

IN THE MISSOURI SUPREME COURT

Appeal No. SC 90647

BEVERLY BREWER,

Plaintiff/Respondent,

vs.

MISSOURI TITLE LOANS, INC.,

Defendant/Appellant.

Supplemental Brief of Plaintiff/Respondent

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SUPPLEMENTAL STATEMENT OF FACTS

Pursuant to Rule 84.04(f), Plaintiff hereby supplements Defendant's Statement of Facts. Because the facts of this case have not changed since this Court's ruling of August 31, 2010, Plaintiff hereby incorporates by reference Plaintiff's "Supplemental Statement of Facts" from her original Respondent's Brief filed with this Court. In this section of the brief, Plaintiff will briefly highlight facts that bear special relevance to this case.

In her Petition, Plaintiff Beverly Brewer has alleged that she took out a \$2,215 loan from Defendant, at a rate of 300 percent APR. Defendant's policy required her to provide Defendant with her original car title and a set of her car keys.¹ Over the next two months, she paid Defendant two separate payments totaling \$1,147.00. These two payments reduced her loan principal by six cents (\$.06).²

Plaintiff filed this class action, alleging that Defendant, a title lender, systematically violated Missouri's loan laws, causing financial damage to her and to a class of tens of thousands of other Missouri citizens.³ In her prayer she seeks compensation for a class consisting of Defendant's Missouri customers, for damages caused by Defendant's

¹ L.F. 353 (Fields Dep. 34); L.F. 287 (Pl.'s Loan Agreement).

² L.F. 119–120.

³ L.F. 119.

violations of Missouri laws.⁴ Basing her actions on Mo. Rev. Stat. Chapter 367 and Mo. Rev. Stat. Chapter 407, Plaintiff has alleged that Defendant:

- Failed to provide numerous disclosures on the loan agreement as mandated by Missouri law;
- Failed to tell customers that frequent renewals of loans would result in interest and fees far exceeding the actual value of the loan,
- Failed to abide by the statutory mandate to reduce the principal by at least 10 percent upon the third and subsequent renewals; and
- Failed to evaluate its customers' ability to pay before making title loans.

Defendant's contract includes an arbitration clause containing a class waiver; this provision purportedly bars Plaintiff from filing any sort of class claim.⁵ Defendant's arbitration clause, part of a much longer contract, can be seen on page A1 of the attached Appendix.⁶ Defendant's entire title loan contract can be found in this Appendix at A2–A3.

At the trial court hearing, Plaintiff called three expert witnesses, experienced consumer attorneys practicing law in Missouri: Bernard Brown, Dale Irwin and John Ammann. Mr. Brown and Mr. Irwin are in private practice. Mr. Ammann is the Director

⁴ L.F. 117, 147.

⁵ L.F. 287–88. *See also* App. 2–3.

⁶ L.F. 287.

of the Law Clinic of the St. Louis University School of Law.⁷ These three experts provided the following evidence, none of which was disputed by any evidence introduced by Defendant:

- 1) Consumers are generally not aware of their statutory rights. For this reason, class actions serve to provide notice of violations to consumers.⁸
- 2) It is nearly impossible to obtain legal representation in Missouri in small-damages consumer claims such as this.⁹ Even seasoned consumer attorneys are not able to handle this type of case because the expenses involved are high and customers could not afford retainers of “several thousand dollars.”¹⁰
- 3) It is extremely difficult for consumers in low-damages cases like this to persuade attorneys to represent them. Class actions are the only way for a consumer to get representation on claims like this.¹¹
- 4) Class action waivers in cases like this deny consumers any chance to obtain legal representation.¹²

⁷ L.F. 295; 303.

⁸ L.F. 501 (Brown Dep. 77, 82, 140, 141).

⁹ L.F. 658, 710 (Irwin Dep. 82, 134-135).

¹⁰ L.F. 311(Ammann Dep. 67–25); L.F. 658 (Irwin Dep. 82, 134–135, 97–98); L.F. 711–712 (Brown Dep. 81–82).

¹¹ L.F. 500, 504, 515 (Brown Dep. 76–77, 80, 91).

- 5) Consumer-lending cases are complicated cases with damages ranging from a few hundred to a few thousand dollars. It is extremely difficult for consumers to find experienced attorneys to handle these cases because there are relatively few consumer-savvy attorneys in Missouri. Further, because these cases are legally complex with relatively low damages, they are not “financially viable” for attorneys to handle, regardless of the fee arrangement.¹³
- 6) Cases against title lenders are complex, involving a wide variety of statutes; they tend to require expert testimony and they involve “a multitude of issues.”¹⁴
- 7) Attorneys are not able to handle cases like this case against Defendant, even when a statute allows for attorney fees. Judges will not award an attorney a \$30,000 fee for a \$1,500 recovery.¹⁵
- 8) It’s “very difficult, next to impossible, to find lawyers to represent [consumers] in these cases.”¹⁶
- 9) Consumers have an extraordinarily difficult time trying to understand contracts such as Defendant’s.¹⁷

¹² L.F. 500, 527–530 (Brown Dep. 76–77, 103–105).

¹³ L.F. 311, 315 (Ammann Dep. 67–68, 83–84).

¹⁴ L.F. 316 (Ammann Dep. 86–90).

¹⁵ L.F. 312, 317, 318 (Ammann Dep. 69–70, 91–92, 95).

¹⁶ *Id.*

10)Waiver of class actions encourages businesses to continue illegal conduct.¹⁸

Proceedings before the trial court

At the conclusion of the trial court hearing,¹⁹ Defendant submitted a statement to the Court in an attempt to retract the following provision of its loan agreement:

“The parties agree to be responsible for their own expenses, including fees for attorneys, experts and witnesses.”²⁰

In open Court Defendant’s counsel admitted that this provision “puts a very high burden on somebody who might not have sufficient funds to pay a lawyer and these other expenses.”²¹

The trial court concluded that “Defendant’s class action/arbitration ban improperly functions to immunize and exculpate Defendant.”²²

¹⁷ L.F. 533–536 (Brown Dep. 109–111).

¹⁸ L.F. 658 (Irwin Dep. 136–137).

¹⁹ The transcript of the hearing begins at L.F. 229.

²⁰ L.F. 283; Defendant’s written statement can be found at L.F. 940.

²¹ L.F. 283.

²² L.F. 1157.

Affirming the trial court, this Court’s August 31, 2010, majority opinion contained the following findings:

- An arbitration agreement is not necessarily unconscionable merely because there is no agreement to class arbitration.²³
- The evidence in this case supports the trial court’s determination that Defendant’s class arbitration waiver is unconscionable.²⁴
- Defendant’s loan agreement was non-negotiable and difficult for the average consumer to understand, and Missouri Title Loans was in a superior bargaining position.²⁵
- Defendant’s high-interest loan agreement was offered to people in financial distress on a take-it or leave-it basis.²⁶
- The evidence in this case supports the trial court’s finding of procedural unconscionability.²⁷
- Plaintiff also introduced substantial evidence of substantive

²³ *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 21 (Mo. banc 2010) (“*Brewer I*”).

²⁴ *Id.* at 23.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

unconscionability.²⁸

- Claims like these require significant expertise and discovery; therefore, it would not be financially viable for an attorney to accept such a claim because of the complicated nature of the case and the small damages at issue.²⁹
- Defendant’s class action waiver placed limitations on Plaintiff’s ability to retain counsel to pursue a cause of action, leaving her with no meaningful avenue of redressing her complicated legal claims.³⁰
- The net result of Defendant’s class arbitration waiver is that Ms. Brewer effectively forfeited legal counsel in any claim that arose under the loan agreement.³¹
- To hold otherwise would allow lenders to continue unfair lending practices; none of its customers would have any practical remedy to stop this conduct.³²
- Nothing in the language of the class arbitration waiver unambiguously informs the consumer that the net result of the waiver is that the lender effectively is

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

immunized from liability.³³

- Defendant's class waiver fails as an attempted exculpatory clause.³⁴

On May 2, 2011, the United States Supreme Court entered the following order:

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the Supreme Court of Missouri for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U. S. ____ (2011).

³³ *Id.*

³⁴ *Id.*

SYNOPSIS

In *Brewer I*, this Court applied general Missouri contract law when it struck Defendant’s arbitration clause.³⁵ Because Defendant’s clause prevented meaningful resolution of claims, this Court held that it was unconscionable and exculpatory.

For more than 25 years, the United States Supreme Court has articulated an almost identical rule, stating that according to the Federal Arbitration Act, arbitration clauses are enforceable only to the extent that the parties can “effectively” vindicate their legal rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). Throughout this brief, this federal rule will be referred to as the “vindication of rights” rule. It is critically important to note that the holding in *Brewer I*, that an arbitration clause must present a meaningful opportunity to resolve claims, is the functional equivalent of the United States Supreme Court’s “vindication of rights” rule. These two rules run entirely in parallel, making federal preemption of this Court’s holding in *Brewer I* impossible. It is also important to note that *AT&T Mobility LLC v. Concepcion*³⁶ did not modify, criticize or question the vindication of rights rule.

³⁵ *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010), *reh'g denied* (Nov. 16, 2010), *vacated by Missouri Title Loans, Inc. v. Brewer*, 2011 WL 531553 (U.S. May 2, 2011) (No. 10–1027). (Hereinafter, “*Brewer I*”).

³⁶ *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (Apr. 27, 2011). (Hereinafter, “*AT&T*”).

Defendant nevertheless argues that the recent decision of *AT&T* requires the enforcement of arbitration clauses, even when they unconscionably prevent parties from vindicating their legal rights. The facts and holding of *AT&T* do not invite this radical departure from established federal law. *AT&T* does not question Missouri law and it does not, in any way, affect the federal vindication of rights rule. Nothing in *AT&T* suggests that it would be proper for Defendant to use an arbitration clause that cuts off its customers' rights to resolve their claims before a fair tribunal.

AT&T is a factually unique case. It considers what happens in the relatively surprising situation where state law requires a court to strike an arbitration clause that presents customers with meaningful dispute resolution process that allows them to vindicate their rights. In *AT&T*, the District Court for the Southern District of California had specifically found that the arbitration clause at issue was “easy to use” and that it was likely to “prompt[t] full or . . . even excess payment to the customer *without* the need to arbitrate or litigate.”³⁷ The *AT&T* trial court had even determined that consumers were in a better position under the *AT&T* clause than they would be in a class action.³⁸ Expert

³⁷ *Id.* at 1745 (quoting *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2008 WL 5216255, at *11 (S.D. Cal. Aug. 11, 2008) (emphasis in original)).

