STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF CHARLESTON	)	**FOR THE 9TH JUDICIAL CIRCUIT**
	)	
Gerald W. Campbell, Jr., individually and in a representative capacity for all others similarly situated	)	C.A. No. 2017-CP-10-2666
	)	
Plaintiff,	)	**ORDER GRANTING DEFENDANT'S MOTION TO STAY AND COMPEL ARBITRATION**
vs.	)	
Baker Motor Company of Charleston, Inc.	)	
Defendant.	)	

This matter comes before the Court by way of Defendant's Motion to Stay and Compel Arbitration pursuant to the Federal Arbitration Act ("FAA") 9 USC §1 et seq. The Motion was argued before me on November 16, 2017, with L. Sidney Connor, IV appearing on behalf of Plaintiff, Gerald W. Campbell, Jr., individually and in a representative capacity for all others similarly situated, and Bradford N. Martin appearing on behalf of Defendant, Baker Motor Company of Charleston, Inc. For the reasons stated herein, the Court grants the Motion.

FACTUAL /PROCEDURAL BACKGROUND

Baker Motor Company of Charleston, Inc. ("Baker") a car dealership, and Gerald W. Campbell, Jr. ("Campbell") entered into a contract whereby Campbell traded in his 2013 Jaguar XF for a new 2015 Maserati Ghibli ("the Maserati"). The contract contained a charge in bold, capital letters in the amount of $499 for a "**CLOSING FEE.**"

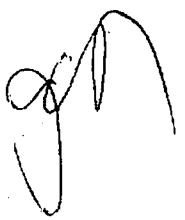
Mr. Campbell signed a Retail Order dated June 26, 2015 and the Arbitration Agreement[1] dated June 27, 2015.[2] He also signed a document entitled in bold capital letters "**ARBITRATION AGREEMENT.**" The Arbitration Agreement stated the following:

[1] Plaintiff does not dispute he signed the Arbitration Agreement, nor that it is his signature. Rather, he only claims he does not "recall" signing it. (Plaintiff's Affidavit, ¶ 12)

ARBITRATION AGREEMENT

Customer and dealer agree that all claims, demands, disputes, or controversies of every kind or nature that may arise between them in connection with or in any way related to the vehicle or its sale, repairs, service, warranty, extended warranty, credit life, disability insurance, condition of vehicle, or financing, tortious conduct, or other related matters or any other vehicles shall be settled by binding arbitration conducted according to the Customer Rules and Protocol of the American Arbitration Association. The Customer and Dealer agree that any dispute regarding the existence, validity and arbitrability of this arbitration clause or whether a matter is subject to arbitration under this agreement shall be resolved by arbitration. It is specifically agreed among the parties that this contract and all disputes, demands, or claims between Customer and Dealer are subject to and governed by the provisions of 9 U.S.C. §1 et seq. The Dealer shall pay an amount equal to the current fee for filing a complaint in the circuit court in connection with the arbitration hereunder. In the event any provision of this arbitration clause shall be held invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby.

The Customer and Dealer further agree that no additional parties may be joined or consolidated in any arbitration held pursuant to this agreement nor may any arbitration proceed as a class action.



Any arbitration hearing to resolve such claims would be conducted within the federal judicial district and division encompassing Baker Motor Company's dealer facility.

Campbell later filed a Complaint in the Charleston County Court of Common Pleas alleging Baker violated the South Carolina Manufacturers, Distributors and Dealers Act (S.C. Code §56-15-10 et. seq.) in the charging of the closing fee. He also brought the action on behalf of those persons who have purchased vehicles from Baker and were charged a closing fee pursuant to S.C. Code §56-15-110(2).

Baker filed its Motion to Stay and Compel bilateral arbitration pursuant to the terms of the Agreement. Campbell opposed the Motion contending that there was no enforceable arbitration agreement between the parties and that the Court could not rule on the class action

[2] Plaintiff asserts that he signed the Retail Order on June 26th and the Arbitration Agreement on June 27th in his Affidavit. Plaintiff also signed several other documents on June 27th related to the purchase of the Maserati, thus indicating that the Arbitration Agreement relates to the purchase of the vehicle in question.

waiver because the arbitration agreement stated that the validity of the waiver was a matter to be decided by the arbitrator and not the Court.

