

**IN THE SUPREME COURT OF MISSOURI  
EN BANC**

BEVERLY BREWER,	)	
	)	
Plaintiff/Respondent,	)	
	)	
v.	)	No. SC90647
	)	
MISSOURI TITLE LOANS, INC.,	)	
	)	
Defendant/Appellant.	)	

---

**SUPPLEMENTAL REPLY BRIEF OF  
APPELLANT MISSOURI TITLE LOANS, INC.**

---

**Appeal from the Circuit Court  
City of St. Louis**

**Hon. David L. Dowd  
Circuit Judge**

---

GREEN JACOBSON, P.C.  
Martin M. Green #16465  
Jonathan F. Andres #39531  
7733 Forsyth Blvd., Suite 700  
Clayton, Missouri 63105  
Phone: 314-862-6800  
Fax: 314-862-1606

Attorneys for Appellant  
Missouri Title Loans, Inc.

**Table of Contents**

Table of Contents ..... i

Table of Cases and Other Authorities ..... iii

Argument ..... 1

I. The Trial Court Erred In Refusing To Enforce Brewer’s  
Arbitration Clause On An Individual Basis Because The  
FAA Preempts Missouri’s Common Law of Unconscion-  
ability In That Such Law Frustrates the Overriding  
Federal Interest In Enforcing Arbitration Agreements  
As Written ..... 1

A. *Concepcion* Rejected Brewer’s Argument About  
Lack of Remedy ..... 2

B. *Concepcion* Applies in State Court ..... 8

C. *Mitsubishi Motors* Does Not Establish Any Applicable  
“Vindication of Rights” Rule ..... 11

D. The Absence of Prior Claims Has No Bearing on  
Brewer’s Rights ..... 13

E. Brewer Misconstrues the FAA’s Savings Clause and  
the Scope of FAA Preemption ..... 14

II.	The Trial Court Erred in Refusing to Enforce Brewer’s Arbitration Clause on an Individual Basis Because the Clause is not Unconscionable in that Statutory Attorneys’ Fees Enable Consumers with Low-Dollar Claims to Obtain Counsel .....	18
III.	The Arbitration Clause is Not an Exculpatory Clause .....	23
	Conclusion .....	25
	Certificate of Compliance .....	27
	Certificate of Service .....	28

Table of Cases and Other Authorities

Cases:

*Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) . . . . . 14

*American Safety Equipment Corp. v. J.P. Maguire & Co.*,  
391 F.2d 821 (2d Cir. 1968) . . . . . 11

*Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712 (N.D. Cal. 2011) . . . . . 4, 6

*AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_\_,  
131 S.Ct. 1740 (2011) . . . . . *passim*

*Bellows v. Midland Credit Mgmt.*, 2011 WL 1691323 (S.D. Cal. 2011) . . . . . 6

*Bernal v. Burnett*, 2011 WL 2182903 (D. Colo. 2011) . . . . . 6

*Billups v. Bankfirst*, 294 F.Supp. 2d 1265 (M.D. Ala. 2003) . . . . . 19-20

*Boyer v. AT&T Mobility, LLC*, 2011 WL 3047666 (S.D. Cal. 2011) . . . . . 7

*Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010);  
*cert. granted*, \_\_\_\_, U.S. \_\_\_\_, 131 S.Ct. 2875 (2011) . . . . . *passim*

*Columbia Nat'l. Res., Inc. v. Tatum*, 58 F.3d 1101 (6th Cir. 1995) . . . . . 10

*Conseco Finance Serv. Corp. v. Wilder*, 47 S.W.3d 335 (Ky. App. 2001) . . . . . 15

*Day v. Persels & Assocs. LLC*, 2011 WL 1770300 (M.D. Fla. 2011) . . . . . 6

*Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76 (Cal. 2005) . . . . . 3, 4

*Doe v. Roman Catholic Archdiocese*, 311 S.W.3d 818 (Mo. App. 2010) . . . . . 8-9

*Elster v. Alexander*, 76 F.R.D. 440 (N.D. Ga. 1977) . . . . . 13

<i>Fay v. New Cingular Wireless, PCS, LLC</i> , 2010 WL 4905698	
(E.D. Mo. 2010)	19
<i>Fensterstock v. Educ. Partners</i> , No. 09-1562, 2011 WL 2582166	
(2d Cir. June 30, 2011)	7
<i>Gay v. CreditInform</i> , 511 F.3d 369 (3d Cir. 2007)	16
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	16
<i>Hale v. First USA Bank</i> , 2001 U.S. Dist. 8045 (S.D.N.Y. June 12, 2001)	15
<i>Holt v. State</i> , 494 S.W.2d 657 (Mo. App. 1973)	4
<i>Hopkins v. World Acceptance Corp.</i> , 2011 WL 2837595 (N.D. Ga. 2011)	7
<i>Jenkins v. First American Cash Advance</i> , 400 F.3d 868 (11th Cir. 2005)	19
<i>Johnson v. West Suburban Bank</i> , 225 F.3d 366 (3rd Cir. 2000)	15
<i>Lozada v. Dale Baker Oldsmobile, Inc.</i> , 91 F.Supp. 2d 1087	
(W.D. Mich. 2000)	14, 15
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> ,	
473 U.S. 614 (1985)	11, 12
<i>NAACP of Camden County East v. Foulke Mgt. Corp.</i> ,	
2011 WL 3273896 (N.J. App. 2011)	5
<i>Perry v. Thomas</i> , 482 U.S. 483 (1987)	14-15
<i>Pierson v. Dean, Witter, Reynolds, Inc.</i> , 742 F.2d 334 (7th Cir. 1984)	21
<i>Pleasants v. American Express Co.</i> , 541 F.3d 853 (8th Cir. 2008)	19

