

**IN THE MISSOURI SUPREME COURT**

**No. SC90601**

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**ASHLEE RUHL,  
Respondent,**

**v.**

**LEE'S SUMMIT HONDA  
Appellant.**

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**Appeal from the  
Circuit Court of Jackson County, Missouri  
Division 17**

**The Honorable Jack R. Grate, Circuit Judge**

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**SUBSTITUTE REPLY BRIEF OF APPELLANT**

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## ARGUMENT

**1. THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION TO COMPEL ARBITRATION BECAUSE RESPONDENT’S CLAIMS ALLEGING THE UNAUTHORIZED PRACTICE OF LAW AND VIOLATION OF THE MISSOURI MERCHANDISING PRACTICES ACT FALL WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT AND CAN BE PROPERLY RESOLVED IN AN ARBITRAL FORUM, IN THAT RESPONDENT’S CLAIMS SOUGHT TO INVALIDATE ONE OF THE TERMS OF THE PARTIES’ PURCHASE AGREEMENT AND THE PARTIES HAD AGREED TO SUBMIT ALL DISPUTES REGARDING THE TERMS OF THE PARTIES’ PURCHASE AGREEMENT TO ARBITRATION.**

**A. Facts and Issues Not In Dispute.**

There are many issues that are *not* disputed by Respondent in this appeal. It is undisputed that the parties’ arbitration agreement falls within the ambit of the Federal Arbitration Act (“FAA”) 9 U.S.C. § 1, *et seq.*, rather than the Missouri Uniform Arbitration Act (“MUAA”), Chapter 435, RSMo 2000. It is also undisputed that the arbitration agreement in this matter is a “broad” arbitration agreement, which requires all disputes to be deemed arbitrable unless they fall clearly beyond the scope of the Arbitration Agreement. *See McCarney v. Nearing, Staats, Prelogar & Jones*, 866 S.W.2d 881, 887 (Mo. App. 1993).

Respondent did not provide a statement of facts. Thus, she concedes the correctness and accuracy of Appellant’s Statement of Facts. While Respondent attempts to make a number of factual assertions within her brief, they are unsupported by any citations to the record. Indeed, *Respondent’s brief is essentially devoid of any citations to the record on appeal.*<sup>1</sup> Respondent’s failure to provide such citations is a violation of Supreme Court Rule 84.04(i), which requires “[a]ll statements of fact and argument” to be supported by “specific page references to the legal file or the transcript.” This violation constitutes grounds for rejecting Respondent’s briefing in this appeal. *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 371 n.1 (Mo. banc 2008). The absence of citations to the record places this Court at risk of becoming an “advocate[] by speculating on facts and arguments that have not been asserted.” *Geiersbach v. Blue Cross/Blue Shield of Kansas City*, 58 S.W.3d 636, 639 (Mo. App. 2001). Accordingly, Appellant moves this Court to strike Respondent’s briefing in this appeal. *C.f., id.*

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<sup>1</sup> Respondent’s Substitute Brief contains only two citations to the record on appeal. The first of these citations is to the trial court’s judgment. *See* Respondent’s Substitute Brief at 9. The second of these citations is to the docket sheets appearing at the beginning of the Legal File. *See id.* at 14. In short, despite making numerous assertions of fact in her brief, Respondent offers no citations to any evidence that was offered to the trial court that would support those assertions.

Alternatively, Appellant asks this Court to disregard Respondent's unsupported assertions of fact in addressing the issues in this appeal.

**B. The Parties' Dispute Falls Within The Scope Of The Arbitration Agreement And Is Arbitrable Because The Fee At Issue Is A Term Of The Contract.**

As there is no dispute in this matter that the arbitration agreement at issue is a broad agreement, "the very existence of an arbitration clause creates a 'presumption of arbitrability' that should be controlling unless there is 'positive assurance' that the contract cannot be interpreted to include the particular dispute at issue." *Kates v. Chad Franklin Nat'l Auto Sales North, LLC*, 2008 WL 5145942 at \*3 (December 1, 2008) (citing *Daniel Const. Co. v. Local 257, IBEW*, 856 F.2d 1174, 1181 (8th Cir. 1988)); *McCarney v. Nearing, Staats, Prelogar & Jones*, 866 S.W.2d 881, 887 (Mo. App. 1993). Respondent begins with an argument that the underlying claims in this matter fall outside of the scope of the arbitration agreement because those underlying claims do not concern or otherwise require reference to the terms of the parties' contract. She premises that argument upon two Missouri appellate decisions and one federal trial court ruling: *Rhodes v. Amega Mobile Home Sales, Inc.*, 186 S.W.3d 793, 798 (Mo. App. 2006); *Northwest Chrysler-Plymouth, Inc., v. Daimler-Chrysler Corporation*, 168 S.W.3d 693 (Mo. App. 2005); and *Seaboard Corporation v. Grindrod Limited*, 4:05-cv-01229-FJG (W.D. Mo., August 1, 2006).

In *Rhodes*, a product liability claim against a manufacturer of a house concerning formaldehyde fumes fell outside of the arbitration clause within a customer warranty, as those defects were not structural and the warranty was limited solely to “*structural* defects in material or workmanship.” 186 S.W.3d at 797. In the *Northwest Chrysler* case, the court found that a product liability claim between a motor vehicle dealer and a vehicle manufacturer was not arbitrable, as the product liability claim would have been enforceable regardless of whether the dealer had obtained the defective vehicle, whether direct from the manufacturer under the dealer-manufacturer contract or through an intermediate seller. 168 S.W.3d at 696. Lastly, in *Seaboard Corporation*, the federal court held that numerous “business tort” claims (civil conspiracy, interference with contract, aiding/abetting breach of fiduciary duty, and tortious interference with prospective business expectancy/relationship) were not within the scope of the parties’ arbitration clause because the tort claims did not seek to enforce or invalidate the underlying contract between the parties.