³⁸ *Id.* at 1753 (quoting *Laster*, 2008 WL 5216255, at *12).

testimony supported this conclusion in *AT&T*.³⁹ Nonetheless, mechanically applying the *per se Discover Bank* rule, the trial court struck AT&T's arbitration clause.⁴⁰ The Ninth Circuit affirmed.⁴¹ Not surprisingly, the United States Supreme Court recognized that the federal district court's employment of the *Discover Bank* rule was a decision that was hostile to arbitration and that the use of the overbroad *Discover Bank* rule was thus preempted by the FAA.⁴²

The facts and holding of *AT&T* are nothing like the facts and holding of this case. *AT&T* was based on California's use of its *Discover Bank* rule, a *per se* rule that applied almost exclusively to arbitration clauses. The *Discover Bank* rule required the California district court to strike a clause even after there was a factual finding that AT&T's clause was beneficial to individual consumers.⁴³ In short, although the clause complied with the

³⁹ AT&T had submitted an affidavit by an attorney named Richard Nagareda, a Vanderbilt University Law professor, who concluded that AT&T's arbitration clause facilitated "the fair and efficient Resolution of disputes between individual consumers and [AT&T]." Nagareda Aff. 7, filed Mar.13, 2008 in *Laster*, 2008 WL 5216255. The *AT&T* plaintiffs had not submitted any expert testimony on this topic.

⁴⁰ *Id.* at 1745 (quoting *Laster*, 2008 WL 5216255, at *14).

⁴¹ *Id.*

⁴² *Id.* at 1750–51.

⁴³ *See id.* at 1750, 1745, 1753.

vindication of rights rule, and although it promoted efficient resolution of claims, it was held invalid under a misplaced state law that was hostile to arbitration.

The facts in this matter could not be more different. The arbitration clause at issue in this case does not guarantee recovery. Unlike in *AT&T*, Defendant's customers are required to pay at least their own costs of arbitration, cannot choose the form of arbitration (in person, on phone, by paper), have no minimum recovery, and cannot be awarded double attorney fees. Defendant's arbitration clause does not in any way induce individual resolution. Instead, the undisputed evidence before this Court shows that Defendant's clause prohibits resolution of claims and immunizes Defendant. This Court has already found this to be true in this case based upon the evidentiary record of *Brewer I*. As a result, Defendant's clause was struck down pursuant to general Missouri contract law that evaluates contracts on a case-by-case basis, requiring that before a clause is enforced, it must allow for resolution of claims and vindication of rights. Far from doing harm to the FAA, this Court's holding in *Brewer I* promotes the purpose of the FAA as enunciated by 25 years of United States Supreme Court precedent.

Enforcing the arbitration clause in *AT&T* was consistent with the purpose of the FAA: to enforce arbitration clauses when they will truly promote resolution of disputes. Enforcing Defendant's arbitration clause in this case would do the opposite: it would guarantee that disputes were not resolved. For the reasons set forth in more detail in this brief, failing to strike Defendant's arbitration clause in this case would be anathema to the FAA. It would be inconsistent with the spirit of *AT&T* and it would violate Missouri

law.

AT&T thus has no relevance to the outcome of *Brewer I*. For each of these reasons, *Brewer I* should now be reaffirmed by this Court.

ARGUMENT

The Argument portion of this brief consists of four sections: Plaintiff's **Section I** analyzes *AT&T* and compares it to *Brewer I*, addressing Defendant's Point I (FAA preemption). Plaintiff's **Section II** (Unconscionability) responds to Defendant's Point II (Unconscionability) and further elaborates on the topic of unconscionability. Plaintiff's **Section III** explains why Defendant's class waiver is an unenforceable exculpatory clause.⁴⁴

I. BREWER I REMAINS GOOD LAW IN LIGHT OF AT&T (RESPONSE TO DEFENDANT'S POINT I)

A. Standard of Review⁴⁵

The trial court reviewed substantial evidence on the record at its hearing in this case. The judgment must be affirmed if the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or

⁴⁴ Plaintiff's expansive response in Section II and Plaintiff's entire Section III comply with Missouri Rule of Civil Procedure 84.04(f), allowing for "additional arguments in support of judgment that are not raised by the points relied on in Defendant's brief."

⁴⁵ The standard of review is the same for all points in this brief. For this reason, it has not been repeated in each section.

apply the law. *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 20 (Mo. banc 2010), *reh'g denied* (Nov. 16, 2010), *vacated by Missouri Title Loans, Inc. v. Brewer*, No. 10-1027, 2011 WL 531553 (U.S. May 2, 2011) (“*Brewer I*”); *see also Woods v. QC Fin. Servs, Inc.*, 280 S.W.3d 90, 94 (Mo. Ct. App. 2008). The issue of whether a dispute is subject to arbitration is subject to de novo review. *Id.*

The standard of review is of special import in this case. Plaintiff introduced substantial evidence that Defendant’s arbitration clause prevented the resolution of consumer disputes. This evidence included the testimony of experts Dale Irwin, Bernard Brown and John Ammann, all of whom were cited with approval by this Court in *Brewer I* for the proposition that consumers are highly unlikely to find representation for small damage claims. *See Brewer I*, 323 S.W.3d at 23. The trial court in this case considered and relied upon substantial evidence that, despite tens of thousands of transactions, Defendant’s arbitration clause has never been used by any consumer to resolve any dispute. At the trial court level, all evidence in this case proves that A) Defendant’s class action waiver immunizes Defendant, and B) the purported “efficiencies” of Defendant’s arbitration clause were not the real reason Defendant imposed its arbitration clause on its customers. The record does not contain any evidence suggesting otherwise.

Defendant cannot point to any expert, any document, or any resolved claim to suggest that its arbitration clause efficiently resolves claims. To the contrary, the evidence before the trial court proved that Defendant’s clause functioned as an anti-arbitration clause and that it has completely prevented the resolution of any customer

claims. As such, the undisputed facts of this case establish that Defendant's arbitration clause strips consumers of all remedies.

B. The Holdings in *Brewer I* Remain Good Law in Missouri

Defendant's arbitration clause is nothing like the arbitration clause in *AT&T*, which essentially guaranteed efficient resolution of claims. *See AT&T*, 131 S. Ct. at 1745, 1753. *AT&T* promotes the enforcement of arbitration clauses that fairly and effectively resolve claims, and it prohibits the application of *per se* rules that would strike class arbitration waivers in every case. *AT&T* does not require the enforcement of arbitration clauses that bar the resolution of claims; to do this would fly in the face of the Federal Arbitration Act (FAA), and run afoul of established, general contract law in Missouri. *See, e.g., id.* at 1749 (holding that one of the primary goals of the FAA is to promote 'efficient and speedy dispute resolution' (internal quotation omitted)).

AT&T's holding regarding California's *Discover Bank* rule does not affect the holding of this Court for each of the reasons set forth below.

1. *AT&T* does not apply in state court.
2. This case is factually and legally different from *AT&T*.
3. For an arbitration clause to be enforceable, a party must be able to vindicate his or her statutory rights. The evidence in this case indisputably proves that enforcement of the clause at issue would deprive Plaintiff of any statutory remedy.

4. Reading *AT&T* to require reversal in this case would require reading *AT&T* to produce a special body of law applicable only to arbitration clauses, in direct violation of the text of *AT&T* requiring arbitration clauses be put on “equal footing” with all other contracts. It would also require this Court to enforce arbitration clauses that prohibit resolution of claims, despite *AT&T*’s claim that the purpose of the FAA is to resolve disputes expeditiously.
5. Missouri law regarding exculpatory clauses is unaffected by *AT&T*, because *Brewer I* held that the clause at issue was an ambiguous, unenforceable exculpatory clause, and *AT&T* did not address this topic.

1. *AT&T* Does Not Apply in State Court

The 5-4 holding of *AT&T*—that California’s *Discover Bank* rule stands as an obstacle to the purposes of the FAA and is thus preempted—is limited to cases that arose in federal court, like *AT&T*. Had the issue in *AT&T* reached the United States Supreme Court from a state court, there would not be five votes for preemption. This limitation is clear because Justice Clarence Thomas—who provided the crucial fifth vote for the *AT&T* majority—has consistently maintained that the FAA does not apply to state court cases.

Since the 1995 case of *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 285 (1995), Justice Thomas has been adamant that the FAA in general, and Section 2 of

the Act in particular, simply “does not apply in state courts.” *Allied-Bruce*, 513 U.S. at 285 (Thomas, J., dissenting; Scalia, J. joining in this dissent). In *Allied-Bruce*, the Court held that the FAA preempted a state law making written, pre-dispute arbitration agreements unenforceable. *Id.* at 269. Justice Thomas, however, dissented on the grounds that Congress intended for the FAA to apply only to federal courts. As he explained, at the time of the FAA’s passage in 1925, “laws governing the enforceability of arbitration agreements were generally thought to deal purely with matters of procedure rather than substance,” and as such it “would have been extraordinary for Congress to attempt to prescribe procedural rules for *state* courts.” *Id.* at 286, 288–29 (emphasis in original). To the contrary, as the 1925 Congress understood matters, “state arbitration statutes prescribed rules for the state courts, and the FAA prescribed rules for the federal courts.” *Id.* at 289. In the view of Justice Thomas, this federal-court limitation on the FAA applies to Section 2 because the text of the statute as a whole “makes clear that § 2 was not meant as a statement of substantive law binding on the States” but is instead “a purely procedural provision.” *Id.* at 291.

Since Justice Thomas was appointed to the United States Supreme Court in 1991, the Court has on five occasions—*Allied-Bruce*, *Doctor’s Ass’ns, Inc. v. Casarotto*, 517 U.S. 681 (1996), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), and *Preston v. Ferrer*, 552 U.S. 346 (2008)—confronted the question of whether the FAA applies to cases arising in state court. In every single one of those cases, Justice Thomas reiterated his views that it does

not. In *Doctor's Associations*, for example, the Court held that the FAA preempted a Montana law which required contracts to contain a notice, in underlined and capital letters on the first page, that the contract was subject to arbitration. 571 U.S. at 683. In the absence of such a notice, the arbitration provision would not be enforced. *Id.* Justice Thomas dissented on the grounds that “Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, does not apply to proceedings in state courts.” *Id.* at 689 (Thomas, J., dissenting). Similarly, in *Preston*, the Court held the FAA preempted a California statute that would refer certain disputes first to an administrative agency. 552 U.S. at 349–50. Justice Thomas’s dissent hinged on his view that the FAA does not apply in state court and, therefore, “in state-court proceedings, the FAA cannot displace a state law that delays arbitration until administrative proceedings are completed.” *Id.* at 363 (Thomas, J., dissenting); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. at 449 (Thomas, J., dissenting) (because the FAA does not apply in state courts, “in state-court proceedings, the FAA cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law”); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. at 460 (Thomas, J., dissenting) (because FAA does not apply in state courts, FAA cannot preempt state court’s interpretation of arbitration agreement).

