

IN THE MISSOURI SUPREME COURT

Appeal No. SC91728

LAVERN ROBINSON,

Plaintiff/Respondent,

vs.

TITLE LENDERS, INC.,
d/b/a Missouri Payday Loans

Defendant/Appellant.

*Ordered filed
as is.
7/7/11
7/7/11*

FILED

JUL 7 2011

Brief of Plaintiff/Respondent

CLERK, SUPREME COURT

Simon Law Firm, PC
John Campbell, #59318
Erich Vieth, #29850
Attorneys for Respondent
800 Market St., Suite 1700
St. Louis, Missouri 63101
Telephone: (314) 241-2929
Facsimile: (314) 241-2029
jcampbell@simonlawpc.com
evieth@simonlawpc.com

SCANNED

TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
SUPPLEMENTAL STATEMENT OF FACTS	7
A. Undisputed Facts Relating to Customers, Defendant’s Loan Agreement and Procedural Unconscionability.....	7
B. Undisputed Facts Relating to Substantive Unconscionability.....	12
C. The Findings and Holdings of the Trial Court.....	17
D. Events Subsequent to the March 13, 2009 Findings and Holdings of the Trial Court.....	21
SYNOPSIS	24
ARGUMENT	28
I. BREWER v. MISSOURI TITLE LOANS REMAINS GOOD LAW IN LIGHT OF AT&T.....	28
A. Standard of Review.....	29
B. For a Variety of Reasons, the Holdings in <i>Brewer I</i> Remain Good Law in Missouri	31
C. No Aspect of <i>AT&T</i> Overrules U.S. Supreme Court Precedent Requiring that Parties Be Able to Vindicate Their Statutory Rights in the Arbitral Forum	42
D. Reading <i>AT&T</i> Broadly Would Lead to Absurd Real-World Results.....	47
II. RESPONSE TO POINT I: THE DEFENDANT’S ARBITRATION CLAUSE IN THIS CASE IS PROCEDURALLY UNCONSCIONABLE.	54

III. RESPONSE TO POINT II: SUBSTANTIVE UNCONSCIONABILITY. 59

 A. The Arbitration Clause at Issue is Substantively Unconscionable. 59

 B. The Problem with Lack of Notice to Other Class Members..... 61

 C. Improper Waiver of Jury Trial as Additional Aspect of Substantive
 Unconscionability. 63

 D. Additional Points Requiring Response 65

IV. RESPONSE TO POINT III – EXCULPATORY CLAUSES 70

CONCLUSION 75

CERTIFICATES OF SERVICE, BRIEF FORM AND VIRUS SCANNING 78

APPENDIX 79

TABLE OF AUTHORITIES

CASES

<i>Alack v. Vic Tanny Int'l of Missouri, Inc.</i> , 923 S.W.2d 330 (Mo. banc 1996) . . .	71, 72, 73
<i>Allied-Bruce Terminix Cos., Inc. v. Dobson</i> , 513 U.S. 265 (1995)	32, 33
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997)	47
<i>AT&T Mobility LLC v. Concepcion</i> , 563 U.S. ___, 131 S. Ct. 1740 (April 27, 2011)	
.	25, 26, 31, 32, 36, 37, 38, 41, 43, 48, 49, 51, 52, 53, 54, 75
<i>Brewer v. Missouri Title Loans, Inc.</i> , 323 S.W.3d 18 (Mo. banc 2010), <i>reh'g denied</i> (Nov. 16, 2010), <i>vacated by Missouri Title Loans, Inc. v. Brewer</i> , 2011 WL 531553 (U.S. May 2, 2011) (No. 10-1027)	
.	24, 25, 26, 27, 28, 29, 30, 40, 41, 48, 49, 54, 58, 59, 60, 70, 71, 72, 73, 74
<i>Buckeye Check Cashing, Inc. v. Carhegna</i> , 546 U.S. 440 (2006)	33, 34
<i>Cooper v. QC Fin. Servs., Inc.</i> , 503 F.Supp.2d 1266 (D. Ariz. 2007)	61
<i>Discover Bank v. Superior Court</i> , 113 P.3d 1100 (Cal. 2005)	61
<i>Doctor's Ass'ns, Inc. v. Casarotto</i> , 517 U.S. 681 (1996)	33, 34
<i>Eisel v. Midwest Bankcentre</i> , 230 S.W.3d 335 (Mo. banc 2007)	62, 63
<i>Feeney v. Dell, Inc.</i> , 98 N.E.2d 753 (Mass. 2009)	61
<i>Fiser v. Dell</i> , 188 P.3d 1215 (N.M. 2008)	61
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991)	42, 43
<i>Green Tree Fin. Corp.-Alabama v. Randolph</i> , 531 U.S. 79 (2000)	42, 43
<i>Green Tree Fin. Corp. v. Bazzle</i> , 539 U.S. 444 (2003)	33, 34

<i>Hartman v. Chicago, B. & Q.R. Co.</i> , 182 S.W. 148 (Mo. Ct. App. 1915)	71
<i>Hewit v. Helms</i> , 482 U.S. 755 (1987)	35
<i>Huch v. Charter Commc 'ns, Inc.</i> , 290 S.W.3d 721 (Mo. banc 2009)	45, 46
<i>Jacobsen v. U.S. Postal Serv.</i> , 993 F.2d 649 (9th Cir. 1992)	35
<i>Kinkel v. Cingular Wireless</i> 857 N.E.2d 250 (Ill. 2006)	61
<i>Lozada v. Dale Baker Oldsmobile, Inc.</i> , 91 F.Supp.2d 1087 (W.D. Mich. 2000)	46
<i>Malan Realty Investors, Inc. v. Harris</i> , 953 S.W.2d 624 (Mo. banc 1997)	63, 64
<i>Meyer Jewelry Co. v. Prof'l Building Co.</i> , 307 S.W.25d 517 (Mo. Ct. App. 1957)	71
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985)	42
<i>Muhammad v. County Bank of Rehoboth Beach, Del.</i> , 912 A.2d 88 (N.J. 2006)	61, 62
<i>Och v. Mo., K. & T. RY. Co.</i> , 31 S.W. 962 (1895)	71
<i>Phoenix Assur. Co. of N.Y. v. Royale Investment Co.</i> 393 S.W.2d 43 (Mo. Ct. App. 1965)	71
<i>Preston v. Ferrer</i> , 552 U.S. 346 (2008)	33, 34
<i>Thomas v. Skelly Oil Co.</i> , 344 S.W.2d 320 (Mo. Ct. App. 1960)	71
<i>Tillman v. Commercial Credit Loans</i> , 655 S.E.2d 362 (N.C. 2008)	61
<i>United States v. Gerke Excavating, Inc.</i> , 464 F.3d 723 (7th Cir. 2006) (per curiam) . . .	35
<i>Vasquez v. Beneficial Oregon</i> , 152 P.3d 940 (Or. App. 2007)	61
<i>Vincent v. Schneider</i> , 194 S.W.3d 853 (Mo. banc 2006)	59
<i>Whitney v. Alltel Communications, Inc.</i> , 173 S.W.3d 300 (Mo. Ct. App. 2005)	42, 54, 60, 61

Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90 (Mo. Ct. App. 2008)

. 24, 29, 54, 57, 58, 60, 61, 62

STATUTES

Federal Arbitration Act, 9 U.S.C. § 2 32, 33, 34, 39, 40, 51

Merchandising Practices Act, Mo. Rev. Stat. § 407.020 (2010) 45, 46, 74

Merchandising Practices Act, Mo. Rev. Stat. § 407.025 (2010) 44, 67

Merchandising Practices Act, Mo. Rev. Stat. § 407.025.2 (2010) 44

Merchandising Practices Act, Mo. Rev. Stat. § 407.025.3 (2010) 44

Mo. Rev. Stat. § 408.562 (2010) 67

Mo. Rev. Stat. § 490.065.3 (2010) 69

SUPPLEMENTAL STATEMENT OF FACTS

Plaintiff presents the following supplemental facts pursuant to Rule 84.04(f).

None of the evidence recited in this *Supplemental Statement of Facts* was contradicted by any evidence presented in this case.

A. Undisputed Facts Relating to Customers, Defendant's Loan Agreement and Procedural Unconscionability.

1. Lavern Robinson is the named Plaintiff. She is a 56-year old widow with three grown children.¹
2. Mrs. Robinson did not finish high school and she was not successful in trying to pass the GED test.²
3. Missouri Payday Loans ("Defendant") is a large company that generates around \$10 million per year in revenue.³
4. Consumers often come into Defendant's stores to borrow money for "day-to-day survival."⁴

¹ Legal File 8. Throughout this Brief, the parties will often be referred to as Plaintiff and Defendant, as they were in the trial court. Hereinafter, Legal File will be abbreviated as "L. F.".

² Tr. 89.

³ Kaplan Dep. 39:12-15, (Pl.'s Ex. 7).

⁴ Kaplan Dep. 33:12-19 (Pl.'s Ex. 7).

5. Mrs. Robinson obtained a payday loan from Defendant at its store on Delmar in St. Louis, Missouri. She returned to that store seven or eight additional times.⁵
6. Defendant charges its payday loan customers interest at 235 % annual percentage rate (APR).⁶
7. Defendant's contract was take-it-or-leave-it on a pre-printed form.⁷
8. Defendant's arbitration clause is a part of a form contract that Defendant began using around the year 2000.⁸
9. The arbitration clause at issue was included in Defendant's paperwork as a result of a decision by Mr. Jerry Silverman, President of Missouri Payday Loans, in consultation with outside counsel for Defendant.⁹
10. The class waiver section of Defendant's arbitration clause appears on the back page of Defendant's contract, and looks like this¹⁰:

⁵ Tr. 92.

⁶ L. F. 300-301 (*also found at Pl.-Resp't App. 1-2*).

⁷ *See* Defense counsel's opening statements, Tr. 60.

⁸ Silverman Dep. 15:6-13 (Pl.'s Ex. 8).

⁹ Silverman Dep. 17:19-18:8 (Pl.'s Ex. 8).

¹⁰ From L. F. 300-301 (*also found at Pl.-Resp't App. 1-2*) (size of font approximately equal to the original).

court and how to initiate a small claims court proceeding, call your local small claims court administrator. You can find the telephone number of the AAA or the small claims court administrator by looking in a telephone book or by calling directory assistance.

Each party, you and we, shall each bear its own costs and expenses, including attorneys' fees, that party incurs with respect to the arbitration. However, if under the circumstances relating to the dispute (including, among other things, the size and nature of the dispute, the nature of the services that we have provided you, and your ability to pay) it would be unfair or burdensome for you to pay the AAA's filing fees or other fees, we will pay those fees for you.

Only disputes involving you and us may be addressed in the arbitration. The arbitration may not address any dispute on a "class action" basis. This means that the arbitration may not address disputes involving other persons, which may be similar to the disputes between you and us.

The arbitrator shall have the authority to award any legal or equitable remedy or relief that a court in the State of Missouri could order or grant. The arbitrator, however, is not authorized to change or alter the terms of this Agreement or to make any award that would extend to any loan other than your own.

BY AGREEING TO ARBITRATE ANY DISPUTE, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT DISPUTE IN COURT, OR TO HAVE A JURY TRIAL ON THAT DISPUTE, OR ENGAGE IN DISCOVERY PROCEEDINGS EXCEPT AS PROVIDED FOR ABOVE OR IN THE ARBITRATION RULES. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS PERTAINING TO ANY DISPUTE SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING, EXCEPT TO THE EXTENT IT IS SUBJECT TO REVIEW IN ACCORDANCE WITH APPLICABLE LAWS GOVERNING ARBITRATION AWARDS, OTHER RIGHTS THAT YOU OR WE WOULD HAVE IN COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

All statute of limitations that are applicable to any Dispute shall apply to any arbitration between you and us.

Borrower *Lorena Robinson* Borrower _____

11. Defendant's class waiver provisions (depicted above) appear within several fine-print paragraphs that collectively consist of approximately 210 words, appearing at the bottom of the second page of Defendant's contract, after many paragraphs of boilerplate on the front and back of this contract. Before even reaching the paragraphs containing the class waiver language, a person first would need to read through approximately 550 words of boilerplate on the front page of the contract and 660 more words of boilerplate on the back side of the contract.
12. Mrs. Robinson testified that she didn't understand the language of Defendant's arbitration clause when she applied for her payday loan. She didn't know what "arbitration" meant.¹¹

¹¹ Tr. 91-92.

13. Defendant's arbitration clause is written in fine print.¹²
14. Defendant's arbitration clause is difficult for customers to read.¹³
15. Defendant's arbitration clause is difficult for payday customers to understand.¹⁴
16. Mrs. Robinson also took out payday loans from other payday lenders.¹⁵
17. At least some of the other lenders from whom Ms. Robinson has borrowed money also had arbitration clauses in their agreements.¹⁶
18. Only Mr. Jeffrey Silverman, President of Missouri Payday Loans, could change the terms of the customer contract, including the arbitration clause, and he could do so only after consulting with outside counsel.¹⁷ It was a "take it or leave it" agreement.¹⁸
19. Mr. Silverman did not know whether Defendant's arbitration clause required his company to arbitrate claims or if claims could be filed in court.¹⁹

¹² L. F. 300–301 (*also found at* Pl.-Resp't App. 1–2).

