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SC Court of Appeals

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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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This is a simple case in which Christine Watts decided she wanted to purchase a luxury BMW convertible from Century BMW. With the active assistance of her father, she negotiated to purchase her 2005 BMW for the specific price of $32,000.00 including any and all taxes, fees or any other charges. [R.p. 1145, Buyer's Order.] Unremarkably, Ms. Watts and her father traveled to the dealership to close the transaction and sign the documents confirming she was purchasing a BMW convertible and was paying the exact price she and her father established in their negotiations. There were no additional fees or charges that suddenly appeared that increased the negotiated price of her convertible. Those documents included a separate and conspicuously titled Arbitration Agreement which both Ms. Watts and her father signed. These uncontested facts have morphed into a series of contradicting claims by the Wattses in order to avoid complying with her contractual obligation to arbitrate any dispute she might have with Century BMW.

The Respondent in her brief, Ms. Watts, does not mention that—consistent with Century BMW policy—the F&I manager never told the Wattses that signing the arbitration agreement was required to purchase a car. It also ignores Ms. Watts's own admission that she had full opportunity to read any and all documents, including the arbitration agreement, but decided not to because she was in a rush to leave the dealership. [R.p. 929, lines 1-14, R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.] These undisputed facts alone demonstrate that Ms. Watts had a meaningful choice in agreeing to arbitrate. Moreover, the agreement is both valid and enforceable under Supreme Court of the United States and South Carolina precedent because Ms. Watts can fully and effectively vindicate her claims in arbitration.

FACTS

Ms. Watts's response to Century BMW's appeal relies on numerous and substantial distortions of the record, including:

- "The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign." Pl.'s Br. at 8. However, Mr. Watts actually testified that he was not given a large stack of documents and said nothing about flags. [R.p. 930, lines 4-6, Michael Watts Dep. p. 51:4-6.]

- The arbitration agreement was presented "on a take-it-or-leave-it-basis." Pl.'s Br. at 13. Signing all of the documents was "mandatory." Pl.'s Br. at 17. "The Wattses were led to believe . . . they had to sign [the arbitration agreement] to get the car." Pl.'s Br. at 27. In this case, however, the Wattses were never told they had to sign the arbitration agreement. [R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9; R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19.] The record shows that Century BMW does not require a customer to sign the arbitration agreement to purchase a vehicle and has in fact had customers not sign the arbitration agreement and still purchase vehicles. [R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9; R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19; R.p. 1029, line 24 – p. 1030, line 10, R.p. 1093, line 4 – p. 1095, line 5, Bobby Bishop Dep. pp. 22:24-23:10, 86:4-88:5.]

- "The car . . . was needed so that she could get back and forth to work." Pl.'s Br. at 8. In this case, Ms. Watts had a perfectly operable vehicle before purchasing the 2004 BMW Z4 convertible in June 2005. [R.p. 998, line 24 – R.p. 999, line 10, Christine Watts Dep. pp. 59:24-60:10.]

- "The documents were hastily presented." Pl.'s Br. at 8. The actual sworn testimony of the Wattses indicates otherwise. It was the Wattses who were eager to leave the dealership as quickly as possible and the manager put no pressure on them to sign the documents. [R.p. 929, lines 1-14, R.p. 932, lines 13-18, Michael Watts Dep. pp.50:1-14, 53:13-18; R.p. 979, liens 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.] Ms. Watts's brief cites to her affidavit, rather than the deposition transcripts, because her deposition testimony contradicts her affidavit and confirms that any rush to sign the documents was self-imposed. *Compare* R.p. 1101, ¶4, Christine Watts Affid. *with* R.p. 929, lines 1-14, R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.

- The Plaintiffs can be dismissed as a "twenty-four year old" girl and a "garage door salesman." See, Pl.'s Br. at 8. The facts are that (1) the Respondent Christine Watts is a highly trained auditor with a bachelor's and master's degree in accounting, and (2) her father, Michael Watts, is a sales manager with prior

experience managing forty-five employees. [R.p. 948, line 10 - R.p. 953, line 2, Christine Watts Dep. pp. 9:10 – 14:2; R.p. 894, line 19 - R.p. 897, line 1 Michael Watts Dep. pp. 15:19-18:1.]