The Court in *AT&T* also had no occasion to consider the extent to which its holding applied in state-court proceedings, and therefore, the *AT&T* decision cannot be read to govern a state case. When the Court makes a “judicial pronouncement,” that

pronouncement's value comes from "the settling of some dispute which affects the behavior of the defendant towards the plaintiff." *Hewitt v. Helms*, 482 U.S. 755, 762 (1987). Put another way, the *AT&T* decision should be understood as a pronouncement that extends only to the context of that particular case, a case litigated in federal court. That the "*Discover Bank* rule is pre-empted by the FAA" should be interpreted to mean only that the *Discover Bank* rule is preempted by the FAA in federal court. So long as one takes Justice Thomas at his consistent and repeated word, it follows that he would not have voted the way he did had *AT&T*, like this case, arisen in a state court. *Cf. United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam) (examining Supreme Court plurality opinion to predict outcomes based on likely vote of Justice Kennedy); *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649, 655 n.2 (9th Cir. 1992) (counting votes to consider whether "the Supreme Court would have five votes for holding a post office is a nonpublic forum").

It is one of this Court's tasks to determine how *AT&T* would impact *Brewer I*, and it is also clear that Justice Thomas would not apply *AT&T* to state court proceedings.

2. This Case Differs from *AT&T* Factually and Legally

Even if this Court were to conclude that Justice Thomas would reverse his long-standing opposition to applying the FAA in state courts, *AT&T* still would not change the analysis in *Brewer I* because *AT&T* is factually and legally dissimilar from the facts of this case.

a. The Essential Facts of *AT&T*

In *AT&T*, the Court framed its inquiry as “whether [the FAA] preempts California’s rule classifying most collective-arbitration waivers in consumer contracts as unconscionable.” *AT&T*, 131 S. Ct. at 1746. The Court explained that California had devised a mechanical rule that invalidated class action waivers any time the contract met the following criteria:

- 1) a consumer contract of adhesion;
- 2) predictably small damages; and
- 3) an allegation that the defendant engaged in a scheme to cheat consumers. *Id.*

If these three factors are present, the *Discover Bank* rule nonetheless required the clause to be invalidated, even if the clause encouraged the effective resolution of claims. *Id.*

AT&T’s arbitration clause provided for a fast and simple dispute resolution system by providing a form on the *AT&T* website that consumers filled out to lodge a complaint. *Id.* at 1744. If the claim was not resolved within 30 days for any reason, including the consumer’s belief that the offer by *AT&T* was not fair, that consumer could demand arbitration. *Id.* The arbitration demand form was available on the *AT&T*

website and AT&T was obligated to pay all costs of arbitration in all cases, unless they were found to be frivolous. *Id.* Arbitration was required to occur in the county where the plaintiff resided, and in any claim under \$10,000, the customer had the right to choose the form of the arbitration (in person, on phone, by paper). *Id.* AT&T gave up any right to seek attorney fees no matter what outcome was reached, and if the arbitrator issued an award that was greater than AT&T's last offer to settle the case, AT&T was required to pay \$7,500 to the consumer. *Id.* As an additional perk, AT&T was required to pay double attorney fees. *Id.* In the trial court, AT&T even introduced a factually undisputed expert attorney affidavit establishing that the AT&T clause would help people find representation and that AT&T's clause was fair.⁴⁶

The fact that the *Discover Bank* rule allowed courts to invalidate arbitration clauses even when they encouraged resolution of claims (and adequately attracted counsel) is the central difference between *AT&T* and *Brewer I*. While the *AT&T* clause was uniquely inviting to consumers, *Brewer I* found that Defendant's clause in this case discourages any resolution of consumer disputes.

⁴⁶ AT&T had submitted an affidavit by an attorney named Richard Nagareda, a Vanderbilt University Law professor, who concluded that AT&T's arbitration clause facilitated "the fair and efficient Resolution of disputes between individual consumers and [AT&T]." Nagareda Aff. 7, filed Mar. 13, 2008 in *Laster*, 2008 WL 5216255. The *AT&T* plaintiffs did not submit any expert testimony on this topic.

In *AT&T*, the district court’s *factual* findings were overwhelmingly in favor of AT&T’s clause. Among other things, the court found the clause was “quick, easy to use” and it encouraged “prompt full or...even excess payment to the customer *without* the need to arbitrate or litigate.” *Id.* at 1745 (quoting *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2008 WL 5216255, at *11 (S.D. Cal. Aug. 11, 2008) (emphasis in original)). The potential \$7,500 award was a “substantial inducement for the consumer to pursue the claim in arbitration,” and consumers who were members of the class would probably be worse off than in individual arbitration. *Id.* at 1745 (quoting *Laster*, 2008 WL 5216255, at *11–*12). Despite the conclusion that the clause encouraged resolution of claims, the district court struck the clause entirely, applying the mechanical, inflexible *Discover Bank* rule. *Id.*

**b. Stark Differences between the Arbitration Provisions Considered in
Brewer I and *AT&T***

The arbitration provisions of AT&T and Missouri Title Loans differ sharply, as indicated in the following table:

AT&T Arbitration Clause Terms⁴⁷	MTL Arbitration Clause Terms⁴⁸
<ul style="list-style-type: none"> • AT&T will always pay all costs of arbitration for non-frivolous claims, and claim filing is available on AT&T’s own website. • AT&T waived any right to seek attorney fees in any case • AT&T is required to arbitrate all claims 	<ul style="list-style-type: none"> • Consumers are responsible for their own expenses to arbitrate (Defendant attempted to withdraw this in open court, stating it was hard on consumers) • Consumers could be subject to paying Defendant’s attorney fees • Missouri Title Loans reserved the right for itself to go to court to repossess cars; even though there was no right for customers

⁴⁷ *AT&T* at 1744.

⁴⁸ *See* App. 2–3.

<ul style="list-style-type: none">• \$7,500 is guaranteed to consumers who are awarded more than AT&T's offer of settlement• Double attorney fees are guaranteed to consumer attorneys where award exceeds AT&T offer	<p>to ever go to court</p> <ul style="list-style-type: none">• No guaranteed recovery for prevailing consumers• No attorney fee multiplier
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c. Stark Differences between the Real-World Effects of the Arbitration Provisions Considered in *Brewer I* and *AT&T*

The *real-world effects* of these two arbitration clauses also differ sharply, as set forth in the following table:

Real-World Effect of AT&T Clause	Real-World Effect of MTL Clause
<p>Based on the expert attorney affidavit submitted by <i>AT&T</i> and the language of the <i>AT&T</i> clause, the district court found that <i>AT&T</i>'s claims resolution process was "quick, easy to use" and likely to "promptly full or ... even excess payment to the customer <i>without</i> the need to arbitrate or litigate."⁴⁹</p>	<p>Evidence from expert consumer attorneys, depositions and documentary evidence proved that it would be "exceedingly difficult," if not "outright rare," for consumers to find attorneys for these complex claims.⁵⁰ No consumer has ever filed an individual claim against Defendant. The trial court found the clause prevented resolution of claims, and this Court affirmed.</p>

⁴⁹ *AT&T* at 1745.

⁵⁰ *Brewer I* at 23.

d. Other Stark Differences between *Brewer I* and *AT&T*

It is no wonder the United States Supreme Court concluded that use of the *Discover Bank* rule was preempted, given that it was tailored only for class action waivers in arbitration clauses and required courts to ignore relevant evidence regarding the real-world operation of an arbitration clause. The decision in *AT&T*, which by its very terms considered only the *Discover Bank* rule, does not require reversal of this Court's decision in *Brewer I*. As discussed in the previous section, it is well-established that the United States Supreme Court only decides the case then under consideration and does not offer advisory opinions on unrelated facts. Justice Samuel Alito succinctly stated this point in a public speech at Law Day in St. Louis on May 16, 2011, in which he revealed "Ten Things You Didn't Know or Might Have Forgotten about the Supreme Court." In part, he said:

Some of our opinions mean less than a lot of people think. What do I mean by that? This is so for several reasons Our opinions focus on, primarily, on deciding the case at hand, so the majority that endorses the opinion and the rule that's set out in the opinion necessarily believes that that rule is the right one for that case and it governs that case but the agreement among members of the majority may not actually extend a lot further than the ground that is actually covered in the opinion, and if you read more into it, if you read it as

having a much broader application, you may or may not be correct.⁵¹

As Justice Alito suggested, and the law requires, *AT&T* must be read as a case decided only on the facts before it. To read it instead as a general rule that all companies may now prohibit class actions in all settings, regardless of state law, would mean that the *savings clause* of the FAA is now superfluous.⁵² It would also mean that a case discussing the interplay between federal law and a California-specific rule somehow applies to the state of Missouri. Such a reading also suggests that there is now an overweening federal body of law pertaining to the enforceability of arbitration clauses

⁵¹ The recording of this speech is publicly available at <http://www.youtube.com/watch?v=BvCLi7EMlwo>. The comments cited here begin around minute and second marker 1:42.

⁵² 9 U.S.C. § 2. **Validity, irrevocability, and enforcement of agreements to arbitrate.**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract.**

[Emphasis added to point out the savings clause]

rather than recognizing the fact that, by its own terms, the FAA subjects arbitration clauses to the varying laws of the varying states.

The specific text of Justice Scalia's majority opinion in *AT&T* and the text of the FAA itself ("save upon such grounds as exist at law or in equity for the revocation of any contract") both require arbitration clauses to be subject to Missouri law. 9 U.S.C. § 2. Nothing in *AT&T* undoes that well-established tradition. As such, this Court's analysis in *Brewer I* must stand so long as this Court's conclusions were based on the record before it and based upon the application of general Missouri contract law, rather than based on a mechanical test such as the one articulated in *Discover Bank*.

The facts in *Brewer* sharply contrast with those of *AT&T*. In *Brewer*, a detailed evidentiary record, which must be afforded deference, made clear that the clause at issue stymied dispute resolution. In considering the trial court record in *Brewer I*, the majority of this Court concluded there was "substantial evidence of substantive unconscionability," and that failure to invalidate the arbitration clause would "allow a lender to continue unfair lending practices since none of its customers would have practical remedy to bring about a stop to the conduct." *Brewer I*, 323 S.W.3d at 23 (internal quotes and citations omitted).

Unlike *AT&T*, the decision in *Brewer I* was tailored to the evidence in the record and the specific terms of the arbitration clause. Unlike *AT&T*, *Brewer I* did not dismantle a clause guaranteed to produce efficient resolution of claims. Instead, *Brewer I* promoted the resolution of claims and was based on two long-standing bodies of contract law: 1)

Missouri's rule has long been that some clauses are so one-sided, so shocking in their impact on rights, that they will not be enforced because they are unconscionable; and 2) if a contract functions to exculpate, it may be enforced, but only if it is clear and unambiguous in describing the release of claims. In short, this Court's decision in *Brewer I* was based on a factual record and general law, which makes *Brewer I* a far cry from *AT&T*.

There is another important distinction to note. While the *Discover Bank* rule worked as a *per se* rule to invalidate arbitration clauses, this Court made clear that its decision in *Brewer I* did not affect all, or even substantially all, class action waivers:

This is not to say that an arbitration agreement is always unconscionable merely because there is no agreement to class arbitration; *Stolt-Nielsen* demonstrates that requiring individual arbitration can be reasonable and enforceable. It is only when the practical effect of forcing a case to individual arbitration is to deny the injured party a remedy . . . that a requirement for individual arbitration is unconscionable.

