & Reply Mem. in Support of Mot. to Compel Arb. (Exs. F and G); . [R.p. ___; Pls.' Mem. in Opp'n to Mot. to Dismiss at 29-35 (Ex. H).] The circuit court postponed ruling on the motion in light of the South Carolina Supreme Court's intervening decision in *Simpson v. Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), which addressed an arbitration agreement in a vehicle transaction.

In November 2007, both parties submitted supplemental memoranda addressing *Simpson*'s impact on Century BMW's motion. . [R.p. ___; Def.'s Supp. Mem. in Support of

[3] Although Mr. Watts co-signed for Ms. Watts's purchase from Century BMW and signed the arbitration agreement, he has not sued Century BMW based on the purchase and does not allege he purchased a vehicle from Century BMW. [R.p. ___; First Amended Complaint ¶ 388 (alleging only a purchase from Toyota of Greenville).]

Mot. to Compel Arb. (Ex. I); R.p. ___; Pl.'s Supp. Mem. Opposing Def.'s Mot. to Compel Arb. (Ex. J).] On November 30, 2007, the circuit court heard oral argument, after which it granted limited discovery relating to the arbitration agreement. On January 29, 2008, Michael and Christine Watts were deposed and on January 30, 2008, Bobby Bishop, the General Manager of Century BMW, was deposed as a Rule 30(b)(6), SCRCP, corporate representative.

On February 18, 2008, both parties submitted additional supplemental memoranda. [R.p. ___; Def.'s Second Supp. Mem. in Support of Mot. to Compel Arb. (Ex. K); R.p. ___; Pl.'s Second Supp. Mem. Opposing Def.'s Mot. to Compel Arb. (Ex. L).] On February 22, 2008, the parties submitted replies to the supplemental memoranda. [R.p. ___; Def.'s Second Reply Mem. in Support of Mot. to Compel Arb. (Ex. M); R.p. ___; Pl.'s Second Reply Mem. Opposing Def.'s Mot. to Compel Arb. (Ex. N).]

On March 10, 2008, Judge Early denied Century BMW's Motion to Compel Arbitration of Ms. Watts's claims on the ground that the arbitration agreement is unconscionable. Century BMW timely appealed the denial two days later.

Standard of Review

Pursuant to S.C. Code Ann. § 15-48-200(a)(1), "[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration made under § 15-48-20 . . . ." Similarly, the Federal Arbitration Act ("FAA") states: "An appeal may be taken from . . . an order . . . denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1)(C). Therefore, as this Court held in *Towles v. United Healthcare Corp*, "an order that favors litigation over arbitration—whether it refuses to stay litigation in deference to arbitration [or] refuses to compel arbitration . . .—is immediately appealable, even if interlocutory." 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999) (internal quotation and emphasis omitted).

Arbitrability determinations are subject to *de novo* review. *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667. A circuit court's factual findings must be reasonably supported by the evidence. *Id.*

Argument

Ms. Watts does not contest that: (1) she executed the arbitration agreement, (2) the FAA applies to the agreement, and (3) her claims fall within the scope of the agreement. Consequently, pursuant to the FAA, the arbitration agreement is valid and enforceable, and Ms. Watts must arbitrate her claims. 9 U.S.C. § 1 *et seq.*; *see Green Tree Fin. Corp. – Al. v. Randolph*, 531 U.S. 79 (2000).

Both federal and South Carolina law favor arbitration. Through the FAA, Congress endorsed arbitration as a less formal and more efficient means of resolving disputes than litigation. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998) (internal citation omitted). The United States Supreme Court describes arbitration as an attractive method of resolving disputes because of its simplicity, informality, and expedience. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

The FAA and the federal policy favoring arbitration bind state courts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (internal citation omitted). "[S]tates may not treat arbitration clauses differently from other contract provisions," and may not "singl[e] out arbitration provisions for suspect status." *Lackey*, 330 S.C. at 397, 498 S.E.2d at 903 (internal citation omitted).

