IN THE MISSOURI SUPREME COURT

No. SC92539

ANITA JOHNSON,
Respondent,

v.

JF ENTERPRISES, LLC, d/b/a JEREMY FRANKLIN'S SUZUKI OF KANSAS CITY, and JEREMY FRANKLIN,
Appellants,

and

AMERICAN SUZUKI MOTOR CORPORATION,
Defendant.

Appeal from the
Circuit Court of Jackson County, Missouri
Division 11
The Honorable W. Brent Powell, Circuit Judge

SUBSTITUTE OPENING BRIEF OF APPELLANTS JF ENTERPRISES AND JEREMY FRANKLIN

Kevin D. Case, No. 41491
Patric S. Linden, No. 49551
Case & Roberts P.C.
Two Pershing Square
2300 Main Street, Suite 900
Kansas City, MO 64108
Tel: (816) 448-3707
Fax: (816) 448-3779
kevin.case@caseroberts.com
patric.linden@caseroberts.com
Attorneys for Appellants

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JURISDICTIONAL STATEMENT

This matter arises from an action brought by Respondent Anita Johnson, in the Circuit Court of Jackson County, Missouri. Legal File at LF 6. Appellant Jeremy Franklin ("Franklin") is the president of Appellant JF Enterprises, LLC ("JF Enterprises"). Legal File at LF 58 (¶ 1). Johnson brought claims asserting that JF Enterprises and Franklin had negligently misrepresented the terms under which she had purchased a vehicle from JF Enterprises and had been negligent in its communications with lenders regarding the financing terms of that purchase. Legal File at LF 6-20. Johnson also brought claims against the manufacturer of the vehicle, American Suzuki Motor Company ("ASMC"), for violations of the Missouri Merchandising Practices Act, Section 407.010 *et seq.*, RSMo 2000. Legal File at LF 13-14. JF Enterprises and Franklin moved to compel arbitration pursuant to a binding arbitration agreement between the parties. Legal File at LF 49-51. This motion was denied by the trial court on June 3, 2010. Legal File at LF 126. JF Enterprises and Franklin timely filed their Notice of Appeal on June 13, 2011. Legal File at LF 127.

This Court has jurisdiction to hear an immediate appeal of the denial of Appellant's motion to compel arbitration under 9 U.S.C. § 16(a)(1)(B) and/or § 435.440.1, RSMo 2000. The appeal was properly filed in the Missouri Court of Appeals, Western District , as Jackson County is within the geographic boundaries of that District. This matter does not involve any of the issues reserved for the exclusive jurisdiction of the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution, in

that none of the issues in this matter concerns the validity of a treaty or statute of the United States, the validity of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or a criminal conviction where the punishment imposed is death. However, this Court has jurisdiction to hear the present appeal pursuant to its constitutional authority under Article V., Section 10 of the Missouri Constitution, which empowers this Court to order the transfer of any case pending before the Court of Appeals "because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to supreme court rule."Mo. Const. art. V, § 10

STATEMENT OF FACTS

Appellant JF Enterprises, LLC, operates a motor vehicle dealership in Kansas City, Missouri, under the registered fictitious name Jeremy Franklin's Suzuki of Kansas City. *See* Legal File at LF 6 (¶ 2), 35 (¶ 2), 59 (¶3). Appellant Jeremy Franklin is the President of JF Enterprises, LLC. Legal File at LF 58.

On or about December 23, 2007, Respondent Anita Johnson purchased a new 2008 Suzuki XL-7 from JF Enterprises. Legal File at LF 60. This vehicle was obtained by JF Enterprises from American Suzuki Motor Corporation (ASMC), a company located in Brea, California. *Id.* at LF 63 The purchase price of that vehicle was $39,396.95. *Id.* at LF 60. She financed the purchase of that vehicle, executing a Retail Installment Contract which obligated her to make 75 payments of $762.32 per month. *Id.* That loan was subsequently assigned to Wells Fargo Auto Finance, a lending institution located in Phoenix, Arizona. *Id.* at LF 62, 64.

Johnson asserted that she came to JF Enterprises as a result of a "promotional program" that advertised the sale of Suzuki vehicles "for very low or no monthly payments" as well as a direct mailing she received which discussed the sale of motor vehicles for $99.00 per month. Legal File at LF 9 (¶15). She contended that ASMC controlled and participated in the advertising discussing this promotional program. *Id.* at LF 8-9 (¶¶ 13, 14).

Johnson alleged that she contacted JF Enterprises and was told that "she could purchase a new Suzuki vehicle in exchange for very low monthly payments and return the vehicle to the dealer in ten to twelve months and purchase another new Suzuki vehicle with no negative equity." Legal File at LF 9 (¶ 16). She stated that she was told that she would receive a check for the difference between the monthly payments on the retail installment contract and the program payments. *Id.* at LF 11 (¶ 24). She also alleged that she received a check from JF Enterprises in the amount of $7,956.00 after her purchase of the vehicle. *Id.* She claimed that, after these funds were exhausted through making installment payments on the vehicle, customers who had participated in the promotional program were told that they were no longer part of the promotional program and would be responsible for the full loan amounts. *Id.* at LF 11-12 (¶ 25). She also apparently claimed that she was similarly advised that she was no longer part of the program. *See id.*

As part of her motor vehicle purchase transaction, and subsequent to the execution of the Retail Installment Contract, Johnson also executed an Arbitration Agreement. Legal File at LF 62; LF 111. That arbitration agreement required Johnson to submit "[a]ny claim or dispute, whether in contract, tort, statute or otherwise … which arise out of or relate to your credit application, purchase or condition of this vehicle, your purchase or financing contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase or financing contract)" to binding arbitration. *Id.* at LF 62.

Johnson filed the present matter in the Circuit Court of Jackson County, Missouri, on December 13, 2010, subsequently amending her Petition on April 8, 2011. Legal File at LF 1. In that Amended Petition, she brought claims against JF Enterprises and Franklin for negligent misrepresentation and under a general negligence theory. *Id.* at LF 14-19. She also brought claims against the manufacturer, ASMC, for violation of the Missouri Merchandising Practices Act. *Id.* at LF 13-14. She seeks damages in excess of $75,000. *Id.* at LF 14, 19.