<i>Price v. Charter Twp. of Fenton</i> , 909 F. Supp. 498 (E.D. Mich. 1995) . . . . .	10
<i>Pyburn v. Bill Heard Chevrolet</i> , 63 S.W.3d 351 (Tenn. App. 2001) . . . . .	15
<i>Reeners v. Verizon Communications, Inc.</i> , 2011 WL 2791262 (M.D. Tenn. 2011) . . . . .	7
<i>Schlereth v. Hardy</i> , 280 S.W.3d 47 (Mo. banc 2009) . . . . .	8
<i>Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.</i> , 130 S.Ct. 1431 (2010) . . . . .	13
<i>Sherr v. Dell, Inc.</i> , 2006 WL 2109436 (S.D.N.Y. 2006) . . . . .	21
<i>Sonic Automotive, Inc. v. Watts</i> , 131 S.Ct. 2872 (2011) . . . . .	9
<i>Southland Corp. v. Keating</i> , 465 U.S. 1 (1984) . . . . .	14
<i>State ex rel. Vincent v. Schneider</i> , 194 S.W.3d 853 (Mo. banc 2006) . . .	22-23
<i>Stolt-Nielsen v. AnimalFeeds Int’l. Corp.</i> , 130 S.Ct. 1758 (2010) . . . . .	16
<i>Strand v. U.S. Bank N.A.</i> , 693 N.W.2d 918 (N.D. 2005) . . . . .	20
<i>Swain v. Auto Services, Inc.</i> , 128 S.W.3d 103 (Mo. App. 2003) . . . . .	22
<i>Taylor v. Citibank USA, N.A.</i> , 292 F.Supp. 2d 1333 (M.D. Ala. 2003) . . . . .	20
<i>United States v. Suarez</i> , 263 F.3d 468 (6th Cir. 2001) . . . . .	10
<i>Wallace v. The Ganley Auto Group</i> , 2011 WL 2434093 (Ohio Ct.App. 2011) . . . . .	7
<i>Wolf v. Nissan Motor Acceptance Corp.</i> , 2011 WL 2490939 (D.N.J. 2011) . . . . .	6

*Young v. Pitts*, 335 S.W.3d 47 (Mo. App. 2011) . . . . . 18

*Zarandi v. Alliance Data Systems*, 2011 WL 1827228 (C.D. Cal. 2011) . . . . 6

**Statutes and Other Authorities**

Section 367.506, R.S.Mo. . . . . 20

20 CSR ¶1140-29.010 . . . . . 20

Rule 83.08(b), Mo. S.Ct. Rules . . . . . 18

“Justice by the Numbers: The Supreme Court and the Rule of Four  
 – Or Is It Five?,” 36 Suffolk Univ. L. Rev. 1 (2002) . . . . . 9

## ARGUMENT

### I. The Trial Court Erred In Refusing To Enforce Brewer’s Arbitration Clause On An Individual Basis Because The FAA Preempts Missouri’s Common Law Of Unconscionability In That Such Law Frustrates The Overriding Federal Interest In Enforcing Arbitration Agreements As Written.

In *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010) (“*Brewer*”), this Court held that “the unavailability of class arbitration under the FAA [Federal Arbitration Act] means the entire arbitration agreement is rendered unconscionable.” 323 S.W.3d at 24. The Court’s rationale was that, absent a class action, “Brewer effectively forfeited legal counsel in any claim that arose under the loan agreement.” *Id.* at 23.

In *AT&T Mobility LLC v. Concepcion*, 563 U.S. \_\_\_\_, 131 S.Ct. 1740 (2011), the Supreme Court of the United States rejected both the holding and the rationale of *Brewer*. Under *Concepcion*, a court may not refuse to enforce an arbitration agreement because the agreement does not provide for class arbitration, even if this means that some “small-dollar claims” might “slip through the legal system.” 131 S.Ct. at 1753.

If Brewer had a legitimate basis for distinguishing *Concepcion*, she would not have needed an 80-page brief to state it. Her own counsel acknowledges in

another forum that, after *Concepcion*, challenges to arbitration clauses that restrict class actions are no longer an option. *See infra* at pages 7-8.