LAW / ANALYSIS

I. This Court is the Appropriate Forum for Determining the Validity of the Class Action Waiver.

As a preliminary matter, Campbell contends that the arbitrator and not this Court, should rule on the validity of the class action waiver clause contained in the Arbitration Agreement. However, the Supreme Court of South Carolina addressed this issue in *Simpson v. MSA of Myrtle Beach,* Inc., 373 S.C. 14, 644 S.E.2d 633 (2007). As in *Simpson*, Campbell alleges that the Arbitration Agreement states that "[t]he Customer and Dealer agree that any dispute regarding the existence, validity, and arbitrability of this arbitration clause or whether a matter is subject to arbitration under this agreement, shall be resolved by arbitration." As the Supreme Court held:

> This proposition [that the trial court should determine the validity of the Arbitration Agreement] finds support in other jurisprudence. The United States Supreme Court has noted that, in limited circumstances, a court should assume that the parties intended the court to decide certain arbitration issues in the absence of "clear and unmistakable" evidence to the contrary. [citations omitted]. These limited circumstances typically involve certain "gateway matters," such as whether the parties have a valid arbitration agreement at all ... Thus the prevailing authority supports the notion that courts may have at least a limited role where an arbitration clause otherwise applies.
>
> [I]n this case, the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract between [Customer and Dealer]. Although the clause specifically stated that arbitration applied to issues involving "the validity and scope of this contract," [Customer] challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. Under the UAA, the question of this clause's validity was for the court to decide. *See* S.C. Code Ann. §15-48-20(a) (2005)...
>
> Furthermore because [Customer] has challenged the validity of the entire arbitration clause on the grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity. Accordingly, the trial court did not err

in ruling on the issue of validity instead of submitting the issue itself to arbitration." *Simpson, supra,* 373 S.Ct. at 23, 644 S.E.2d at 677.

The Arbitration Agreement clearly stated that arbitration may not proceed as a class action; therefore, there is no "clear and unmistakable" evidence that the parties intended the arbitrator to determine if it should be allowed.

The Fourth Circuit recently concluded that a court should determine the availability of class arbitration because of the "significant distinctions between class and bilateral arbitration." *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 874-75 (4th Cir.), cert. denied sub nom. 137 S. Ct. 567 (2016). The U.S. Supreme Court recognized that arbitration is poorly suited to class actions.[3] The Fourth Circuit noted that class arbitration would reduce or eliminate nearly all the benefits of bilateral arbitration. *Dell Webb*, 817 F.3d at 875.[4] It reasoned that the United States Supreme Court was "but a short step away" from announcing that this was a question for the courts. *Dell Webb*, 817 F.3d at 875.[5]

Further, the parties did not agree that class arbitration was a question for the arbitrator. First, the parties agreed to waive class arbitration, meaning that there was no determination to be

[3] "The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. And class arbitration greatly increases risks to defendants. The absence of multilayered review makes it more likely that errors will go uncorrected. That risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once. Arbitration is poorly suited to these higher stakes." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

[4] When parties agree to forgo their right to litigate in the courts and in favor of private dispute resolution, they expect the benefits flowing from that decision: less rigorous procedural formalities, lower costs, privacy and confidentiality, greater efficiency, specialized adjudicators, and—for the most part—finality. These benefits, however, are dramatically upended in class arbitration, which brings with it higher risks for defendants. *Id.*

[5] Other courts have also concluded that, "unless the parties clearly and unmistakably provide otherwise," whether an arbitration agreement permits class arbitration is a question of arbitrability for the court. See *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett,* 734 F.3d 594, 597–99 (6th Cir.2013) (reasoning that the Supreme Court "has given every indication, short of an outright holding, that class-wide arbitrability is a gateway question" for the court, and focusing on *Stolt–Nielsen* and *Concepcion's* observations of the fundamental differences between bilateral and class arbitration). *See also Opalinski v. Robert Half Int'l Inc.*, 761 F.3d 326, 331–34, 335–36 (3d Cir.2014) (finding that the Supreme Court had "cast doubt" on the *Bazzle* plurality, and that an agreement's authorization of class arbitration implicates both whose claims and the type of controversy an arbitrator may resolve); *Puelo v. Chase Bank USA, NA*, 605 F.3d 172 (3rd Cir. 2010) (finding that a challenge to the enforceability of an explicit class action waiver within an arbitration agreement is a challenge to the validity of the parties' agreement to arbitrate and, therefore, a question for the court to decide).