On April 15, 2011, JF Enterprises and Franklin moved to compel arbitration pursuant to the Arbitration Agreement executed by Johnson during her purchase transaction, also filing its Statement of Uncontroverted Material Facts and Suggestions in Support of that Motion. Legal File at LF 52-64, LF 65-79. Johnson filed Suggestions in Opposition to that motion, to which JF Enterprises and Franklin subsequently filed Reply Suggestions. *See Id.* at LF 80-109, LF 110-125. The trial court denied the Motion to Compel Arbitration on June 3, 2011. *Id.* at LF 126. The sole basis for that ruling was the trial court's reliance upon *Krueger v. Heartland Chevrolet, Inc.*, 289 S.W.3d 637, 638 (Mo. Ct. App. 2009). *See id.*

The present appeal was timely filed on June 13, 2011. *Id.* at LF 127. Following briefing and oral argument, the Court of Appeals issued its opinion on March 27, 2012. *See Johnson v. JF Enterprises, LLC*, WD73990, 2012 WL 1034234, at *1 (Mo. App. Mar. 27, 2012). That opinion affirmed the trial court's denial of the Motion to Compel

Arbitration. *See id.* at *3-4. In reaching that decision, however, the Court of Appeals reasoned that, so long as the Retail Installment Contract contained a merger clause similar to that in *Krueger* and otherwise contained terms that covered the full subject matter of the contract, the merger clause would operate to supersede even a *subsequently* executed Arbitration Agreement. *See id.* at *3.

Following the issuance of the Court of Appeals' opinion on March 27, 2012, Appellants timely moved for rehearing or transfer in the Court of Appeals, and that motion was subsequently denied by the Court of Appeals on May 1, 2012. Appellants then filed their application for transfer in this Court, which was granted on July 7, 2012.

POINTS ON APPEAL

I. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION, BECAUSE RESPONDENT FAILED TO MAKE A SUFFICIENT SHOWING THAT THE DOCTRINE OF *KRUEGER V. HEARTLAND CHEVROLET* WAS APPLICABLE TO THE PARTIES' ARBITRATION AGREEMENT, IN THAT WHILE THE RETAIL INSTALLMENT CONTRACT CONTAINED A MERGER CLAUSE, RESPONDENT FAILED TO DEMONSTRATE THAT THE ARBITRATION AGREEMENT WAS SUBJECT TO THE MERGER CLAUSE BECAUSE SHE PRESENTED NO EVIDENCE THAT THE ARBITRATION AGREEMENT WAS EXECUTED PRIOR TO THE RETAIL INSTALLMENT CONTRACT.

Krueger v. Heartland Chevrolet, Inc., 289 S.W.3d 637 (Mo. Ct. App. 2009)

II. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION, BECAUSE THAT DENIAL CANNOT BE UPHELD UPON ANY OF THE ALTERNATIVE GROUNDS RAISED IN JOHNSON'S SUGGESTIONS IN OPPOSITION TO THE MOTION TO COMPEL ARBITRATION, IN THAT THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE, DOES NOT LIMIT HER ABILITY TO BRING CLAIMS OR SEEK RECOVERY UNDER THE MISSOURI MERCHANDISING PRACTICES ACT, AND PLAINTIFF'S CLAIMS FALL WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)

Kansas City Urology, P.A. v. United Healthcare Services, 261 S.W.3d 7, 12 (Mo. Ct. App. 2008)

ARGUMENT

I. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION, BECAUSE RESPONDENT FAILED TO MAKE A SUFFICIENT SHOWING THAT THE DOCTRINE OF *KRUEGER V. HEARTLAND CHEVROLET* WAS APPLICABLE TO THE PARTIES' ARBITRATION AGREEMENT, IN THAT WHILE THE RETAIL INSTALLMENT CONTRACT CONTAINED A MERGER CLAUSE, RESPONDENT FAILED TO DEMONSTRATE THAT THE ARBITRATION AGREEMENT WAS SUBJECT TO THE MERGER CLAUSE BECAUSE SHE PRESENTED NO EVIDENCE THAT THE ARBITRATION AGREEMENT WAS EXECUTED PRIOR TO THE RETAIL INSTALLMENT CONTRACT.

A. Standard of Review.

The question of whether an arbitration agreement should be enforced is an issue of law, subject to *de novo* review. *Paetzold v. Am. Sterling Corp.*, 247 S.W.3d 69, 71 (Mo. Ct. App. 2008), citing *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. banc 2006).

B. The *Krueger v. Heartland Chevrolet* Doctrine.

Johnson argued in the proceedings below that the parties' arbitration agreement in this matter was superseded by the Retail Installment Contract, because of a merger clause contained within that agreement. She relied upon a prior decision of this Court, *Krueger v. Heartland Chevrolet, Inc.*, 289 S.W.3d 637 (Mo. Ct. App. 2009). The holding in the *Krueger* case is closely tied to the specific facts before that court.

Like the case at bar, *Krueger* arose out of a motor vehicle purchase transaction between a consumer and a motor vehicle dealership. *See Krueger*, 289 S.W.3d at 638. In the course of purchasing the vehicle, the plaintiffs executed three documents that were subsequently discussed in the appellate court's opinion: "a Retail Buyer's Order, an Arbitration Addendum to Retail Buyer's Order, and a Retail Installment Contract." *Id.* at 638. After the plaintiffs brought suit against the motor vehicle dealer, the dealer sought to compel arbitration under the terms of the Arbitration Addendum to Retail Buyer's Order. *See Id.* The plaintiffs resisted that motion, arguing that the Arbitration Addendum was superseded by the Retail Installment Contract, which contained no arbitration clause. *See id.*

The *Krueger* Court agreed with the plaintiff, concluding that the Retail Installment Contract was the parties' final agreement and that this final agreement took the place of any prior agreements. *See id.* at 640. In supporting this conclusion, the Court looked to

the language of the Retail Installment Contract. *See id.* at 638-39. It first found that the opening paragraph contained language which indicated that the document was intended to cover both the sale of the vehicle and the terms under which the vehicle would be financed. *See id.* at 639. It next found that the Retail Installment Contract did not expressly refer to any other documents or incorporate those documents. *See id.* Rather, the Court observed that the Retail Installment Contract contained a "merger clause" which stated that the document constituted "the complete and exclusive agreement of the parties." *Id.* at 639. That merger clause specifically stated:

> Oral agreements or commitments to loan money, extend credit or to forbear from enforcing repayment of a debt including promises to extend or renew such debt are not enforceable. To protect you (borrower(s)) and us (creditor) from misunderstanding or disappointment, any agreements we reach covering such matters are contained in this writing, *which is the complete and exclusive statement of the agreement between us, except as we may later agree in writing to modify it.*

Id.(emphasis in original).[1] Thus, the "Retail Buyers Order and its accompanying Arbitration Addendum" were superseded by the subsequent execution of the Retail Installment Contract and its included merger clause. *Id.* at 639.

Implicit in the *Krueger* holding is a determination that the Arbitration Addendum was executed *prior to* the Retail Installment Contract. As discussed in the quotation of the merger clause, above, the retail installment contract in *Krueger* specifically provided that it could be amended if the parties entered into a later written agreement to do so. *See id.* Accordingly, the *Krueger* decision stands for the proposition where the parties enter into a stand-alone contract containing a merger clause, the execution of that contract operates to supersede any *prior* agreements, replacing them with the last-executed contract. However, the existence of a merger clause is no bar to subsequent modification of the contract by whatever means and procedure which the parties have agreed to within their contract.[2]

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[1] The same language appears in the Retail Installment Contract in the Johnson transaction. Legal File at LF 61.