**A. *Concepcion* Rejected Brewer’s Argument About Lack of Remedy.**

Brewer’s principal argument is that the arbitration clause here “strips consumers of all remedies” and is therefore unenforceable. Brief at 22. She contrasts the clause here with the “gold plated,” consumer-friendly arbitration clause in *Concepcion*, Brief at 58, and suggests that, faced with our clause, *Concepcion* would have had a different result. Brewer rephrases this argument numerous times, arguing that:

- The arbitration clause in *Concepcion* was more consumer friendly than the one here, and thus encouraged effective resolution of claims. Brief at 27-32.
- Missouri Title’s arbitration clause “stymied dispute resolution.” Brief at 35.
- *Concepcion* involved a blanket ban on arbitration, whereas Missouri’s ban is selective. Brief at 36-37.<sup>1</sup>

---

<sup>1</sup> Given that 11 of 12 reported Missouri cases held an arbitration clause unconscionable in whole or in part, the factual premise of this argument is tenuous at best. *See Concepcion*, 131 S.Ct. at 1747 (“it is worth noting that California’s courts have been more likely to hold contracts to arbitrate

- The “gold plated” *Concepcion* arbitration clause meant plaintiffs would be better off in arbitration than in a class action and the Court would have decided the case differently if there were proof that only a class action could vindicate their rights. Brief at 37-39; 57-58; 61.
- *Brewer* was “based on general contract law prohibiting a party from insulating itself from liability.” Brief at 55.

While this argument is incorrect for the reasons stated in Point II of this Reply Brief, it is also irrelevant. *Concepcion* rejected the argument when it was endorsed by the dissent. The *Concepcion* dissent wrote:

In California’s perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the \$30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). *Discover Bank [v. Superior Court]*, 30 Cal. Rptr. 3d 76 (Cal. 2005)] sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement’s author from liability for its own

---

unconscionable than other contracts”).

frauds by deliberately cheating large numbers of consumers out of individually small sums of money.

131 S.Ct. at 1761 (Breyer, J., dissenting) (citations and internal punctuation omitted). In overruling *Discover Bank*, *Concepcion* rejected the argument:

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But *States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.*

*Id.* at 1753 (emphasis added).<sup>2</sup> *Accord, Arellano v. T-Mobile USA, Inc.*, 2011 WL 1842712 at \*2 (N.D. Cal. 2011) (argument that arbitration would “preclude an individual from ever bringing these types of claims” was “rejected by *Concepcion*”).

The broad holding in *Concepcion* did not rely on the gold-plated nature of the arbitration clause and was not confined to the specific facts of the case. The issue was not how “consumer friendly” the AT&T arbitration provision was, but

---

<sup>2</sup> *Concepcion’s* discussion about the allegedly consumer-friendly nature of the AT&T arbitration clause would at best be an alternate holding. “It is well settled that when a court bases its decision on two or more distinct grounds, each is as authoritative as the other and neither is obiter dictum.” *Holt v. State*, 494 S.W.2d 657, 659 (Mo. App. 1973) (McMillian, J.).

whether California courts, by conditioning the enforceability of arbitration agreements on the availability of class procedures, violated the FAA. States simply cannot take steps that “conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.” *Concepcion*, 131 S.Ct. at 1750 n.6:

Arbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.... 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 1752-53 (citations and internal punctuation omitted). *See NAACP of Camden County East v. Foulke Mgt. Corp.*, 2011 WL 3273896 (N.J. App. 2011) at \*20 (“that the arbitration provisions in *AT&T Mobility* may have been more generous to consumers than the provisions here does not affect the force of the Supreme Court’s preemption analysis,” which “turned on general doctrinal principles rather than the specific wording of the cellular contracts”).

The policy rationale behind the reasoning in *Concepcion* also did not rely on the gold-plated nature of AT&T’s arbitration clause. Rather, *Concepcion* explained a court’s refusal to enforce an arbitration clause that precludes class arbitration “would frustrate *both*” of the objectives of the FAA: enforcing private

agreements, *and* encouraging speedy and efficient dispute resolution. 131 S.Ct. at 1749 (emphasis original).

In the past few months, many courts have followed *Concepcion* and enforced class action waivers in arbitration clauses over objections that such waivers were either unconscionable or contrary to state public policy. *See, e.g., Bellows v. Midland Credit Mgmt.*, 2011 WL 1691323 (S.D. Cal. 2011) at \*3 (*Concepcion* “mak[es] clear the agreement to arbitrate is not substantively unconscionable merely because it includes a class action waiver”); *Day v. Persels & Assocs. LLC*, 2011 WL 1770300 (M.D. Fla. 2011) at \*7 (pursuant to *Concepcion* “states cannot refuse to enforce arbitration agreements based on public policy”); *Arellano*, 2011 WL 1842712 at \*2 (same); *Zarandi v. Alliance Data Systems*, 2011 WL 1827228 (C.D. Cal. 2011) (rejecting plaintiff’s argument that a class action waiver is unconscionable because “that argument is no longer viable after *Concepcion*”); *Bernal v. Burnett*, 2011 WL 2182903 (D. Colo. 2011) (court indicated that prior to *Concepcion* it would likely have found the class waiver unconscionable under Colorado law, but enforced the waiver, stating that “the Court has to take the legal landscape as it lies and cannot ignore the Supreme Court’s clear message”); *Wolf v. Nissan Motor Acceptance Corp.*, 2011 WL 2490939 (D.N.J. 2011) (“New Jersey precedent notwithstanding, the Court is bound by the controlling authority of the United States Supreme Court”);