made by the arbitrator on this issue. The courts view arbitration as "a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 492, 593 S.E.2d 480, 484 (Ct.App.2004). "Unless the parties clearly and unmistakably provide otherwise," whether an arbitration agreement permits class arbitration is a question of arbitrability for the court. *Dell Webb*, 817 F.3d at 876.

Second, the parties intentionally separated the issue of waiver of class arbitration from any issues they agreed would be decided by the arbitrator. The parties agreed in the first paragraph of the Arbitration Agreement "that any dispute regarding the existence, validity, and arbitrability of **this arbitration clause** or whether a matter is subject to arbitration under the agreement shall be resolved by arbitration." (emphasis added) The parties then agreed to waive class arbitration in the second paragraph of the Agreement. It was never "clearly and unmistakably" agreed that the issue of class action would be decided by the arbitrator. The Agreement can be valid or not valid without reference to class arbitration.

Because the parties did not agree that the issue of class arbitrability was for the arbitrator to decide, this Court can determine the gateway issue of the availability of class arbitration based on the clear language of the Arbitration Agreement.

This Court therefore finds that it has jurisdiction to determine the validity of the class action waiver.

II. The Federal Arbitration Act Requires the Court to Compel the Parties to Submit to Arbitration.

This action is governed by the Federal Arbitration Act. The parties contractually agreed that any dispute arising out of the purchase of the Maserati from Baker would be subject to the FAA. Additionally, the sale of automobiles is considered commerce sufficient for the FAA to apply. *See Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990).

The purpose of the Federal Arbitration Act "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and has been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647 (1991). The language of the FAA makes clear that arbitration is mandatory when the parties have a valid agreement to arbitrate. It states:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. There is also a strong presumption in favor of the validity of arbitration agreements under both federal and state law. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927 (1983); *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004).

There is no dispute that Plaintiff signed a stand-alone document entitled "Arbitration Agreement." One is required to read what he signs and is bound by its terms. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). The Agreement stated, in pertinent part:[5]

> Customer and Dealer agree that all claims, demands, disputes, or controversies of every kind or nature that may arise between them in connection with or any way related to the vehicle or its sale . . . shall be settled by binding arbitration . . . .

This mutual agreement to submit to bilateral arbitration is consistent with the goals of the FAA. *AT&T Mobility v. Concepcion*, 563 U.S. 333, 334, 131 S.Ct. 1740 (2011) ("requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus

[5] The June 27th Arbitration Agreement modifies the June 26th Retail Order. See *U.S. Bank Trustee Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) (stating a contract can be modified by another contract that includes a meeting of the minds on essential terms).

creates a scheme inconsistent with the FAA."). Therefore, federal law requires staying the action to pursue arbitration.

III. The Plaintiff's Single Cause of Action is Subject to the Arbitration Agreement.

In his Complaint, Plaintiff alleges one cause of action for violation of the South Carolina Dealer's Act[7] against Baker that arises out of Plaintiff's payment of a closing fee as part of the purchase of the Maserati. Both federal and South Carolina state law are clear that if there is any interpretation of an arbitration clause that covers a dispute, then arbitration must be ordered.

"The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 103, 739 S.E.2d 209, 213 (2013). Unless a court can say with positive assurance that the clause is not susceptible to an interpretation that covers the dispute, arbitration is required. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Anyone challenging the enforceability of an arbitration agreement bears the burden of proving the provision is unenforceable. *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513 (2000).

The Agreement provided that it was subject to the Federal Arbitration Act ("FAA") (9 U.S.C. § 1 *et seq.*) and applies to:

> . . . all claims, demands, disputes, or controversies of every kind or nature that may arise between them in connection with or any way related to the vehicle or its sale . . . .

Plaintiff's claims regarding the payment of a closing fee during the sale of the Maserati are expressly and impliedly covered by the terms of the Arbitration Agreement. Therefore, this

[7] S.C. Code Ann. § 56-15-10, *et seq.*

Court must look to the FAA and not to the Dealer's Act to determine whether Campbell's arbitration agreement is enforceable.