[2] Indeed, even in the absence of an express provision specifying how a contract can be amended, it is clear that the parties retain the ability to make subsequent amendments to a prior contract. *Lunceford v. Houghtlin*, 170 S.W.3d 453, 464 (Mo. App. 2005) (citing *Twin River Constr. Co. v. Pub. Water Dist. No. 6*, 653 S.W.2d 682, 690 (Mo. App. 1983)). They can also agree to rescind or abandon the contract altogether.

C. *Krueger* Is Distinguishable From The Case At Bar.

While the circumstances of the instant matter presents certain parallels to *Krueger*, those circumstances materially depart from *Krueger* in ways that eliminate the premises that underpin the reasoning in *Krueger*. As such, the *Kruger* holding is inapplicable to the parties' Arbitration Agreement, here. Simply put, unlike *Krueger*, there was no demonstration by Johnson that the Arbitration Agreement was executed *prior* to the Retail Installment Contract or that it was part of a prior agreement that was superseded by the Retail Installment Contract. Thus, she did not meet her burden to demonstrate that the *Krueger* doctrine applied to the case at bar and operated to render the Arbitration Agreement unenforceable. Indeed, the language of the Arbitration Agreement, here, suggests that it was a *subsequent* writing intended to modify the terms of the motor vehicle purchase as set forth in the Retail Installment Contract, and modified those terms in the manner provided for within the Retail Installment Contract's merger clause.

As discussed in the previous section, the *Krueger* decision stands for the proposition that a contract which contains a merger clause operates to supersede any

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See In re Reed's Estate, 414 S.W.2d 283, 286 (Mo. 1967); *Thumm v. Lohr*, 306 S.W.2d 604, 608 (Mo. App. 1957).

Rather the purpose of contract provisions regarding amendment of the contract is to define and clarify how the parties can amend their agreement.

prior agreements that the parties may have had before executing the contract with the merger clause. For example, in *Krueger*, the retail installment contract, with its merger clause, superseded the buyers order in the transaction. *Krueger*, 289 S.W.3d at 639-40. That retail installment also, therefore, superseded the previously-executed arbitration addendum to that buyers order. *See Id.*

The reasoning of the *Krueger* doctrine, however, does not have any impact upon *subsequent* agreements seeking to modify a prior contract, even if that prior contract contains a merger clause. Indeed, in *Krueger* (as in the case at bar), the parties' Retail Installment Contract expressly provided a procedure for amending that contract. *See id.* at 639. Thus, in order to demonstrate that *Krueger* applies to supersede the Arbitration Agreement, here, Johnson was required to show not only that the Retail Installment Contract contained a merger clause, but that the Arbitration Agreement was executed *before* the Retail Installment Contract. She made no such showing, however. Indeed, she acknowledges that the Arbitration Agreement was "provided to [her] *after* she had agreed to purchase the 2008 Suzuki XL7." Legal File at LF 89 (italics added).

Further, the language of the Arbitration Agreement cannot be squared with a conclusion that it was executed before the Retail Installment Contract. Unlike the arbitration agreement in *Krueger*, which was specifically denominated as a "Arbitration Addendum To Retail Buyers Order," the Arbitration Agreement, here, contains no such designation. *See* Legal File at LF 62. Moreover, the Arbitration Agreement provides that

it applies to claims "which arise out of or relate to … your purchase or financing contract…." *Id.* It also expressly contemplates arbitration of disputes that arise out of the customer's relationship with the lender, as the Arbitration Agreement includes within its scope disputes "which arise out of or relate to … any such relationship with third parties who do not sign your purchase or financing contract…." *Id.* The Arbitration Agreement also contains a provision stating that "[t]his Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract." *Id.* The only rational way to give meaning to these provisions is to conclude that the Arbitration Agreement is an agreement subsequent to the Retail Installment Contract. As the merger clause does not supersede subsequent agreements, it does not impede the enforcement of the Arbitration Agreement in this matter.

D. The Rationale Employed By The Court Of Appeals In Its Opinion, Below, Radically Departs From Missouri Precedent And Should Not Be Adopted.

In its opinion below, the Court of Appeals applied *Krueger* in a manner that not only distorted its holding but which also threatens to significantly alter the common law of contract in Missouri. The Court of Appeals' March 27, 2012, opinion appears to extend the principles of *Krueger* apply to *post-contract* amendments, finding that a retail installment contract containing a merger clause would supersede an Arbitration Agreement executed *after* that retail installment contract. *See Johnson*, 2012 WL

1034234, at *3. The Court of Appeals reasoned that the merger clause in the retail installment contract operated to exclude *subsequent* agreements on the basis that such clauses are "indicative of the parties' intent that the retail installment contract be the complete and exclusive agreement between the parties." *See id.*

The Court of Appeals' application of the law applicable to merger clauses departs from prior Missouri precedent which applies such clauses to exclude consideration solely of *prior* oral or written agreements, as discussed below. The opinion below also appears to rest its holding on the grounds that the Arbitration Agreement "fails to reference or incorporate the Retail Installment Contract in any fashion, or indicate that it is an agreement modifying the retail installment contract." *Id.* at *3. For the reasons discussed below, this rationale also appears to deviate markedly from pre-existing contract law in Missouri, and misinterprets the intent of the parties as expressed in the contract documents within the record on appeal.

The premise in the opinion below that the Arbitration Agreement "fails to reference … the Retail Installment Contract," misinterpreted the facts and undisputed evidence in the record. The Arbitration Agreement, as the March 27, 2012, opinion acknowledged, clearly refers to a "financing contract." *Id.* at *3. *See also* Legal File at LF 62. The "financing contract" *was* the Retail Installment Contract (as the Retail Installment Contract is the only document that sets forth the terms of both the vehicle purchase as well as the loan terms for the *financing* of the vehicle's purchase price). *See*

Legal File at LF 60-61. There is nothing in the record or the parties' briefing below that suggested that the Arbitration Agreement's reference to a "financing contract" meant some other contract other than the Retail Installment Contract. Thus, to the extent that the Court of Appeals' opinion reasoned that the Arbitration Agreement does not "reference" the Retail Installment Contract, this would appear to misinterpret the facts within the record, an error that undoubtedly contributed to the lower appellate court's flawed opinion, as the decision moved from mere reference to the prior contract to *incorporation* of that prior contract.

