STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Judge

Case No.: 2012-CP-40-7313

Cynthia Hall; Ronald R. Ballentine,

Respondents,

v.

Green Tree Servicing, LLC, f/k/a Green Tree Financial Servicing Corp.,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. THE RESPONDENTS' STATUTORY CLAIMS ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT, AND THEREFORE ALL OF THE RESPONDENTS' CLAIMS SHOULD BE ORDERED TO ARBITRATION.

As the Respondents state in their Initial Brief, the circuit court held that the Respondents' statutory claims were not within the scope of the arbitration clause because "[t]here is no provision in the arbitration agreement that indicates [Respondents] agreed to arbitrate statutory claims." (R. p. 5). However, contrary to the Respondents' statement in their Initial Brief, this statement by the circuit court, in effect, requires that the language of the arbitration clause specifically indicate that the Respondents agreed to arbitrate statutory claims. The circuit court erred in establishing such a requirement.

As discussed in greater detail in Appellant's Initial Brief, in *Compucredit Corp. v. Greenwood*,[1] the United States Supreme Court held that the policy favoring arbitration agreements requires courts to enforce agreements to arbitrate according to their terms, even when the claims at issue are statutory claims.[2] Furthermore, in both *Gilmer v. Interstate/Johnson Lane Corp.*[3] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[4] the United States Supreme Court held that statutory claims were subject to arbitration even though the arbitration agreements in both cases did not specifically state that they applied to statutory claims.[5]

Here, the circuit court correctly relied on *Gilmer* for the proposition that statutory claims may be the subject of an arbitration agreement, yet failed to recognize that the holding in *Gilmer* required the court to send this entire matter to arbitration. In *Gilmer*, the parties "agree[d] to

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[1] CompuCredit Corp. v. Greenwood, 565 U.S. ___, 132 S. Ct. 665 (2012).
[2] Id. at 669.
[3] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[4] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
[5] Gilmer, 500 U.S. at 23, 35; Mitsubishi Motors Corp., 473 U.S. at 617.

arbitrate any dispute, claim or controversy" arising between Gilmer and his employer, Interstate. After signing this agreement, Gilmer brought suit alleging that Interstate had discharged him because of his age, in violation of the ADEA.[6] Interstate moved to compel arbitration. The United States Supreme Court held that arbitration was appropriate because Gilmer failed to show that Congress intended to preclude arbitration for ADEA claims.[7]

Just as in *Gilmer*, the parties here entered into a broad arbitration agreement covering "any controversy or claim" between them. Such an agreement encompasses statutory claims unless Respondents could prove that our state legislature intended to preclude parties from arbitrating claims brought pursuant to S.C. Stat. Ann. § 15-69-10, et seq. and S.C. Stat. Ann. § 36-9-601 et seq. The Respondents did not carry this burden. In fact, the Respondents concede that "the agreement contains no limitation to the types of claims that should be brought before an arbitrator." (*See* Respondents' Brief, p. 7). Accordingly, the circuit court erred by finding that the statutory claims were outside the scope of the arbitration agreement, and this entire matter should be submitted to mandatory arbitration.

II. THE RESPONDENTS ARE PROCEDURALLY PRECLUDED FROM ARGUING THAT THE ARBITRATION CLAUSE IS UNCONSCIONABLE.

In their brief, Respondents ask this Court to find that the arbitration agreement was unconscionable and to render "the entire arbitration agreement" invalid. The circuit court, however, ruled to the contrary, specifically finding that the parties' arbitration agreement was not unconscionable. Respondents did not appeal from that ruling, and it is now the law of the case.[8]

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[6] Gilmer, 500 U.S. at 24.
[7] Id. at 26.
[8] See Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004) ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 553, 566, 511

Furthermore, this issue cannot be raised as an additional sustaining ground because the trial court made a specific finding that is *contrary* to the Respondents' position on appeal. Rule 220(c) of the South Carolina Appellate Court Rules allows the appellate court to ***affirm*** a circuit court's ruling based upon any ground appearing in the Record on Appeal. Where, as here, the circuit court ruled on an issue to the detriment of the Respondents, the Respondents would have to file an appeal in order to get that ruling ***reversed.***