Each of these cases is distinguishable. Unlike *Rhodes*, there is no contract provision in this matter that excludes the Respondent’s particular claims from arbitration. Likewise, in contrast to *Northwest Chrysler*, Respondent, here, is challenging the validity and legality of a fee *that is one of the express terms of the parties’ contract* and which is part of the “Total Selling Price” of the vehicle purchased. *See* L.F. at 16. *See also*, *Piazza v. Combs*, 226 S.W.3d 211, 226 (Mo. App. 2007) (describing price as one of the essential terms of a purchase contract). Respondent’s claims hinge upon the premise that

Appellant has *charged* Respondent for the preparation of legal documents. *See, e.g.*, L.F. at 8 (¶ 12-14), 9 (¶ 19), 11 (¶¶ 29-30), 13 (¶ 33-36). Respondent’s allegations focus upon the purpose and legality of the fees at issue, thereby constituting a direct attack upon the validity of a term of the parties’ contract. Thus, her argument that her claim does not concern the enforceability of the contract defies logic and reason.

Lastly, *Seaboard Corporation* is distinguishable because reference to the contract is inevitable, here, because the parties’ contract sets forth the *name* of the fee, and that denomination constitutes relevant evidence of the purpose of the fee. Because reference to the contract is unavoidable, arbitration must be ordered. *Estate of Ethon v. Conseco Financing Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. 2002). Simply put, if the fee is charged as a term of the parties’ contract, then it follows that this case involves a dispute regarding the terms of the contract. If so, then her claims fall well within the scope of the Arbitration Agreement and must be arbitrated.

**C. Respondent Presents No Authority That Creates Any Exception To The General Rule That Parties Can Agree To Submit Disputes To Binding Arbitration.**

Respondent contends in her Substitute Brief that the parties’ Arbitration Agreement should not apply to her unauthorized practice of law claims, arguing that such

claims are reserved to the judiciary and are unarbitrable.<sup>2</sup> The Missouri Court of Appeals found Respondent’s arguments to be unpersuasive. That court ultimately concluded that “arbitrating the unauthorized practice of law claim would not interfere with our exclusive authority to decide what constitutes the practice of law.” *Ruhl v. Lee’s Summit Honda*, 2009 WL 3571309 at \*4 (Mo. App. Nov. 3, 2009). While Appellant contends that the Court of Appeals was incorrect in its resolution of the unconscionability issues discussed in Appellant’s Second Point on Appeal, that court correctly resolved the questions raised in Appellant’s first point on appeal by concluding that the present dispute fell within the scope of the parties’ arbitration agreement and that the claims were arbitrable.

Arbitration, by its very nature, is a creature of contract, by which the parties agree to submit a dispute to an arbitral forum. An arbitrator’s power to resolve disputes is given solely by the parties’ agreement. *See Holman v. Trans World Airlines, Inc.*, 737 F.Supp. 527, 530 (E.D. Mo. 1989). Absent the parties’ agreement, an arbitrator has no legal authority to decide disputes or to require arbitration of a dispute. *See id.*; *Dunn Indus. Group, Inc., v. City of Sugar Creek*, 112 S.W.3d 421, 435 (Mo. banc 2003).

Respondent advances an argument that the parties cannot agree to arbitrate certain state

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<sup>2</sup> She does not appear to argue that the resolution of the claims within Count II of her Petition, which alleges violation of the Missouri Merchandising Practices Act, are exclusively reserved to the judiciary. Thus, she apparently concedes that her MMPA claim is arbitrable.

law claims, however, specifically those claims alleging that a party has engaged in conduct that constitutes the unauthorized practice of law. She contends that such claims can only be resolved by the (state) judiciary. Put another way, Respondent argues that, as a matter of *state* law, certain claims are exempt from Appellant’s right to compel arbitration provided by *federal* law.

It is solely within the power of *Congress* to exempt claims from arbitration under the Federal Arbitration Act. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”) Respondent cites no law passed by Congress that excludes her unauthorized practice of law or Merchandising Practices Act claims from arbitration under the FAA. Indeed, Respondent presents no authority holding that claims were unarbitrable because the claims alleged that a party charged for goods or services that constituted engaging in the unauthorized practice of law.<sup>3</sup> Appellant is aware of no reported case standing for that proposition.

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<sup>3</sup> In addition to the *Bass v. Carmax* and *Gutierrez v. State Line Nissan* decisions issued by the United States District Court for the Western District of Missouri (discussed in greater detail in Appellant’s Substitute Opening Brief), at least one other federal court

Respondent instead premises her argument upon this Court’s decision in *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335, 338-39 (Mo. banc 2007). The particular passage she cites discusses *the respective roles of the judiciary and the legislature* in defining what constitutes the practice of law. *See id.* at 338-39. In *Eisel*, this Court stated that the judiciary is the sole “arbiter” of what constitutes the unauthorized practice of law. *See id.* However, that statement was made in the context of analyzing whether the legislature, through statutory enactment, can limit or expand what constitutes the unauthorized practice of law. *See id.* It does not speak to the role of an arbitrator with regard to deciding monetary damages claims arising from the purported practice of law. Thus, even if the Missouri judiciary has exclusive authority to *define* what constitutes the practice of law in Missouri, it does not follow that an arbitrator, in deciding a dispute, is forbidden from *applying* the definitions that the judiciary has adopted in resolving a private dispute for monetary damages. *See Bass v. Carmax Auto Superstores*, 2008 WL 2705506, at \*2 (W.D. Mo. July 9, 2008).<sup>4</sup>

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has ordered arbitration of unauthorized practice of law claims. *See, e.g., CSA-Credit Solutions of America, Inc. v. Schafer*, 408 F.Supp.2d 503511 (W.D. Mich. 2006).