¹³ *Id.* See also Brown Dep. 34:22–37:10. (Pl.'s Ex. 6).

¹⁴ *Id.* (Brown Dep.)

¹⁵ Tr. 95.

¹⁶ Tr. 100.

¹⁷ Silverman Dep. 102:15–103:10; 10:8–12 (Pl.'s Ex. 8).

¹⁸ Tr. 60.

¹⁹ Silverman Dep. 32:16–33:14; 134:3–134:15 (Pl.'s Ex. 8).

20. The APR on Defendant's loans can reach 515%.²⁰

21. Mr. Silverman did not know exactly what arbitration is. He testified that he would have to talk to outside counsel to determine whether or not an arbitrator's decision is binding.²¹

22. Mr. Silverman did not know whether the American Arbitration Association had rules for class arbitration, and he did not know how class arbitration works.²²

23. Mr. Silverman testified that, "[Arbitration] appears to me to be more timely, more effective, and not as theatrical as a court setting can be."²³

24. Mr. Silverman sits on the board of an organization of payday lenders, investors, and lawyers who are involved in the payday loan industry.²⁴ This organization, called the Community Financial Services Association of America (CFSA), hosts speakers who give lectures on preventing class actions through the use of arbitration clauses.²⁵

²⁰ Kaplan Dep. 24:18–25:18 (Pl.'s Ex. 7).

²¹ Silverman Dep. 51:19–52:4 (Pl.'s Ex. 8).

²² *Id.* 83:9–84:2.

²³ *Id.* 42:6–21.

²⁴ *Id.* 155:19–160:21.

²⁵ *Id.* 158:20–160:4.

B. Undisputed Facts Relating to Substantive Unconscionability

25. According to Mr. Silverman, the average customer earns between \$20,000 and \$75,000. Mr. Silverman is aware of no studies substantiating this range of customer income. He cannot identify a location where the average income is \$75,000. He does not know upon what data he bases his assertion that customers make \$75,000.²⁶
26. The only requirement for a customer to get a payday loan is a “banking relationship.”²⁷
27. Missouri Payday Loans has never actually advanced any arbitration costs to any customer.²⁸
28. Defendant admits that consumers give up important legal rights when they sign Defendant’s Agreement.²⁹
29. Defendant has never faced a lawsuit by a customer.³⁰
30. Defendant’s arbitration clause allows for claims to be filed in court only if the claims are filed in Small Claims Court.³¹

²⁶ Silverman Dep. 21:2–22:7 (Pl.’s Ex. 8).

²⁷ *Id.* 21:2–21:6.

²⁸ (Pl.’s Ex. 8).

²⁹ Silverman Dep. 44:20–46:12 (Pl.’s Ex. 8).

³⁰ Kaplan Dep. 88:15–22 (Pl.’s Ex. 7).

31. Defendant has filed many cases in courts other than Small Claims Court.³²
32. Defendant has taken the position that associate circuit court is the equivalent of “Small Claims Court.”³³
33. Mr. Kaplan admits that Defendant has filed cases against its own customers in court to collect consumer debts.³⁴
34. Defendant was prohibited by its own arbitration clause from filing cases in any court other than Small Claims Court.³⁵
35. Ryan Mielcarek is an attorney formerly employed by a law firm that did collection work for Title Lenders, Inc., d/b/a Missouri Payday Loans. Mielcarek testified regarding cases he filed in court for Defendant.³⁶
36. Mielcarek testified that Defendant violated its own arbitration clause by filing claims in courts other than Small Claims Court.³⁷

³¹ See Defendant’s Arbitration Clause at L. F. 300–301 (*also found at Pl.-Resp’t App. 1–2*).

³² See generally Mielcarek Dep., date (Pl.’s Ex. 10).

³³ Tr. 63–69.

³⁴ Tr. 59:7-59:9; 66:14-19.

³⁵ L. F. 300–301 (*also found at Pl.-Resp’t App. 1–2*).

³⁶ Mielcarek Dep. 9:10-20; 10:3-5; 11:14-22 (Pl.’s Ex. 10).

³⁷ *Id.* 12:16–13:10; 14:18-22 (Pl.’s Ex. 10).

37. In the lawsuits brought in court by Defendant, Defendant claimed as damages the amount it alleged it was owed plus attorney fees and court costs.³⁸
38. The customers against whom Defendant filed suit varied in age and sex. Many were unemployed. Those who were employed had “low wage” jobs. Based on Mr. Mielcarek’s impressions of the customer-defendants with whom he dealt, they could not understand the contracts they signed.³⁹
39. Plaintiff’s expert witnesses, attorneys Dale Irwin and Bernard Brown, have each practiced extensively in the area of consumer law in the State of Missouri.⁴⁰ They presented testimony as expert witnesses, based on their training and experience as consumer attorneys.⁴¹
40. Mr. Irwin has practiced consumer law in Missouri for more than 20 years.⁴²
41. Mr. Brown’s experience in consumer law is extensive, spanning more than 25 years. He is a co-founder of the only consumer law group in the country. He also teaches consumer law and is one of the authors for portions of the National Consumer Law Center (“NCLC”) manuals on consumer law. The NCLC has

³⁸ *Id.* 17:6-13.

³⁹ *Id.* 22:6–23:7.

⁴⁰ Irwin Dep. 6:2–7:14, (Pl.’s Ex. 5); Brown Dep. 6:6–7:21 (Pl.’s Ex. 6).

⁴¹ Irwin Dep. 3:22 (laying foundation for his expert testimony) (Pl.’s Ex. 5); Brown Dep. 5:1 (laying foundation for his expert testimony) (Pl.’s Ex. 6).