This Court, therefore, upholds the liberal federal policy favoring arbitration and compels arbitration.

IV. The Arbitration Agreement is Enforceable Under State Law.

Although the Federal Arbitration Act applies to this dispute, the Court must turn to state law when assessing the enforceability of the arbitration clause. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("[g]eneral contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

The Arbitration Agreement in this case meets all the requirements for a binding contract. It is true that courts have refused to enforce arbitration agreements where the agreement is too one sided or lacks mutual consideration. *See Hull v. Norcom, Inc.*, 750 F.2d 1547, 1549 (11th Cir.1985). That is not the case here, however. The arbitration agreement provides that both customer and dealer agree to forego litigation in court and submit all claims to arbitration. This mutual promise and forbearance constitutes sufficient consideration for the arbitration agreement. *See O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration"); *see also Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996) ("exchange of promises qualified as consideration").

An arbitration provision may also be invalidated where it is unconscionable. To determine whether this contract provision is unconscionable, the Court must find both an "absence of meaningful choice on the part of one party due to the one-sided contract provisions" and "terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498

S.E.2d 898, 902 (Ct.App.1998). Plaintiff does not argue either that he lacked meaningful choice or that the terms of the Arbitration Agreement are unconscionable.[8] He also does not deny he signed the Agreement.

Plaintiff asks this Court to find the Arbitration Agreement void based on his assertions that Baker has violated the Dealers' Act. However, the underlying merits of the case are not properly before this Court. Additionally, S.C. Code Ann. § 56-15-130 would render void only such contracts which were themselves in violation of a provision of the Dealers' Act. The plaintiff further claims that the class action waiver is a violation of the Dealers' Act and therefore voids the Agreement under 56-15-130. This argument, however, is pre-empted by the FAA, as discussed in more detail below.

V. Bilateral Arbitration Is Hereby Ordered.

It is for the Court to order bilateral arbitration. First, the parties have not left the issue of class arbitration open to interpretation. Instead, they have unequivocally agreed to waive class arbitration. Second, the parties have not agreed that the arbitrator will determine whether a waiver of class arbitration is enforceable. They intentionally separated the issue of waiver of class arbitration from the clause addressing those issues that the arbitrator can determine. Finally, the U.S. Supreme Court has found that the parties' agreement to waive class arbitration is controlling.[9] This agreement leaves no room for an inquiry as to the parties' intent.[10]

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[8] "Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." *Gladden v. Boykin*, 402 S.C. 140, 145, 739 SE2d 882, 884 (2013).

[9] *See Stolt-Nielsen*, 559 U.S. at 684, 130 S.Ct. at 1775 ("the panel's conclusion [to require class action] is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent")

[10] *See Stolt-Nielsen*, 559 U.S. at 676, 130 S.Ct. at 1770.

A. The Parties unequivocally agreed to waive class arbitration.

Campbell agreed in writing not to participate in class action arbitration. The Agreement states:

> The Customer and Dealer further agree that no additional parties may be joined or consolidated in any arbitration held pursuant to this agreement nor may any arbitration proceed as a class action.

Plaintiff does not dispute the plain meaning of the Arbitration Agreement that class arbitration has been waived. "[A]rbitration is a matter of consent." *Stolt-Nielsen*, 559 U.S. at 684. An agreement to arbitrate disputes does not imply that the party agreed to class arbitration of those disputes, because class arbitration significantly changes the nature of arbitration. *Stolt-Nielsen*, 559 U.S. at 685. In the present case, I find the parties explicitly agreed to waive class arbitration.

B. The Parties' agreement to waive class arbitration is controlling and any finding to the contrary violates the FAA.

The "principal purpose" of the FAA is to "ensure[e] that private arbitration agreements are enforced according to their terms." *AT&T Mobility v. Concepcion*, 563 U.S. 333, 343, 131 S.Ct. 1740, 1748 (2011). I find the parties agreed to one-on-one arbitration, and the central or "primary" purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms."[11] To the extent any state law prohibits the agreement between the parties, it is preempted by the FAA. *Concepcion*, supra.