*Wallace v. The Ganley Auto Group*, 2011 WL 2434093 at \*3 (Ohio Ct. App. 2011) (upholding class action waiver in light of *Concepcion* because the FAA preempts state public policy favoring class actions); *Boyer v. AT&T Mobility, LLC*, 2011 WL 3047666 (S.D. Cal. 2011) at \*3 (in light of *Concepcion*, “plaintiff’s argument that the class action waiver is unconscionable under California law no longer has merit”); *Fensterstock v. Educ. Partners*, No. 09-1562, 2011 WL 2582166 (2d Cir. June 30, 2011) (Second Circuit concluded that its earlier opinion holding that the class action waiver was unconscionable under California law was no longer viable); *Hopkins v. World Acceptance Corp.*, 2011 WL 2837595 (N.D. Ga. 2011) at \*7 (*Concepcion* “is quite broad, and allows for the enforcement of class action waivers in arbitration agreements, even when (1) the arbitration agreement is a contract of adhesion, (2) the plaintiff can only recover a small amount, and (3) the plaintiff alleges that the defendant had schemed to cheat its customers”); *Reeners v. Verizon Communications, Inc.*, 2011 WL 2791262 (M.D. Tenn. 2011) (court followed *Concepcion* and compelled individual arbitration).

In a blog commentary published on the Internet, Brewer’s own counsel admitted that the federal policy in favor of arbitration announced in *Concepcion* trumps any state policy in favor of class actions:

- “Attacking arbitration clauses that restrict class actions is **no longer an option.**”

- *Concepcion* “**carved out all class actions**” from arbitration.
- Consumers “**have now lost their right to seek redress for consumer fraud by pursuing class claims.**”

Vieth, Erich, “AT&T v. Concepcion: Lack of Class. Lack of Ethics,” <http://dangerousintersection.org/2011/04/29/att-v-concepcion-lack-of-class-lack-of-ethics/> (emphasis added).

*Concepcion* and *Brewer* are simply irreconcilable. Under the Supremacy Clause of the United States Constitution, the state policy favoring class actions must give way to the federal policy favoring arbitration. *Brewer* must yield to *Concepcion* and the FAA.

#### **B. *Concepcion* Applies in State Courts.**

*Brewer* contends that *Concepcion* does not apply in state courts, despite acknowledging at least five opinions of the Supreme Court of the United States holding that the FAA does apply in state courts. Brief at 23-24. Her rationale is that Justice Thomas, the fifth member of the *Concepcion* majority, dissented from the opinions holding that the FAA applies in state court.

In none of the cases *Brewer* cites were there more than two votes for the proposition that the FAA does not apply to state courts. This “Court is obligated to follow majority decisions of the United States Supreme Court, not dissenting opinions.” *Schlereth v. Hardy*, 280 S.W.3d 47, 53 (Mo. banc 2009). *Accord, Doe*

*v. Roman Catholic Archdiocese*, 311 S.W.3d 818, 823 (Mo. App. 2010) (“United States Supreme Court determinations of federal questions bind all state courts and must be followed notwithstanding any contrary state decisions”).

So the Supreme Court has unquestionably held that the FAA applies to state court proceedings. *Concepcion* unequivocally holds that the FAA trumps any state policy in favor of class actions. *Concepcion* also overturned by name the *Discover Bank* rule followed in California state courts. Justice Thomas joined the majority opinion in *Concepcion* and wrote a separate concurring opinion. Nowhere did he endorse Brewer’s argument.

If the Supreme Court did not believe that *Concepcion* applied to state court proceedings, why did the Court vacate *Brewer* and remand for reconsideration? Why did it do the same in *Sonic Automotive, Inc. v. Watts*, 131 S.Ct. 2872 (2011), remanding to the Supreme Court of South Carolina? The five votes that it took to vacate *Brewer* and *Sonic* (vacatur is a merits action)<sup>3</sup> were undoubtedly the same five votes (including Justice Thomas) that comprised the majority in

---

<sup>3</sup> See “Justice by the Numbers: The Supreme Court and the Rule of Four – Or Is It Five?,” 36 Suffolk Univ. L. Rev. 1, 4 (2002) (“a Supreme Court decision to vacate a judgment below and remand the case to the lower court ... requires five votes”).

*Concepcion*. There was no dissent by Justice Thomas from the Court's vacatur of *Brewer* and *Sonic*.