Finally, even if Respondent could raise these arguments as additional sustaining grounds, this Court should refuse to consider those arguments because they were never raised to the circuit court. "[A]n appellate court is less likely to rely on [an additional sustaining] ground when the respondent has failed to present it to the lower court" because "the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal."[9]

At the hearing on Green Tree's motion to compel arbitration, the Respondents argued the agreement was an adhesion contract, and therefore, unconscionable. They did not argue, as they do on appeal, that "South Carolina does not approve of arbitration clauses that allow for judicial proceedings to occur independently and concurrently of arbitration." Nor did they argue, as they do now on appeal, that "arbitration provisions that include warranty claims are unconscionable." Accordingly, it would be unfair to allow Respondents to make those arguments now, when they never raised those issues at the circuit court, either during the hearing or via a Rule 59(e), SCRCP motion.

S.E.2d 372, 378 (Ct. App. 1998) (holding that an unappealed ruling, right or wrong, is the law of the case).

[9] I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000).

III. IN THE EVENT THAT THE COURT REACHES THE MERITS OF THE RESPONDENTS' UNCONSCIONABILITY ARGUMENTS, THE COURT SHOULD FIND THAT THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE BECAUSE IT IS DISTINGUISHABLE FROM THE ARBITRATION CLAUSES IN *SIMPSON* AND *YORK*.

While the Court should not reach the merits of the Respondents' unconscionability arguments for the reasons discussed above, even if the Court does reach the merits of these arguments, the Court should find that the arbitration clause is not unconscionable.

To address the arguments raised by the Respondents for the first time in their Initial Brief, the arbitration clause in this case is distinguishable from the arbitration clauses at issue in *Simpson v. MSA of Myrtle Beach, Inc.*[10] and *York v. Dodgeland of Columbia, Inc.*[11] As a threshold matter, both the South Carolina Supreme Court in *Simpson* and the South Carolina Court of Appeals in *York* held that the contracts at issue therein were contracts of adhesion and that the borrowers had no meaningful choice in agreeing to the arbitration clause.[12] In this case, the circuit court did not hold that either the Contract or the arbitration clause were contracts of adhesion, or that the Respondents lacked a meaningful choice in agreeing to arbitrate their claims. (R. p. 7-8). This is a key distinction from *Simpson* and *York*, because the Courts in *Simpson* and *York* would not have proceeded to discuss potentially oppressive and one-sided terms of the contracts if the Courts had found that the borrowers had a meaningful choice in signing the contracts.

In *Simpson*, the Court found that the arbitration clause in *Simpson* contained three oppressive and one-sided terms: (1) the arbitration clause prevented the arbitrator from awarding punitive, exemplary, double, or treble damages against either party; (2) the arbitration clause

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[10] Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).
[11] York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013).
[12] Id. at ___, 749 S.E.2d at 149; Simpson, 373 S.C. at 28, 644 S.E.2d at 670.

allowed the dealer to exercise certain judicial remedies regarding the collateral at issue that would not be stayed by pending arbitration, while the borrower was not permitted to use a judicial forum; and (3) the arbitration clause expressly included claims that implicated the Magnuson-Moss Warranty Act ("MMWA").[13]

Here, the Respondents state that two of the above three oppressive and one-sided terms are present in the arbitration clause between Green Tree and the Respondents.

First, the Respondents argue that the arbitration clause in this case is nearly identical to that of *Simpson* and *York* in that it gives Green Tree the ability to exercise certain judicial remedies during a pending arbitration that would supersede any claims that could be made by the Respondent. (Respondents' Brief p. 5-6) The language of the arbitration clause in *Simpson* applicable to this argument stated:

> "[H]owever, that nothing in this contract shall require Dealer to submit to arbitration any claims by Dealer against customer for claim and delivery, repossession, injunctive relief, or monies owed by customer in connection with the purchase or lease of any vehicle and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration."[14]

The primary concern expressed by the Supreme Court in *Simpson* with regard to this portion of the arbitration clause, was that this provision would allow the dealer to bring a claim and delivery action in a judicial forum, and, if successful, the dealer could repossess and sell the vehicle while the arbitration of any claim alleged by the Simpsons was still pending.[15] The Court ruled that this provision was oppressive and one-sided in *Simpson*.[16]