In *Concepcion*, the Supreme Court of the United States held that state law is preempted when it allows any party to a consumer contract to demand classwide arbitration notwithstanding the presence of a class arbitration waiver in an otherwise valid arbitration agreement. *AT&T*

[11] *Stolt-Neilsen, supra,* 559 US at 682, 305 Ct. at 1774 (2010) (citing *Volt v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 479, 109 S.Ct. 1248; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 58, 115 S.Ct. 1212 (1995).

Mobility v. Concepcion, 563 U.S. 333, 131 S.Ct. 1740 (2011). See *id.* 563 U.S. at 344 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."). The Court noted that arbitration is poorly suited to the higher stakes of class litigation. *Concepcion*, 563 U.S. at 350.

The enforceability of the Arbitration Agreement is not altered by the fact that the Plaintiff has alleged a violation of the Dealers Act.[12] In *Am. Express Co. v. Italian Colors Rest.*, Justice Scalia noted:

> In *Gilmer, supra,*[13] we had no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions. We said that statutory permission did "'not mean that individual attempts at conciliation were intended to be barred.'" (internal citations omitted)

Am. Express Co. v. Italian Colors Rest., 570 U.S. __, 133 S.Ct. 2304, 2311 (2013).

Any argument that group litigation under the Dealer's Act is nonwaivable has been rejected by the U.S. Supreme Court when referring to a Rule 23 Class Action:

> One might respond, perhaps, that federal law secures a nonwaivable opportunity to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition in *AT&T Mobility*, 563 U.S., at ___, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (slip op., at 9).

Am. Express Co. v. Italian Colors Rest., supra, 570 U.S. at ____, 133 S.Ct. at 2310.[14]

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[12] Plaintiff attached a copy of the Monroney label to his Affidavit in support of his allegation that Baker failed to disclosed the closing fee in its advertised price. The Honorable Doyet A. Early, III addressing this issue in 2010 found that Monroney labels were not an advertisement by the dealer because they were statements made by the manufacturer and not the dealer. *Herron, et al. v. Dick Dyer & Associates, et al.*, C.A. No. 2006-CP-02-1230, Order dated January 11, 2010, p. 12.

[13] The *Gilmer* Court came to the conclusion that the lack of a right to proceed collectively in arbitration did not warrant a finding that ADEA claims were nonarbitrable despite the fact that the ADEA explicitly provides for class action suits. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647 (1991).

[14] Similar provisions in other statutes have been found to be preempted by section 2 of the FAA. *See e.g., Preston v. Ferrer*, 552 U.S. 346, 128 S.Ct. 978 (2008) (FAA preempted provisions in California Talent Agencies Act); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652 (1996) (FAA preempted state statute requiring special notice of arbitration clauses); *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520 (1987) (FAA preempted state statute that invalidated agreements to arbitrate certain wage collection claims); *Southland Corp. v. Keating*, 465 U.S.

Statutory claims likewise may be the subject of an arbitration agreement, enforceable pursuant to the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647 (1991). This is the case unless the FAA's mandate has been "overridden by a contrary congressional command." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S. Ct. 2332 (1987).

There is no such congressional command in the present case. South Carolina courts have also held the FAA preempts South Carolina statutes. *Soil Remediation Co. v. Nu-Way Envt'l*, 323 S.C. 454, 461, 476 S.E.2d 149, 153 (1996) (holding that the FAA preempts South Carolina's notice requirement for arbitration agreements under S.C. Code Ann. § 15-48-10); *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000) (FAA preempted statute invalidating arbitration agreements that provide for out-of-state arbitration).

The South Carolina Court of Appeals has upheld a class action waiver as valid and enforceable. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 149 (Ct. App. 2013). The Court in *Dodgeland* recounted the history of this issue and found that the Dealers Act was preempted by the FAA. The Court of Appeals acknowledged that the South Carolina Supreme Court held, in *Herron v. Century BMW* (*Herron I*), that a provision within an arbitration agreement that required purchasers to "waive[] their right to . . . bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration," was void and unenforceable on public policy grounds.[15] However, the Court of Appeals noted that subsequently, the Supreme Court of the United States vacated the South Carolina Supreme Court's *Herron I* judgment, and remanded with instructions for the Court to reconsider its

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1, 104 S.Ct. 852 (1984) (FAA preempted California statute which provided that "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.")