Brewer I, 323 S.W.3d at 21. This is critically important. Even the broadest pronouncements found in the *AT&T* opinion merely prohibit states from "conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures." *AT&T*, 131 S. Ct. at 1744. Missouri has done no such thing. Some class arbitration waivers are enforceable; some are not. Decisions are based on whether a clause strips consumer of a remedy. This comports with the very purpose of

the FAA and the mandate of *AT&T*. The mere fact that unconscionability may sometimes result from, or be heightened by, a class waiver is not the same as a *per se* rule conditioning enforceability on the existence or non-existence of such a provision.

Brewer I thus meets the requirement to treat each arbitration clause like any other contract provision. As a result, *Brewer I* is controlling regarding this case and *Brewer I* requires affirmation of the trial court order striking Defendant's arbitration clause in its entirety.

C. No Aspect of *AT&T* Overrules United States Supreme Court Precedent Requiring that Parties Be Able to Vindicate Their Statutory Rights in the Arbitral Forum

Beginning in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985), the United States Supreme Court has consistently held that arbitration agreements are enforceable, but only so long as a party is able to vindicate its statutory rights in the arbitral forum. This point has been reiterated many times. *See, e.g., Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (“so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum the statute serves its functions”); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). This principle has been echoed, verbatim, by Missouri courts. *See, e.g., Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005) (holding that the trial court had to assess whether “statutory rights could be effectively vindicated in the arbitral forum”). Nothing in *AT&T* overrules this simple,

common-sense principle. Quite the opposite, Justice Scalia's opinion in *AT&T* clearly shows that the majority considered whether the clause at issue would deprive consumers of remedies:

. . . [T]he arbitration agreement provides that AT&T will pay claimants a minimum of \$7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be essentially guaranteed to be made whole. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement

AT&T, 131 S. Ct. at 1753 (emphasis in original) (internal quotation marks and citations omitted).

There is no reason to believe the decision in *AT&T* would have been the same had the clause stripped parties of the right to vindicate their statutory rights. Quite the opposite, to read *AT&T* as a refutation of such a principle would be to read Justice Scalia as overruling previous opinions in which he was in the majority. *See, e.g., Green Tree Fin. Corp.-Alabama*, 531 U.S. at 90, and *Gilmer*, 500 U.S. at 28 (In both cases, Justice Scalia joined the majority in affirming and reasserting the vindication of rights rule.).

The more reasonable reading of *AT&T*, then, is that arbitration agreements are

enforceable as long as statutory rights can be enforced; this principle remains good law, and it continues to serve as a check on questionable arbitration clauses.

Brewer I is different from *AT&T* in another critical way that relates to consumers' substantive rights. The *AT&T* Court did not consider the import of a substantive state statute that included the right to a class action in the statutory text. This situation does pertain to Missouri because the state Merchandising Practices Act (MPA) grafts a class action right into its text. Mo. Rev. Stat. § 407.025.2 (2000). Since there is a federal requirement that parties must be able to vindicate their statutory rights, and because a Missouri statute specifically contemplates class actions as a necessary tool for vindicating those consumer rights, it stands to reason that any contract that strips a party of the right to a class action cannot stand.

Despite the fact that the Missouri and Federal Rules of Civil Procedure already provided for class actions, the MPA was written specifically to include the right to bring class cases. Mo. Rev. Stat. § 407.025.2 (2000). It incorporates the standards from the civil rules right into the statute. Mo. Rev. Stat. § 407.025.3 (2000). In fact, the title of the section granting a private right of action under the MPA is titled, "Civil Action to Recover Damages – Class Action Authorized – When – Procedure." Mo. Rev. Stat. § 407.025 (2000). The Act states in pertinent part:

An action may be maintained as a class action in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri rule of civil procedure 52.08 to the extent such state rule is not inconsistent with the

federal rule . . .

Mo. Rev. Stat. § 407.025.3 (2000).

The inclusion of a private right to bring a class claim can only be read to contemplate the right to bring class claims in order to give the statute effect. This is in keeping with the broad reading to be afforded the MPA. “The Act’s fundamental purpose is the protection of consumers.” *Huch v. Charter Commc’ns, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009) (internal quotation omitted). The legislature intended Section 407.020 to “supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions.” *Id.* (citing *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. Ct. App. 1973)). Allowing the waiver of this substantive right would run afoul of United States Supreme Court precedent protecting consumers. It would also violate the edicts of this Court. In *Huch*, this Court unequivocally held that the MPA’s protections were not subject to waiver:

In short, Chapter 407 [the MPA] is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection. Furthermore, the very fact that this legislation is paternalistic in

nature indicates that it is fundamental policy: a fundamental policy may be embodied in a statute which . . . is designed to protect a person against the oppressive use of superior bargaining power.

Id. at 725–26 (quoting *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. banc 1992) (internal quotation omitted).

Given this Court’s consistent precedent preventing parties from waiving a consumer’s rights under the MPA, given the fact that the MPA explicitly includes a class action right, given that the United States Supreme Court precedent requires the ability to vindicate statutory rights, and given that the record in this case indicating that in the absence of a class action, MPA rights are made meaningless, the enforcement of Defendant’s class action waiver would be wholly inconsistent with Missouri law, Missouri public policy, and federal law.

A Michigan federal court found this argument compelling:

[E]ven if the waiver of judicial forum was not substantively unconscionable with respect to TILA claims, under the Michigan Consumer Protection Act, the availability of class recovery is explicitly provided for Because the arbitration agreement prohibits the pursuit of class relief, it impermissibly waives a state statutory remedy.

Lozada v. Dale Baker Oldsmobile, Inc., 91 F.Supp.2d 1087, 1105 (W.D. Mich. 2000).

Further, even if the class action right were not grafted into the MPA or if it were read to be procedural in nature, the fact that a class action can be essential to being able to bring a claim at all is not novel. The United States Supreme Court noted that, “The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). As such, the right to a class action can be inextricably intertwined with substantive rights, making it essential to an individual’s ability to pursue a remedy. The evidence in this case makes clear this is true in this case.

That Missouri courts recognizes class actions as a *substantive* right is yet another reason this case differs from *AT&T*. Nothing in *AT&T* suggests it overrules decades of precedent that a party must be able to vindicate her statutory rights in the arbitral forum in order for the clause to be enforceable.

For each of these reasons, this Court should construe *AT&T* to be limited to its own facts and to the unique legal setting in which it arose. *AT&T* cannot be read to prevent Missouri from enforcing its laws, providing remedies to individuals, or applying general contract law to arbitration clauses, as is required by the FAA and by the United States Supreme Court.

D. *AT&T* Does Not Preempt Missouri Law

Defendant advocates for a reading of *AT&T* that requires a finding of preemption of this Court's decision in *Brewer I*. This runs afoul of long-held principles of law regarding preemption, the plain text of the FAA, and the holding in *AT&T*. *AT&T*'s general holding is that if a state law is inconsistent with the fundamental purpose of the FAA, the state law will give way. *AT&T* at 1748. This led to the specific holding that California's *Discover Bank* rule, which struck down arbitration clauses even when they would encourage efficient resolution of claims, was unenforceable because it ran afoul of the FAA's purpose: to enforce arbitration agreements as written when doing so encourages the resolution of disputes. As such, to determine whether *Brewer I* is altered by the *AT&T* decision, only one question needs answering:

Did this Court apply a rule in *Brewer I* that was hostile to the purpose of the FAA and therefore preempted?

The answer is a resounding "no." Far from seeking to strike arbitration clauses because they do not allow class arbitration—even when they encourage the efficient resolution of claims—this Court made clear it would strike arbitration clauses only when they denied individuals a chance to resolve claims at all. The difference is clear. In *AT&T*, the district court had a simple switch: the clause was enforceable if it allowed for class arbitration; it was unenforceable if it did not. It did not matter how the clause functioned or whether consumers could resolve claims.

Although Defendant argues that *Brewer I* is overruled because *AT&T* prohibits conditioning the enforceability of arbitration clauses on the existence of class arbitration, this Court's decision in *Brewer I* expressed no such a condition. Instead, it made clear that many class action waivers are enforceable.⁵³ The determining factor is not whether or not one can have a class action; it is whether or not one has a remedy. *Brewer I* advocates making this decision based on the facts of a case, not by applying a *per se* rule like the *Discover Bank* rule. In so doing, the holding in *Brewer I* protected a consumer's right to a remedy for wrongs while recognizing that some clauses may prohibit class actions but still provide a remedy for individuals (such as the *AT&T* clause). Far from being inconsistent with the FAA, requiring that a clause allow for resolution of claims promotes one of the core purposes of the FAA.

Defendant rejects this proposition, and although it is careful not to expressly say so, the logical conclusion of its argument is that *AT&T* stands for a new rule: arbitration agreements are always enforceable, just as they are written. In short, Defendant wants a *per se* rule of its own: if a clause exists, enforce it. To say this reading is strained is to understate the point.

Defendant reads *AT&T* to rewrite the FAA so that the entire second half of Section 2, which specifically subjects arbitration clauses to state law, is revoked. Defendant

⁵³ “This is not to say that an arbitration agreement is always unconscionable merely because there is no agreement to class arbitration.” *Brewer I* at 21.

argues that *AT&T* interprets the FAA to always preempt Missouri law. Such a conclusion is entirely unsupportable, as it is out of step with the United States Supreme Court's guidance on preemption.

The United States Supreme Court has held that, “[w]hen addressing questions of express or implied pre-emption, the Court begins its analysis with the assumption that the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress.” *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (internal quotation omitted). That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. *Altria*, 555 at 77. Many members of the majority in *AT&T* have gone even further in arguing that preemption should be rarely found. For example, Justice Stevens wrote a dissent, in which Justice Scalia joined, that chastised the majority for failing to carefully analyze preemption and for failing to avoid infringing on state rights:

It is familiar learning that the purpose of Congress is the ultimate touchstone of pre-emption analysis. In divining that congressional purpose, I would have hoped that the Court would hew both to the [Act's] text and to the basic rule, central to our federal system, that in all pre-emption cases . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

...

It is especially troubling that the Court so blithely pre-empts [a state's] laws designed to protect consumers. Consumer protection is quintessentially a field which the States have traditionally occupied. The Court should therefore have been all the more reluctant to conclude that the clear and manifest purpose of Congress was to set aside the laws of a sovereign State.

Watters v. Wachovia Bank, N.A., 550 U.S. 1, 35-36 (2007) (Stevens, J., dissenting, with whom Scalia, J., joined) (internal citations and quotations omitted).