⁴² Irwin Dep. 6:2–7:14 (Pl.’s Ex. 5).

been recognized by the Missouri Supreme Court as an authority on consumer law. Mr. Brown has presented at every annual NCLC conference since the conference's inception in 1992.⁴³

42. Mr. Brown has testified that when actual damages are only a few thousand dollars, a class action waiver serves as a “get out of jail free card” for a defendant handling payday loans.⁴⁴

43. Mr. Irwin testified that as a general rule, class waivers deprive consumers “of adequate access to the justice system in this country.”⁴⁵

44. Mr. Irwin testified: “The only meaningful remedy for wholesale violations of law by companies such as payday lenders, the only real remedy, the only real effective remedy is the class action device. And that is because, in my experience in dealing with consumers, working class clients...since 1973...most of the people in that class are unaware of their legal rights. And the class action device is a way to make them aware of their rights, as well as obtain redress for violations of those rights.”⁴⁶

45. Mr. Irwin opined that it is highly unlikely that consumers with individual consumer claims with damages of less than \$4,000 would be able to find any

⁴³ Brown Dep. 6:19–17:7 (Pl.’s Ex. 6).

⁴⁴ *Id.* 18:19–20:8.

⁴⁵ Irwin Dep. 12:22-24 (Pl.’s Ex. 5).

⁴⁶ *Id.* 13:17–14:8.

member of the Missouri Bar willing to pursue those claims in litigation on an individual basis.⁴⁷

46. Mr. Brown and Mr. Irwin both testified that the economic realities for a practicing consumer attorney make it highly unlikely that any attorney would handle small-damage consumer claims, even if attorney fees and punitive damages were possible.⁴⁸

47. Mr. Irwin is consistently forced to reject claims for less than several thousand dollars due to economic realities and workload.⁴⁹

48. There are very few consumer attorneys in the state of Missouri.⁵⁰

49. Class actions can provide meaningful relief. In some cases, thousands of people receive checks.⁵¹

50. In one of Mr. Irwin and Mr. Brown's joint cases, people whose wages were being garnished by the defendant received checks and the garnishment was stopped. In the same case, Mr. Irwin and Mr. Brown insisted upon, and

⁴⁷ Irwin Dep. 16:14–17:23 (Pl.'s Ex. 5).

⁴⁸ Brown Dep. 21:13–25:13 (Pl.'s Ex. 6); Irwin Dep. 16:14–17:5; 23:18–24:13 (Pl.'s Ex. 5).

⁴⁹ Irwin Dep. 16:14–17:5; 23:18–24:13 (Pl.'s Ex. 5).

⁵⁰ *Id.* 16:14–17:5; 17:24–18:9.

⁵¹ *Id.* 24:14–28:8.

obtained, a settlement that allows the defendant's practices to be monitored for three years into the future.⁵²

51. Class actions serve as a tool for changing a defendant's illegal practices.⁵³

52. Class arbitration can allow for the effective redress of class-wide problems. Mr. Irwin referred to the United States Supreme Court case of *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) as a reference. Arbitration forums such as the American Arbitration Association have hundreds of class arbitrations proceedings pending and have established rules for such actions.⁵⁴

53. The average, middle-class consumer is unlikely to have knowledge of the legal issues raised in this lawsuit, and as such, in the absence of class notice, consumers are unlikely to know of their legal rights.⁵⁵

C. The Findings and Holdings of the Trial Court

54. In its March 13, 2009 Order, the trial court held each of the following:

- a. "Written agreements to arbitrate are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."⁵⁶

⁵² Irwin Dep. 24:14–28:8 (Pl.'s Ex. 5).

⁵³ *Id.* 27:17–28:8.

⁵⁴ *Id.* 29:8–30:12.

⁵⁵ Brown Dep. 29:20–30:18 (Pl.'s Ex. 6); Irwin Dep. 13:17–14:8; 16:5-13 (Pl.'s Ex. 5).

- b. “An unconscionable contract or clause of the contract will not be enforced.”⁵⁷
- c. “Procedural unconscionability focuses on such things as high-pressure sales tactics, unreadable fine print, or misrepresentation among other unfair issues in the contract formation process.”⁵⁸
- d. “Substantive unconscionability means any undue harshness in the contract terms.”⁵⁹
- e. “Contracts of adhesion are not automatically unenforceable.”⁶⁰
- f. “There was “unequal bargaining position between the parties when the underlying contract was entered into...”⁶¹
- g. “The terms of the arbitration clause are unduly harsh and not commercially reasonable in the prohibition of class actions and the ability to arbitrate as a class.”⁶²

⁵⁶ L. F. 1218.

⁵⁷ *Id.*

⁵⁸ L. F. 1219.

⁵⁹ *Id.*

⁶⁰ L. F. 1220.

⁶¹ L. F. 1221.

⁶² *Id.*

- h. “The arbitration clause is both procedurally and substantively unconscionable to the extent that it prohibits class actions.”⁶³
- i. “Defendant's argument that Associate Circuit Court is a form of Small Claims Court is ‘not persuasive.’”⁶⁴
- j. “If a class-action were precluded, Plaintiff’s claims would not be reasonably feasible to prosecute.”⁶⁵
- k. “An arbitration clause that defeats the prospect of class action treatment in a setting where the practical effect affords the defendant immunity is unconscionable.”⁶⁶
- l. “The class-action waiver is exculpatory and unenforceable because it is not clear and unambiguous.”⁶⁷
- m. “The court finds that the underlying contract is divisible, and that the parties did not assent to all of the promises as a single whole so that there would be no bargain if any promise was stricken out.”⁶⁸

⁶³ L. F. 1222.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ L. F. 1223.

⁶⁷ *Id.*

⁶⁸ L. F. 1224.

- n. “The court finds that the class waiver provision in the arbitration agreement is unconscionable and unenforceable.”⁶⁹
- o. The class waiver provision is severable from the arbitration clause, “because the parties did not assent to all of the promises as a single whole so that there would be no bargain if any promise was stricken out.”⁷⁰
- p. Defendant has agreed to pay Plaintiff’s arbitration filing fees and other fees if “it would be unfair or burdensome’ for her to pay those fees.”⁷¹
- q. “The court further orders that all language in the arbitration clause prohibiting class arbitration or participation in a class-action is unenforceable and hereby stricken from the agreement.”⁷²
- r. Plaintiff’s action was ordered stayed pending arbitration before the American Arbitration Association.⁷³

⁶⁹ L. F. 1224.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ L. F. 1225.

D. Events Subsequent to the March 13, 2009 Findings and Holdings of the Trial Court

55. Defendant appealed the trial court's March 13, 2009, ruling to the Missouri Court of Appeals for the Eastern District of Missouri.
56. On February 23, 2010, the Eastern District dismissed this appeal, indicating that the appellate court did not have jurisdiction because the trial court did not actually deny Defendant's Motion to Compel Arbitration. The Court of Appeals ruled that the trial court had "stayed Robinson's action and compelled the parties to arbitrate their claims; an order compelling arbitration is not an appealable judgment."⁷⁴
57. The Court of Appeals dismissed that appeal, ruling that the trial court had not yet resolved "all issues as to all parties and claims," and that the claims "remain pending in the trial court."⁷⁵ The Court of Appeals did not change its position, even in light of a January 12, 2010, trial court ruling (jointly sought by the parties) indicating that "there is no just reason for delay and therefore, pursuant to Rule 74.01(b), re-denominates its 3/13/09 Order as a 'Judgment' so that appeal is proper."⁷⁶

⁷⁴ Order, Feb. 23, 2010, at 3.