<sup>4</sup> Respondent’s argument, if accepted, would necessarily imply a finding that only the Missouri *state* judiciary could resolve claims alleging that a party had engaged in the unauthorized practice of law. Thus, Respondent’s reasoning would lead to the absurd conclusion that federal courts would be unable to decide such claims, even if jurisdiction

Here, the Arbitration Agreement requires arbitrators to be attorneys or retired judges, persons likely to have experience with applying case law to the facts of the dispute to be arbitrated. *See* L.F. at 39. One of the strengths of arbitration is the ability for the parties to select an arbitrator with particular expertise and familiarity with the specific legal questions in dispute. *See Stolt-Nielsen v. AnimalFeeds Int’l Corp.*, 2010 WL 2655826 at \*12 (U.S. April 27, 2010) (citing *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548, 552 (2nd Cir. 1981)). Here, the parties might select an arbitrator with experience handling unauthorized practice of law issues, perhaps an attorney who has been employed by the Office of the Chief Disciplinary Counsel, or a retired judge from this Court.

There is no reasonable basis to conclude that the parties are forbidden to agree to have an arbitrator decide claims for monetary damages, even for claims involving the question of whether a party has engaged in the unauthorized practice of law. In *Bass v. Carmax*, *supra*, and *Gutierrez v. State Line Nissan, Inc.*, 2008 WL 3155896 (W.D. Mo. August 4, 2008), courts found no legal basis to treat as non-arbitrable claims that were essentially identical to those raised in the case at bar. *See Bass* at \*2; *Gutierrez* at \*3. Respondent’s brief is silent as to both of these decisions, failing to distinguish them on

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to decide such claims was otherwise proper (whether due to diversity or “federal question” jurisdiction).

their merits or to offer any legal analysis to suggest why these two cases should not be followed by this Court. While decisions by the U.S. District Court for the Western District of Missouri are not binding on this Court, Respondent's failure to address the *Bass* and *Carmax* decisions is an implicit concession that the reasoning of these cases is sound. That reasoning should be adopted by this Court, and this Court should conclude that Respondent's claims are within the scope of the arbitration agreement and can be arbitrated.

**2. THE TRIAL COURT ERRED IN DENYING APPELLANT’S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION AGREEMENT WAS NOT UNENFORCEABLE DUE TO UNCONSCIONABILITY, IN THAT RESPONDENTS PRESENTED NO EVIDENCE THAT WOULD SUPPORT A FINDING OF PROCEDURAL UNCONSCIONABILITY AND THE ARBITRATION AGREEMENT WAS NOT SUBSTANTIVELY UNCONSCIONABLE GIVEN THAT NEITHER THE PARTIES’ JURY TRIAL WAIVER NOR THE PARTIES’ WAIVER OF THE ABILITY TO BRING OR PARTICIPATE IN A CLASS ACTION PROCEEDING WERE UNDULY HARSH OR UNEXPECTED.**

**A. The Supreme Court Has Held That Class Arbitration Cannot Be Imposed Unless The Parties’ Agreement Permits Arbitration Of Class Claims.**

Before turning to the specifics of the unconscionability arguments raised by Respondent in her Substitute Brief, it is necessary to address very recent case law which greatly clarifies the underlying question of whether the FAA allows the submission of class claims to arbitration. After the filing of Appellant’s Substitute Opening Brief in this appeal, the United States Supreme Court issued a significant decision in the matter of *Stolt-Nielsen, S.A., v. Animalfeeds International Corporation*, 2010 WL 1655826 (U.S.

April 27, 2010). As anticipated by Appellant in its Substitute Opening Brief, the *Stolt-Nielsen* decision dramatically impacts the issues in this matter.

The *Stolt-Nielsen* litigation arose from series of disputes between Stolt-Nielsen, S.A., an international shipping company, and a group of companies who were consumers of international shipping services, including AnimalFeeds International Corporation. *See id.* at \*4. Stolt-Nielsen’s contracts with its customers contained arbitration provisions, and AnimalFeeds served Stolt-Nielsen with a demand for *class* arbitration under their contract. *See id.* at \*4-5, Stolt-Nielsen, in turn, argued that class arbitration could not be ordered and that the putative class members’ claims had to be resolved through individual, separate arbitrations. *See id.* at \*5. The question of whether the contract permitted class arbitration was submitted to an arbitration panel for decision, and that panel determined that the arbitration could proceed as a class arbitration. *See id.* at \*6. Stolt-Nielsen then sought judicial review of that determination, ultimately resulting in review by the United States Supreme Court. *See id.*

The Court, applying the Federal Arbitration Act, rejected the public policy/industry practices approach taken by the arbitration panel in determining whether class arbitration was permitted under the parties’ agreement. *See id.* at \*7-9. Instead, the Supreme Court focused its analysis upon the statutory language of the FAA and the fundamental differences between class arbitrations and individual arbitrations. *See id.* at \*11-15. “While the interpretation of an arbitration agreement is generally a matter of

state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration “is a matter of consent, not coercion,” *Id.* at \*11 (citations omitted).