How then, does Defendant suggest that *AT&T* should be read to preempt Missouri law? How can Defendant suggest that *AT&T* stands for the principle that clauses are enforceable, even when unconscionable, when the United States Supreme Court and the FAA's own text require analysis of arbitration clauses under state law?⁵⁴ Defendant advocates rejecting the *per se* rule of *Discover Bank*, which was unduly hostile to arbitration clauses, and replacing with a new *per se* rule that is equally hostile to state law. This is not a reasonable reading of *AT&T*.⁵⁵

⁵⁴ See Def.'s Br. 10.

⁵⁵ Defendant's argument that Missouri law regarding unconscionability and exculpatory clauses is somehow wholly preempted could lead to results that could not have been intended by *AT&T*. For example, if a clause required a \$10,000 arbitration filing fee, it would almost certainly preclude resolution of consumer claims and the vindication of

In light of general preemption law, the text of the FAA, and the text of *AT&T*, the majority's opinion can only be read to mean that in the vast majority of cases, state law will govern arbitration clauses. However, if that state law would interfere with the core

their rights. Similarly, a clause that required that all arbitrations must take place in person in Nepal would preclude meaningful claim resolution. However, Defendant's reasoning suggests that arbitration is always a creature of contract, and even unconscionable clauses must be enforced. (Deft. Br. page 10). This flies in the face of the United States Supreme Court's long-standing guidance that parties must be able to vindicate their statutory rights in order for a clause to be enforceable. In fact, the United States Supreme Court has specifically recognized that a clause could be unenforceable because it would prevent a remedy. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) (in which the Court enforced an arbitration clause but suggested that if a party proves that the cost of arbitration would prevent the vindication of statutory rights, the clause could be invalidated). In all its briefing, Defendant makes no logical distinction between refusing to enforce clauses because the cost of arbitration would prohibit resolution of claims and refusing to enforce an arbitration clause because the prohibition of class arbitration would prevent the resolution of claims. This fundamental logical flaw is telling.

purpose of the FAA, it must give way. This is the exception, not the rule. This is in line with finding only the narrowest of preemption when it is not expressly provided for in a federal statute. Because the *Discover Bank* rule was purportedly state law, but set itself up against enforcing all arbitration clauses that prohibited class actions, even when they would resolve dispute, it was inconsistent with the FAA. In this rare case, preemption was necessary. Missouri does not have any such overbroad and overzealous law that indiscriminately strikes arbitration clauses regardless of whether they provide meaningful resolution of claims.

Defendant's reading of *AT&T*, requiring the mechanical enforcement of all arbitration agreements, even when all the facts demonstrate that doing so would run afoul of state law and deprive individuals of resolution of claims, cannot be sustained. *AT&T* is a rare case in which a state devised a law hostile to arbitration and out of step with FAA. It rejects striking clauses that promote resolution of claims. As such, *AT&T* has no application to *Brewer I*. Because the clause at issue in this matter has been factually shown to deny resolution of claims (which is in direct conflict with the FAA's purpose of resolving claims) and because it violates Missouri law, it must be struck.

E. The *Brewer I* Dissent

Although the *Brewer I* dissent did not agree that Defendant's arbitration clause was unconscionable and impermissibly exculpatory, this does not affect the analysis of whether *AT&T* preempts the majority holding. *AT&T* does not require a reexamination of the facts in *Brewer I*. Although the *Brewer I* dissent disagrees with the *Brewer I*

majority, it is nonetheless in a position to agree that Missouri law is not preempted by the FAA for the reasons stated herein. As such, Plaintiff asks all members of this Court to hold that the sovereign law of Missouri, including its right to apply general contract law to arbitration clauses and its right to protect consumer remedies, are unaltered by the United States Supreme Court's ruling in *AT&T*.

F. Defendant's Reading of *AT&T* Would Not Encourage Dispute Resolution, and it Contradicts the Purpose of the FAA

Defendant argues that *AT&T* preempts *Brewer I* and that this Court is now barred from finding arbitration clauses to be unconscionable when they prohibit class actions, even if it is clear such a prohibition would strip consumers of all remedies at law.⁵⁶ It is important to note that this Court ruled for the *Brewer I* Plaintiff based on two independent grounds: unconscionability and improper exculpatory clause.⁵⁷ Thus, for Defendant to prevail based upon an ultra-broad reading of *AT&T*, Defendant would also need to argue that although *AT&T* does not even address exculpatory clauses like those found in this case, *AT&T* preempted that defense too. It is important to consider the ramifications of such an absurdly broad reading.⁵⁸

⁵⁶ Def.'s Br. 10.

⁵⁷ *Brewer I*, 323 S.W.3d at 24.

⁵⁸ The issue of exculpatory clauses is discussed in more detail in Section IV of this brief.

1. Enforcing the Clause at Issue Would Violate the Essential Purposes of the FAA

Although Defendant argues that the FAA requires the enforcement of the class action waiver and the arbitration clause in which it is contained, this would work an untenable result. In actuality, the FAA requires the striking of the arbitration clause in this case.

Nothing should be done by any court that is inconsistent with the purpose of the FAA. A primary purpose of the FAA is to enforce arbitration agreements as written. However, this purpose is clarified immediately by the majority in *AT&T*: clauses are enforced as written when they will promote “expeditious results.” *AT&T*, 131 S. Ct. at 1749. Justice Scalia’s opinion quarrels with the dissent (which argued that expeditious resolution of claims was not a fundamental purpose of the FAA):

The dissent quotes [a case] as “rejecting the suggestion that the overriding goal of the Arbitration Act was to promote expeditious resolution of claims.” This is greatly misleading.

Id. The majority concluded that “[the] point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures . . . reducing the cost and increasing the speed of dispute resolution.” *Id.* (emphasis added).

It is easy to see why Justice Scalia held as he did in *AT&T*. The AT&T clause undisputedly encouraged efficient resolution of disputes, such that striking it would have

done harm to the general purpose of the FAA (enforcing arbitration clauses to encourage resolution of claims). Justice Scalia concluded that no state law could contravene this general purpose of the FAA. The final sentence in his majority opinion is enlightening in this regard:

Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California's *Discover Bank* rule is preempted by the FAA.

Id. at 1753. But as the previous section indicates, *Brewer I* is not *AT&T*. In *Brewer I*, this Court held that the arbitration clause of Missouri Title Loans made certain that disputes would not be resolved efficiently; in fact, literal enforcement of Defendant's arbitration clause would make sure that no consumer claims would be resolved at all. *Brewer I*, 323 S.W.3d at 23–24. This Court concluded that enforcing the Missouri Title Loans arbitration clause as written would have been at odds with the principle that is actually a central purpose of the FAA (enforcing clauses to resolve disputes). *Id.* Thus, this Court's holding in *Brewer I* is in line with *AT&T*.

No court, including the majority in *AT&T*, has ever asserted that the purpose of the FAA was to help companies avoid resolving disputes. Therefore, in addition to the fact that the Missouri Title Loans clause at issue ran afoul of general state law (and was therefore invalid under the saving clause to the FAA), that clause also ran afoul of the essential purpose of the FAA, rendering it doubly unenforceable.

Put even more simply, the primary purpose of the FAA, and the FAA saving

clause commanding the application of general state law (Section 2), require that the arbitration clause be struck whenever it denies remedies in direct violation of the holding in *AT&T*. The moment an arbitration clause ceases to promote resolution of disputes, and instead eliminates the advantages of arbitration, it cannot be enforced. That is what this Court held in *Brewer I*, and that is what this Court should hold in *Brewer II*.

2. Location of a Clause in a Contract Should Not Be the Primary Deciding Factor as to Enforceability

This Court has affirmatively held that if a clause immunizes a defendant from all liability, it is unconscionable. This Court has also made clear that some class action waivers, although certainly not all waivers, could accomplish this result. However, if this Court read *AT&T* to preempt these principles when the class waiver is in an arbitration clause, the results would be strange indeed.

If a contract with no arbitration clause included a class action waiver in a setting where its inclusion prevented resolution of claims, it would be unenforceable under the rationale in *Brewer I*. However, if the party took the identical clause and moved it into the arbitration clause, it would suddenly become enforceable. Justice Scalia certainly could not have meant that companies can entirely avoid state law simply by slipping otherwise impermissible clauses into the body of the arbitration agreement. If this were the case, why would Justice Scalia write that arbitration clauses are to be on equal footing with other contracts? *AT&T*, 131 S. Ct. at 1745 (stating that “courts must place

arbitration agreements on an equal footing with other contracts”).

3. The Saving Clause Would Be Qualified by the Primary Clause, in Violation of Common Sense and Statutory Construction

Section 2 of the FAA holds that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. What is immediately clear from this text is the general rule that arbitration clauses are enforceable. This rule is qualified by the second half of the sentence. The United States Supreme Court has consistently read Section 2 to mean that arbitration clauses are subject to “grounds that exist at law or in equity for the revocation of any contract,” and invited the application of general contract law defenses. Justice Scalia refers to this clause in *AT&T* as the “saving clause.” *AT&T*, 131 S. Ct. at 1746. The general rule (arbitration clauses are enforceable) is thus qualified by the “saving clause.”

If *AT&T* is read to preempt general state contract law in almost all settings, however, Section 2 of the FAA would be turned upside down. Instead of arbitration clauses being subject to state law, state law would be subject to the near-universal enforcement of arbitration clauses. What is clearly “anti-preemptive” language in the saving clause of the FAA (9 U.S.C.A §2) would somehow be read to indicate an intent to preempt state law. Such a result is nonsensical, and it is unsupported by law. To read the FAA to expansively preempt the ability of states to regulate their own affairs seems

wildly inconsistent with many other opinions issued by judges in the majority in *AT&T*.

In fact, this reading is inconsistent even with the language of the *AT&T* majority opinion, which carefully narrows its impact on the saving clause in holding only that the saving clause cannot be “construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.”

AT&T, 131 S. Ct. at 1748 (internal quotation omitted). The common law, statutory, and constitutional right to a remedy can hardly be read to be “absolutely inconsistent with the provisions of the act.” *Id.* (internal quotation omitted).

AT&T stands only as a caution that the saving clause exception cannot be made to swallow the FAA general rule that arbitration clauses must allow the efficient vindication of claims. This principle was violated by California’s *Discover Bank* rule, because it destroyed the *AT&T* arbitration clause even though that arbitration clause was deemed efficient at resolving disputes and providing consumers the benefits of efficiency unique to arbitration. *See id.* at 1745. The rule was hostile to arbitration, and that hostility is precisely what the FAA sought to eliminate. The Court struck down the *Discover Bank* rule accordingly.