Also central to the holding of the Court of Appeals' March 27 opinion is a focus upon the absence of any express provision within the Arbitration Agreement *incorporating* the Retail Installment Contract. *See Johnson*, 2012 WL 1034234, at *3. Thus, Court of Appeals' analysis appears to implicitly agree with Appellants' position that the Arbitration Agreement was executed after the Retail Installment Contract. However, the lower court's opinion appears to hold that a subsequently-executed Arbitration Agreement *must expressly incorporate the prior Retail Installment Contract* in order to constitute a valid amendment of that prior contract. *See id.*

Appellants respectfully suggest that such a holding would dramatically depart from existing Missouri contract law. Prior Missouri precedent contains *no* requirement that a contract amendment contain any express provision incorporating the parties' prior contract. The Court of Appeals' March 27 opinion cites no authority that stands for the

proposition that a writing must expressly incorporate the terms of a prior contract in order to be enforceable as an amendment to the contract. Nor does there appear to be any reported Missouri authority that has previously reached that conclusion. Section 400.2-209, RSMo 2000, which governs modification of contracts for the sale of goods does not impose such a requirement. The opinion below relies upon *CIT Group/Sales Financing Inc. v. Lark*, 906 S.W.2d 865, 868 (Mo. App. 1995), for the proposition that "the existence of a merger clause is a strong indication on its face that the writing is intended to be complete." However, *CIT Group* concerned the application of the merger clause and the parol evidence rule to exclude "evidence of *prior or contemporaneous oral agreements*." 906 S.W.2d at 868. *CIT Group* did not concern a written agreement executed *after* the underlying contract that operated to amend that prior contract. *See id.* The parol evidence rule does not bar evidence of *subsequent* modifications to a contract. *See Pac. Carlton Dev. Corp. v. Barber*, 95 S.W.3d 159, 165 (Mo. Ct. App. 2003); *Warrenton Campus Shopping Ctr., Inc. v. Adolphus*, 787 S.W.2d 852, 855 (Mo. Ct. App. 1990). Therefore, neither the authority cited by the Court or the underlying parol evidence rule discussed in *CIT Group* lends support to a conclusion that a subsequent writing must reference and incorporate a prior contract to constitute a valid amendment of the prior contract.

Rather, to amend a contract, Missouri law requires that the parties enter into a subsequent agreement whose terms show an intent to modify the parties' rights and obligations under their prior contract, in order to amend that contract. *Compare, Mt.*

Vernon Car Mfg. Co. v. Hirsch Rolling Mill Co., 227 S.W. 67, 74 (Mo. 1920). "Generally, the parties to a contract are free to subsequently modify their contract, notwithstanding contract language limiting modification." *Lunceford v. Houghtlin*, 170 S.W.3d 453, 464 (Mo. Ct. App. 2005) (citing *Twin River Constr. Co. v. Pub. Water Dist. No. 6*, 653 S.W.2d 682, 690 (Mo.App.1983)). Thus, the reasoning of the March 27, 2012, opinion that the merger clause in the parties' Retail Installment Contract can operate to bar consideration of *subsequent* amendments to that contract is contrary to well-settled law in Missouri. Simply put, the presence of a merger clause within the parties' Retail Installment Contract did not prohibit the parties from later amending that contract via the Arbitration Agreement. Indeed, the parties amended their prior contract through the mechanism expressly allowed in by the Retail Installment Contract – via a writing signed by the parties. Legal File at LF 61, 62. As the merger clause operates only to supersede all *prior* agreements and the Arbitration Agreement satisfied the requirements of that clause for amendment of the Retail Installment Contract (as it is a later agreement in writing), the March 27 opinion appears to misapply both the facts and the law regarding merger agreements in concluding that the Arbitration Agreement did not amend the Retail Installment Contract.

Obviously, had the parties' Arbitration Agreement contained express language stating that it was intended to amend the Retail Installment Contract, this would have made the parties' intent to amend the prior contract crystal clear. It does not follow, however, that the absence of express language incorporating the prior contract operates to

render the amendment invalid. Instead, the touchstone is whether the parties' intent to amend their prior contract can be discerned from their subsequent written agreement. Provided that the terms of the subsequent writing modify the parties' rights and obligations as they existed under the prior contract (and otherwise meet the requirements for a valid contract[3]), then the writing should be enforced as an amendment to the contract. However, by imposing a *requirement* that a subsequent contract amendment expressly reference and incorporate the prior contract, the Court of Appeals' March 27, 2012, opinion elevates a prudent drafting practice to a new status as a rule of law.

Because the Court of Appeals' opinion below markedly departs from prior Missouri precedent, this Court should not adopt its reasoning in deciding the case at bar. Rather, should this Court conclude that the underlying *Krueger* doctrine is sound, that decision should be limited to its facts, where the Arbitration Agreement was an amendment to a prior contract, which was, in turn, superseded by the retail installment contract. This Court should hold that, where (as here) the record reflects that the Arbitration Agreement was executed *after* the retail installment contract, the Arbitration Agreement operates to amend the previously executed retail installment contract. Accordingly, this Court should reverse the order of the trial court denying the Motion to

[3] *Barr v. Snyder*, 294 S.W.2d 4, 9 (Mo. 1956) (Stating that "[i]t is the general rule that a modification of a contract constitutes the making of a new contract" and discussing the formal requirements for such modification).

Compel Arbitration filed by JF Enterprises and Franklin in the proceedings below and remand this matter with directions to order Johnson to submit her claims to binding arbitration.

II. THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION TO COMPEL ARBITRATION, BECAUSE THAT DENIAL CANNOT BE UPHELD UPON ANY OF THE ALTERNATIVE GROUNDS RAISED IN RESPONDENT'S SUGGESTIONS IN OPPOSITION TO THE MOTION TO COMPEL ARBITRATION, IN THAT THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE, DOES NOT LIMIT HER ABILITY TO BRING CLAIMS OR SEEK RECOVERY UNDER THE MISSOURI MERCHANDISING PRACTICES ACT, AND RESPONDENT'S CLAIMS FALL WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

A. Standard of Review.

As discussed above, in regard to Point I, the trial court's denial of a motion to compel arbitration is an issue of law, subject to *de novo* review. *Paetzold v. Am. Sterling Corp.*, 247 S.W.3d 69, 71 (Mo. Ct. App. 2008), citing *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. 2006)

B. The Parties' Arbitration Agreement Is Not Unconscionable.

1. As A Contract Involving Interstate Commerce, The Parties' Arbitration Agreement Is Governed By The Federal Arbitration Act.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. (2000), creates "a body of federal substantive law applicable in state and federal courts." *Skewes v. Shearson*

Lehman Bros., 250 Kan. 574, 829 P.2d 874, 579 (1992). This act was established to reverse the then long-standing judicial hostility to arbitration agreement and to place arbitrations upon the same footing as other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (U.S.N.C. 1991). The FAA establishes a liberal policy favoring arbitration agreement so the disputes may be resolved without resort to the courts. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427 (Mo. 2003).