⁷⁵ *Id.* at 4.

⁷⁶ *Id.*

58. On April 27, 2010, the United States Supreme Court decided *Stolt-Nielsen v. Animalfeeds, Int'l Corp.*, 130 S. Ct. 1758 (2010), holding that class arbitration would not be enforced where the arbitration agreement was silent on the issue.
59. Based upon the new *Stolt-Nielsen* holding, Plaintiff-Respondent filed, in the trial court, a “Motion to Modify This Court’s March 13, 2009 Order.” In its motion, Plaintiff-Respondent argued as follows:

This Court decided to send this case to arbitration because, at the time of this Court’s Order, class arbitration was a viable option. It appears that class arbitration is no longer an option, based on *Stolt-Nielsen*. To send this to individual arbitration would immunize Defendant (again, for the same reasons determined by this Court in its Order of March 13, 2009). No rational plaintiff (or attorney) would risk the time, energy and money necessary to bring one of these low-value claims individually. This massive roadblock to resolving these types of claims individually was forcefully established through the testimony of several attorney-experts called by Plaintiff in this case (Defendant did not provide any expert testimony in opposition). Therefore, it continues to be the case that the only possible way to grant Plaintiffs and thousands of class members any meaningful resolution of their claims is to allow for this case to be resolved through a class action in this Court.⁷⁷

⁷⁷ L. F. 1249.

60. Plaintiff-Respondent thus argued to the trial court that Defendant's arbitration clause should be deemed to have entirely failed of its essential purpose, and that a class action should proceed in the trial court.⁷⁸
61. Defendant-Appellant filed a cross-motion seeking to enforce the entire arbitration clause, including the class waiver, asking the trial court to send the entire case to arbitration.⁷⁹
62. In response to these cross-motions, on October 12, 2010, the trial court vacated its order of March 13, 2009 and issued an order denying Defendant's Motion to Stay and Compel Arbitration.⁸⁰
63. On January 18, 2011, the trial court re-denominated its ruling, reissuing it in the form of an "Order and Judgment."⁸¹
64. Defendant-Appellant appeals the trial court "Order and Judgment" of January 18, 2011.

⁷⁸ *Id.*

⁷⁹ L. F. 1261.

⁸⁰ L. F. 1281.

⁸¹ L. F. 1307.

SYNOPSIS

Defendant inserted into its payday loan contracts an arbitration clause which purported to prohibit customers from filing any class actions or class arbitrations against Defendant. The trial court held that Defendant's class waiver was unenforceable for two distinct reasons: A) the class waiver was unconscionable, and B) the class waiver was an impermissibly ambiguous exculpatory clause. The trial court's findings were rooted in an extensive factual record built during a full-day evidentiary hearing that included live witnesses, the introduction of depositions, the testimony of two expert witnesses, and hundreds of pages of documents. The factual findings of the trial court, which are entitled to deference, unequivocally support the finding that, if enforced, Defendant's arbitration clause would strip Plaintiff and class of any meaningful remedy for Defendant's alleged systematic wrongdoing.

The facts of this case are almost identical to the facts before this Court in *Brewer v. Missouri Title Loans, Inc.*,⁸² as well as the facts considered by the Court of Appeals for the Eastern District of Missouri in *Woods v. QC Fin. Servs., Inc.*⁸³ These carefully

⁸² *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010), *reh'g denied* (Nov. 16, 2010), *vacated by Missouri Title Loans, Inc. v. Brewer*, 2011 WL 531553 (U.S. May 2, 2011) (No. 10-1027). (Throughout this brief, in anticipation of the fact that *Brewer* will be reconsidered by this Court, the August 31, 2010 Opinion of this Court will be referred to as *Brewer D*).

⁸³ *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90 (Mo. Ct. App. 2008).

considered cases would seem to quickly end the inquiry; however, due to the recent decision in *AT&T Mobility LLC v. Concepcion*⁸⁴ and the subsequent decision by the United States Supreme Court to remand *Brewer* “for further consideration” in light of its holding in *AT&T*, additional legal analysis is required.⁸⁵

The result is somewhat anticlimactic. As discussed herein, the takeaway from *AT&T* is far less relevant to this case than one might expect at first glance. *AT&T* criticized the mechanical operation of California’s *Discover Bank* rule, which functioned as a *per se* rule requiring the automatic invalidation of arbitration agreements even if the agreements guaranteed efficient resolution of consumer claims.⁸⁶

In *AT&T*, the District Court for the Southern District of California found the arbitration clause at issue was “easy to use” and encouraged “promp[t] full or...even excess payment to the customer *without* the need to arbitrate or litigate.”⁸⁷ The court even determined that consumers were in a better position under the clause than they

⁸⁴ *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (April 27, 2011).

⁸⁵ *Missouri Title Loans, Inc. v. Brewer*, 2011 WL 531553 (U.S. May 2, 2011) (No. 10-1027) (vacating *Brewer I* and remanding the case to the Missouri Supreme Court for further consideration in light of *AT&T Mobility LLC v. Concepcion*, 563 U.S. ___, 131 S. Ct. 1740 (April 27, 2011)).

⁸⁶ *AT&T*, 131 S. Ct. at 1753.

⁸⁷ *Id.* at 1745 (quoting *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2008 WL 5216255, at *11 (S.D. Cal. Aug. 11, 2008) (emphasis in original)).

would be in a class action.⁸⁸ Expert testimony supported this conclusion. Nonetheless, mechanically applying the *per se Discover Bank* rule, the court struck the arbitration clause.⁸⁹ The Ninth Circuit affirmed.⁹⁰ Not surprisingly, the United States Supreme Court recognized that the federal district court's employment of the *Discover Bank* rule was a decision that was hostile to arbitration and that the use of the overbroad *Discover Bank* rule was thus preempted by the FAA.⁹¹

A close reading of *AT&T* makes clear that it is nothing like this case. It was based on California's unique *per se* rule that applied almost exclusively to arbitration clauses, it related to a uniquely consumer-friendly arbitration clause, and it involved a factual finding that the clause was beneficial to individual consumers.⁹² The facts in this case and this Court's earlier holding in *Brewer v Missouri Title Loans (Brewer I)*, could not be more different from *AT&T*. The arbitration clause at issue here, as well as the one in *Brewer I*,⁹³ does not guarantee recovery, double attorney fees, or otherwise induce individual resolution. Instead, the factual findings support only the conclusion that the clauses prohibit resolution of claims and immunize the defendants. The clauses were

⁸⁸ *Id.* at 1753 (quoting Laster, 2008 WL 5216255, at *12).