- The General Manager of Century BMW's statement that arbitration is a method to resolve disputes without having to go to court is somehow misleading. *See* Pl.'s Br. at 10. It is true that arbitration *is* a method of resolving disputes without having to go to court. In this matter, the arbitration agreement waives no statutory or common law remedies. Moreover, whatever the General Manager might hypothetically say to other customers has no relevance to this case or to the Wattses who claim that dealership employees provided no explanation—misleading or otherwise—of the arbitration agreement to them.

These distortions notwithstanding, the Respondent does not dispute several significant and fundamental facts:

(1) she was never told that signing the arbitration agreement was required to purchase a car [R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19; R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9];

(2) she was not pressured to sign the agreement, [R.p. 929, line 13 – R.p. 932, line 17, Michael Watts Dep. pp.50:13-51:17; R.p. 983, lines 17-19, Christine Watts Dep. p. 44:17-19];

(3) she had full opportunity to read the agreement, [R.p. 929, lines 1-4, R.p. 932, line 13- R.p. 934, line 4, Michael Watts Dep. pp. 50:1-14, 53:13-55:4; R.p. 979, lines 19-23, R.p. 983, lines 17-19, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 44:17-19, 46:18-22];

(4) she was the individual who decided to be in a rush to leave the dealership, [R.p. 929, line 1-14; R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22];

(5) she claims to have not read *any* of the six documents she signed, [R.p. 982, lines 16-22, R.p. 983, lines 14-19, Christine Watts Dep. p. 43:16-22, 44:14-19]; and

(6) Century BMW—as a matter of practice and policy—does not require a customer to sign the arbitration agreement to purchase a vehicle. [R.p. 1029, line 24-R.p. 1030, line 10; R.p. 1093, line 4-R.p. 1095, line 5, Bobby Bishop Dep. pp. 22:24-23:10, 86:4-88:5.]

ARGUMENT

I. The Circuit Court Erred By Reversing the Governing Presumption Favoring Arbitration Mandated by the Federal Arbitration Act.

Instead of favoring arbitration, the circuit court approached the Century BMW arbitration agreement with "considerable skepticism." [R.p. 4, Order p. 4.] The *Simpson* decision, upon which the circuit court relied, is not on point or controlling because it held that the South Carolina Uniform Arbitration Act ("UAA") governed the applicable agreement. 373 S.C. 14, 22-24. In this matter, by contrast, Ms. Watts's arbitration agreement is governed by the Federal Arbitration Act ("FAA"). *See* 9 U.S.C. § 1 *et seq.;* [R.p. 1100, Arbitration Agreement ("The parties acknowledge and agree that the Federal Arbitration Act . . . shall govern any arbitration under this Agreement.").] The FAA represents a "liberal federal policy favoring arbitration agreements" and mandates that courts resolve all doubts "in favor of arbitration." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396, 498 S.E.2d 898, 903 (S.C. Ct. App. 1998) (citing *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 81 (1996)). This policy *favoring* arbitration is binding on state courts and precludes the circuit court's presumption against arbitration. *See id.* By reviewing and analyzing the arbitration agreement with the wrong standard, the circuit court erred and its ruling should be reversed so that any dispute Ms. Watts may have can be arbitrated and resolved.

II. The *Simpson* Decision Confirms that the Wattses Cannot Avoid Enforcement of The Agreement They Signed By Later Claiming They Did Not Read It.