[15] 387 S.C. 525, 535-36, 693 S.E.2d 394, 399-400 (2010) (alteration in original).

decision invalidating the provision banning class arbitration, in light of the decision in *AT&T Mobility LLC v. Concepcion, supra.* The Court of Appeals acknowledged that while the South Carolina Supreme Court had "technically reinstated" its Herron I opinion in light of the failure of the defendant in that case to preserve the issue of preemption of the FAA, the *Herron I* reinstatement "did not signify a post-Concepcion position that the Dealers Act provision is immune to FAA preemption." See, *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 92-94, 749, S.E.2d 139, 152 (Ct. App., 2013).

The Court of Appeals noted that since the decision in *Herron I and Herron II,* numerous other jurisdictions have applied *AT&T Mobility* to preempt similar state laws that, if not preempted, would invalidate class action waivers on public policy grounds. *York,* 406 S.C. at 93, 749 S.E.2d at 153.[16] There is no distinction, as Plaintiff argues, because the Dealers Act allows class action in all cases and not just arbitration.

In the case of *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1236 (11th Cir. 2012), Pendergast asserted a cause of action for violation of the Florida Deceptive and Unfair Trade Practices Act. Pendergast argued that the class action waiver was void because it frustrated the remedial purposes of the FDUTPA. Pendergast argues, as did the Concepcions, "that the arbitration agreement [is] unconscionable and unlawfully exculpatory under [state] law because

[16] citing *Litman v. Cellco P'ship*, 655 F.3d 225, 231 (3d Cir. 2011) (holding, in light of *Concepcion* and, thus, contrary to prior New Jersey state law, "the arbitration clause at issue here must be enforced according to its terms, which requires individual arbitration and forecloses class arbitration"). See also, *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1236 (11th Cir. 2012) ("[W]e need not reach the question of whether Florida law would invalidate the class action waiver . . . because, to the extent it does, it would be preempted by the FAA."); *Cruz v. Cingular Wireless*, LLC, 648 F.3d 1205, 1207 (11th Cir. 2011) ("[I]n light of *Concepcion*, the class action waiver in the Plaintiff's arbitration agreements is enforceable under the FAA."); *McKenzie Check Advance of Fla., LLC v. Betts*, 112 So. 3d 1176, 1178 (Fla. 2013) ("Applying the rational[e] of Concepcion . . . we conclude that the FAA preempts invalidating the class action waiver in this case on the basis of it being void as against public policy."); *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 24 A.3d 777, 781 (N.J. Super. Ct. App. Div. 2011) ("[W]e uphold the court's specific ruling that the class action waiver provisions in the [vehicle purchase] documents should not be invalidated on public policy grounds, a conclusion that is in keeping with . . . [*Concepcion*].").

it disallow[s] classwide procedures." *Concepcion,* 131 S.Ct. at 1745. The Eleventh Circuit found that if Florida law were to invalidate the class action on that basis, that state law would impose procedures fundamentally incompatible with the arbitration the parties agreed upon, would thus stand as an obstacle to the accomplishment of the FAA's objectives, and would be preempted. *See id.* at 1746–53. The Eleventh Circuit held that it "need not decide whether the class action waiver here is unconscionable under Florida law or if it frustrates the remedial purposes of the FDUTPA, because to the extent Florida law would invalidate the class action waiver, it would still be preempted by the FAA."

This Court therefore applies the FAA and upholds Campbell's Arbitration Agreement with Baker, including the waiver of classwide arbitration.

CONCLUSION

I conclude that: 1) this Court has jurisdiction to determine the validity of the class waiver; 2) there is a valid agreement to arbitrate; 3) the class waiver is valid and enforceable; and 4) to the extent the Dealer's Act would invalidate the Arbitration Agreement, it is preempted by the FAA and the United States Supreme Court case of *AT&T Mobility.*

THEREFORE, IT IS HEREBY ORDERED that Baker's Motion to Stay and Compel Arbitration is GRANTED.

AND IT IS SO ORDERED.

The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

Charleston, South Carolina
January 8, 2018