Ultimately, however, Brewer's speculation about Justice Thomas' legal views based upon his dissents in past cases carries no weight:

The majority of the argument offered by [Appellee] appears to rest on Justice Scalia's concurrence and on further analysis of which justices in *H.J. Inc.* are still on the Court. Such arguments are inappropriate. While we understand that changes in Court personnel may alter the outcomes of Supreme Court cases, we do not sit as fortune tellers, attempting to discern the future by reading the tea leaves of Supreme Court alignments. Each case must be reviewed on its merits in light of precedent, not on speculation about what the Supreme Court might or might not do in the future, as a result of personnel shifts.

*Columbia Nat'l. Res., Inc. v. Tatum*, 58 F.3d 1101, 1107 n.3 (6th Cir. 1995); *Accord, Price v. Charter Twp. of Fenton*, 909 F. Supp. 498 (E.D. Mich. 1995) (rejecting defendant's argument that changes in the composition of the Supreme Court had somehow "weakened" Supreme Court precedent); *United States v. Suarez*, 263 F.3d 468, 490 (6th Cir. 2001) (Cole, J., concurring) ("Any such suggestion ... of what a majority of the Supreme Court *might* believe is nothing

more than mere speculation that should in no way inform our resolution of an issue that is squarely governed by controlling authority”).

**C. *Mitsubishi Motors* Does Not Establish Any Applicable “Vindication of Rights” Rule.**

Brewer contends that *Concepcion* does nothing to change the so-called “vindication of rights” rule – that arbitration clauses are enforceable only to the extent that the parties can “effectively” vindicate their legal rights. Brief at 15, 37-42, citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). Instead of failing to overrule what Brewer has coined the “vindication of rights” rule, *Concepcion* reaffirms the rationale underlying the Supreme Court’s holding in *Mitsubishi* that “[an] agreement to arbitrate [is] ‘enforceable in accord with the explicit provisions of the Arbitration Act.’” *Id.*, 473 U.S. at 640 (citations omitted).

In *Mitsubishi Motors*, plaintiff contended that its antitrust claims were not arbitrable in Japan even though it had agreed to arbitration in Japan. The lower court sided with plaintiff and reasoned that under the so-called *American Safety* doctrine,<sup>4</sup> “the pervasive public interest in enforcement of the antitrust laws, and

---

<sup>4</sup> See *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827-28 (2d Cir. 1968).

the nature of the claims that arise in such cases, combine to make antitrust claims inappropriate for arbitration.” *Id.* at 629.

The Supreme Court reversed, holding that the arbitration agreement was enforceable, notwithstanding the important public policy concerns embodied in the federal antitrust laws. *Mitsubishi Motors*, 473 U.S. at 629. “[W]here the parties have agreed that the arbitral body is to decide a defined set of claims,” including those arising from the application of American antitrust law, a foreign tribunal should be “bound to decide that dispute in accord with the national law giving rise to the claims.” *Id.* at 636-37. And on that basis, i.e., where a domestic litigant can expect a foreign tribunal to apply American law, the Supreme Court of the United States held, “[s]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [antitrust] statute will continue to serve both its remedial and deterrent function.” *Id.* at 637.

Brewer’s reliance on *Mitsubishi Motors* is misplaced. In both *Mitsubishi Motors* and *Concepcion*, the Supreme Court rejected plaintiffs’ arguments that their respective claims could not be vindicated in an arbitral forum. Thus, nothing in *Concepcion* is incongruous with *Mitsubishi Motors*. In any event, *Concepcion* is the Court’s most recent statement and therefore must be followed.

**D. The Absence of Prior Claims Has No Bearing on Brewer’s Rights.**

Brewer makes much of the absence of prior claims against Missouri Title, speculating that the arbitration clause was the reason. Brief at 32. More likely, the absence of prior claims reflects Missouri Title's consistent compliance with Missouri law. Contrary to Brewer's assertions, the absence of other cases cuts strongly against a class action:

If there were a substantial number of actions of a similar nature filed in this or other courts, this would be a factor favoring certification. However, in the present case, precisely the opposite is true .... This Court is unwilling to breathe the spirit of judicial combat into 8,500 persons who, so far, have shown no desire to litigate this particular matter.

*Elster v. Alexander*, 76 F.R.D. 440, 443 (N.D. Ga. 1977). *Accord*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1443 (2010) (“that some plaintiffs who would not bring individual suits for the relatively small sums involved will choose to join a class action ... has no bearing on [the parties'] legal rights”).

**E. Brewer Misconstrues the FAA’s Savings Clause and the Scope of FAA Preemption.**

Brewer claims that *Concepcion* must be limited to its facts, lest the savings clause of the FAA becomes a dead letter. Brief at 34-35, 53-54. Not so. *Concepcion* squarely holds that nothing in the savings clause “suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” 131 S.Ct. at 1748. Refusing to enforce arbitration clauses that do not permit class arbitration is precisely such an “obstacle” to the FAA, and hence is preempted. *Id.* at 1753.

Brewer asserts that her class action is the product of a statute rather than a court rule; that Missouri law prohibits the waiver of rights under a statute; and that arbitration agreements that do not permit class actions impermissibly waive that right. Brief at 41, quoting *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp. 2d 1087, 1105 (W.D. Mich. 2000).