⁸⁹ *Id.* at 1745 (quoting Laster, 2008 WL 5216255, at *14).

⁹⁰ *Id.*

⁹¹ *Id.* at 1750–51.

⁹² *See id.* at 1750, 1745, 1753.

⁹³ *See Brewer I*, 323 S.W.3d at 23–24.

struck down under general Missouri contract law that operates on a case-by-case basis and is not specific to arbitration clauses.⁹⁴

In sum, enforcing the clause in *AT&T* was consistent with the purpose of the FAA, to enforce arbitration clauses when it will promote resolution of disputes. However, enforcing the arbitration clause in this matter and in *Brewer* would do the opposite: it would guarantee that disputes are not resolved at all. This is an anathema to the FAA, inconsistent with the spirit of *AT&T*, and inconsistent with Missouri's general contract law, which by rule of the FAA, must apply in this matter.

For all these reasons, the trial court's decision must be affirmed.

⁹⁴ See, e.g., *id.* at 22 (applying Missouri's unconscionability doctrines to the contract at issue in *Brewer I*).

ARGUMENT

I. ***BREWER v. MISSOURI TITLE LOANS* REMAINS GOOD LAW IN LIGHT OF *AT&T*.**

This case is almost identical to *Brewer v Missouri Title Loans*.⁹⁵ The only difference is that the Defendant in this case has repeatedly filed lawsuits in court in violation of its own arbitration clause. This case involves two of the same experts as in *Brewer I*, similar testimony by Defendant, high-interest lending (payday loans instead of title loans), a consumer with little to no bargaining power, a complex contract with a lengthy arbitration clause, a full evidentiary hearing at the trial court, and a conclusion that the class action waivers were unconscionable and exculpatory. For these reasons, the outcome in *Brewer* is likely to decide this case. This fact is recognized by Defendant, who moved to transfer this matter to this Court because of these similarities. For these reasons, the interplay between *Brewer* and *AT&T* will be carefully addressed in this brief, with additional discussion unique to this case appearing in the responses to Defendant's points on appeal.

The Argument portion of this brief consists of four sections: **Section I** analyzes *AT&T* and compares it to *Brewer I*. This complies with Missouri Rule of Civil Procedure

⁹⁵ *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010), *reh'g denied* (Nov. 16, 2010), *vacated by Missouri Title Loans, Inc. v. Brewer*, 2011 WL 531553 (U.S. May 2, 2011) (No. 10-1027).

84.04(f), allowing for “additional arguments in support of judgment that are not raised by the points relied on in appellant’s brief.” **Section II** responds to Appellant’s first point on appeal (Procedural Unconscionability). **Section III** responds to Appellant’s second point on appeal (Substantive Unconscionability) and **Section IV** responds to Appellant’s third point on appeal (Exculpatory Clauses).

A. Standard of Review⁹⁶

Defendant boldly asserts that the standard of review is *de novo*, claiming that the trial court is to be afforded no deference. This starkly misstates the law.

The trial court heard substantial amounts of evidence on the record at its hearing. The judgment must be affirmed if the judgment is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law. *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18, 20 (Mo. banc 2010), *reh'g denied* (Nov. 16, 2010), *vacated by Missouri Title Loans, Inc. v. Brewer*, No. 10-1027, 2011 WL 531553 (U.S. May 2, 2011); *see also Woods v. QC Fin. Servs, Inc.*, 280 S.W.3d 90, 94 (Mo. App. Ct. 2008). The issue of whether a dispute is subject to arbitration is subject to *de novo* review. *Id.*

The standard of review is of special import in this case. As discussed in the Statement of Facts, Plaintiff introduced substantial evidence that Defendant’s arbitration

⁹⁶ The standard of review is the same for all points in this brief. For this reason, it has not been repeated in each section.

clause prevented the resolution of consumer disputes. This evidence included the testimony of experts Dale Irwin and Bernard Brown, both of whom were cited with approval by this Court in *Brewer I* for the proposition that consumers are highly unlikely to find representation for small damage claims. See *Brewer I*, 323 S.W.3d at 23. The trial court in this case considered and relied upon substantial evidence that, despite tens of thousands of transactions, Defendant's arbitration clause has never been used by any consumer to resolve any dispute. The trial court also heard evidence that even the Defendant itself did not believe its arbitration clause was efficient for resolving disputes, demonstrated by the fact that Defendant violated its own clause when it filed numerous lawsuits against its customers in associate circuit court. Similarly, although Defendant's corporate representative testified generally that arbitration was good at resolving disputes, he could not explain the rules applicable to arbitrations and he could not justify his company's claim that individual arbitration would be more efficient at resolving disputes. At the trial court level, all evidence in this case points to the fact that A) Defendant's class action waiver immunizes Defendant, and B) the purported "efficiencies" of Defendant's arbitration clause were not the real reason Defendant imposed its arbitration clause on its customers. There is no evidence suggesting otherwise.

Defendant cannot point to any expert, any document, or any resolved claim to suggest that its arbitration clause efficiently resolves claims. To the contrary, the evidence before the trial court proved that Defendant's clause functioned as an anti-

arbitration clause and that it has completely prevented the resolution of any customer claims. As such, the undisputed facts of this case establish that Defendant's arbitration clause strips consumers of all remedies.

Defendant's arbitration clause is nothing like AT&T's arbitration clause, which essentially guaranteed efficient resolution of claims. *See AT&T*, 131 S. Ct. at 1745, 1753. The analysis in *AT&T* promotes the enforcement of arbitration clauses that expedite resolution of claims and it prohibits the application of *per se* rules that would strike class arbitration waivers in every case, but nothing in the *AT&T* decision can be read to require the enforcement of a clause that bars the resolution of claims, flies in the face of the Federal Arbitration Act (FAA), and runs afoul of established, general contract law in Missouri. *See, e.g., id.* at 1749 (holding that one of the primary goals of the FAA is to promote 'efficient and speedy dispute resolution' (internal quotation omitted)).