The Court’s analysis focused upon the goal of ascertaining the intent of the parties, as expressed in the arbitration agreement. The Court recognized that the parties’ intent creates, defines, and limits an arbitrator’s authority to decide a particular dispute:

Whether enforcing an agreement to arbitrate or  
construing an arbitration clause, courts and arbitrators must  
“give effect to the contractual rights and expectations of the  
parties.” In this endeavor, “as with any other contract, the  
parties’ intentions control.” This is because an arbitrator  
derives his or her powers from the parties’ agreement to forgo  
the legal process and submit their disputes to private dispute  
resolution

*Id.* The parties’ ability, via the language of the arbitration agreement, to elect which disputes will be submitted to arbitration also provides the parties the ability to determine *what persons* can participate in the arbitration proceeding. *Id.* at \*12. “From these principles, it follows that *a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.*” *Id.* at \*13 (italics added).

In *Stolt-Nielsen*, the parties conceded that there was no express agreement on the issue of whether class arbitration was permissible. *See id.* at \*13 n.10. This raised the question of whether entering into an arbitration agreement implied agreeing to arbitrate class claims. *See id.* at \*13. The Court rejected that implication, observing that “[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” *Id.* For example, class action arbitration “resolves many disputes between hundreds or perhaps even thousands of parties,” who are not party to the underlying contract as opposed to “a single dispute between the parties to a single agreement....” *Id.* The absence of confidentiality in class proceedings also threatens to “frustrate[e] the parties’ assumptions when they agreed to arbitrate....” The high (perhaps even catastrophic) stakes of class action arbitration are comparable to class litigation, but arbitration removes key protections (for both the parties *and absent class members*) by limiting the scope of judicial review. *See id.* For these reasons, the Court found that “the differences between bilateral and class-action arbitration are too great” for one to be able to presume that “the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.” *See id.*

The Court’s decision in *Stolt-Nielsen* provides clarity on three key issues. First, the intent of the parties, as expressed in their arbitration agreement, controls whether class arbitration can be ordered. *See id.* at \*11. Second, consent to class arbitration cannot be inferred from merely agreeing to arbitrate claims. *See id.* at \*13. Third, in the

absence of language permitting arbitration of class claims, class arbitration cannot be ordered. *See id.* *Stolt-Nielsen* leaves open the question of *what* particular contract language is required to authorize arbitration of class claims. Here, the parties' Arbitration Agreement specifically *prohibited* arbitration of class claims, stating that the parties were relinquishing the ability to bring class claims or participate in class action proceedings. *See* L.F. at 39. Thus, the intent of the parties, as expressed in their arbitration agreement, is clear. Class arbitration is forbidden under the parties' agreement, and *Stolt-Nielsen* requires this Court to enforce that prohibition.

Respondent attempts to distinguish *Stolt-Nielsen*, on the basis that it involved a commercial dispute between two companies, rather than a consumer claim such as the case at bar. However, nothing within the Supreme Court's reasoning rests upon the fact that the dispute arose from a commercial, rather than consumer, transaction. *See generally, Stolt-Neilsen*, at \*11-15. The procedures of ascertaining the intent of the parties by looking to the language of the agreement are the same, regardless of whether a business-to-business or business-to-consumer transaction is at issue. Nor is there any language within the FAA that distinguishes the enforcement of arbitration agreements in commercial transactions from those in consumer transactions. *See generally*, 9 U.S.C. §§ 1, *et seq.* The fundamental differences between bilateral arbitration and class arbitration is similar (and perhaps even more pronounced) in the consumer context. Thus, the circumstances Respondent discusses do not provide a basis for legally distinguishing this matter from *Stolt-Nielsen*.

**B. Respondent Has Failed To Present Evidence That Supports A Finding Of Procedural Unconscionability.**

Respondent asserts, as she did in the proceedings below, that the arbitration agreement should be invalidated due to procedural unconscionability. Procedural unconscionability concerns “the formalities of making the contract” and “unfair issues in the contract formation process.” *See Repair Masters Const., Inc., v. Gary*, 277 S.W.3d 854, 858 (Mo. App. March 3, 2009). By its nature, *evidence* of the circumstances of the transaction is required before a court can determine whether “unfair issues” such as high-pressure sales tactics or misrepresentation are present in a transaction. Absent such evidence, there cannot be a finding of procedural unconscionability. *See, e.g., Fallo v. High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009).

Respondent asserts a number of supposed “facts” in support of her argument that procedural unconscionability is present. She asserts, for example, that the Arbitration Agreement was “never negotiated,” that there was “unequal bargaining power,” and that Respondent “had no opportunity to change or modify any of the terms or conditions.” *See* Respondent’s Brief at 9-11, 14. She also discusses what she claims is “common practice” in the automotive industry regarding arbitration agreements. *See id.* However, she offers no citations to any evidence in the record on appeal that supports any of these purported

“facts.” *See id.*<sup>5</sup> Appellant objects to any consideration of these unsupported factual assertions and this Court must disregard them.<sup>6</sup> Respondent’s assertions, which are devoid of any evidentiary support, provide no basis upon which the trial court’s erroneous finding of procedural unconscionability can be affirmed.