For purposes of FAA preemption, it does not make the slightest difference whether “state law” is created by a court rule or a legislative statute. The FAA still preempts. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995) (Alabama statute prohibiting pre-dispute arbitration clause preempted by FAA); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (California statute requiring judicial resolution of franchisee claims preempted by FAA); *Perry v.*

*Thomas*, 482 U.S. 483, 491 (1987) (California statute that required litigants to be provided a judicial forum for resolving wage disputes “must give way” to Congress’ intent in the FAA to provide for enforcement of arbitration agreements); *Conseco Finance Serv. Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001) (“Even if the [Kentucky Consumer Protection Act] did create an exception to Kentucky’s Arbitration Act ..., that exception would have no bearing on Conseco’s federally established rights, for when the FAA applies ... it supersedes incompatible state laws”); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 361 (Tenn. App. 2001) (“Tennessee [lacks] the power to require a judicial forum for the resolution of claims arising under the [state statute] even though the contracting parties had agreed to resolve any such claims by arbitration. This is exactly what is prohibited by the FAA”).

The Truth in Lending Act (TILA) at issue in *Lozada* also expressly provides for class actions – but the vast majority of cases have held, contrary to *Lozada*, that the TILA “does not preclude the pre-dispute selection by the parties of an arbitral forum.” *Johnson v. West Suburban Bank*, 225 F.3d 366, 370 (3rd Cir. 2000), and cases therein cited. *See also Hale v. First USA Bank*, 2001 U.S. Dist. 8045 at \*23 n. 4 (S.D.N.Y. June 12, 2001) (noting that *Lozada* “is at odds with the reasoning of nearly every other court that has considered the issue” and was based upon a district court decision that was later reversed). *Lozada*

certainly did not survive *Concepcion* and *Stolt-Nielsen v. AnimalFeeds Int'l. Corp.*, 130 S.Ct. 1758 (2010).

In any event, Brewer is not waiving any of her statutory rights. By agreeing to arbitrate, “a party does not forgo ... substantive rights” but “only submits to their resolution in an arbitral, rather than a judicial, forum.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). *Accord, Gay v. CreditInform*, 511 F.3d 369, 382 (3d Cir. 2007) (“If this case proceeds to arbitration instead of litigation in a judicial forum, Gay will ‘retain the full range of rights created by [the statutes]’”).

Brewer next offers an abstract discussion of the law of preemption, coupled with a misstatement of Missouri Title’s argument. Brief at 43-48. Missouri Title does not contend that arbitration clauses are *per se* enforceable or that Missouri unconscionability law is always preempted. Our argument is that the Court may not find *this* arbitration clause to be unconscionable simply because it does not offer class arbitration. This Court held in *Brewer*:

[B]ecause Brewer proved that the class arbitration waiver was unconscionable, the unavailability of class arbitration under the FAA means that the entire arbitration agreement is rendered unconscionable.

323 S.W.3d at 24. The lower courts in *Concepcion* reached precisely the same holding as *Brewer*, and that holding is precisely what the Supreme Court of the United States reversed.

Brewer also contends that a waiver of a class action in a court proceeding would be unenforceable under *Brewer*, so the result should be no different for an arbitration proceeding. Brief at 52. This contention ignores the FAA. Section 2 of the FAA preempts state laws inconsistent with the FAA's overriding goal of enforcing arbitration clauses. No similar federal statute exists with respect to class actions in court.

A party who knows that the law is diametrically opposed to his or her position often tries to muddle the issues, and Brewer's meandering brief executes that strategy quite well. But it cannot obscure reality. *Brewer* refused to enforce the arbitration clause solely because it did not permit class arbitration. *Concepcion* clearly and unambiguously holds that the federal interest in enforcing arbitration clauses preempts any such state law principle. Brewer's lawyer has admitted as much.

*Concepcion* requires that this Court reverse the trial court's judgment and remand with instructions to dismiss the action, or stay the action pending arbitration of Brewer's individual claim.

**II. The Trial Court Erred in Refusing to Enforce Brewer’s Arbitration Clause on an Individual Basis Because the Clause is not Unconscionable in that Statutory Attorneys’ Fees Enable Consumers With Low-Dollar Claims to Obtain Counsel.**

Point II of Missouri Title’s substitute brief explained that the premise of *Brewer* – that statutory attorneys’ fees will not attract qualified lawyers to low dollar cases – is incorrect. The whole point of a statutory attorneys’ fee is to provide economic incentive for lawyers to take low-dollar cases. The hundreds of low-dollar cases filed by private counsel in federal and state courts in Missouri every year are concrete evidence that such fees serve their intended purpose.