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

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

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

4. Reading *AT&T* to require reversal in this case would require reading *AT&T* to produce a special body of law applicable only to arbitration clauses, in direct violation of the text of *AT&T* requiring arbitration clauses be put on “equal footing” with all other contracts. It would also require this Court to enforce arbitration clauses that prohibit resolution of claims, despite *AT&T*’s extortion that the purpose of the FAA is to resolve disputes expeditiously.
5. Missouri law regarding exculpatory clauses is unaffected by *AT&T*, and the clause at issue has found to be an ambiguous, unenforceable exculpatory clause. (This point is addressed in response to Appellant’s Point III, found in Section IV.)

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

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

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

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

Since Justice Thomas was appointed to the United States Supreme Court in 1991, the Court has on five occasions — *Allied-Bruce*, *Doctor’s Ass’ns, Inc. v. Casarotto*, 517 U.S. 681 (1996), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), *Buckeye Check Cashing, Inc. v. Carhegna*, 546 U.S. 440 (2006), and *Preston v. Ferrer*, 552 U.S. 346 (2008) — confronted the question of whether the FAA applies to cases arising in state court. In every single one of those cases, Justice Thomas reiterated his views that it does not. In *Doctor’s Associations*, for example, the Court held that the FAA preempted a

Montana law which required contracts to contain a notice, in underlined and capital letters on the first page, that the contract was subject to arbitration. 571 U.S. at 683. In the absence of such a notice, the arbitration provision would not be enforced. *Id.* Justice Thomas dissented on the grounds that “Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, does not apply to proceedings in state courts.” *Id.* at 689 (Thomas, J., dissenting). Similarly, in *Preston*, the Court held the FAA preempted a California statute that would refer certain disputes first to an administrative agency. 552 U.S. at 349–50. Justice Thomas’s dissent hinged on his view that the FAA does not apply in state court and, therefore, “in state-court proceedings, the FAA cannot displace a state law that delays arbitration until administrative proceedings are completed.” *Id.* at 363 (Thomas, J., dissenting); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J., dissenting) (because the FAA does not apply in state courts, “in state-court proceedings, the FAA cannot be the basis for displacing a state law that prohibits enforcement of an arbitration clause contained in a contract that is unenforceable under state law”); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (Thomas, J., dissenting) (because FAA does not apply in state courts, FAA cannot preempt state court’s interpretation of arbitration agreement).

In short, Plaintiff urges this Court to consider this hypothetical: If this case had reached the U.S. Supreme Court, would that Court preempt the trial court ruling based on the FAA or would it strictly follow Missouri law? This Court should assume that Justice

Thomas meant what he has written on five separate occasions and that the FAA does not extend to proceedings in state court.

The Court in *AT&T* also had no occasion to consider the extent to which its rule applied in a state-court proceeding and cannot be read to govern a state case. When the Court makes a “judicial pronouncement,” that pronouncement’s value comes from “the settling of some dispute which affects the behavior of the defendant towards the plaintiff.” *Hewitt v. Helms*, 482 U.S. 755, 762 (1987). Put another way, the *AT&T* decision should be understood as a pronouncement that extends only to the context of that particular case, a case litigated in federal court. That the “*Discover Bank* rule is preempted by the FAA” should be interpreted to mean only that the *Discover Bank* rule is preempted by the FAA in federal court. So long as one takes Justice Thomas at his consistent and repeated word, it follows that he would not have voted the way he did had *AT&T*, like this case, arisen in a state court. *Cf. United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 725 (7th Cir. 2006) (per curiam) (examining Supreme Court plurality opinion to predict outcomes based on likely vote of Justice Kennedy); *Jacobsen v. U.S. Postal Serv.*, 993 F.2d 649 n.2 (9th Cir. 1992) (counting votes to consider whether “the Supreme Court would have five votes for holding a post office is a nonpublic forum”).

It is this Court’s job to determine how *AT&T* would impact *Brewer I*, and it is clear that Judge Thomas would not apply *AT&T* to state court proceedings. It is also indisputable that the four justices who dissented in *AT&T* would not overrule *Brewer I*.

For these reasons, this Court should hold that AT&T's ruling cannot be read to impact *Brewer I* in any way.

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

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

a. The Essential Facts of *AT&T*

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

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

If these three factors are present, the *Discover Bank* rule nonetheless requires the clause to be invalidated, even if the clause is good for individual consumers and encourages the effective resolution of claims. *Id.*

The fact that the *Discover Bank* rule allowed courts to invalidate clauses that encouraged resolution of claims and adequately attracted counsel is the central difference between *AT&T* and Missouri’s case-by-case approach, which, unlike the *Discover Bank*

rule, is governed by general principles of contract law. While the *AT&T* clause was uniquely inviting to consumers, the one here discourages any resolution of consumer disputes.

The *AT&T* arbitration clause provided for a fast and simple dispute resolution system by providing a form on the AT&T website that consumers filled out to lodge a complaint. *Id.* at 1744. If the claim was not resolved within 30 days for any reason, including the consumer's belief that the offer by AT&T was not fair, that consumer could demand arbitration. *Id.* The arbitration demand form was available on the AT&T website and AT&T was obligated to pay all costs of arbitration in all cases, unless they were found to be frivolous. *Id.* Arbitration was required to occur in the county where the plaintiff resided, and in any claim under \$10,000, the customer had the right to choose the form of the arbitration (in person, on phone, by paper). *Id.* AT&T gave up any right to seek attorney fees no matter what outcome was reached, and if the arbitrator issued an award that was greater than AT&T's last offer to settle the case, AT&T was required to pay \$7,500 to the consumer. *Id.* As an additional perk, AT&T was required to pay double attorney fees. *Id.* In the trial court, AT&T even introduced a factually undisputed expert attorney affidavit establishing that its clause would help people find representation and that the clause was fair.