Consistent with this federal requirement, South Carolina also has a strong policy favoring arbitration. *See Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). South Carolina courts give "due regard . . . to the federal policy favoring arbitration," *id.*, and "unless the court can say with positive assurance that the

arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (internal citation omitted). Accordingly, any doubts concerning enforceability of an arbitration agreement "should be resolved in favor of arbitration." *Id.*

A. The Circuit Court Erred By Reversing the Presumption Favoring Arbitration.

The circuit court violated the federal policy favoring arbitration. Rather than resolving any doubts in favor of arbitration, the circuit court did the exact opposite, saying that it approached the arbitration agreement with "considerable skepticism." [R.p. ___; Order at 4.] The circuit court's "considerable skepticism"[4] violates the United State Supreme Court's mandate that state courts place arbitration agreements on equal footing with all other contracts. *See Lackey*, 330 S.C. at 397, 498 S.E.2d at 903 (citing *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 81 (1996)). This Court should therefore reverse the circuit court's order as inconsistent with federal law and enforce the arbitration agreement.

B. The Circuit Court Erred in Finding the Agreement Unenforceable Despite the Wattses' Undisputed Opportunity to Read It.

The circuit court turned nearly a century of South Carolina precedent on its head by excusing the Wattses' failure to read the arbitration agreement they now complain about. The circuit court found it "unavailing" that the "Wattses could have read the agreement," noting that even if they had read it, it was "not easily understandable." [R.p. ___; Order at 6-7.) This reasoning is inconsistent with long-standing South Carolina law and the factual record in this case.

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[4] The circuit court simply signed—without change—the lengthy order that plaintiffs' counsel submitted.

Under South Carolina law, every contracting party has a duty to read an agreement before signing it. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340 S.E.2d 786 (1986) (citing *J.B. Colt Co. v. Britt*, 123 S.E. 845 (1924)). Consonant with that duty, a party who is capable of reading an agreement but fails to do so is "bound by the terms thereof." *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981). In other words, a party cannot avoid the effect of an agreement by claiming he did not read it, *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003), because South Carolina courts will "not protect those who, with full opportunity to do so, will not protect themselves," *Brit*, 123 S.E. at 848.

This bedrock principle of contract law applies to arbitration agreements. In *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001), the South Carolina Supreme Court refused to invalidate an arbitration agreement where the plaintiffs claimed that the defendant had not advised them that an arbitration clause was in the contract. *Id.* at 541, 542 S.E.2d at 365. The Court held that "a person who can read is bound to read an agreement before signing it." *Id.* This venerable state law principle, the Court held, was also compelled by the federal mandate that arbitration agreements "will not be set aside on the ground the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it." *Id.* at 541 n.6, 542 S.E.2d at 365.

The circuit court's Order ignores this basic tenet. The Wattses admit no one prevented them from reading the agreement and they were capable of reading it, but the circuit court found that because they did not read it—and thus did not understand it—they should not be held accountable for their signatures. Rather than focus on the Wattses' carelessness in not reading the agreement, the circuit court shifted the blame to Century BMW, explaining that it would not

enforce the agreement because the F&I manager never explained it to them. [R.p. ___; Order at 6-7.]

The circuit court's order was thus directly inconsistent with *Munoz* and with other South Carolina Supreme Court precedent. The law imposes no duty "to explain to an individual what he could learn from simply reading the document." *See Citizens & Southern Nat'l Bank v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994); *Towles*, 338 S.C. at 39, 524 S.E.2d at 845; *Regions Bank*, 354 S.C. at 664, 582 S.E.2d at 440. As long as a party had the ability and opportunity to read the agreement, he is bound by his signature. *See Sims*, 276 S.C. at 643, 281 S.E.2d at 230.

Here, the Wattses failure to read the agreement caused any failure to understand it. Mr. Watts testified that the agreement was readily identifiable as an arbitration agreement and perfectly readable. [R.p. ___; Michael Watts Deposition at 51:14-52:21.] Their rush to leave the dealership as quickly as possible does not relieve them of the obligations they undertook in the contracts they signed.