The circuit court's decision, excusing the Wattses' failure to read the arbitration agreement they now complain about, is inconsistent with *Simpson v. Myrtle Beach, Inc.*,

373 S.C. 14, 644 S.E.2d 663 (2007).[1] *Simpson* 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.*

Here, Ms. Watts claims the presumption was rebutted because the agreement contains small font and was inconspicuously placed within a series of separate documents. Pl.'s Brief at 30. Both claims are inaccurate. First, Ms. Watts's arbitration agreement is a separate document printed in ten point font, with certain portions bolded, underlined, and in all capital letters. [R.p. 1100, Arbitration Agreement.] Second, Mr. Watts confirmed that they did not receive a large stack of documents and recalled signing only five or six documents. [R.p. 929, lines 18-24, Michael Watts Dep. p. 50:18-24.] In fact, Ms. Watts signed six documents. [R.p. 982, lines 16-22, R.p. 983, lines 14-19, Christine Watts Dep. pp. 43:16-22, 44:14-19.]

Even if this Court were to somehow find Ms. Watts's claims valid, those two facts alone do not establish that the agreement was inconspicuous. Ms. Watts does not dispute

[1] It is also inconsistent with the long standing principles of law that a person who has signed a contract or other written document cannot avoid the effect of the document by claiming he did not read it. *Regions Bank v. Schmauch*, 354 S.C. 648, 663 582 S.E.2d 432, 440 (S.C. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981); *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977)). It is the responsibility of the person signing the document to read it and make sure of its contents. *Id.* at 644, 354 S.C. at 644. A person signing a written document has the duty to exercise reasonable care to protect himself by reading the document. *Id.* (citing *Maw v. McAlister*, 252 S.C. 280, 285, 166 S.E.2d 203, 205 (1969), *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 587, 239 S.E.2d 76, 77 (1977); *DeHart v. Dodge City of Spartanburg*, 311 S.C. 135, 139, 427 S.E.2d 720, 722 (Ct. App. 1993)).

that the agreement itself is conspicuous—in stark contrast to the agreement in *Simpson*. The arbitration clause in *Simpson* was a single-paragraph arbitration *clause* on the back of a form buyer's order (embedded within sixteen other clauses) that Simpson did not initial or otherwise independently sign. Here, Ms. Watts signed a stand-alone *agreement*, conspicuously entitled "**ARBITRATION AGREEMENT**." [R.p. 1100, Arbitration Agreement.] The full-page agreement required both of the Wattses to indicate their assent. [R.p. 1100, Arbitration Agreement.] Moreover, several provisions are in all capital letters, and are 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. 1100, Arbitration Agreement.] 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. 1100, Arbitration Agreement.] 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. 930, line 14-R.p. 931, line 21, Michael Watts Dep. pp. 51:14-52:21.] Thus, unlike in *Simpson*, the agreement here was conspicuous and there was no excuse or legal basis for the Wattses' failure to read it.

As long as the Wattses had the ability and opportunity to read the arbitration agreement—which they do not contest—South Carolina law binds them to their signatures. Thus, the circuit court erred by denying the motion to compel arbitration. No arbitration agreement would be enforceable if a party can later claim they did not take the time to read the agreement they signed. This result would require the Court to reverse

prior court rulings such as the *Lackey* decision. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. Ct. App. 1998).

III. The *Simpson* Decision is Distinguishable Because the Respondent Did Not Lack a Meaningful Choice and the Agreement Did Not Contain Oppressive and One-sided Terms.

The *Simpson* case also supports the propositions that the Respondent had a meaningful choice in signing the agreement and that the agreement does not contain any oppressive and one-sided terms. Ms. Watts's argument that "the facts in this case mirror those in *Simpson,*" Pl.'s Brief at 26, is in substantial conflict with the facts in this case. Although plaintiffs' counsel had Ms. Watts sign an affidavit a week after the *Simpson* decision parroting (virtually verbatim) the language of that decision and claiming that exactly what happened in the *Simpson* case had also miraculously happened to her, the depositions taken in this matter demonstrated that the Wattses' transaction was nothing like the *Simpson* transaction. Consider the following examples:

MEANINGFUL CHOICE	
***Simpson* Facts**	**Watts Facts**
The clause is a contract of adhesion; "[n]either party disputes that the contract . . . was an adhesion contract." 373 S.C. at 27.	**The agreement is not a contract of adhesion**; the F&I manager never told the Wattses that the arbitration agreement was mandatory. [R.p. 986, lines 16-19, Christine Watts Dep. p. 47:16-19; R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9.] Century BMW permits customers to buy cars even if they refuse to sign the agreement. [R.p. 1093, line 4-R.p. 1095, line 5, Bishop Dep. p. 22:24-23:10; 86:4-88:5.]
The contract was **presented on a take-it-or-leave-it basis**. *Id.* at 26-27.	The agreement was **not presented on a take-it-or-leave-it basis** because the F&I manager never said they had to sign it. [R.p. 986, lines 16-19, Christine Watts Dep. p. 47:16-19; R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9.]

Simpson **"did not possess the business judgment** necessary to make her aware of the implications of the arbitration agreement." *Id.* at 27.	Ms. Watts is an **auditor, trained to examine documents carefully, with a master's degree in accounting.** [R.p. 948, line 10-R.p. 953, lines 2; R.p. 999, line 11-R.p. 1000, line 7, Christine Watts Dep. pp. 9:10-14:2, 60:11-61:7.]
Simpson apparently was **unaccompanied** during her purchase. *Id.*	Ms. Watts was **accompanied by her father,** who had purchased twelve vehicles from dealerships in his lifetime. [R.p. 985, line 1-R.p., 900, line 2, Michael Watts Dep. pp. 16:1-21:2.]
The contract was **"hastily" presented** for her signature. *Id.*	**The Wattses were eager to leave the dealership as soon as possible** and any haste to sign the documents was solely caused by their self-imposed rush. [R.p. 929, line 1-14; R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.]
The vehicle was a necessity. *Id.*	Ms. Watts admits **she did not need to buy a luxury convertible** and she could have continued driving her Mitsubishi Montero to and from work. [R.p. 998, line 24-R.p. 999, line 10, Christine Watts Dep. pp. 59:24-60:10.]
The clause was inconspicuous; it is written entirely in small print and embedded within fifteen other paragraphs. *Id.* at 27-28.	**The stand-alone agreement was conspicuous** as Mr. Watts admits the, with portions in all capital letters and bolded, is readily identifiable as an arbitration agreement and is perfectly readable. [R.p. 930, line 14-R.p. 931, line 21, Michael Watts Dep. pp. 51:14-52:21.]

NO OPPRESSIVE AND ONE-SIDED TERMS	
***Simpson* Facts**	**Watts Facts**
The clause limits statutory remedies, precluding "punitive, exemplary, double, or treble damages." *Id.* at 28-29.	**The agreement does not limit statutory remedies** and provides the arbitrator with the authority to award fees, costs, injunctive and other equitable relief, and any damages allowed under governing law. [R.p. 1100, Arbitration Agreement.]

The clause violates the Dealers Act, preventing "Simpson from receiving mandatory statutory remedies to which she may be entitled . . . [under] SCUTPA and [the] Dealers Act." *Id.* at 29-30.	**The agreement does not violate the Dealers Act** as the Wattses are not prevented from receiving any statutory remedies under the SC Dealers Act or any other statute. [R.p. 1100, Arbitration Agreement.]
The clause does not address attorneys' fees and costs. *Id.* at 20.	**Under the agreement, attorneys' fees and costs are recoverable** in accordance with applicable law. [R.p. 1100, Arbitration Agreement.]
The clause lacks mutuality of remedy because the dealer is not required to submit certain claims to arbitration, even though the clause mandates arbitration of all customer claims. *Id.* at 31.	**The agreement includes mutuality of remedy** as either party can demand arbitration of any dispute and no judicial fora are reserved for the Dealer. [R.p. 1100, Arbitration Agreement].
The clause provides no right to forego arbitration. *Id.* at 20.	**The agreement provides a right to forego arbitration** by bringing an action in small claims court. [R.p. 1100, Arbitration Agreement.]
The filing fees are paid by the party initiating arbitration. *Id.* at 20.	If a customer initiates the action, the **dealer pays any amount in excess of what the customer would have paid to file the case in court.** [R.p. 1100, Arbitration Agreement.] The agreement is also subject to the AAA rules, which require the dealer to pay any arbitrator's fees over $125. [R.p. 665, AAA rules.]
The clause designates a mandatory arbitration location. *Id.* at 20.	**The customer decides the locale of the arbitration** as the customer can choose between the federal district where she lives or the federal district where she purchased the vehicle. [R.p. 1100, Arbitration Agreement.]
The dealer's judicial remedies supersede the consumer's arbitral remedies as certain Dealer remedies are not stayed pending the outcome of arbitration. *Id* at 31-32.	**A customer's arbitral remedies are not superseded** as all remedies are stayed pending the outcome of arbitration. [R.p. 1100, Arbitration Agreement.]