Respondent’s failure to cite the record is due to her failure to offer evidence in the proceedings before the trial court. The only relevant evidence offered by Respondent was a copy of the Arbitration Agreement. *See generally* L.F. 77. She did not even submit an affidavit discussing her recollections of the circumstances of her transaction. Respondent, as the party seeking to avoid the Arbitration Agreement, bore the burden of presenting evidence of unconscionability. *See In re Estate of Looney*, 975 S.W.2d 508, 520 (Mo. App. 1998) (citing *Mochar Sales Co. v. Meyer*, 373 S.W.2d 911, 914 (Mo. 1964)). As she failed to come forward with evidence of unconscionability, the trial court

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<sup>5</sup> Respondent claims that she was “denied” discovery on these factual issues, citing only to the trial court’s docket sheet. However, review of that docket sheet shows that Appellant responded to Respondent’s opening discovery on April 22, 2008. *See* L.F. at 2. The docket sheet also demonstrates that Respondent did not seek any further discovery before responding to Appellant’s Motion to Compel Discovery. *See generally*, L.F. at 1-4.

<sup>6</sup> Appellant also objected to the trial court’s consideration of Respondent’s unsupported allegations of fact. *See* L.F. at 97.

had no evidentiary basis that would permit it to conclude that procedural unconscionability was present in the parties' transaction. *See id.*

In *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006), the relator argued that an arbitration agreement should be invalidated because it was a contract of adhesion, a species of procedural unconscionability. On appeal, this Court observed that the relator failed to establish that the arbitration agreement was adhesive because there was no evidence presented that (1) the agreement was not the subject of negotiation, (2) relators "were unable to look elsewhere for more attractive contracts," and (3) that there was any "unexpected surprise advantage" for the party seeking to enforce the arbitration agreement. *Id.* at 857. In light of those observations, this Court held that "[r]elators cannot simply allege that a pre-printed contract is a contract of adhesion and offer no other proof on the matter." *Id.* Respondent attempts to do precisely what this Court has forbidden. She cannot merely allege that the Arbitration Agreement is adhesive or procedurally unconscionable. Instead, she is required to come forward with *evidence* to support such findings. She has failed to do so.

In an effort to distract this Court from this absence of evidence, Respondent's Substitute Brief discusses purported congressional testimony by Gene Fondren, and correspondence purportedly written on behalf of the National Auto Dealer's Association. *See* Respondent's Brief at 10-11. Nowhere in her brief does Respondent offer any basis upon which these statements, which are clearly hearsay, would constitute admissible

evidence under any exception to the hearsay rule. Respondent objected to consideration of these statements in the proceedings before the trial court. *See* L.F. at 100. Just as the trial court was forbidden from considering these hearsay statements, this Court cannot consider these irrelevant hearsay statements in deciding the issues at bar.

The present appeal does not concern a dispute as to whether the trial court's fact findings were against the *weight* of the evidence. Rather, the issue is instead is the total *absence* of evidence that would constitute a factual basis for the trial court's finding of unconscionability. Again, Respondent's failure to cite to *any* evidence in the record underscores her failure to present evidence to the trial court in support of her assertions. Lacking any evidentiary support to find procedural unconscionability, the Court's finding is in error. This error requires reversal, because an arbitration agreement cannot be invalidated unless there is both procedural and substantive unconscionability. *See Kansas City Urology, P.A., v. United Healthcare Services*, 261 S.W.3d 7, 15 (Mo. App. banc 2008); *Fallo*, 559 F.3d at 879 (finding that substantive unconscionability need not be considered where plaintiff failed to make any showing of procedural unconscionability). Accordingly, Appellant's second point on appeal must be granted and this case should be remanded with directions to the trial court to compel Respondent to arbitrate her individual claims.

**C. The Arbitration Agreement Is Not Unenforceable Upon Grounds Of Substantive Unconscionability Merely Because That Agreement Contains A Class Action Waiver.**

If the trial court's finding of procedural unconscionability was erroneous, this Court need not address the issue of substantive unconscionability. *See Kansas City Urology*, 261 S.W.3d at 15; *Fallo*, 559 F.3d at 879. Numerous Missouri appellate decisions, have required the existence of both procedural and substantive unconscionability must be required to render a contract unenforceable. *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W.3d 918, 923 (Mo. App. 2009) (rejecting unconscionability argument for failure to prove procedural unconscionability); *Funding Systems Leasing Corp. v. King Louie Int'l*, 597 S.W.2d 624, 635 (Mo. App. 1979) (same). Even this Court, as recently as 2009, has stated, “[i]n general, both procedural and substantive unconscionability must exist for an arbitration provision to be unenforceable.” *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 531 (Mo. banc 2009).<sup>7</sup>

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<sup>7</sup> This Court, in *State ex rel. Vincent v. Schneider*, cited and relied upon authority standing for the proposition that the doctrine of unconscionability provides a mechanism to invalidate contracts where there is “an absence of meaningful choice and unfairly oppressive terms.” 194 S.W.3d at 858 (emphasis added) (quoting Hollis, et al., IS STATE LAW LOOKING FOR TROUBLE?, 2003 JOURNAL OF DISPUTE RESOLUTION 463, 487). Requiring both aspects of unconscionability is sound public policy. Otherwise, courts would be free to strike down contracts in situations where (1) a party agreed to

Here, Respondent's primary basis for arguing that the Arbitration Agreement is substantively unconscionable is the presence of a class action waiver within that agreement. She contends that the Arbitration Agreement should be held unenforceable due to the *effect* of this class action waiver provision. However, the recent *Stolt-Nielsen* decision, undermines her argument. The United States Supreme Court has clearly stated that arbitration agreements *do not permit class arbitration* except in circumstances where a particular agreement's terms authorize arbitration of class claims. *Stolt-Nielsen*, at \*13. Thus, given that class arbitration is generally prohibited under the Federal Arbitration Act, it can hardly be said to be unduly harsh to the parties to relinquish the ability to bring class claims in arbitration. Put another way, it defies reason to conclude that waiver of this procedural mechanism is unduly harsh where the selected means of dispute resolution does not generally permit use of that mechanism in the first instance.