If the circuit court's Order is upheld, a party would have an enormous incentive not to read agreements she signs so that if she later decides she does not like some of the terms, she can void the contract by suddenly claiming she did not understand it. How could consumer or business transactions proceed if parties are free to invalidate agreements by later claiming they did not read them? Under the circuit court's holding, the contract for the purchase of the vehicle itself could be voided because Ms. Watts claims not to have read that agreement as well. [R.p. ___; Christine Watts Deposition at 43:20-22.]

The circuit court's decision is also inconsistent with *Simpson v. Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). In *Simpson*, the Court reaffirmed the presumption that "a party

to a contract has read and understood the contract's terms." *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670. It found the presumption rebutted in that case, however, because of the "inconspicuous nature of the arbitration clause," which was written in tiny print on the back of the contract, and was "embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page." *Id.*

In contrast, the arbitration agreement here is conspicuous. It is an easy-to-read, free-standing document with key portions bolded, underlined, and in all capital letters. [R.p. ___; Arbitration Agreement; R.p. ___; Michael Watts Deposition Ex. 1.] Mr. Watts admits that it would not have been difficult to read the entire agreement, which was clearly titled "**ARBITRATION AGREEMENT**." [R.p. ___; Michael Watts Deposition. at 51:14-52:21.] Thus, unlike in *Simpson*, the agreement here was conspicuous and there was no valid excuse for the Wattses' failure to read it.

As long as the Wattses had the ability and opportunity to read the arbitration agreement—a fact they do not contest—South Carolina law binds them to their signatures. Thus, the circuit court erred by denying the motion to compel arbitration.

C. The Arbitration Agreement Is Not Unconscionable Because the Wattses Did Not Lack a Meaningful Choice and the Agreement Does Not Contain Any Oppressive and One-sided Terms.

The circuit court also erred in finding the arbitration agreement unconscionable. Under South Carolina law, an agreement is unconscionable only when there is both an "absence of meaningful choice on the part of one party due to the one-sided contact provisions" *and* "terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902 (quoting *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996)); *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365. *Simpson* emphasized "the importance of a case-by-case

analysis" to address the unique circumstances and facts of each consumer transaction. 373 S.C. at 36, 644 S.E.2d at 674.

In *Simpson*, the South Carolina Supreme Court found an arbitration clause in a motor vehicle transaction to be unconscionable and unenforceable because Simpson lacked a meaningful choice in signing the agreement and the agreement contained oppressive, one-sided terms. This case is unlike *Simpson* because the Wattses had a meaningful choice and there are no one-sided terms.

1. Unlike in *Simpson*, the Wattses had a meaningful choice in agreeing to arbitrate.

The circuit court erred in finding that Ms. Watts "had an absence of meaningful choice when she entered into the arbitration agreement." [R.p. ___; Order at 8.] *Simpson* set out the factors to consider in the meaningful choice analysis:

> courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson, 373 S.C. at 25, 644 S.E.2d at 669.

The circuit court erroneously found the agreement at issue was a contract of adhesion, there was a disparity in the parties' bargaining power, the plaintiffs were not sophisticated, there was unfairness and surprise in the inclusion of the agreement, and the convertible was a "necessity." On each of these factors the circuit court relied on either a flawed reading of the record or a misapplication of the law.

a. The arbitration agreement was not a contract of adhesion.

The factual record established that the arbitration agreement was not a contract of adhesion because Century BMW did not require customers to sign the agreement to complete the

deal.[5] An adhesion contract is "a standard form contract offered on a 'take-it-or-leave-it' basis," with non-negotiable terms. *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901. To be an adhesion contract requires both that the terms are non-negotiable *and* that the contracting party is unwilling to waive enforcement in order to deal. *See Wingard v. Exxon Co.*, 819 F. Supp. 497, 503 (D.S.C. 1992); *see also Lackey*, 330 S.C. at 394, 498 S.E.2d at 901.