Under the FAA, a written agreement to submit a dispute to arbitration is valid, enforceable, and irrevocable, except upon such grounds as exist at law or equity for the revocation of any contract. *McCarney v. Nearing, Staats, Prelogar & Jones*, 866 S.W.2d 881, 887 (Mo. Ct. App. 1993); 9 U.S.C. § 2. Under the FAA, an arbitration clause will be construed in favor of arbitration unless the clause positively cannot be interpreted to cover the parties' dispute. *McCarney*, 866 S.W.2d at 887. While Missouri has also enacted statutory provisions regarding arbitration agreements, those state law provisions are preempted by the FAA when it is applicable. *See Bunge Corp. v Perryville Feed & Produce*, 685 S.W.2d 837, 839 (Mo. banc 1985); *Duggan v. Zip Mail Services, Inc.*, 920 S.W.2d 200, 202 (Mo. Ct. App. 1996). The FAA is applicable "where the contract simply relates to interstate commerce, even when the relationship was less than substantial." *Paetzold*, 247 S.W.3d at 73. Indeed, this Court has recognized that the FAA's reach extends "even to intrastate activities of a very small scale." *Id.* Factors

such as whether supplies or materials involved or used in the contract were obtained from another state can be determinative of this issue. *See Id.*

Here, the transaction in question involved the sale of a vehicle, a transaction which the U.S. Supreme Court has held affect interstate commerce. *See United States v. Evans*, 272 F.3d 1069, 1080 (8th Cir. 2001)("More important, the transaction-the purchase of an automobile from a commercial used car dealer-is sufficient, by itself to have an affect on interstate commerce."); *Teamsters Local Union No. 116 v. Fargo-Moorhead Auto. Dealers Ass'n*, 459 F. Supp. 558, 560 (D.N.D. 1978)("The automobile sales industry is an industry affecting interstate commerce."). Moreover, the evidence presented below demonstrated that the Johnson transaction involved interstate commerce. For example, the vehicle purchased by Johnson was obtained by JF Enterprises from its manufacturer, American Suzuki Motor Company, which is located in Brea, Californa. *See* Legal File at LF 63. Johnson's purchase of the vehicle was ultimately financed by Wells Fargo Auto Finance, a company located in Phoenix, Arizona. *See id.* at 54. Wells Fargo was also identified as a lienholder upon the vehicle. *See id.*

As both the subject matter of the Johnson transaction and the loan that financed the purchases of the vehicle were obtained from other states, this transaction clearly involved interstate commerce. Thus, the FAA governs the parties' arbitration agreement and supersedes any contrary Missouri statute or precedent.

2. The Unconscionability Doctrine In Missouri Contract Law.

The FAA provides that an arbitration agreement can be invalidated "upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. Generally, under Missouri law, contracts can be found unenforceable if the contract is unconscionable. *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 531 (Mo. 2009). Historically, Missouri courts have examined unconscionability under terms of "procedural" and "substantive" unconscionability, typically requiring both forms of unconscionability to be present before setting aside a contract as unenforceable. *See Lawrence*, 273 S.W.3d at 531. "Procedural unconscionability deals with the formalities of making the contract." *State ex rel. Vincent,* 194 S.W.3d at 858. It concerns inequities in the contract formation process, such as unequal bargaining position, "high pressure sales tactics, unreadable fine print, or misrepresentation." *Id.*.; *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. Ct. App. 2005). Substantive unconscionability has been defined by the Missouri Supreme Court as "undue harshness in the contract terms." *State ex rel. Vincent,* 194 S.W.3d at 858. It has been described as "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." *State, Missouri Dept. of Soc. Services, Div. of Aging v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 277 (Mo. 2001); *Carter v. Boone County Trust Co.*, 338 Mo. 629, 92 S.W.2d 647, 653 (1935).

Missouri courts have also generally followed a "balancing" test to both types of unconscionability. *See Whitney*, 173 S.W.3d at 308. Where there is evidence of a great deal of procedural unconscionability, little evidence of substantive unconscionability will be required. *See Id.* Likewise, a showing of gross substantive unconscionability will only require a minimal showing of procedural unconscionability to render a contract unenforceable. *See Id.* Historically, Missouri courts have generally required a showing of both procedural and substantive unconscionability in order to find a contract unenforceable.[4] *See, e.g., Lawrence*, 273 S.W.3d at 531(Norton, J., concurring); *Repair*

[4] Curiously, a review of the reported cases reveals that the only occasions where this Court has departed from an approach where both procedural and substantive unconscionability were needed to render a contract unenforceable is in the context of determining the enforceability of arbitration agreements. *See, e.g., State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006); *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 22 (Mo. 2010) vacated by *Missouri Title Loans v. Brewer*, ___ U.S. ___, 131 S.Ct. 2875 (2011) ("*Brewer I*"); *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 139-40 (Mo. 2010). This is indicative of a trend among Missouri courts to treat arbitration agreements on a different footing than other contracts, which is expressly forbidden under the FAA. *See Perry v. Thomas*, 482 U.S. 483, 493, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004). However, this trend is not surprising, given the long history of judicial hostility to arbitration that ultimately led to the enactment of the FAA. *See Buckeye*

Masters Const., Inc. v. Gary, 277 S.W.3d 854, 858 (Mo. Ct. App. 2009); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 559 (Mo. Ct. App. 2009); *Kansas City Urology, P.A.*, 261 S.W.3d at 15-16(Mo. App. 2008; *Woods v. QC Fin. Services, Inc.*, 280 S.W.3d 90, 95 (Mo. Ct. App. 2008); *Whitney*, 173 S.W.3d at 308; *Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 634 (Mo. Ct. App. 1979); *Cicle v. Chase Bank USA*, 583 F.3d 549, 554 (8th Cir. 2009); *Pleasants v. Am. Exp. Co.*, 541 F.3d 853, 857 (8th Cir. 2008).

3. The Arbitration Agreement Cannot Be Invalidated On The Basis Of Procedural Unconscionability

Her first contention raised in the trial court with regard to the issue of procedural unconscionability was that the arbitration agreement was procedurally unconscionable merely because she had no opportunity to negotiate, change, or modify the agreement and that it was presented as a take-it-or-leave-it proposal. *See* Legal File at LF 89. Even assuming this to be true, this does not render the Arbitration Agreement unenforceable. At best, these circumstances might demonstrate that the Arbitration Agreement is an adhesion contract. However, contracts of adhesion are enforceable. Indeed, as recently noted by the U.S. Supreme Court, "the times in which consumer contracts were anything other than adhesive are long past." *AT&T Mobility LLC*, 131 S. Ct. at 1750. As such, a

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Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 1206, 163 L. Ed. 2d 1038 (2006).

rule that rendered a contract unenforceable merely because it was adhesive in nature would be completely unworkable. *See State ex rel. Vincent*, 194 S.W.3d, 857-58(quoting *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. Ct. App. 2003)).