It is clear that Justice Scalia was gravely concerned that the *Discover Bank* rule was only a thinly veiled attack on arbitration, spending a full page discussing other ways a state might attempt to disguise hostility for arbitration. *See id.* at 1747. He suggested that states might concoct facially neutral rules (such as suggesting it is unconscionable to deny access to the Federal Rules of Civil Procedure or requiring a panel of twelve

arbitrators) in order to attack arbitration clauses. *Id.* Scalia rightfully pointed out that these concocted reasons would serve to eviscerate arbitration agreements entirely. *Id.* at 1748. He concluded the *Discover Bank* rule was not materially different from these concocted ways to invalidate arbitration clauses. *Id.*

The case now before this Court is vastly different. This Court cannot possibly be accused of concocting a new rule designed to attack arbitration clauses. The principles in *Brewer I* were sound and based on general contract law prohibiting a party from insulating itself from liability. They do nothing to threaten the core principles of arbitration. As a result, *Brewer I* is well-reasoned, good law, and it should be affirmed.

a. This Court's Decision Was Not Centered on the Availability of Class Arbitration.

The *AT&T* majority opinion discusses reasons that a party could not be required to participate in class arbitration (lack of appeal, lack of qualification of arbitrators, pressure to settle, etc.). *AT&T*, 131 S. Ct. at 1751–52. The majority concludes from this discussion that requiring class arbitration would be unfair to a defendant in a class action. *Id.* at 1752. This concern does not arise in this case. Nothing in this Court's decision in *Brewer I* would require these parties to participate in class arbitration. Instead, when any contract (arbitration or not) would prevent a party from vindicating his or her statutory rights, *Brewer I* stands for the proposition that the case must proceed in court. There, Defendant's rights are protected via procedural safeguards, trained judges, and the right to appeal; likewise, Plaintiff's right to a remedy for illegal acts is also protected.

G. Defendant's Ten Erroneous Contentions

In the opening pages of its brief, Defendant makes ten claims that do not bear the scrutiny of a careful reading of *AT&T*. Plaintiff will conclude this section of her brief by succinctly responding to each of Defendant's claims. It is Plaintiff's belief that taking time to address Defendant's specific contentions head-on will sharply define and contrast the positions of the parties.

Defendant's Contention #1:

AT&T Mobility LLC v. Concepcion, 563 U.S. ____, 131 S. Ct. 1740 (2011), holds that the FAA preempts state laws that find arbitration clauses unconscionable if they fail to provide for class arbitration.⁵⁹

This is incorrect. *AT&T* prohibits conditioning enforceability of an arbitration clause on whether or not it allows for class arbitration. California's *Discover Bank* rule was such a *per se* rule, and the United States Supreme Court struck it down. This was necessary and proper, as California's rule resulted in striking an arbitration clause that was proven in the trial court to promote expedited resolution of claims.⁶⁰ This Court has

⁵⁹ Def.'s Br. 8.

⁶⁰ The District Court had denied AT&T's motion even though it had described AT&T's arbitration agreement favorably, noting, for example, that the informal dispute-resolution process was "quick, easy to use" and likely to "promp[t] full or . . . even excess payment to the customer *without* the need to arbitrate or litigate"; that the \$7,500 premium

already rejected a *per se* rule like the one struck in *AT&T*. In *Brewer I*, the majority noted that many class action waivers are enforceable.⁶¹ Put another way, it is not whether or not class arbitration is available that determines the enforceability of a clause; it is whether the arbitration clause denies all reasonable remedies, and as a result, runs afoul of the core purpose of the both FAA and of general Missouri contract law (facilitating meaningful resolution of claims). In *Brewer I*, this Court examined the actual language and the practical effects of the arbitration clause at issue, and it applied general contract law to assess its enforceability, just as it would to assess any other contract. Contrast this approach with that of the District Court in *AT&T*, which ruled that a reasonable arbitration clause was “unconscionable” after mechanically applying the *Discover Bank* rule. The fact that the arbitration clause at issue in *AT&T* did provide a meaningful remedy evidenced to the United States Supreme Court just how unreasonable and arbitrary the *Discover Bank* rule was, which is why the majority opinion of *AT&T* set forth the consumer-friendly features of the AT&T arbitration clause in exacting detail.⁶²

functioned as “a substantial inducement for the consumer to pursue the claim in arbitration” if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. *AT&T*, 131 S. Ct. at 1745.

⁶¹ “This is not to say that an arbitration agreement is always unconscionable merely because there is no agreement to class arbitration” *Brewer I* at 21.

⁶² *AT&T* at 1744.

Defendant’s Contention #2:

The opinion expressly rejected not only the holding in *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010) (*Brewer I*), but also its rationale.⁶³

It is not true that *AT&T* “expressly rejected” *Brewer I*. By its very terms, *AT&T* held as follows:

Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California’s *Discover Bank* rule is preempted by the FAA.⁶⁴

Brewer I did not apply the *Discover Bank* rule; this Court did not blindly strike the arbitration clause at issue in the face of evidence that the clause was consumer-friendly and that it would allow consumers to resolve their claims. What the United States Supreme Court said about the gold-plated *AT&T* arbitration clause and its interaction with the *Discover Bank* rule has nothing to do with this Court's holding regarding the arbitration clause at issue and its interaction with Missouri law.

⁶³ Def.’s Br. 8.

⁶⁴ *AT&T* at 1753 (internal quotation and citation omitted)

Defendant’s Contention #3:

In light of [AT&T], this Court should reverse the trial court’s order and remand with instructions to arbitrate Ms. Brewer’s individual claim.⁶⁵

This contention is incorrect for in the responses to Contentions 1 and 2.

Defendant’s Contention #4:

Under *Discover Bank*, a class action waiver in an arbitration agreement is unconscionable if: (a) the agreement is a consumer contract of adhesion drafted by a party with superior bargaining power; (b) the agreement occurs in a setting in which disputes between the contracting parties predictably involve small damages; and (c) plaintiff alleges that the party with the superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money. 30 Cal. Rptr. 3d at 87.⁶⁶

Plaintiff agrees that this describes the *Discover Bank* rule was disallowed by AT&T. Plaintiff points out, however, that *Discover Bank* rule was not applied in *Brewer I*. Plaintiff further notes that this shotgun rule failed to consider whether a particular arbitration clause allowed consumers to reasonably resolve their claims.

⁶⁵ Def.’s Br. 8.

⁶⁶ *Id.* at 9, n.2.

Defendant mentions that *Brewer I* cited to *Discover Bank*.⁶⁷ This is true, but the *Brewer I* Court did not apply the *Discover Bank* rule, which was a *per se*, mechanical rule that failed to consider the real-world function of the arbitration clause under consideration; rather, this Court relied on general rules applicable to all contract claims. This Court cited *Discover Bank* for the proposition that allowing a defendant immunity from all claims is impermissible.⁶⁸ In *AT&T* trial court, the *Discover Bank* rule had evolved into something quite different, requiring that even when a Defendant was not immunized, and a consumer had a meaningful remedy, the clause was still unenforceable. *Brewer I* never relied on this mechanical version of the *Discover Bank* rule.

Defendant's Contention #5:

According to the majority [opinion in *Brewer I*], this alleged “inability to retain counsel leaves the consumer with no meaningful avenue of redressing” his or her claims.⁶⁹

The undisputed evidence before this Court in *Brewer I* proved that customers could not find attorneys and they could not arbitrate these complex, cost-prohibitive cases individually. They had no way to resolve their claims at all. The AT&T customers did

⁶⁷ *Id.* at 9.

⁶⁸ *Brewer I* at 23.

⁶⁹ Def.'s Br. 8.

have a reasonably way to vindicate their legal rights. In fact, the District Court found, as a matter of fact, that the AT&T clause gave them a better method of resolving claims than they would have had through a class action. Compare this to the Missouri Title Loans arbitration clause, which slammed the door shut to any resolution of legal claims.

Defendant’s Contention #6:

[In *AT&T*], both the District Court and the Ninth Circuit reached exactly the same conclusion as *Brewer I*: the inability to proceed with a class action made the arbitration clause unconscionable and hence unenforceable.⁷⁰

This contention is not correct. The facts considered by the AT&T courts starkly contrasted from the facts of *Brewer I*. In *AT&T*, consumers already had a path to submit and resolve claims. The Ninth Circuit struck an arbitration clause that promoted the effective resolution of disputes under *Discover Bank* simply because it was an arbitration clause. In *Brewer I*, consumers had no way at all to resolve their claims. The arbitration clause of Defendant Missouri Title Loans —unlike AT&T’s arbitration clause—left customers without a remedy and with no way to submit or resolve their claims.

⁷⁰ Def.’s Br. 9.

Defendant’s Contention #7:

The Supreme Court of the United States . . . noted that the FAA preempts “generally applicable contract defenses” if they “stand as an obstacle to the accomplishment of the FAA’s objectives.”⁷¹

Plaintiff agrees with Defendant’s contention. Nonetheless, it is important to point out that the FAA has at least two major objectives. One of those is to encourage “efficient and speedy dispute resolution.”⁷² Far from standing “as an obstacle” to the FAA’s objectives, the generally applicable contract defense relied upon by this Court in *Brewer I* promotes the accomplishment of the FAA’s objectives.

Defendant’s Contention #8:

Pursuant to [*AT&T*], an arbitration agreement that bars class-wide arbitration is valid and enforceable under the FAA, even if such an agreement is unconscionable under state law or violates state public policy.⁷³

⁷¹ *Id.*

⁷² *AT&T* at 1749.

⁷³ *Id.* at 10.

This contention is incorrect. Class waivers that are deemed to be unconscionable by a state court are not enforceable unless the state court finding of unconscionability conflicts with the FAA’s purpose of “efficient and speedy dispute resolution.”⁷⁴

Defendant’s Contention #9:

[*AT&T*] also took note of the “judicial hostility towards arbitration” which “manifested itself in a great variety of devices and formulas declaring arbitration against public policy.”⁷⁵

It is correct that, pursuant to *AT&T*, the United States Supreme Court will not tolerate judicial hostility toward arbitration. Such hostility was manifest in *AT&T*, where the lower courts deemed that a consumer-friendly arbitration clause that promoted the FAA’s objectives was unconscionable pursuant to the mechanically-applied *Discover Bank* rule. No such hostility is apparent in *Brewer I*, where, based on substantial (and, in fact, undisputed) evidence, Plaintiff proved that Defendant’s arbitration class waiver cut off any possibility that Defendant’s customers could resolve claims against Defendant, either individually or through class proceedings. In *Brewer I*, this Court displayed “hostility” only toward contract clauses that A) deny individuals the opportunity to resolve claims and B) immunize the defendant. In *Brewer I*, the evidence demonstrated

⁷⁴ *AT&T* at 1749.

⁷⁵ Def.’s Br. 11.

that Defendant's class waiver failed this test—Defendant's clause gave Defendant complete immunity, even for systemic wrongdoing.