Here, the Wattses have not established, and cannot establish, that the arbitration agreement was an adhesion contract. The Watts transaction was thoroughly negotiated as they haggled extensively over the price and refused to enter into multiple other agreements the dealership proffered at the closing of the transaction. Moreover, Century BMW did not present the arbitration agreement on a "take it or leave it basis." An offeree faced with an adhesion contract has two choices: "complete adherence or outright rejection." *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901. Here, the Wattses never faced such a choice. The Wattses admit no one told them they were required to sign the arbitration agreement. They admit they asked no questions about any documents. [R.p. ___; Michael Watts Deposition; R.p. ___; Christine Watts Deposition.] Moreover, they point to no statement or affirmative action indicating that their signatures were required or establishing that Century BMW was unwilling to consummate the transaction if they refused to sign. The circuit court's only evidentiary support for its finding appears in a footnote in which it notes Ms. Watts's ambiguous, unsupported allegation that she

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[5] Adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669 (citing *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902). They are "part of the fabric of our society" and "obviously serve a very useful purpose in commerce" as "a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations." *Lackey*, 330 S.C. at 395-96, 498 S.E.2d at 902 (internal quotation omitted); *see also Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 88 (4th Cir. 2005) ("Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable.") (internal citation omitted)).

subjectively believed they were required to sign the arbitration agreement, without any articulation of **how** she came to believe that. [R.p. ___; Order at 4 n.1.] The record simply contains no objective evidence that the agreement was mandatory. Rather, it shows that (1) the Wattses were never told that the arbitration agreement was required, (2) neither of the Wattses asked any questions about the arbitration agreement, (3) neither of the Wattses voiced any objections to the arbitration agreement, and (4) the Wattses were eager to leave the dealership as quickly as possible. Moreover, it is undisputed that Century BMW's policy is to complete the transaction whether or not the customer signs the arbitration agreement and that the dealership has had customers refuse to sign the arbitration agreement and still purchase a vehicle. [R.p. ___; John Robert Bishop Deposition at 22:24-23:18, 86:4-88:5.]

The court's decision also relies on the fact that Century BMW's General Manager could name only one customer during the deposition who purchased a vehicle without signing an arbitration agreement. [R.p. ___; Order at 4.] This is a red herring. Mr. Bishop (Century BMW's General Manager) explained that the dealership handles deals in which a customer does not sign the arbitration agreement no differently than those in which the customer does sign it; the deal is not flagged in any way. [R.p. ___; John Robert Bishop Deposition at 23:11-18; 43:20-44:9.] Since the General Manager of the dealership is not the dealership employee who interacts with the customer at the time the arbitration agreement is presented to and either accepted or not accepted by the customer, it is hardly surprising that he did not have at his finger tips the names of all of the customers who have previously declined to sign the arbitration agreement and still purchased vehicles. He testified unequivocally under oath, however, that he knew there were other customers, whose names he did not know, who have refused to sign the

arbitration agreement and still purchased vehicles. [R.p. ___; John Robert Bishop Deposition at 87:10-14.]

b. The Wattses are well-educated, sophisticated consumers who exercised considerable bargaining power during the transaction.

The circuit court also erred in finding a "clear disparity in the parties' bargaining power" and that the plaintiffs were not sophisticated. [R.p. ___; Order at 5.] The Wattses are well-educated, savvy consumers who exerted significant bargaining power during the entire transaction with Century BMW. The record demonstrates that Ms. Watts was accompanied by her father, who had purchased nearly a dozen vehicles from other dealerships. For her part, at the time of the transaction Ms. Watts was highly-educated and about to attain a master's degree in accounting, had already worked at a prestigious accounting firm, and was about to begin a career founded upon the careful examination of documents. No one from the dealership pressured the Wattses to do anything they did not want to do: they negotiated below the sticker price of the vehicle, refused all additional product enhancements, and obtained outside financing. Indeed, the Wattses did nearly everything a leading consumer's group recommends car buyers do when making a vehicle purchase, including (1) researching a variety of models, (2) test driving the vehicle, (3) negotiating by phone, (4) negotiating below the sticker price, (5) obtaining outside financing, (6) refusing to purchase additional features, and (7) selling the prior vehicle (Montero Mitsubishi) to an independent buyer rather than trading it in, Michael Watts Deposition at 57:5-9.[6] [R.p. ___; Michael Watts Deposition at 57:5-9.] As the Court is no doubt aware, car