Johnson also raised an argument that procedural unconscionability was present because she did not recall seeing or signing an arbitration agreement. In responding to the Statements of Uncontroverted Fact filed with the Motion to Compel Arbitration, Johnson asserts that she "has no recollection of seeing or signing an Arbitration Agreement." Legal File at LF 82. Elsewhere in her written briefing before the trial court, she asserts that she was not made aware of the Arbitration Agreement because it was "on the back side of the contract" and that her lack of acceptance is demonstrated by the absence of any "initials … made to the back portion of said agreement." *Id.* at LF 91. She contends that the Arbitration Agreement was not conspicuous and that "it was not shown to her when she was instructed to sign by the Defendant." *Id.* at LF 92.

These arguments are belied by the evidence presented which demonstrated that the Arbitration Agreement was a separate document (rather than the reverse side of another contract document). *See* Legal File at 62. That document was clearly titled, in large, bold-face type "Arbitration Agreement." *See id.* This document was also separately signed by Johnson. *See id.* She raises no allegation that this signature was forged. Johnson's arguments also admit that she viewed and signed the document. In her Suggestions in Opposition filed in the trial court, she states on multiple occasions that the

Arbitration Agreement "was provided to the Plaintiff after she had agreed to purchase the 2008 Suzuki XL7." *Id.* at LF 89-90. These additional arguments, which indicate that she had reviewed the arbitration agreement also square with the evidence presented below demonstrating that it was the practice of the JF Enterprises dealership "to identify and explain all the terms of all the documents that the customer signs when purchasing a vehicle…." Legal File at LF 59.

Having acknowledged that she had reviewed the Arbitration Agreement, Johnson next contended that she did not have *sufficient* time to read the transaction documents that were shown to her. Johnson's affidavit discusses the circumstances of her review of *all* of the transaction documents, not circumstances specific to the arbitration agreement. An argument of procedural unconscionability relating to the contract in general, that is not specifically directed to the Arbitration Agreement, raises an issue that is for the arbitrator, not the trial court, to decide in the first instance. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). Moreover, the evidence Johnson marshaled in support of these arguments is equivocal, at best, however. She submitted an affidavit which implicitly acknowledges that she had the opportunity to read the transaction documents, stating that she merely did not have the opportunity to "thoroughly" read those documents. Legal File at LF 104.

Thus, even if the Arbitration Agreement was pre-printed and Johnson was not provided an opportunity to negotiate or vary its terms, the arbitration agreement is

enforceable. "Only such provisions of the standardized form which fail to comport with such reasonable expectations and which are unexpected and unconscionably unfair are held to be unenforceable." *Hartland Computer Leasing Corp., Inc. v. Ins. Man, Inc.*, 770 S.W.2d 525, 527 (Mo. Ct. App. 1989). As discussed above, Johnson was provided clear and conspicuous notice of the Arbitration Agreement contained within the Retail Installment Contract. "[A]n average person would reasonably expect that disputes arising out of an agreement like this might have to be resolved in arbitration. An agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair." *Swain*, 128 S.W.3d at 107-08. Accordingly, this Court should find that the parties' Arbitration Agreement is not procedurally unconscionable, and conclude that the denial of the Motion to Compel Arbitration cannot be affirmed on the alternative ground of procedural unconscionability.

4. Johnson's Substantive Unconscionability Arguments Were Rejected By The U.S. Supreme Court's Decision in *AT&T Mobility v. Concepcion*.

Turning to the issue of substantive unconscionability, her arguments raised before the trial court also fail to provide a basis upon which the trial court's order denying the Motion to Compel Arbitration can be affirmed. In summary, Johnson argued that the Arbitration Agreement was substantively unconscionable because it requires her to give up certain rights such as the right to trial by judge or jury, the ability to bring or participate in class actions, the rights to discovery that are available in litigation, the right to appeal, as well as other rights that are normally available in litigation. She specifically

expanded the discovery limitations and waiver of class claims in her argument below. She also raised an argument that the arbitration agreement operated to limit her right to bring claims under the Missouri Merchandising Practices Act ("MMPA") § 407.010 *et seq.*, RSMo 2000.

Turning first to Johnson's assertion that the Arbitration Agreement unconscionably limits her ability to conduct discovery, it should be noted that arbitration inherently involves a significantly more limited range of discovery as traditional litigation. Simply put, relinquishing the right to a court trial, the discovery and procedures that accompany court-tried litigation, as well as a robust appellate process is part and parcel of arbitration. Indeed, the whole point of entering into an arbitration agreement is to "trade[] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985). The Arbitration Agreement merely apprises the parties of the ways in which arbitration streamlines and simplifies the dispute resolution process. *See* Legal File at LF 62. Johnson's argument appears to be that an arbitration agreement is unconscionable and unenforceable if it does not provide the same procedures as available in traditional litigation. As discussed below, this position has been expressly rejected by the U.S. Supreme Court.

Johnson also argued in the proceedings below that the Arbitration Agreement should be held to be unconscionable because it prohibits arbitration of class claims. *See* Legal File at LF 96-97. This argument is flawed for several reasons. First and foremost, the issue of whether or not the Arbitration Agreement bars class arbitration is immaterial because Johnson has neither pleaded nor attempted to raise any class claims. *See id.* at LF 6-20. Instead, her Petition raises only individual claims. *See id.* Second, the Missouri precedent critical of arbitration agreements that do not allow class arbitration is inconsistent with the controlling U.S. Supreme Court decision in *AT&T Mobility*. Third, even under the Missouri precedents, this case is distinguishable because those cases have considered the value of the underlying claim in assessing whether the unavailability of class arbitration agreement renders an arbitration agreement unenforceable.

In *Perry v. Thomas*, 482 U.S. 483, 493, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987), the Court held (discussing the preemptive effect of the FAA) that state courts cannot "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what ... the state legislature cannot." In its recent *AT&T Mobility* decision, the Court considered whether the FAA prohibited state courts from finding "unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery." *AT&T Mobility LLC*, 131 S. Ct. at 1747. It also examined whether state courts could adopt rules that "classify[] as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an

ultimate disposition by a jury (perhaps termed "a panel of twelve lay arbitrators" to help avoid preemption)." *Id.* at 1747. It opined that such rules or holdings would be preempted by the FAA because they would "have a disproportionate impact on arbitration agreements" or would be otherwise incompatible with arbitration. *See Id.*

Johnson's argument that the arbitration agreement is substantively unconscionable merely due to its inclusion of a class action waiver was rejected by the *AT&T Mobility* Court. In *AT&T Mobility*, the U.S. Supreme Court found that class claims were irreconcilably inconsistent with the FAA's mandate for traditional, bilateral arbitration on a number of grounds. *See Id.* at 1749-1753. Class litigation frustrates the FAA's goals of speed, efficiency, and reducing the cost of dispute resolution, by making "the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. Attempting to arbitrate class claims "*requires* procedural formality" and "was not even envisioned by Congress when it passed the FAA…." *Id.*(italics in original). Moreover, arbitration is fundamentally unsuited to the high stakes presented by class litigation. *Id.* at 1752.