A. Ms. Watts and her father did not lack a meaningful choice in agreeing to arbitrate.

The circuit court's finding that Ms. Watts lacked a meaningful choice is premised on a distortion of the record. Ms. Watts does not dispute that the agreement itself was conspicuous. Nor can she and her father plausibly claim that the agreement was "hastily" presented to them as they both admit they were eager to leave the dealership as quickly as possible. Similarly, any supposed surprise by the inclusion the arbitration agreement in the documents they signed is solely attributable to their personal decision to rush to leave the dealership. Ms. Watts made her own decision not to read *any* of the documents she was presented. The agreement itself is clearly entitled "**ARBITRATION AGREEMENT**." Even a cursory review of the document would have notified both of them of the nature of the agreement they each independently signed. Moreover, the Wattses were not ignorant unsophisticated consumers. At the time of her purchase, Ms. Watts was about to attain a master's degree in accounting and was about to begin a career founded upon the careful examination of documents. In addition, her father had (1) purchased nearly a dozen vehicles from other dealerships, (2) they negotiated below the sticker price of the vehicle, (3) refused all additional product enhancements, and (4) obtained outside financing.

Instead, Ms. Watts now relies heavily on her claim that the agreement was presented on a take-it-or-leave-it basis, and therefore, constituted a contract of adhesion. *See* Pl.'s Br. at 13. The Respondent reaches this unfounded and contorted conclusion by avoiding and misconstruing the testimony from the depositions.

The arbitration agreement was *not* presented on a "take it or leave it basis." All three depositions establish that signing the arbitration agreement was not required to

complete the deal. The Wattses admit that no one ever told them they were required to sign the arbitration agreement. [R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19; R.p. 933. lines 6-9, Michael Watts Dep. p. 54:6-9.] They point to no statement or affirmative action whatsoever demonstrating that their signatures were required or establishing that Century BMW was unwilling to proceed with her purchase if she did not sign the agreement. The circuit court's only evidentiary support for its finding appears in a footnote in which the Order notes Ms. Watts's ambiguous, unsupported allegation that she subjectively believed they were required to sign the arbitration agreement, without any articulation of **how** she came to believe that when she and her father, who had purchased a dozen vehicles in his lifetime, did not take the time to ask about the arbitration agreement or any document. [R.p. 4, Order p. 4 fn.1.] The record simply contains no evidence that the agreement was mandatory. Rather, it shows that (1) the F&I manager never said the arbitration agreement was required, (2) the Wattses did not ask any questions about the arbitration agreement, (3) the Wattses did not voice any objections to the arbitration agreement, (4) the Wattses were in a rush to leave the dealership as quickly as possible, (5) Century BMW's policy is that the arbitration agreement is not mandatory, and (6) Century BMW has allowed customers not to sign the agreement and still purchase vehicles.[2]

Even if credited, Ms. Watts's testimony that it was her subjective belief that she "had to sign everything" to purchase the car does not advance her claim that the agreement she signed should not be enforced. Reliance on Ms. Watts's subjective