[6] *See generally* ConsumerReports.org on Yahoo! Autos, *10 common car-buying mistakes*, http://autos.yahoo.com/consumerreports/article/common_car_buying_mistakes.html (last visited Feb. 14, 2008). Century BMW disagrees with some of what the article says, but notes that Mr. Watts seems to have followed most of the article's suggestions. [R.p. ___; 10 Common Car-Buyiing Mistakes]

purchases are probably the most highly negotiated type of consumer transaction, with haggling and horse-trading being the rule rather than the exception. The Wattses knew that they could walk away from the negotiations for the transaction at any time and had, in fact, previously terminated earlier negotiations with another dealership because they were dissatisfied with the bargain offered. [R.p. ___; Michael Watts Deposition at 25:14-27:4.] Therefore, the record demonstrates that the Wattses were not only sophisticated consumers, but also that they possessed and exercised considerable bargaining power during their transaction with Century BMW.

c. The arbitration agreement is conspicuous and easily understandable.

The circuit court also found there was unfairness and surprise in the inclusion of the arbitration agreement because it was "inconspicuously placed" with other documents and was not easily understandable. [R.p. ___; Order at 6.] Once again, the record demonstrates otherwise. Ms. Watts's arbitration agreement could hardly be more conspicuous—in sharp contrast to the clause in *Simpson*. Simpson's arbitration clause was single-paragraph arbitration *clause* on the back of a form buyer's order (embedded within sixteen other clauses) that Simpson neither initialed nor otherwise independently agree to. Here, Ms. Watts signed a stand-alone *agreement*, conspicuously entitled "**ARBITRATION AGREEMENT**." [R.p. ___; Arbitration Agreement; R.p. ___; Christine Watts Deposition at Ex. 1.] The full-page agreement required both of the Wattses signatures to indicate their assent. [R.p. ___; Arbitration Agreement; R.p. ___; Christine Watts Deposition at Ex. 1.] Moreover, several provisions are in all capital letters, and clearly written: "IF A DISPUTE IS ARBITRATED, YOU AND WE WILL EACH GIVE UP OUR RIGHT TO A TRIAL BY THE COURT OR BY A JURY." [R.p. ___; Arbitration Agreement; R.p. ___; Christine Watts Deposition at Ex. 1.] The final sentence of the agreement,

which is in bold and all capital letters, states: "**BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND AGREE TO THE TERMS OF THIS ARBITRATION AGREEMENT.**" [R.p. ___; Arbitration Agreement; R.p. ___; Christine Watts Deposition at Ex. 1.] Because Ms. Watts signed a stand-alone arbitration agreement, which included unmistakable notice both of what she was signing and the consequences of her signature, the circuit court's finding that the agreement was inconspicuous is clearly erroneous. Moreover, Mr. Watts admits that the document is easily identifiable as an arbitration agreement and that it would not have been difficult to read the entire agreement. [R.p. ___; Michael Watts Deposition at 51:14-52:21.] To the extent the Wattses were unaware of the implications of the arbitration agreement, they have solely themselves to blame as any haste in signing the documents came from them alone; they were in a rush to get out of the dealership "as quickly as possible." The F&I manager put no pressure on them to sign the agreement. [R.p. ___; Michael Watts Deposition at 50:2-14.] Thus, had the Wattses taken the time to read the agreement, they would have been aware of its consequences.

d. The 2004 Z4 BMW convertible was not a necessity.

Finally, the purchase of a 2004 Z4 BMW convertible was not a "necessity." Ms. Watts had a working vehicle and did not need to buy a luxury convertible to get to and from work. Moreover, the Wattses were well aware that they had other options in purchasing a vehicle, having visited other dealerships in their search for this graduation gift. [R.p. ___; Michael Watts Deposition at 25:13-23.]