Two of the cases upon which Johnson relied, *Brewer v. Missouri Title Loans*, 323 S.W.3d 18 (Mo. banc 2010) ("*Brewer I*") and *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136 (Mo. banc 2010), were either expressly or implicitly vacated by the U.S. Supreme Court after *AT&T Mobility* was decided. *Brewer* was vacated and remanded by the U.S. Supreme Court after its decision in *AT&T Mobility*. *Missouri Title Loans, Inc. v. Brewer*,

131 S. Ct. 2875, 179 L. Ed. 2d 1184 (2011). As the *Ruhl* decision relied heavily upon the analysis in *Brewer I*, the U.S. Supreme Court ruling vacating *Brewer I* implicitly overruled *Ruhl* as well.

Following the remand of *Brewer I* by the U.S. Supreme Court, this Court reconsidered its prior decision in light of *AT&T Mobility*. *See Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc 2012) ("*Brewer II*"). The *Brewer II* decision is difficult to reconcile with *AT&T Mobility*, as this Court found that the arbitration agreement was unconscionable and unenforceable because it did not provide for arbitration of class claims, relying upon the same public policy considerations upon which the California Supreme Court based its holding in *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). In reaching its conclusion that the *Discover Bank* Rule contravened the FAA, the U.S. Supreme Court in *AT&T Mobility* expressly held that those public policy considerations did not yield a basis upon which courts can disregard the FAA to invalidate arbitration agreements. *AT&T Mobility*, 131 S.Ct. at 1746-48. As noted in Judge Price's dissent in *Brewer II*, the result reached by this Court appears to directly contravene *AT&T Mobility*. *Brewer II*, 364 S.W.3d at 503-04. *Brewer II* is currently pending before the U.S. Supreme Court on a Petition for Writ of Certiorari, and

a decision as to whether that Court will accept that appeal should be made in the next few months.[5]

One key factor also renders *Brewer I*, *Brewer II*, and *Ruhl* distinguishable, making their public policy based reasoning inapposite, here. Specifically, the claims in both *Brewer* and *Ruhl* were very small. *See Brewer II*, 323 S.W.3d at 20 (Loan balance of $2,215); *Ruhl*, 322 S.W.3d at 139 (maximum individual recovery of approximately $600). One of the central premises of the *Brewer* and *Ruhl* decisions was this Court's concern that a plaintiff with such low value claims would be unable to find counsel to represent her because it would be uneconomical to litigate the plaintiff's individual claim. *See Brewer II*, 364 S.W.3d at 494. This Court further reasoned that the class action mechanism, by allowing aggregation of multiple (often many) claims and increasing the underlying value of the claim, incents counsel to represent a plaintiff upon a small consumer claim.[6] *See Brewer I*, 323 S.W.3d at 22 ; *Ruhl*, 322 S.W.3d at 139-40.

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[5] The Supreme Court cert briefing in *Brewer II* has concluded, and the case has been set for conference on September 24, 2012. *See* Docket, Case No. 11-1466 (available at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-1466.htm; last accessed Aug. 6, 2012). A decision on the cert petition could be issued as soon as October 1, 2012.

[6] This reasoning appears to assume that all (or most) small value claims are suitable for class treatment. Neither *Ruhl* or either of the *Brewer* decisions provides any

Here, in contrast, the claims at issue are hardly "small value" claims. Johnson is seeking actual damages in excess of $75,000, together with an unspecified amount of punitive damages and attorney's fees. Legal File at LF 19. Thus, the actual damages sought are roughly 25 times those sought in *Brewer* and approximately 125 times the individual recovery available in *Ruhl*. She has not presented any evidence that she would have difficulty finding counsel to represent her on a claim with a value exceeding $75,000 or that it would be uneconomical to bring such claims individually. Indeed, the simple fact that Johnson has found counsel to represent her upon her individual claims, here, (and the absence of any pleaded class claim or any subsequent attempt to assert a class claim) fatally undermines her argument that her individual claims lack sufficient value to litigate. As Johnson was able to find counsel to bring her individual claims, this Court has no basis to conclude that the unavailability of class arbitration renders the Arbitration Agreement unconscionable.

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citation to any evidence or empirical studies that would support that assumption. Given the highly individualized nature of many litigated disputes, there is reason to question whether the class action mechanism is actually available in many small-value claims. If that mechanism is not available in most small-dollar cases, then the policy-based rationale of *Ruhl* and *Brewer* founders.

It is important to note that the Arbitration Agreement does not place any limits upon the legal theories under which Johnson can make claims against JF Enterprises and Franklin. *See* Legal File at 62. Nor does it limit or bar Johnson from recovering any damages that she could seek in traditional litigation. *See id.* The Arbitration Agreement specifically provides that "[a]rbitrators shall be attorneys or retired judges" and requires the arbitrator to "apply governing substantive law in making an award." *Id.* It further expressly authorizes the arbitrator to make award of attorneys fees to Johnson if she is otherwise able to recover them "under applicable law." *Id.* Thus, the record before the trial court demonstrates that she can obtain the same categories of damages and other relief upon the same claims in arbitration as she has sought to bring before the trial court. Thus, there is no basis upon which to conclude that the Arbitration Agreement limits Johnson's ability to bring her individual claims or seek relief upon those claims. Nor is there any support for a conclusion that the unavailability of the class arbitration renders the agreement unenforceable with regard to the present dispute.

C. The Arbitration Agreement Does Not Restrict Johnson's Claims Under The Missouri Merchandising Practices Act.

Similarly, Johnson's argument below that the Arbitration Agreement limits her ability to bring claims under the MMPA, cannot be reconciled with the terms of the Arbitration Agreement. First and foremost, this argument is immaterial, given that she has not asserted any MMPA claim against either JF Enterprise or Franklin. Rather, her MMPA claim is directed solely against ASMC. Legal File at LF 13-14. ASMC has not

sought to compel arbitration of Johnson's claims. Moreover, this argument is not supported by any evidence in the record.

Johnson relies upon this Court's prior decision in *Whitney*, 173 S.W.3d 300, which held Alltel's arbitration agreement unenforceable because it was in "fine print" on back of a sheet sent to the plaintiff and sought to limit the plaintiff's ability to recover consequential and incidental damages, and prohibited an award of attorneys fees. *See Id.* at 310, 313-314. While Johnson claimed that there is similar language in the Arbitration Agreement, here, she quoted no such language. *See* Legal File at LF 98. This is due to the simple fact that there is no provision limiting the recovery of incidental or consequential damages, here. *See* Legal File at LF 62. Nor, unlike *Whitney*, was the arbitration agreement in "fine print" on the back side of a document. Rather, it was a separate document, clearly titled "Arbitration Agreement" and readily legible. *See id.*

Johnson's arguments regarding the interplay between her MMPA claims and the Arbitration Agreement are moot due to the absence of any such claims asserted against JF Enterprises and Franklin, the parties who have sought to compel arbitration. Even if those arguments were not immaterial, they are belied by the record before the trial court, which demonstrates that the Arbitration Agreement does not limit Johnson's ability to bring claims under the MMPA in arbitration, nor does it constrain the arbitrator's ability to grant relief that is authorized by the MMPA. Thus, Johnson's arguments regarding the

MMPA cannot provide an alternative basis for affirming the order denying JF Enterprises and Franklin's Motion to Compel Arbitration.