Brewer does not even try to respond to the logic of this position.<sup>5</sup> Most courts to address the issue have held that the logic alone warrants a finding that arbitration can vindicate a low-dollar plaintiff’s claim just as effectively – or more effectively – than a class action. When “the opportunity to recover

---

<sup>5</sup> Brewer attempts to incorporate into her 80-page brief some 40 more pages from her original substitute brief. Brief at 65. No rule authorizes this practice. Parties may not incorporate by reference arguments made to the trial court in appellate briefs, *Young v. Pitts*, 335 S.W.3d 47, 56 (Mo. App. 2011), nor arguments in briefs in the court of appeals in this Court. Rule 83.08(b). There is no reason to allow the practice in a substitute brief.

attorneys' fees is available, lawyers will be willing to represent such debtors in arbitration" even without class arbitration. *Jenkins v. First American Cash Advance*, 400 F.3d 868, 878 (11th Cir. 2005); and cases there cited. *Accord, Pleasants v. American Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008) ("total recovery of attorney's fees, costs and statutory damages of \$2,000 would likely exceed the costs of pursuing the claim") (applying Missouri law).

Brewer asserts that she presented undisputed testimony from her expert witnesses that, without a class action, consumers cannot obtain lawyers. Brief at 66-69. She does not dispute that, contrary to his testimony, one of her experts regularly files individual low-dollar cases seeking statutory attorneys' fees. While characterizing it as a "trickle," Brief at 69, she does not dispute that, in fact, private counsel file hundreds of individual, low-dollar cases every year in federal courts in Missouri, driven, in part, by the prospect of statutory attorneys' fees.

Most courts have rejected the kind of self-serving, conclusory expert testimony on which Brewer relies. *E.g., Fay v. New Cingular Wireless, PCS, LLC*, 2010 WL 4905698 (E.D. Mo. 2010) (enforcing arbitration clause despite affidavit from plaintiff's counsel that neither he nor any other attorney would take the individual case, because the theory "is clearly negated by the ability of the customer to receive attorneys' fees"); *Billups v. Bankfirst*, 294 F.Supp. 2d

1265, 1274 (M.D. Ala. 2003) (rejecting affidavits of lawyers that class action was necessary to prosecute claim, because it was “based on the erroneous assumption that her costs and attorney’s fees will be paid from her damage award” instead of from statutory attorneys’ fees); *Taylor v. Citibank USA, N.A.*, 292 F.Supp. 2d 1333, 1342 (M.D. Ala. 2003) (same); *Strand v. U.S. Bank N.A.*, 693 N.W.2d 918, 926 (N.D. 2005) (rejecting affidavit of plaintiff’s lawyer because it did not prove that “no attorney would be willing to accept such cases, particularly where attorney fees are available for prevailing plaintiffs”). Still less should such conclusory testimony override the uncontested fact that private counsel file hundreds of individual, low-dollar claims in Missouri every year.

Brewer next argues that class actions are necessary to protect other consumers from alleged violations of Missouri law. Brief at 69-71. Not true. First, there is no evidence in the record that Missouri Title routinely violates the rights of its customers. Second, the company is licensed by the division of finance, § 367.506, R.S.Mo., and is subject to regulation by the division. 20 CSR ¶ 1140-29.010. The division of finance polices Missouri Title’s business practices, thus protecting consumers as a whole.

Finally, Brewer has no standing to make this argument. Whatever the merit of class actions generally, the issue in Point II is whether this arbitration clause is unconscionable as to Brewer. Since it is clear that the statutory

attorneys' fees she seeks are a sufficient incentive to obtain qualified counsel, *her* arbitration clause is not unconscionable. Her claimed inability to vindicate other people's rights is not an injury to her. *Sherr v. Dell, Inc.*, 2006 WL 2109436 (S.D.N.Y. 2006) at \*7 ("plaintiff is not entitled to a class action suit or class-wide arbitration to vindicate the rights of everyone else").

Brewer also contends that she never properly waived her right to a jury trial because the arbitration clause was "buried" in the "fine print." Brief at 71-72. The record proves the opposite. Immediately before the signature block, the contract recites in solid capital letters and bold face, **"THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."** P. App. A3 (emphasis original). If she agreed to arbitration, she necessarily and impliedly agreed to waive a jury trial. *Pierson v. Dean, Witter, Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984) ("loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate").

Immediately above the bold text just quoted, the contract provides, again in capital letters and bold face, **"DO NOT SIGN THIS AGREEMENT BEFORE YOU HAVE READ IT."** P. App. A3. And an inch above that statement, also in capital letters and bold face, the contract states **"BY AGREEING TO ARBITRATE DISPUTES, BORROWER WAIVES ANY RIGHT ... TO HAVE A**

**JURY TRIAL.”** *Id.* Brewer’s “buried in the fine print” theory is without factual basis.

Finally, Brewer complains about alleged procedural unconscionability. Brief at 73-74. There are three flaws with her arguments. First, they are irrelevant. If the existence of statutory attorneys’ fees makes her individual claims viable, it does not matter if she was given a “take it or leave it” deal with regard to class claims. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. 2003).

Second, the essence of her argument is nothing more than that she signed a form contract. But there is nothing “inherently sinister and automatically unenforceable” about boilerplate documents. *Swain*, 128 S.W.3d at 107 (internal punctuation omitted). Any rule automatically invalidating form contracts would be “completely unworkable.” *Id. Accord, Concepcion*, 131 S.Ct. at 1750 (“the times in which consumer contracts were anything but adhesive are long past”).