Therefore, the record demonstrates that the arbitration agreement was not mandatory and that Ms. Watts did not lack a meaningful choice in agreeing to arbitrate.

2. Ms. Watts's arbitration agreement lacks any oppressive, one-sided terms.

In addition to erring in finding a lack of meaningful choice, the circuit court also erred in finding the arbitration agreement had oppressive, one-sided terms that no reasonable person would make or accept, an independent ground requiring reversal of the ruling below.

Simpson found a number of unconscionable provisions in the arbitration agreement there; none is in the Wattses' arbitration agreement. Moreover, although plaintiffs' counsel represents that there are 1100 words in the arbitration agreement, [R.p. ___; John Robert Bishop Deposition at 63:16], in all of those words, plaintiffs' counsel has found only one provision that they contend is unconscionable: a provision requiring individual, rather than class, treatment of claims. [R.p. ___; John Robert Bishop Deposition at 63:16] The *Simpson* arbitration clause, however, also contained a class action waiver and the South Carolina Supreme Court had the opportunity to examine that provision and did not find it unconscionable. The circuit court's finding that the provision requiring individual treatment of claims prevented Ms. Watts from effectively vindicating her rights in arbitration is inconsistent not only with *Simpson* but also with binding federal authority.

a. The majority of jurisdictions addressing arbitration agreements with class action waivers—and the only two decisions with binding authority on this Court—have upheld such provisions.

The great weight of authority has found that clauses requiring individual treatment of claims are reasonable and enforceable. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied* 126 S. Ct. 1457 (2006).[7] That certain litigation devices—

[7] *See also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (precluding class arbitration "does not leave the plaintiffs without remedies"); *Livingston*

including representative actions—may not be available in an arbitration "is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [—] characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.'" *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 31 (1991)); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1350 (11th Cir. 2005). In fact, had Ms. Watts abided by her agreement to arbitrate, it is almost a certainty that her claim would already have been resolved.

Two decisions that bind this Court did not find class action waivers unconscionable. The *Simpson* Court found that the arbitration clause there "contained a total of three unconscionable provisions," none of which was the requirement for individual treatment of claims. *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674. The court stressed throughout its decision that it would not enforce any provision that "is violative of policy, statutory law, or provisions of the Constitution." *Id.* at 33, 644 S.E.2d at 673. Thus, if the provision precluding the class treatment of claims violated the Dealers Act—the statutory basis for Simpson's claims—the court would have expressly found it unconscionable. But it did not do so, confirming that such provisions are, in fact, enforceable.

Likewise, the United States Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), compels the conclusion that class action waivers are enforceable.

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v. Assocs. Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277 (7th Cir. 1995); *Delta Funding Corp. v. Harris*, 189 N.J. 28 (2006); *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) ("Such provisions are a common feature of consumer arbitration agreements, and numerous courts have recognized that they are valid and fully enforceable."); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable."); *Gay v. Creditinform*, 511 F.3d 369 (3rd Cir. Dec. 21, 2007); *Davidson v. Cingular*, 2007 WL 896349, No. 2:06CV00133-WRW (E.D. Ark. 2007).

There, the Court held that it was for an arbitrator to determine whether the arbitration clause at issue precluded class-wide arbitration. *Id.* at 454. By permitting the arbitrator to decide whether the clause prevented class-wide arbitration, the Supreme Court recognized that class preclusion was permissible; after all, if class preclusion were per se invalid, then the Court would have just said so and not directed the arbitrator to determine whether the agreement allowed for class actions. *See also Kinkel v. Cingular*, 223 Ill. 2d 1, 19 (2006) ("The Court's holding in *Green Tree* . . . suggest[s] that an arbitration agreement expressly waiving the ability to arbitrate class claims is enforceable.").

Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002), has the same effect. There, the United States Court of Appeals for the Fourth Circuit, upon which *Simpson* relied,[8] rejected an attack on a class action waiver in the context of a consumer protection statute. The plaintiff, who sued, *inter alia*, under the Maryland Consumer Protection Act, claimed that the waiver violated public policy because it precluded her from attracting legal representation given her modest claim for damages. *Snowden*, 290 F.3d at 638-39. The Fourth Circuit disagreed. First, it held that because the prevailing party could recover attorneys' fees, the plaintiff had sufficient ability to obtain legal representation. *Id.* at 638. Second, it "rejected as meritless" the argument that the agreement violated public policy, holding that such logic failed to place arbitration agreements on equal footing with other contracts. *Id.* at 639. The Fourth Circuit emphasized that the "agreement placed no limitations upon the substantive remedies available to Snowden in arbitration."[9] *Id.* As in *Snowden*, the arbitration agreement here is valid and enforceable because Ms. Watts can recover attorneys' fees and the agreement places no

[8] *See Simpson v. Myrtle Beach, Inc.*, 373 S.C. at 668-69 (2007).

[9] Invalidating Ms. Watts's arbitration agreement would thus create a split between state and federal courts in South Carolina.

limitations on the substantive remedies she can recover in arbitration. [R.p. ___; Arbitration Agreement; R.p. ____, Christine Watts Deposition at Ex. 1.]

b. The arbitration agreement does not inhibit a customer's ability to bring a claim against Century BMW.

Ms. Watts is able to vindicate her claims under the arbitration agreement inexpensively. Century BMW must pay for nearly all arbitration costs, including the filing fee in excess of the cost of the court filing fee. [R.p. ___; Arbitration Agreement; R.p. ____, Christine Watts Deposition at Ex. 1.] The agreement is also subject to the American Arbitration Association ("AAA") rules, which require the dealership to pay the entire arbitrator's fee in excess of $125. [R.p. ___; American Arbitration Rules; R.p. ____, Christine Watts Deposition at Ex. 1 (AAA rules).] Additionally, under the agreement, attorneys' fees and costs are recoverable in accordance with the applicable law.[10] [R.p. ___; Arbitration Agreement; R.p. ____, Christine Watts Deposition at Ex. 1.]

The agreement also grants Ms. Watts the right to forego arbitration entirely. If a customer wants to avoid arbitration, the agreement allows her to do so by bringing a claim in small claims court. [R.p. ___; Arbitration Agreement; R.p. ____, Christine Watts Deposition at Ex. 1.] .

Thus, a consumer can easily and inexpensively pursue a claim against Century BMW.

c. The arbitration agreement explicitly places no limits on Ms. Watts's remedies.

The circuit court incorrectly held that the arbitration agreement prevents Ms. Watts from effectively vindicating her rights under the Dealers Act. When evaluating arbitration agreements

[10] *See, e.g., Jenkins v. First American Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005) (arbitration agreement permitted consumers to vindicate their statutory rights because it expressly permitted consumers to recover attorneys' fees and costs); *Snowden*, 290 F.3d at 638.

with class action waivers, courts generally focus on whether the agreement limits a party's ability to receive remedies in arbitration. In *Simpson*, for example, the court focused on whether the arbitration clause limited the plaintiff's ability to receive damages. *Simpson*, 373 S.C. at 28. There, the clause precluded the arbitrator from awarding punitive, double, or treble damages, *Simpson*, 373 S.C. at 28, which prevented Simpson from receiving the "statutory remedies to which she may be entitled in her underlying . . . Dealers Act claim[]." *Simpson*, 373 S.C. at 30. Likewise, in the minority of courts that have found class action waivers invalid, typically the arbitration agreement removed some remedies, such as attorneys' fees or certain damages.[11] *See, e.g., Dale v. Comcast*, 498 F.3d 1216 (11th Cir. 2007) (distinguishing Eleventh Circuit cases upholding class action waivers on the basis that the plaintiffs in those cases could recover attorneys' fees and costs); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 313-14 (Mo. App. 2005) (arbitration clause required customers to bear the costs of arbitration and prohibited an award of incidental, consequential or exemplary damages, or attorney fees).