Defendant's Contention #10:

Since 2000, Missouri appellate courts have issued twelve published opinions in which a party argued that an arbitration clause was unconscionable. In *eleven* of those twelve cases, courts found the clause to be unconscionable in whole or in part.⁷⁶

None of these cases involved an arbitration provision remotely like the one in *AT&T*. Further, this Court found the clause at issue was unenforceable for two independent reasons: (1) it was unconscionable and (2) it was an unenforceable exculpatory clause. Defendant fails to discuss the law regarding exculpatory provisions or to recognize that *AT&T* had nothing to do with Missouri state exculpatory clause law. Even if this Court were to find that *AT&T* did not allow Defendant's clause to be stricken as unconscionable, Defendant's clause still fails to conform to general contract law, established over a period of many decades, that an exculpatory clause must be explicit and that Defendant's attempt to exculpate itself was not explicit. *AT&T* has no impact on this exculpatory provision analysis.

⁷⁶ *Id.*

**II. DEFENDANT’S ARBITRATION CLAUSE IN THIS CASE IS
SUBSTANTIVELY AND PROCEDURALLY UNCONSCIONABLE
(RESPONSE TO DEFENDANT’S POINT II).**

As this Court ruled in *Brewer I*, substantive unconscionability alone has invalidated arbitration clause provisions. “Under Missouri law, unconscionability can be procedural, substantive or a combination of both.” *Brewer I* at 22. *See also, Vincent v. Schneider*, 194 S.W.3d 853, 858-61 (Mo. en banc 2006) (in which the court first held that the contract was not an adhesion contract and then struck a substantively unconscionable provision.)

Plaintiff hereby incorporates by reference the arguments located from page 39 to page 77 of Plaintiff’s original Respondent’s Brief regarding the ample evidence of procedural and substantive unconscionability in this case.⁷⁷ In *this* brief, Plaintiff offers the following truncated review of that evidence:

A. Substantive Unconscionability

1. Evidence of Substantive Unconscionability in this Case

The Plaintiff provided ample evidence of substantive unconscionability to the trial court, including the following:

⁷⁷ Discussed in *Brewer I* at 22–24.

- 1) Actual damages involved in this case are “a couple thousand dollars.” This case is therefore a small-damages case.⁷⁸
- 2) Defendant admitted that by signing Defendant’s arbitration provision, Defendant’s customers are giving up various legal rights, including the right to go to court, the right to a jury trial, and the right to serve as a class representative in a class action.⁷⁹
- 3) Defendant admitted that its contract allows Missouri Title Loans to repossess its customers’ vehicles without going through arbitration.⁸⁰
- 4) Consumers are generally not aware of their statutory rights. For this reason, class actions serve to provide notice of violations to consumers.⁸¹
- 5) Businesses often utilize arbitration clauses for the purpose of limiting liability.⁸²
- 6) Waiver of class actions encourages businesses to continue illegal conduct.⁸³

⁷⁸ L.F. 119 (Pl.’s Am. Pet., ¶¶ 1, 3, 7); L.F. 504 (Brown Dep. 80); L.F. 311 (Ammann Dep. 68).

⁷⁹ L.F. 74-77 (Fields Dep. 74-76).

⁸⁰ L.F. 376 (Fields Dep. 72, 74); Pl.’s Loan Agreement, Section 12. App 2-3.

⁸¹ L.F. 501 (Brown, Dep. 77, 82, 140, 141).

⁸² L.F. 709-10 (Irwin Dep. 137-38).

⁸³ L.F. 708-09 (Irwin Dep. 136-37).

- 7) It is nearly impossible to obtain legal representation in Missouri in a small-damages consumer claim such as this.⁸⁴ Even seasoned consumer attorneys are simply not able to handle this type of case because the expenses involved are too high and customers could not afford retainers of “several thousand dollars.”⁸⁵
- 8) It is extremely difficult for consumers in low damages cases like this to persuade attorneys to represent them. Class actions are the only way for a consumer to get representation on claims like this.⁸⁶
- 9) Class action waivers in cases like this kill off any chance for consumers to obtain legal representation.⁸⁷
- 10) These cases are complicated consumer cases with damages ranging from a few hundred to a few thousand dollars. It is extremely difficult for consumers to find experienced attorneys to handle these cases because there are relatively few consumer-savvy attorneys. Further, because these cases are legally complex with

⁸⁴ L.F. 658, 710 (Irwin, Dep. 82, 82, 134–35).

⁸⁵ L.F. 311(Ammann Dep. 67); L.F. 658 (Irwin Dep. 82, 97-98, 134–35,); LF 711–12 (Brown Dep. 81-82).

⁸⁶ L.F. 500, 504, 515 (Brown Dep. 76–77, 80, 91).

⁸⁷ L.F. 500, 527–30 (Brown Dep. 76–77, 103–05).

relatively low damages, they are not “financially viable” for attorneys to handle regardless of the fee arrangement.⁸⁸

This evidence, based on undisputed expert testimony before this Court, squarely contradict Defendant’s argument (Point II of Defendant’s Brief) that customers could have hired attorneys to pursue individual cases against Defendant. Plaintiff has produced *undisputed* evidence that Defendant’s title loan customers would not be able to hire attorneys to represent them on these individual claims given the complexity of these cases and the relatively low claim value.⁸⁹ Even seasoned consumer attorneys would not handle this type of case because the expenses involved are high and customers could not afford retainers of “several thousand dollars.”⁹⁰ Class actions are the only way for a consumer to get representation on claims like this⁹¹ and class action waivers in cases like this kill off any chance for consumers to obtain legal representation.⁹² Defendant failed to provide evidence that any attorney would be willing to handle these claims on an individual basis.

⁸⁸ L.F. 311, 315 (Ammann Dep. 67–68, 83–84).

⁸⁹ L.F. 658, 710 (Irwin, Dep. 82, 134–35).

⁹⁰ L.F. 311(Ammann Dep. 67); L.F. 658 (Irwin Dep. 82, 97–98, 134–35,); L.F. 711–12 (Brown Dep. 81-82).

⁹¹ L.F. 500, 504, 515 (Brown Dep. 76-77, 80, 91).

⁹² L.F. 500, 527–30 (Brown Dep. 76–77, 103–05).

Consumers cannot find *individual* representation due to the relatively small damages of their claims, but Defendant has tried to cut off the only alternative: class actions/class arbitrations. This amounts to immunity. Defendant’s arbitration clause is unconscionable because it “defeats the prospect of class-action treatment in a setting where the practical effect affords the defendant immunity.” *Woods*, 280 S.W.3d at 100. “The inability to retain counsel leaves the consumer with no meaningful avenue of redressing complicated statutory and common law claims.” *Brewer I* at 23.

Defendant certainly had the right to call as a witness *even one attorney* who might have claimed that he or she would be able to handle individual payday loan cases or individual title loan cases as part of a rational business model. Defendant failed to call a single attorney. Therefore, the only evidence on this point is the evidence provided by Plaintiff’s three experts.

In its brief, Defendant suggests that because a steady trickle of lawyers are willing to handle TILA cases, FDCPA cases, and some cases involving automobile repairs, there is evidence that the tens of thousands of customers of Missouri Title Loans would also be able to hire attorneys to represent them in these legally complex small-damages claims. This argument conflicts with the undisputed evidence in the record before this Court.

2. The Problem with Lack of Notice to Other Class Members

One additional aspect of substantive unconscionability deserves special treatment. In the absence of a class case, notice and the opportunity for remedies for other class members are non-existent. This is true because even if one assumes that consumers are

sufficiently zealous to file lawsuits based on amounts ranging from a few hundred to a few thousand dollars each and even if they can find lawyers to indulge them, they would still be unlikely to bring these claims because the claims are opaque to most consumers. Payday lending statutes are rare reading for lawyers, much less the average consumer. For this reason, Defendant's prohibition of class proceedings hurts consumers in yet another way: it prevents consumers from learning that their rights are being violated. As indicated by the expert witnesses in this case, consumers have an extraordinarily difficult time trying to understand contracts such as Defendant's or the fact that the contract is illegal.

Courts have noted this important function, reasoning that “. . . without the availability of a class-action mechanism, many consumer fraud victims may never realize that they have been wronged.” *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006). The *Woods* Court also noted the importance of involving more than the named plaintiff when it spoke of the need for “precedential effect” of dispute resolution and the need for “scrutiny and accountability” that would be destroyed without the possibility of class proceedings. *Woods*, 280 S.W.3d at 98. This language contradicts Defendant's assertion that class proceedings are not necessary for purposes of providing notice to and representation for other potential claimants.⁹³

This Court has been equally skeptical of placing the burden on consumers to

⁹³ Def.'s Br. 20.

recognize complicated forms of illegal activity. In *Eisel*, the Court noted:

[T]o hold . . . that a customer, not a [defendant] would be burdened with the responsibility to recognize the unauthorized business of law . . . would be illogical and inequitable.

Eisel v. Midwest Bankcentre, 230 S.W.3d 335, 339 (Mo. banc 2007). Allowing class arbitrations (which include notice to the entire class) provides a remedy for this knowledge deficit, allowing consumers to learn that their rights were violated.

3. Improper Waiver of Jury Trial as Additional Aspect of Substantive Unconscionability

Missouri courts have fiercely protected the right to a jury trial. In Missouri, no person can be said to have agreed to arbitration in the first place unless that person has “knowingly and voluntarily” given up his or her right to a jury. *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. banc 1997). Therefore, no purported waiver of a jury trial is enforceable if it is “buried” in a contract. *Id.* This rule applies to all jury waivers, including those not in arbitration clauses:

The fundamental nature of a due process right to a jury trial demands that it be protected from an unknowing and involuntary waiver. The standard that is universally applied to prevent overreaching and to protect against unequal bargaining positions requires that the trial court determine whether the waiver was knowingly and voluntarily or intelligently made Additionally, the courts have examined the following factors: negotiability

of the contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision. Having determined that a party may contractually waive its right to a jury trial, it remains to be determined whether the defendant did so knowingly and voluntarily under the facts of this case or whether there was an overreaching as a result of unequal bargaining positions.

Id. (internal citations omitted).

In this case, Defendant had disparate bargaining power compared to its customers, and that there was overreaching by the Defendant. “[T]here was evidence that the loan agreement was non-negotiable and difficult for the average consumer to understand and that Missouri Title Loans was in a superior bargaining position.” *Brewer I* at 23. The parties before this Court were not “commercial entities at arm’s length,” such that a fine-print clause on the back of a lengthy contract could be deemed to constitute a waiver of right to a jury.

Missouri carefully protects the right to jury trial. To agree to arbitrate a claim requires the proper waiver of a jury trial, and that was not properly done in Defendant’s contract. It is thus arguable that Defendant’s customers never effectively waived their rights to jury trial, and thus never acceded to arbitrate their claims in the first place. At a minimum, Defendant’s use of fine print and buried contract terms to deprive customers of jury trials constitutes yet another instance of substantive unconscionability.