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unfavorable terms, despite having the ability to seek out or negotiate more favorable terms, or (2) a party lacked sufficient opportunity to negotiate contract terms but the underlying terms of the contract are fair. Only where both a lack of choice/bargaining power and unfavorable contract terms are combined, should the courts step in and set aside the terms of the parties' agreement. Otherwise, the stability and enforceability of contracts in Missouri will be seriously compromised.

This Court cannot take the position that an arbitration agreement is unconscionable and unenforceable merely because arbitration of class claims is unavailable, without creating a direct conflict between state and federal law. The U.S. Supreme Court, interpreting the FAA, has clearly held that class arbitration is unavailable, as a matter of federal law, unless the parties express an intent to permit arbitration of class claims within their contract. *See Stolt-Nielsen* at \*13. Taking the position that, as a matter of *state* policy, arbitration agreements are unconscionable if they do not allow arbitration of class claims would amount to invalidating arbitration agreements merely because they are arbitration agreements. The United States Supreme Court has clearly held that it is forbidden to treat arbitration agreements differently from other types of contracts upon state law grounds. *See Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987). In short, any state law rule that would invalidate arbitration agreements merely because it is an arbitration agreement (under which class arbitration is generally unavailable) would be in direct conflict with federal law as interpreted by the Supreme Court.<sup>8</sup>

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<sup>8</sup> A petition for *certiorari* is currently pending before the U.S. Supreme Court that raises the precise issue of whether state-law based bans on class action waivers are superseded under the FAA, in the matter of *AT&T Mobility, Inc. v. Concepcion*, U.S. Supreme Court Case No. 09-893. According to the Supreme Court's docket, that case is currently set for conference with regard to the *certiori* petition on May 20, 2010.

The *Stolt-Nielsen* decision does not represent a radical departure from prior law. Contrary to Respondent’s assertions, there is no “recent trend” toward invalidating class action waivers. In addition to the *Bass v. Carmax* and *Gutierrez v. State Line Nissan* decisions discussed in Appellant’s Opening Brief, a number of other recent decisions reject Respondent’s contentions: *Pleasants v. American Exp. Co.*, 541 F.3d 853, 859 (8th Cir. 2008); *Kates v. Chad Franklin Nat’l Auto Sales North, LLC*, 2008 WL 5145942 at \*5 (W.D. Mo., December 1, 2008); and *Fahey v. U.S. Bank Nat’l Ass’n*, 2006 WL 2850529 (E.D. Mo. September 29, 2006). These cases stand for two key propositions: (1) that “the mere existence of a class action waiver within an arbitration agreement does not render the Arbitration Agreement substantively unconscionable, absent limitations on the remedies available to claimants” and (2) that class action waivers, standing alone, do not provide a basis for invalidating the parties’ arbitration agreement. Again, there must be both procedural unconscionability and other grounds for a finding of substantive unconscionability. The existence of a class action waiver, standing alone, is insufficient to find an agreement substantively unconscionable.

Respondent’s cases regarding class action waivers are distinguishable, as she relies primarily upon case law where significant (even overwhelming) procedural

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However, the Court’s *Stolt-Nielsen* decision would seem to foreshadow that such state law prohibitions are inconsistent with the FAA.

unconscionability was also present. *See Whitney v. Alltel*, 173 S.W.3d 300, 309 (Mo. App. 2005); *Sprague v. Household Int'l.*, 473 F.Supp 2d 966, 972-73 (W.D. Mo. 2005); *Doerhoff v. General Growth Properties, Inc.*, 2006 WL 3210502 at \*6 (W.D. Mo. 2006); *Woods v. QC Financial Services*, 2008 WL 5454124, at \*4 (Mo. App. December 23, 2008). Those decisions either expressly or implicitly rested upon the presence of *both* procedural and substantive unconscionability to conclude that an arbitration agreement containing a class action waiver was unenforceable. The Court of Appeals' decision, below, represents a clear departure from prior precedent.

Respondent also relies upon a single appellate decision, *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 446 (Mo. App. 2009), issued by the Eastern District after the Western District issued its opinion in the case at bar. The *Shaffer* decision, however, relies almost exclusively upon the Western District's opinion in this matter, an opinion that was vacated by operation of law once this Court ordered transfer of the case. *See Collector of Revenue for St. Louis v. Parcels of Land Encumbered with Delinquent Tax Liens*, 566 S.W.3d 475, 475 n.1 (Mo. banc 1978). Thus, the *Shaffer* decision does not provide significant support for Respondent's position. Moreover, the *Stolt-Nielsen* decision implicitly overrules *Shaffer*, as *Stolt-Nielsen* reveals that class arbitration is generally unavailable unless the parties' contract expressly provides for class arbitration.