Here, the arbitration agreement—on its face—does not limit Ms. Watts's remedies. It unambiguously authorizes an arbitrator to award "those damages or other relief allowed by [the] governing law," including "fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law." [R.p. ___; Arbitration Agreement; R.p. ____, Christine Watts Deposition at Ex. 1.] Ms. Watts is not precluded from recovering statutory damages. The agreement authorizes any award of attorneys' fees and costs that applicable law permits. [R.p. ___; Arbitration Agreement; R.p. ____, Christine Watts Deposition at Ex. 1.] Moreover, despite the circuit court's assertion otherwise, the agreement explicitly grants the arbitrator the ability to

[11] Requiring claims to be treated on an individual basis is not a limitation of a substantive remedy. *See, e.g., Strand v. U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926 (N.D. 2005) ("[R]estricting the availability of a class action is not, by itself, a restriction on substantive remedies . . . . A class action is not a substantive remedy.").

award injunctive or equitable relief.[12] [R.p. ___; Arbitration Agreement; R.p. ____, Christine Watts Deposition at Ex. 1.]

Without any limitations on Ms. Watts's possible remedies, the Court should hold—consistent with *Greentree, Simpson*, and *Snowden*—that the class action waiver is valid and enforceable.

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court reverse the circuit court's Order and direct the circuit court to enter an order compelling arbitration of Ms. Watts's claims against Century BMW in accordance with the terms of the arbitration agreement and dismissing her claims currently pending in the circuit court.

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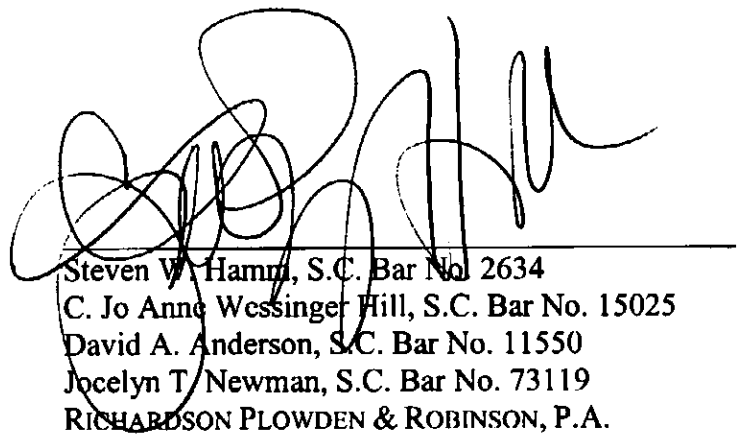
[12] The circuit court's invalidation of the arbitration agreement because it does not provide for broad equitable relief is erroneous as a matter of law and baseless as a matter of fact. [R.p. ___; Order at 10.] The United States Supreme Court previously addressed—and rejected— this argument in *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 31 (1991). First, the Court held that arbitrators have the power to fashion equitable relief and the applicable arbitration rule did not restrict the types of relief an arbitration could award, including equitable relief. Second, the Court noted that even if the arbitration could not proceed as a class action, that the statute "provides for the possibility of collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* Finally, the Court found it significant that the arbitration agreement did not preclude the Equal Employment Opportunity Commission from bringing actions seeking class-wide equitable relief.

The same is true here. First, not only do arbitrators have the power to fashion equitable relief, but Ms. Watts's agreement, on its face, provides for all relief *including equitable relief.* Second, that the Dealers Act provides for the possibility of collective action does not make the right to bring a class action under the Dealers Act an unwaivable right. *See also Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3rd Cir. 2000); R.p. ___; Arbitration Agreement.] Indeed, *Simpson* did not find that the class preclusion clause there violated the Dealers Act. Finally, the South Carolina Attorney General's office is authorized to seek class-wide equitable relief for any violations of the Dealers Act. S. C. Code Ann. §56-15-40.

Respectfully submitted,



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