D. Johnson's Claims Fall Within The Scope Of The Arbitration Agreement.

Lastly, Johnson raised an argument in the trial court (in the context of her discussion of the MMPA), that the claims at issue here do not fall within the scope of the parties' Arbitration Agreement. Legal File at LF 100. The argument she raised was made in passing and is somewhat difficult to follow, as she refers to allegations regarding "undisclosed prior wreck damage" that are not raised in this case, claiming that those allegations are outside the scope of the Arbitration Agreement. The trial court did not address this argument, likely because it would be clear error to deny a motion to compel arbitration as to claims that have never been pleaded in this matter.

Here, the Arbitration Agreement covers "[a]ny claim or dispute, whether in contract, tort, statute, or otherwise … which arise out of or relate to your credit application, purchase or condition of this vehicle, your purchase or financing contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase or financing contract)…." Legal File at LF 62. This language renders the Arbitration Agreement a "broad" agreement. *See Dunn Indus. Group, Inc., v. City of Sugar Creek,* 112 S.W.3d 421, 428 (Mo. banc 2003) ("A broad arbitration provision covers all disputes arising out of a contract to arbitrate; a narrow

provision limits arbitration to specific types of disputes"). As the scope of the arbitration agreement is broad, there is a "strong presumption in favor of arbitrability and the circuit court should order arbitration of any issue that 'touches' matters covered by the parties' contract." *Kansas City Urology, P.A. v. United Healthcare Services*, 261 S.W.3d 7, 12 (Mo. Ct. App. 2008). Moreover, due to the strong public policy favoring arbitration "'once an agreement to arbitrate is proven, the arbitration clause will be construed in favor of arbitration unless the clause positively cannot be interpreted to cover the asserted dispute.'" *Harris v. A.G. Edwards & Sons, Inc.*, 273 S.W.3d 540 (Mo. Ct. App. 2008) (quoting *State ex rel. MCS Bldg. Co. v. KKM Med.*, 896 S.W.2d 51, 53 (Mo. Ct. App. 1995)).

Here, the gravamen of Johnson's claims in her First Amended Petition are that JF Enterprises and its employees negligently misrepresented the terms under which she was purchasing the subject vehicle or were otherwise negligent in its dealings with lenders with regard to Johnson's purchase of the vehicle. *See* Legal File at LF 14-19. Thus, her claims clearly "arise out of or relate to" her purchase of the vehicle, the purchase contract, and even extend to her relationship with third parties (such as the lender who financed her purchase of the vehicle). Those claims fall well within the scope of the Arbitration Agreement.[7] Therefore,

[7] Johnson has not raised any argument that Franklin is unable to invoke the Arbitration Agreement or that claims against Franklin fall outside of the scope of the

CONCLUSION

For the reasons discussed above, the trial court's denial of the Motion to Compel Arbitration must be reversed and this matter remanded back to the trial court with directions to order Johnson to submit her claims to binding arbitration. The parties' Arbitration Agreement was not superseded by the Retail Installment Contract, as the record demonstrates that this agreement was entered into subsequent to and as an amendment of the Retail Installment Contract. Thus, the trial court's denial of the Motion to Compel Arbitration cannot be premised upon the *Krueger* doctrine. Nor is there an alternative basis to affirm the trial court's denial of that Motion. Johnson did not demonstrate that the Arbitration Agreement is unenforceable due to unconscionability, especially given that her arguments before the trial court are contrary to the case law binding upon this court and her failure to demonstrate that the Arbitration Agreement limits her ability to raise claims or seek damages or other relief she would otherwise be

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arbitration agreement because he is a nonsignatory to the agreement. Therefore, this cannot yield any grounds for the Court to conclude that Franklin cannot enforce the Arbitration Agreement. Further, it is well-settled that where a plaintiff's claim involves the terms of a written agreement which contains an arbitration provision, the arbitration agreement can be invoked by an officer or owner of a signatory party to that agreement. *See CD Partners, LLC v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005).

able to recover in litigation. Nor can the trial court's ruling be upheld on the grounds that Johnson's claims are beyond the scope of the arbitration agreement, as her claims arise directly from her purchase of the vehicle, the purchase and finance contract, and Johnson's resulting relationships with third parties.

Respectfully submitted,

Case & Roberts P.C.

/s/ Patric S. Linden
Kevin D. Case, No. 41491
Patric S. Linden, No. 49551
Two Pershing Square
2300 Main Street, Suite 900
Kansas City, MO 64108
Tel: (816) 448-3707
Fax: (816) 448-3779
kevin.case@caseroberts.com
patric.linden@caseroberts.com
Attorneys for Appellants JF Enterprises and Jeremy Franklin

CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellants states that this Brief is in compliance with the limitations of Rule 84.06(b). The brief was prepared using Microsoft Word 2007, in Times New Roman 13 point font, and it contains 10,466 words, as determined by said software, exclusive of the cover page, signature block, certificates of compliance and service, and appendix, as determined by said software. This Brief has been scanned for viruses using Symantec Endpoint Protection Small Business Edition, and that scan indicated that the Brief was virus-free. A CD-ROM containing the full text of the Brief in Microsoft Word 2007 format shall be served upon counsel for Respondent with the physical copies of this Brief.

/s/ Patric S. Linden
Patric S. Linden

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Supreme Court Rules 84.01, 84.07, and 84.11 and Supreme Court Rule 103, Court Operating Rule 27, and Local Court Rule No. 1, that on August 14, 2012, I have electronically filed a copy of the foregoing with the Court's electronic filing system, which shall cause notice of said filing to be transmitted via electronic mail to counsel for the parties listed below. Within five (5) days after acceptance of said electronic filing by the Court, two copies of the foregoing Brief and a CD-ROM containing same in Microsoft Word format will be mailed via regular U.S. mail, first class, postage prepaid to:

Joseph M. Backer
The Backer Law Firm, LLC
14801 E. 42nd Street South, Suite 100
Independence, MO 64055
Attorney for Respondent

and

Kurt D. Williams
Laura K. Brooks
Jennifer B. Wieland
Stephen M. Bledsoe
Berkowitz, Oliver, Williams, Shaw & Eisenbrandt, LLP
2600 Grand Boulevard, Suite 1200
Kansas City, MO 64108
Attorneys for Defendant American Suzuki Motor Corporation

/s/ Patric S. Linden
Patric S. Linden