[2] The record also shows that Ms. Watts and her father refused to purchase any additional warranties and service contracts for the vehicle, further indicating they had meaningful choice in the transaction. [R.p. 978, line 15-R.p. 981, line 18, Christine Watts Dep. pp. 39:15-42:18; R.p. 920, line 3-R.p. 924, line 16, Michael Watts Dep. pp. 41:3-45:16]

belief—over the objective evidence that the agreement was not required to complete the transaction—belies both state and nationwide jurisprudence regarding contacts of adhesion. All of the cases in Ms. Watts's Initial Brief that analyze whether a contract is adhesive utilize objective evidence, not self-serving subjective beliefs.[3] In *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 367 (N.C. 2008) (cited in Pl.'s Br. at 24, 27), the court relied on defendant's policy that it would not make a loan if the agreement did not include an arbitration agreement. Likewise, in *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1277 (D. Ariz. 2007) (cited in Pl.'s Br. at 24), the staff "represented to Plaintiff that she was required to sign the agreements containing the arbitration provision in order to accomplish to loan transaction." Additionally in *Simpson*, 373 S.C. at 27 (cited in Pl.'s Br. at 20-30), the defendant did not dispute that the arbitration agreement was presented on a take-it-or-leave-it basis. In fact, the Respondent fails to provide a single case in which a court relies on the subjective impressions of a customer over the actual, stated policy of the dealership in determining whether an arbitration agreement is an adhesion contract. Here, unlike *Tillman, Cooper, Simpson,* and *Woods*, the objective facts demonstrate that the agreement was never presented on a take-it-or-leave-it basis.[4]

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[3] In *Woods v. QC Fin. Servs., Inc.*, Case No. 06-CC-004072-V-CV, at *8 (Mo. Cir. Ct. Dec. 31, 2007), which Ms. Watts cited in her circuit court brief the court emphasized that "courts should **not** look to the subjective understanding of individual consumers" but should apply an "objective test." [R.p. 503, Plaintiff's Second Supp. Memo pp. 8-9] (emphasis added). Ms. Watts conveniently decided not to cite *Woods* in her appellate brief.

[4] For the purpose of argument only, even if an arbitration agreement were deemed to be a contract of adhesion, the South Carolina courts have addressed this position of the Respondent and held that a contract of adhesion is enforceable. In *Lackey v. Green Tree Financial Corp*, the appellate court held that finding a contract was an adhesion contract does not render the contract unenforceable. *Lackey v. Green Tree Financial Corp*, 330

Therefore, the record objectively demonstrates that the arbitration agreement was not mandatory, and the Respondent did not lack a meaningful choice when they signed the agreement.

B. Ms. Watts's arbitration agreement does not contain oppressive terms.

The only provision that the circuit court found oppressive—the class action waiver—has been upheld in the majority of jurisdictions addressing such provisions, including the only two decisions with binding authority on this Court. Consistent with those cases, the agreement is enforceable because the Respondent is able to vindicate effectively her claims in arbitration.

1. 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.

Supreme Court of the United States and South Carolina Supreme Court precedent recognize that class action waivers are enforceable. The Respondent does not dispute that the great weight of authority is that class action waivers are reasonable and enforceable. *See, e.g., 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); *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).[5] The fact that certain litigation devices—including

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S.C. 388, 396, 498 S.E.2d 898, 902 (S.C. App. 1998) (the Court ruled that the conclusion that the arbitration agreements "are adhesion contracts does not render them unenforceable.")

[5] *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 v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Johnson v. West*

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). Indeed, had Ms. Watts abided by her agreement to arbitrate, it is almost a certainty that her claim would already have been arbitrated and resolved.

It is significant that the Respondent does not dispute that the only two decisions with binding authority on this Court that addressed arbitration agreements with class action waivers did not find them unconscionable. First, Ms. Watts does not contest that the Supreme Court of the United States's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), compels the conclusion that it views class action waivers as enforceable.[6] 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 that arbitrator to decide whether the clause prevented class-wide arbitration, the Supreme Court recognized that class preclusion was permissible. If class preclusion were per se

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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.").