Respondent raises a public policy argument for why class action waivers should be impermissible. This argument, however, represents precisely the same approach rejected

by the *Stolt-Nielsen* decision, as discussed above. She contends that class action waivers deprive *other persons* of the opportunity to learn that their rights have been violated. Appellant is aware of no legal authority, however, that allows the consideration of the impact, if any, of a contract as to *strangers* to that contract, in determining whether the terms of the agreement are substantively unconscionable. Indeed, the very essence of the analysis of substantive unconscionability is whether a contract is unduly harsh to *the parties*. This argument is, at best, a public policy consideration that cannot overcome the federal statutory right to compel arbitration created by the Federal Arbitration Act.

Respondent also contends that the class action waiver is substantively unconscionable because that waiver is “one-sided” in favor of Appellant. She first contends that it is “one-sided” because it leaves open the ability to pursue “self help” remedies. The actual language of the Arbitration Agreement allows both parties to pursue such remedies. L.F. at 39 (“[T]he Parties agree they are not waiving their right to exercise any self help or provisional remedy available by law or pursuant to an agreement between them.” (emphasis added)). If Appellant brought a claim against Respondent for monetary damages, that claim would not be excluded from the requirement to arbitrate. In any event, this type of “mutuality of obligation” argument has been conclusively rejected by this Court. *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. banc 2006). This Court has held that “mutuality is satisfied if there is consideration as to the *whole agreement*, regardless of whether the included arbitration clause itself was one-sided.” *Id.* at 858 (italics added). There is no argument by Respondent, here, that the

parties' contract lacked consideration. Thus, her contention that the Arbitration Agreement should be invalidated because it is "one sided" fails as a matter of law.

Respondent next argues that the arbitration agreement is unconscionable because she "is responsible for the initial filing fee for the arbitration and for the first \$750.00 of any administrative costs." This argument omits crucial portions of the Arbitration Agreement, which requires her to pay the initial filing fee (if she initiates the arbitration) only "*up to the amount he/she would be required to pay if the claim were filed before a state or federal court of law having proper jurisdiction over the proceeding.*" L.F. at 39. Any filing fee above that amount she can request that Respondent pay. *Id.* If Respondent were to initiate the arbitration, it would be obligated to pay the entire filing fee. *Id.* With regard to administrative expenses, Respondent has offered no evidence, either before the trial court or in this appeal, of the *amount*, if any, of administrative expenses that would be required by any of the arbitration forums Respondent could select from.

In order for a party to avoid arbitration upon an argument that the costs of arbitration are too high, there must be an evidentiary showing of what those costs might be. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000). Absent such a showing, a court cannot conclude that the costs of arbitration exceed the potential recovery. *See id.* Here, there was no evidence offered by Respondent as to the costs and expenses that she would incur in the arbitration process. Neither the trial court nor this Court can assume that any amount of administrative expenses would be assessed. *See id.*

Simply put, an unsupported assertion that a litigant “will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.” *Id.* at 91. Here, the only pertinent evidence in the record (the terms of the arbitration agreement itself) demonstrates that Respondent would be faced with the exact same filing expenses in arbitration as she faced in filing the present action. This can hardly be said to be one-sided or unfair to Respondent. Moreover, if the cost-allocating portions of the arbitration agreement were somehow so unfair to Respondent as to be unenforceable, the solution would be to invalidate the cost-allocation provisions, not to invalidate the arbitration agreement as a whole. *See, e.g., State ex rel. Vincent*, 194 S.W.3d at 861.

Respondent ultimately contends that the effect of the Arbitration Agreement is to “immunize” Appellant from claims, in light of what Respondent characterizes as the “insufficient incentive” provided by a “small damages case” that renders it economically unfeasible to bring an individual claim or to find counsel. Again, as recognized by the U.S. Supreme Court, when “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of such costs.” *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. at 92. This evidentiary showing was made in the *In re American Express Merchants’ Litigation*, referenced in Respondents’ brief. *See In re American Express Merchants’ Litigation*, 554 F.3d 300, 318-18 (2nd Cir. Jan. 30, 2009) (discussing affidavits presented to trial court). Here, Respondent’s failure to cite to any place in the Record on Appeal where she made such a showing exemplifies her failure to present any

evidence to the trial court on this issue. Yet, it is obvious that Respondent *has* found representation on her claim, here. Nowhere, is it suggested that her counsel intend to abandon her should her individual claim be ordered into arbitration. This should be unsurprising, given that she also seeks attorney’s fees, and punitive damages.<sup>9</sup> Reported cases demonstrate that parties can find representation on relatively small claims where attorneys’ fees, statutory damages, or and punitive damages could potentially be awarded. *See, e.g., Tinnes v. Brand*, 248 S.W.3d 113 (Mo. App. 2008) (actual damages of \$100 and \$250 sought).

In summary, Respondent’s failure to present evidence is fatal to her substantive unconscionability contentions, just as it is dispositive on the issue of procedural unconscionability. *There is no factual basis* in the record from which the trial court could find that the class action waiver in the parties’ arbitration clause would somehow “immunize” Respondent from liability. Nor is there any evidence regarding the costs of arbitration that would provide grounds for a finding by the trial court that those costs render arbitration too costly to be fair to Respondent. This leaves only Respondent’s argument that the mere presence of the class action waiver, alone, suffices to invalidate the Arbitration Agreement, an argument that cannot be supported in light of the recent *Stolt-Nielsen* decision. As such, the trial court’s judgment must be reversed and the

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<sup>9</sup> As the amount of Respondent’s actual damages claim is less than \$100,000, she could seek up to \$500,000 of punitive damages. *See* § 510.265, RSMo 2005.

matter remanded with directions to the trial court to order arbitration of Respondent's individual claims.