Third, Brewer was not forced to deal with Missouri Title. She testified that there were nearly 20 other lenders she could have used – and she actually selected two of them, in addition to Missouri Title, to call. L.F. 277. There is no evidence in the record whether these other lenders used identical or even similar waiver terms in their form contracts. *State ex rel. Vincent v. Schneider*, 194

S.W.3d 853, 857 (Mo. banc 2006) (no procedural unconscionability absent “proof that *all* St. Louis metropolitan area builders used the same arbitration terms of proof that [plaintiffs] were forced to purchase their homes from McBride”).

The purpose of a statutory attorneys’ fee provision is to provide financial incentives to lawyers to take low-dollar consumer cases. Both logic and the record before the Court demonstrate that such provisions accomplish their objective. Since plaintiff can vindicate her individual rights through arbitration, there is nothing unconscionable about denying her the ability to bring a class arbitration.

### **III. The Arbitration Clause Is Not An Exculpatory Clause.**

Brewer’s final contention is that *Brewer* rested on a second holding independent of unconscionability: that the arbitration clause is an invalid exculpatory clause. Brief at 49; 75.

In *Brewer*, Missouri Title – not Brewer – raised the exculpatory clause issue as a separate ground for decision. Substitute Brief at 34-36. In other words, Missouri Title argued that, even if the absence of class arbitration made the clause unconscionable, it nevertheless was sufficiently clear to exculpate Missouri Title from Brewer’s claims. *Brewer* rejected that argument and Missouri Title has not elected to renew it. This was hardly an independent basis for the result.

This Court rejected the argument, finding it indistinguishable from the issue of unconscionability. This Court held that the argument was “without merit” because the “real issue” is “whether the consumer realizes that he or she is bypassing the opportunity to retain counsel to litigate a claim against the lender.” 323 S.W.3d at 24.

*Brewer* held that “the unavailability of class arbitration under the FAA means that the entire arbitration agreement is rendered unconscionable.” 323 S.W.3d at 24. This holding was rejected by *Concepcion*. For the reasons set forth in Point I, that holding stands as an impermissible “obstacle” to the FAA’s twin goals of enforcing contracts and providing speedy and inexpensive dispute resolution and hence is preempted.

According to *Brewer*, however, the Court can evade *Concepcion* by recasting its holding to be: the unavailability of class arbitration means the arbitration agreement must satisfy the standards of an exculpatory agreement to be enforced. Such a recast holding, however, would still interfere with the FAA to the same extent, and thus still be preempted to the same extent, as the originally-phrased holding.

Suppose a lender included in its agreement the language *Brewer* held necessary to effect a valid exculpatory clause. The “net result of the waiver is that the lender effectively is immunized from liability.” 323 S.W.3d at 24.

Brewer's theory boils down to the proposition that, unless the arbitration clause wholly immunizes Missouri Title from liability, the class action waiver cannot be enforced. But Brewer can waive some rights – such as the right to bring a class action – while retaining others – such as the right to bring an individual claim. The baby need not be thrown out with the bath water.

Her exculpatory clause theory also begs the question. It assumes that the absence of class arbitration immunizes Missouri Title from any liability because no lawyer would take an individual low-dollar case. The record contradicts this assumption. As stated, Missouri lawyers file hundreds of individual, low-dollar cases every year because the statutory attorneys' fee provisions work as the legislature intended.

### **Conclusion**

The United States Supreme Court in *Concepcion* held, "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons." This holding governs this case. This holding requires that Missouri Title's arbitration provision be enforced according to its terms.

For the foregoing reasons, Missouri Title respectfully requests that the Court reverse the judgment of the trial court, and remand the case with instructions either to dismiss or to stay the case pending arbitration of Brewer's individual claim.

GREEN JACOBSON, P.C.

By: \_\_\_\_\_

Martin M. Green #16465  
Jonathan F. Andres #39531  
Attorneys for Appellant  
7733 Forsyth Blvd., Suite 700  
Clayton, Missouri 63105  
Phone: 314-862-6800  
Fax: 314-862-1606  
[green@stlouislaw.com](mailto:green@stlouislaw.com)  
[andres@stlouislaw.com](mailto:andres@stlouislaw.com)

### Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 5,352 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

---

Martin M. Green

Certificate of Service

I certify that one copy of this brief and one copy on compact disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by placement in the United States Mail, postage prepaid, on August \_\_\_\_, 2011:

John Simon, Esq.  
Erich Vieth, Esq.  
John Campbell, Esq.  
The Simon Law firm, P.C.  
800 Market Street, Suite 1700  
St. Louis, Missouri 63101  
Attorney for Respondent

Gregory C. Mitchell  
Johnny K. Richardson  
Brydon, Swearingen & England, P.C.  
312 E. Capital Avenue  
P.O. Box 456  
Jefferson City, MO 65102  
Attorneys for *Amicus Curiae* Missouri Automobile Dealers' Association

---