The arbitration clause in *York* contained nearly identical language with respect to the dealer's unilateral ability to bring an action in a judicial forum against the borrower, while the

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[13] Simpson, 373 S.C. at 28-33, 644 S.E.2d at 670-673.
[14] Id. at 20, 644 S.E.2d at 666.
[15] Id. at 32, 644 S.E.2d at 672.
[16] Id.

arbitration clause required all claims alleged by the borrower to be brought in an arbitral forum.[17] The Court of Appeals summarized this provision in *York*: "The second provision [the borrower] challenges allowed [the dealer] to retain repossession, foreclosure, and set-off rights, without regard to pending arbitration claims, while [the borrower]'s sole remedy was arbitration." Relying on the Supreme Court's reasoning in *Simpson*, the Court of Appeals held that this language was also oppressive and one-sided in *York*.[18]

Here, the applicable portion of the arbitration clause that the Respondents portray as oppressive and one-sided states:

> d. Self-Help, Foreclosure, and Provisional Remedies. The provisions of this paragraph shall not limit any rights that *you or I* may have to exercise self-help remedies such as set-off or repossession, to foreclose by power of sale or judicially against or sell any collateral or security, or to obtain any provisional or ancillary remedies from a court of competent jurisdiction before, after or during the pendency of any arbitration under subparagraph (b) above.

(R. p. 5) (Emphasis added).

Thus, unlike the provisions of the arbitration clauses in *Simpson* and *York*, the arbitration clause in this case provides mutual rights to both Green Tree and the Respondents, because it expressly allows both Green Tree and the Respondents to bring the types of claims listed above, or those which are "provisional or ancillary," in a judicial forum. The arbitration clauses in *Simpson* and *York*, only allowed the dealers to bring such claims and, thus, did not allow the borrowers to defend, file a counterclaim, or seek injunctive relief against such claims in a judicial forum.[19]

In this case, the above portion of the arbitration clause that discusses "Self-Help, Foreclosure, and Provisional Remedies" allows both parties to bring such claims, which would allow the Respondents to defend, file a counterclaim, or seek injunctive relief against any such

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[17] York, 406 S.C. at ___, 749 S.E.2d at 150.
[18] Id. at ___, 749 S.E.2d at 151.
[19] Id. at ___, 749 S.E.2d at 150; Simpson, 373 S.C. at 20, 644 S.E.2d at 666.

action brought by Green Tree in the same judicial forum that Green Tree filed its action, even if Green Tree's action was brought during a pending arbitration. Thus, the fears expressed by the Supreme Court in *Simpson* and the Court of Appeals in *York* that the borrower could bring her claim through mandatory arbitration and, while the arbitration was pending, the dealer could bring a claim and delivery action, obtain possession of the collateral and sell the collateral, are expressly alleviated in this case, because this arbitration clause would allow the Respondents to defend, file a counterclaim, or seek injunctive relief against any such action brought by Green Tree in the same judicial forum.

Next, the Respondents rely on *Simpson* to argue that the arbitration clause is unconscionable in this case because it includes the arbitration of warranty claims, which would conflict with the MMWA. (Respondents' Brief p. 6-7) In *Simpson*, the applicable provision of the arbitration clause analyzed in the context of the MMWA stated "that it applie[d] to 'any and all disputes' including 'automobile warranty' and 'any consumer protection statute.'"[20] Because the arbitration clause contained an express agreement to arbitrate disputes involving "automobile warranties" and "consumer protection statutes," claims that implicate the MMWA, the Supreme Court held "that parties may not agree to arbitrate an MMWA claim."[21]

In this case, Green Tree and the Respondents did not agree to arbitrate an MMWA claim, and the arbitration clause makes no express mention of arbitration of any claims that would implicate the MMWA. In *Simpson*, the parties expressly agreed to arbitrate two types of claims that would implicate the MMWA: (1) automobile warranties and (2) claims arising under any consumer protection statute.[22] Here, the parties agreed to arbitrate any controversy or claim

[20] Simpson, 373 S.C. at 32-33, 644 S.E.2d at 673.
[21] Id. at 33, 644 S.E.2d at 673.
[22] Id

arising out or relating to the Contract that involves only a single claimant, or claimants or who are related or asserting claims arising from a single transaction. (R. p. 3). The Contract between Green Tree and the Respondents did not expressly mention any claims that implicate the MMWA.