**D. Class Arbitration Would Still Be Prohibited If The Class Action Waiver Was Severed From The Arbitration Agreement.**

As her final argument, Respondent suggests, as an alternative to invalidating the entire arbitration agreement, that this Court should follow the path taken by the Missouri Court of Appeals, below, by severing the class action waiver from the arbitration agreement and ordering arbitration of the class claims in this matter. This argument clearly disregards the recent *Stolt-Nielsen* decision. Severing the class action waiver would only serve to transform the parties' arbitration agreement from one that prohibited class arbitration to one that was *silent* as to the permissibility of class arbitration. When an arbitration agreement is silent as to whether class arbitration is permitted, then the parties cannot be ordered to arbitrate class claims. *See Stolt-Nielsen*, at \*13. Simply put, striking the class action waiver would not change the end result – class arbitration would still be impermissible under the parties' agreement as a matter of federal law.

This result is consistent with public policy. A result that compelled class arbitration would create serious and irreconcilable problems on remand. First among those problems would be whether the trial court could order class arbitration for class members who did not sign arbitration agreements or who signed arbitration agreements whose terms differed from the agreement between Appellant and Respondent. There also

exist substantial questions as to whether class arbitration is binding and enforceable as to the absent class members,<sup>10</sup> raising serious due process concerns. *See generally, e.g.,* Maureen A. Weston, UNIVERSES COLLIDING: THE CONSTITUTIONAL IMPLICATIONS OF ARBITRAL CLASS ACTIONS, 47 WM. & MARY L. REV. 1711 (2006) (concluding that without significant judicial supervision, class arbitrations do not provide adequate protection to absent class members). These due process questions are unanswered in existing Missouri law. Appellant submits that these issues would be far more problematic for both the parties and the putative class members than the speculative concerns raised by Respondent. Indeed, compelling arbitration of Respondent's individual claims is, by far, the more prudent option, in light of the risks and due process concerns inherent in class arbitration.

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<sup>10</sup> Put another way, the question is whether the arbitration agreement that requires arbitration of disputes arising out of Respondent's vehicle purchase can be used as a basis to compel *other* customers of Appellant to arbitrate claims concerning *other* transactions, despite the fact that those other customers were neither party to the transaction between Appellant and Respondent or in privity with one of those parties at the time of the transaction. *Compare, Lawrence v. Beverly Manor*, 273 S.W.3d 525, 529 (Mo. banc 2009) (concluding that arbitration agreement executed on behalf of decedent did not bind heirs seeking to bring wrongful death claim, as they were neither parties to the arbitration agreement and the heirs' claims were not derivative of any claims of the decedent).

In any event, the approach suggested by Respondent is not permitted under the Federal Arbitration Act. In addition to the *Stolt-Nielsen* case discussed above, a number of other reported decisions interpreting the Federal Arbitration Act have held that courts lack authority to consolidate arbitrations or order class arbitration unless the parties' arbitration agreement *expressly* allows for consolidation or class arbitration. *See Baesler v. Continental Grain Co.*, 900 F.3d 1193, 1195 (8th Cir. 1990) (“[A]bsent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings.”); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277 (7th Cir. 1995). Here, what Respondent proposes would defy the clear intent of the parties, as the arbitration agreement expressly precludes class arbitration. “[T]he goal of the FAA is to enforce the agreement of the parties, not to effect the most expeditious resolution of claims.” *Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001). Thus, given the applicability of the Federal Arbitration Act to the parties' arbitration agreement, *Stolt-Nielsen* leads inexorably to the conclusion that striking the class action waiver in the parties' Arbitration Agreement would be ineffectual, as class arbitration would remain prohibited. Thus, severing the class action waiver and requiring class arbitration is not an option available to the Court in this matter.

## CONCLUSION

This Court cannot affirm the trial court's denial of Appellant's Motion to Compel Arbitration. The present dispute is well within the scope of the parties' Arbitration Agreement and is arbitrable. Respondent failed to offer any evidence that would support the trial court's finding of procedural unconscionability. Her failure to come forward with evidence also precludes any finding of substantive unconscionability. The U.S. Supreme Court's recent decision in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corporation* establishes that class arbitration is impermissible unless the parties specifically agree to arbitration of class claims. This requires the enforcement of the parties' agreement, which prohibits class arbitration. Thus, this Court should conclude that the trial court erred in denying Appellant's Motion to Compel Arbitration and reverse the trial court's judgment, remanding this matter with directions to order the arbitration of Respondent's individual claims and the dismissal of Respondent's class claims.

Respectfully submitted,

**Case & Roberts P.C.**

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## **CERTIFICATE OF COMPLIANCE**

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Respondent states that this Brief is in compliance with the limitations of Rule 84.06(b), is in Microsoft Word format using Times New Roman 13 point font and contains 7,598 words, exclusive of the cover, Certificate of Compliance, Certificate of Service, signature block, and appendix. CD-ROMs, which have been scanned for viruses and are virus free containing the full text of the Brief in Microsoft Word format have been provided to the Clerk and to counsel for Respondent.

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Patric S. Linden

## CERTIFICATE OF SERVICE

I hereby certify, pursuant to Supreme Court Rules 84.01, 84.07, and 84.11 that two copies of Appellant's Brief and a CD-ROM containing same were served via hand-delivery this 17th day of May, 2010, to:

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