B. Procedural Unconscionability

Procedural unconscionability relates to the formalities of the making of an agreement and encompasses, for instance, fine-print clauses, high-pressure sales tactics, and unequal bargaining positions. *Brewer I* at 22. In this case, there are numerous indicia of procedural unconscionability:

- 1) Defendant Missouri Title Loans is a large corporation that specializes in making small loans to financially desperate consumers.⁹⁴
- 2) In order to qualify for Defendant's 300-percent interest loans, Defendant required each of its customers to hand over the original title to their cars and a set of their car keys.⁹⁵
- 3) Missouri Title Loans is a large company, with 50 stores in Missouri. Defendant has had at least 14,895 Missouri customers since 2001.⁹⁶ Plaintiff is an individual consumer.
- 4) Defendant Missouri Title Loans has included arbitration clauses in every one of its loan contracts since it began doing business in 1998.⁹⁷

⁹⁴ L.F. 764 (Def.'s Articles of Incorporation, Article 8).

⁹⁵ L.F. 353 (Fields Dep. 34); *see also* L.F. 287 (Pl.'s Loan Agreement).

⁹⁶ L.F. 342 (Fields Dep. 16); L.F. 790 (Def.'s Answers to Pl.'s Am. Count I Interrogs., No. 40).

- 5) Defendant's loan contract is a form contract that includes an arbitration clause; these forms were drafted by attorneys hired by Defendant Missouri Title Loans.⁹⁸
- 6) Customers do not and may not negotiate the terms of Defendant's arbitration clause.⁹⁹
- 7) Defendant's arbitration clause was printed on the second page of Defendant's convoluted fine-print loan contract dominated by boilerplate.¹⁰⁰
- 8) Consumers have an extraordinarily difficult time trying to understand contracts such as Defendant's.¹⁰¹ Many consumers become *more* confused by reading it.¹⁰²
- 9) Consumers seeking these high-interest title loans are financially stressed.¹⁰³

⁹⁷ L.F. 771 (Def.'s Answers to Pl.'s Am. Count I Interrogs. Nos. 11, 13); L.F. 771 (Def.'s Answers to Pl.'s Am. Count I Interrogs. Nos. 11, 13).

⁹⁸ L.F. 368–69 (Fields Dep. 59–62).

⁹⁹ L.F. 363 (Fields Dep. 51); L.F. 323 (Ammann Dep. 109, 115); L.F. 790 (Def.'s Answers to Pl.'s Am. Count I Interrogs No. 39).

¹⁰⁰ L.F. 287 (Pl.'s Loan Agreement with Def.).

¹⁰¹ L.F. 533–36 (Brown Dep. 109–11).

¹⁰² L.F. 531–34 (Brown Dep. 107–10); L.F. 671, 717 (Irwin Dep. 95, 141); L.F. 321 (Ammann Dep. 109).

¹⁰³ L.F. 322 (Ammann Dep. 110).

III. DEFENDANT'S ARBITRATION CLAUSE FUNCTIONS AS AN IMPROPER AND THUS UNENFORCEABLE EXCULPATORY CLAUSE.

The clause at issue completely exculpates Defendant from liability; however, it does not conspicuously and clearly disclose that Defendant is being exculpated, rendering Defendant's arbitration clause unenforceable under general contract principles of Missouri law. Even if this Court were to find that *AT&T* applies to state courts, and even if this Court were to find that *AT&T* preempts Missouri contract law regarding unconscionability, this would not impact the analysis in *Brewer I* regarding exculpatory clauses.

The failure of Defendant's exculpatory clause is an entirely separate ground from the issue of unconscionability. In *Brewer I*, this Court held that the arbitration clause failed for two independent reasons. The first reason related to unconscionability. The second reason Defendant's clause failed is that it exculpates Defendant but Defendant failed to clearly warn its customers about this fact. This judicial reasoning relating to exculpatory clauses is completely sound, and it could never be criticized as being based on law specific to arbitration clauses.

The law relating to exculpatory clauses is ancient and settled. The law requiring exculpatory clauses to be clear, conspicuous, and unambiguous dates back at least one hundred years and has been applied almost exclusively in general contract cases. It could never be suggested that this contract defense is unique to arbitration clauses or that the application of the law in *Brewer I* was somehow different from the application of the law

to other contracts for more than a century. *See, e.g., Phoenix Assur. Co. of N.Y. v. Royale Investment Co.* 393 S.W.2d 43, 47 (Mo. Ct. App. 1965); *Meyer Jewelry Co. v. Prof'l Building Co.*, 307 S.W.2d 517, 520–21 (Mo. Ct. App. 1957); *Thomas v. Skelly Oil Co.*, 344 S.W.2d 320, 322 (Mo. Ct. App. 1960) (“the contract before us does not clearly and in unequivocal terms provide that defendant shall be indemnified or saved harmless from liability resulting from its own negligence”); *Hartman v. Chicago, B. & Q.R. Co.*, 182 S.W. 148, 151 (Mo. Ct. App. 1915) (noting that “court look with extreme disfavor upon forfeitures designed to destroy valuable rights bought and paid for . . . and will not enforce them unless compelled by the plain letter of the contract”); *Och v. Mo., K. & T. RY. Co.*, 31 S.W. 962 (1895).

The law regarding exculpatory clauses was reviewed and explicitly laid out in *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 334 (Mo. banc 1996). Although exculpatory clauses in contracts releasing an individual from his or her own future negligence are disfavored, they are not prohibited as against public policy. *Id.* However, contracts exonerating a party are to be strictly construed against the party claiming the benefit of the contract, and clear and explicit language in the contract is required to absolve a person from such liability. *Id.* It is a well-established rule of construction that a contract provision exempting one from liability for his or her negligence will never be implied but must be clearly and explicitly stated. *Id.* And “there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest.” *Id.* at 337. This Court

concluded that to be enforceable, a clause must be “explicit.” *Id.* at 336. The clause must be “clear, unambiguous, unmistakable, and conspicuous.” *Id.* at 337.

In *Brewer I*, this Court concluded that the factual record established that the clause at issue was exculpatory. *Brewer I*, 323 S.W.3d at 24. However, the clause did not unambiguously inform consumers that the clause exculpated the merchant. *Id.* This Court noted that although there are times when a party may exculpate itself in Missouri, the law is clear that in order effectively immunize the lender from the laws of Missouri, the waiver has to be clear and unambiguous. *Id.* Exculpatory clauses have never been allowed to be buried in fine print, and they have never been allowed to be general. To be enforceable, the clause must be obvious, to advise customers that they are essentially agreeing to repeal consumer protection laws regarding their transaction and reverting back to the days of “buyer beware.” Applying these principles, this Court addressed the exculpatory clause issue succinctly in *Brewer I*:

In its final point on appeal, Missouri Title Loans argues that the class arbitration waiver is permissible because it functions as an unambiguous exculpatory clause. A defendant cannot exculpate itself from liability unless the language is clear and unambiguous. *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 334 (Mo. banc 1996). Missouri Title Loans asserts that the class arbitration waiver is clear and unambiguous and that the average consumer would understand that he or she is giving up the right to class arbitration. This argument is without merit because the real issue is

not whether the consumer realizes he or she is forsaking class arbitration but, instead, is whether the consumer realizes that he or she effectively is bypassing the opportunity to retain counsel to litigate a claim against the lender. The net result is that the class arbitration waiver effectively immunizes the loan company from liability, creating an economic impediment to the consumer's retention of counsel for litigating his or her claim. Nothing in the language of the class arbitration waiver unambiguously informs the consumer that the net result of the waiver is that the lender effectively is immunized from liability. As was the case in *Woods*, the class arbitration waiver here will not be enforced as a valid exculpatory clause.

Brewer I at 24.

Although Defendant (in *Brewer I*) argued the clause only needed to be clearly worded regarding the fact that arbitration was required, this Court disagreed. Requiring that a clause be clear about its express terms but do nothing to explain the actual effect of the clause would only encourage creative exculpation. For example, consider a merchant who foisted a contract clause onto its customers requiring that all disputes arising from the transaction “must be resolved in Collin County, Missouri.” The clause reads clearly on its face, and under Appellant’s theory, would be readily enforceable. However, it would guarantee immunity for the defendant if enforced literally, because there is no such place as Collin County, Missouri. Similarly, if a defendant included a clause that

indicated that “you must pay \$50,000 to the arbitrator to proceed with any arbitration claim against us,” the express terms would be clear, but no court would enforce such an exculpatory clause.

Under Missouri law, the physical appearance of the clause matters too. What if a party explicitly agreed that it was being released from all claims for negligence arising from a certain activity, but included its provision in three-point font? The clause would be an unenforceable exculpatory clause because, although its language would be clear, it would not be physically *clear and conspicuous*. It would thus be an unenforceable exculpatory clause. Provisions that are not clear and conspicuous are fully capable of tricking even savvy consumers into giving up virtually any legal right, even the right to the protection afforded to consumers by the Missouri legislature.¹⁰⁴ Therefore, arbitration language may not be buried in legalese and jargon. Even those lenders that make some effort to state that arbitration is mandatory have failed to make proper disclosures to the extent that they fail to explain the real-world effect of their clause: the complete exculpation of the lender. This type of “coded exculpatory clause” is impermissible under Missouri law for the reasons this Court recognized in *Brewer I*.

AT&T has no effect on the exculpatory clause defense because *AT&T* did not consider Missouri’s law regarding exculpatory clauses. Although the term “exculpatory” appears in *AT&T*, the trial court had not applied a separate and distinct test (such as

¹⁰⁴ See, e.g., Merchandising Practices Act, Mo. Rev. Stat. § 407.020 (2000).

Missouri's test) barring contract clauses for failing to be clear and conspicuous. Instead, the *AT&T* opinion used the term "exculpatory" as a shorthand term referencing unconscionability. *See AT&T*, 131 S. Ct. at 1745. *AT&T* never suggests a clause may run afoul of well-worn contract law, thereby depriving individuals of remedies, and yet remain enforceable. Because the evidence in this case establishes that the arbitration clause at issue was exculpatory, it would only be permissible if it clearly warned consumers that it would be impossible for them to find any way to pursue any claim against Defendant, whether as part of a class or individually. Defendant's clause in this case did not make it clear that consumers were agreeing to this complete exculpation and, as a result, Defendant's class waiver is unenforceable.

CONCLUSION

For these reasons, *Brewer I*, should be affirmed in its entirety, so that this matter may proceed in the trial court as a putative class action.

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CERTIFICATES OF SERVICE, BRIEF FORM AND VIRUS SCANNING

1. A copy of the foregoing was mailed this 23rd day of July, 2011 to attorneys for the Appellant:

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2. This brief complies with Rule 55.03 and the limitations contained in Rule 84.06(b) limiting Appellant's brief to 90% of 31,000 words, which equals 27,900 words. This brief contains 17,743 words, as determined by the word count feature of MS Word (including Cover, Certifications and Appendix).

3. Pursuant to Rule 84.06(g), Appellant hereby certifies that the CD-ROM accompanying the paper version of this brief has been scanned for viruses and that it is virus-free.

Erich Vieth #29850

APPENDIX

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The physical appearance of Defendant's arbitration agreement	A1
Copy of Defendant's Contract with Plaintiff, including the purported class waiver.	A2-A3