[6] Ironically, Ms. Watts ignores U.S. Supreme Court *Green Tree Financial* decision in her brief, but relies on dicta from the state court decision that the U.S. Supreme Court vacated. Pl. Br. at 24.

invalid, then the U.S. Supreme Court would have just said so and not directed the arbitrator to independently determine whether the agreement allowed for class actions or not. *See also Kinkel v. Cingular*, 857 N.E.2d 250, 262-63 (Ill. 2006) ("The Court's holding in *Green Tree* . . . suggest[s] that an arbitration agreement expressly waiving the ability to arbitrate class claims is enforceable.").

Second, the arbitration clause in the *Simpson* case contained a class action waiver, but the South Carolina Supreme Court did not find it unconscionable, noting that the arbitration clause "contained a total of three unconscionable provisions," none of which included the requirement for individual treatment of claims. *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674. The Respondent argues now that *Simpson* is unavailing because allegedly Simpson did not claim that the class action waiver was unenforceable. Pl. Br. at 25. The *Simpson* Court stressed throughout its decision, however, 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. Consistent with this admonition, the Court found the arbitration clause violated the Magnuson-Moss Warrant Act ("MMWA"), even though Simpson's underlying claims alleged no violation of the MMWA. *See* 15 U.S.C. § 2301 *et seq.* The Court found Simpson's failure to bring a claim under the MMWA "irrelevant" to its conclusion that the clause was unenforceable under the MMWA "as a matter of public policy." *Id.* Likewise, if the provision precluding representative actions violated the Dealers Act or public policy, the Court—regardless of Simpson's specific claims—would have found it unconscionable in the decision refusing to enforce the arbitration agreement presented for review.

2. Ms. Watts can effectively vindicate her cause of action in arbitration.

The circuit court's finding that Ms. Watts cannot effectively vindicate her claims in arbitration (1) ignores the terms of the agreement, (2) transforms the ability to pursue a class action into a non-waivable right, and (3) disregards Supreme Court of the United States precedent.

a. The terms of the agreement establish that Ms. Watts can effectively vindicate her rights in arbitration.

The preclusion of representative actions does not prevent the Respondent from effectively vindicating her rights under the Dealers Act or other statutes. Federal and South Carolina courts unanimously hold that arbitration is permissible as long as the litigant can "effectively" vindicate his or her cause of action in arbitration. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 70 (2000); *Munoz v. GreenTree Fin.*, 343 S.C. 531 (2001). This does not mean that every right must be available in arbitration. It is perfectly permissible—and expected—that certain rights will not transfer to arbitration. *See 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)); *Simpson*, 373 S.C. at 28. Here, the Respondent conflates *effectively* vindicating her rights with vindicating all of her potential rights. Despite being able to arbitrate inexpensively and pursue all applicable relief in arbitration available under the law Ms. Watts argues her inability to bring a class action—in and of itself—invalidates the entire arbitration agreement she decided not to read before she signed it. [R.p. 1100, Arbitration Agreement.]

Rather than ruling that every right transfers to arbitration, courts examining whether a party can "effectively" vindicate his/her rights focus on the litigant's ability to

receive sufficient remedies in arbitration. Ms. Watts does not dispute that in the minority of courts that have found class action waivers invalid, typically the arbitration agreement removed some remedies, such as attorneys' fee or certain damages. *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); *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); *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).

In this case, 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. 1100, Arbitration Agreement.] The agreement also authorizes any award of attorneys' fees and costs that the applicable law permits. [R.p. 1100, Arbitration Agreement.] Given this broad ability to seek and receive all permissible remedies and recoup attorneys' fees and costs, the Respondent can effectively vindicate her claims in arbitration.

b. Ms. Watts has not established that her alleged class action right is non-waivable.