The South Carolina Supreme Court has held that arbitration clauses that generally state the claims upon which the parties have agreed to arbitrate are valid.[23] In *Landers v. FDIC*, the arbitration agreement provided that the parties agreed to arbitrate "any controversy or claim arising out of or relating to this contract or breach thereof."[24] In upholding the language of this agreement, the Supreme Court made no mention of any violation of the MMWA.[25] Therefore, because the arbitration clause in this case is distinguishable from the arbitration clause in *Simpson*, in that it does not expressly include claims subject to the MMWA, the arbitration clause in this case does not implicate the MMWA and, thus, does not violate public policy.

Lastly, in the event that any provision of the Contract is deemed unconscionable, the Court should sever that provision from the Contract, rather than striking the entirety of the arbitration clause or the Contract. Unlike *Simpson*, if any provision of the arbitration clause is found unconscionable in this case, such provision would not have the cumulative effect that existed in *Simpson*.[26] Furthermore, the Contract provides that:

> Wherever possible each provision of this Contract shall be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Contract shall be prohibited by or invalid under applicable law, such provision shall be ineffective only to the extent of such prohibition or invalidity,

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[23] See Landers v. FDIC, 402 S.C. 100, 103, 739 S.E.2d 209, 210 (2013) (upholding an arbitration clause that applied to "any controversy or claim arising out of or relating to this contract or breach thereof").
[24] Id. at 103, 739 S.E.2d at 210.
[25] Id. at 117, 739 S.E.2d at 218.
[26] See Simpson, 373 S.C. at 34, 644 S.E.2d at 674.

> without invalidating the remainder of such provision or the remaining provisions of this Contract.

(R. p. 44).

Thus, as agreed upon by Green Tree and the Respondents, if the Court finds any provision of the Contract to be unconscionable, that provision should be severed from the Contract and should not affect the legality of all remaining portions of the Contract. Furthermore, striking the arbitration clause as a whole would improperly provide the Respondents with affirmative relief through this appeal, where the Respondents have not formally sought affirmative relief because they have not appealed the circuit court's ruling.

CONCLUSION

Based on the foregoing arguments and citation of authority, the Appellant, Green Tree Servicing, LLC f/k/a Green Tree Financial Servicing Corp., respectfully requests that the order of the circuit court be reversed insofar as it denies Green Tree's Motion to Compel Arbitration of all claims in the Complaint, and that all of the Respondents' causes of action be ordered to mandatory arbitration.

Respectfully submitted:

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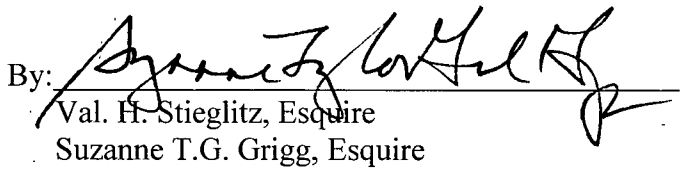
By: 

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March 14, 2014

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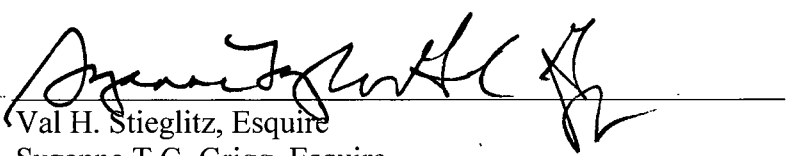
CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Reply Brief complies with Rule 211(b), SCAR.



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I, Kyle Brannon, hereby certify that on March 17, 2014, I served one copy of the ***Final Brief of Appellant*** submitted by the Appellant, Green Tree Servicing, LLC f/k/a Green Tree Financial Servicing Corp., on counsel for the Respondents, Cynthia Hall and Ronald R. Ballentine, via electronic mail and United States Mail, postage pre-paid, and addressed as follows:

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