By focusing her unconscionability argument exclusively on the class action waiver, which the *Simpson* decision did not disturb, the Respondent is now attempting to transform her purported ability to pursue a class action into a non-waivable right. It is

axiomatic that parties are generally free to contract away their rights. *See, e.g., Simpson*, 373 S.C. at 28, 644 S.E.2d at 670. As a result, a party claiming a right is non-waivable bears the burden of proving that the legislature intended to preclude parties from bargaining away that right. *See Randolph v. GreenTree Fin.*, 244 F.3d 814, 817 (11th Cir. 2001). In *Randolph*, the Eleventh Circuit found that while class actions were an "important means of remedying violation of the [Truth in Lending Act] . . . there exists a difference between the availability of the class action tool, and possessing a blanket right to that tool under any circumstances. An intent to create such a 'blanket' right, a non-waivable right, to litigate by class action cannot be gleaned from the text and the legislative history of the [Act.]" *Id.* Other courts have similarly found that parties are free to waive their class action right absent clear evidence that the legislature intended to confer a non-waivable right. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3rd Cir. 2000); *Gipson v. Cross Country Bank*, 293 F.Supp.2d 1251 (M.D. Ala. 2003).

In this case, the Respondent has not provided this Court with a scintilla of evidence or a single case demonstrating that the South Carolina legislature intended to preclude parties from bargaining or contracting to limit their right to bring a representative action under the Dealers Act. To the contrary, the pre-Rule 23, SCRCP, subsection is permissible—not mandatory—as it provides that a party "may" sue "for the benefit of the whole." S.C. Code Ann. § 56-15-110(2). The legislature merely provided litigants with a potential additional option when pursuing a cause of action under Section 56-15-110, without prohibiting waiver thereof and without exempting a person or party from any other requirements that must be met to serve in a representative class action

capacity. Even without that option, the Respondent is still fully capable—through Section 56-15-110(1)—of vindicating her available rights under the South Carolina Auto Dealers Act. *See, e.g.*, S.C. Code Ann. § 56-15-10 *et seq.*

c. The United States Supreme Court has already rejected the position now proffered by Ms. Watts.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), the Supreme Court of the United States addressed—and rejected—Ms. Watts's argument now before this Court to avoid arbitration. There, the Court denied Plaintiffs' claim that an arbitration could not effectively vindicate their rights under the Age Discrimination in Employment Act ("ADEA") because the arbitration procedures did not provide for class actions and broad equitable relief. *Id.* 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 arbitrator could award, including equitable relief. *Id.* Second, the Court noted that although the ADEA provides for the possibility of bringing a collective action, it did not make that right mandatory. *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. *Id.*

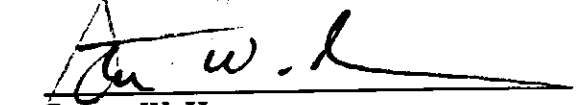
The same considerations apply in this case. First, not only do arbitrators have the power to fashion equitable relief, but Ms. Watts's agreement, on its face, provides for all relief *including equitable relief.* [R.p. 1100, Arbitration Agreement.] Second, that the Dealers Act provides for the possibility of collective action does not make the right to bring a class action under the Dealers Act a non-waivable right. Finally, the South Carolina Attorney General's office is specifically authorized to seek class-wide equitable relief for any violations of the Dealers Act. S.C. Code Ann. § 56-15-40.

Therefore, pursuant to the express terms of the arbitration agreement signed by Christine and Michael Watts as well as the rulings of the Supreme Court of the United States and South Carolina precedent, this Court should reverse the circuit court and find that the Respondent can effectively vindicate her rights in arbitration and direct the lower court to issue an Order granting the Appellant's Motion to Compel Arbitration.

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 Respondent's claims against Century BMW in accordance with the terms of the arbitration agreement and dismissing her claims currently pending in the circuit court.

Respectfully submitted,



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October 6, 2008
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

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

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

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

v.

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

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

PROOF OF SERVICE

The undersigned employee of RICHARDSON PLOWDEN & ROBINSON, P.A., attorneys for Appellant, does hereby certify that service of the foregoing **Appellant's Final Reply Brief** in the above-captioned matter was made upon all counsel of record this 6th day of October 2008, by depositing a copy of same in the U.S. Mail, postage prepaid, addressed as follows:

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CERTIFICATE OF COUNSEL

The undersigned certify that this Final Reply Brief complies with Rule 210(b), SCAR.

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