In *AT&T*, the district court's *factual* findings were overwhelmingly in favor of AT&T's clause. Among other things, the court found the clause was "quick, easy to use" and it encouraged "prompt[t] full or...even excess payment to the customer *without* the

need to arbitrate or litigate.” *Id.* at 1745 (quoting *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2008 WL 5216255, at *11 (S.D. Cal. Aug. 11, 2008) (emphasis in original)). The potential \$7,500 award was a “substantial inducement for the consumer to pursue the claim in arbitration,” and consumers who were members of the class would probably be worse off than in individual arbitration. *Id.* at 1745 (quoting *Laster*, 2008 WL 5216255, at *11–*12). Despite the conclusion that the clause encouraged resolution of claims, the district court struck the clause entirely, applying the mechanical, inflexible *Discover Bank* rule. *Id.*

b. The Stark Differences Between *Brewer I* and *AT&T*

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

Some of our opinions mean less than a lot of people think. What do I mean by that? This is so for several reasons...Our opinions focus on, primarily,

on deciding the case at hand, so the majority that endorses the opinion and the rule that's set out in the opinion necessarily believes that that rule is the right one for that case and it governs that case but the agreement among members of the majority may not actually extend a lot further than the ground that is actually covered in the opinion, and if you read more into it, if you read it as having a much broader application, you may or may not be correct.⁹⁷

As Justice Alito suggested, and the law requires, *AT&T* must be read as a case decided only on the facts before it. To read it instead as a general rule that all companies may now prohibit class actions in all settings, regardless of state law, would mean that the saving clause in the FAA is now superfluous. It would also mean that a case discussing the interplay of federal law and a California-specific rule somehow applies to the State of Missouri. Such a reading also suggests that there is only a federal body of law pertaining to the enforceability of arbitration clauses rather than recognizing the fact that, by its own terms, the FAA subjects arbitration clauses to the varying laws of the varying states.

The specific text of Justice Scalia's majority opinion in *AT&T* and the text of the FAA itself ("save upon such grounds as exist at law or in equity for the revocation of any

⁹⁷ The recording of this speech is publicly available at

<http://www.youtube.com/watch?v=BvCLi7EMlwo>. The comments cited here begin around minute and second marker 1:42.

contract”) both require arbitration clauses to be subject to Missouri law. 9 U.S.C. § 2. Nothing in *AT&T* undoes that well-established tradition. As such, this Court’s analysis in *Brewer I* must stand so long as this Court’s conclusions were based on the record before it and based upon the application of general Missouri contract law, rather than based on a mechanical test such as the one articulated in *Discover Bank*.

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

Unlike *AT&T*, the decision in *Brewer I* was tailored to the evidence in the record and the specific terms of the arbitration clause. Unlike *AT&T*, *Brewer I* did not dismantle a clause guaranteed to produce efficient resolution of claims. Instead, *Brewer I* promoted the resolution of claims and was based on two long-standing bodies of contract law: 1) Missouri’s rule has long been that some clauses are so one-sided, so shocking in their impact on rights, that they will not be enforced because they are unconscionable; and 2) if a contract functions to exculpate, it may be enforced, but only if it is clear and unambiguous in describing the release of claims. In short, this Court’s decision in

Brewer I was based on a factual record and general law, which makes *Brewer I* a far cry from *AT&T*.

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

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

Brewer I, 323 S.W.3d at 21. This is critically important. Even the broadest pronouncements found in the *AT&T* opinion merely prohibit states from “conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.” *AT&T*, 131 S. Ct. at 1744. Missouri has done no such thing. Some class arbitration waivers are enforceable; some are not. Decisions are based on whether a clause strips consumer of a remedy. This comports with the very purpose of the FAA and the mandate of *AT&T*. The mere fact that unconscionability may sometimes result from, or be heightened by, a class waiver is not the same as a *per se* rule conditioning enforceability on the existence or non-existence of such a provision.

Brewer I thus meets the requirement to treat each arbitration clause like any other

contract provision. As a result, *Brewer I* is controlling regarding this case and *Brewer I* requires affirmation of the trial court order striking Defendant's arbitration clause in its entirety.

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

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

. . . [T]he arbitration agreement provides that AT&T will pay claimants a

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

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

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

The more reasonable reading of *AT&T*, then, is that arbitration agreements are enforceable as long as statutory rights can be enforced; this principle remains good law and it continues to serve as a check on questionable arbitration clauses.

Brewer I and this case are different from *AT&T* in another critical way that relates

to consumers' substantive rights. The *AT&T* Court did not consider the import of a substantive state statute that included the right to a class action in the statutory text. This situation pertains to Missouri because the state Merchandising Practices Act (MPA) grafts a class action right into its text. Mo. Rev. Stat. § 407.025.2 (2010). Since there is a federal requirement that parties must be able to vindicate their statutory rights, and because a Missouri statute specifically contemplates class actions as a necessary tool for validating those rights, it stands to reason that any contract that strips a party of the right to a class action cannot stand.

Despite the fact that the Missouri and Federal Rules of Civil Procedure already provided for class actions, the MPA was written specifically to include the right to bring class cases. Mo. Rev. Stat. § 407.025.2 (2010). It incorporates the standards from the civil rules right into the statute. Mo. Rev. Stat. § 407.025.3 (2010). In fact, the title of the section granting a private right of action under the MPA is titled, "Civil Action to Recover Damages – Class Action Authorized – When – Procedure." Mo. Rev. Stat. § 407.025 (2010). The Act states in pertinent part:

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

Mo. Rev. Stat. § 407.025.3 (2010).

The inclusion of a private right to bring a class claim can only be read to

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

In short, Chapter 407 [the MPA] is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection. Furthermore, the very fact that this legislation is paternalistic in nature indicates that it is fundamental policy: a fundamental policy may be embodied in a statute which ... is designed to protect a person against the oppressive use of superior bargaining power.

Id. at 725–26 (quoting *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d

493, 498 (Mo. banc 1992) (internal quotation omitted).

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

A Michigan federal court found this argument compelling:

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

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

Further, even if the class action right were not grafted into the MPA or if it were read to be procedural in nature, the fact that a class action can be essential to being able to bring a claim at all is not novel. The United States Supreme Court noted that, "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617

(1997). As such, the right to a class action can be inextricably intertwined with substantive rights, making it essential to an individual's ability to pursue a remedy. The evidence in this case makes clear this is true in this case.

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

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

D. Reading *AT&T* Broadly Would Lead to Absurd Real-World Results.

In this case, Plaintiff fully expects Defendant to argue that *AT&T* preempts *Brewer I* and that this Court is now barred from finding arbitration clauses to be unconscionable when they prohibit class actions, even if it is clear such a prohibition would strip consumers of all remedies at law. It is important to note that this Court ruled for the *Brewer I* Plaintiff based on two grounds: unconscionability and improper exculpatory clause.⁹⁸ Thus, to prevail based upon an ultra-broad reading of *AT&T*, Defendant would also need to argue that although *AT&T* does not even address exculpatory clauses like

⁹⁸ *Brewer I*, 323 S.W.3d at 24.

those found in both this case and *Brewer I*, *AT&T* preempted that defense too. It is important to consider the ramifications of such an absurdly broad reading.⁹⁹

1. Enforcing the Clause at Issue in *Brewer II* and in this Matter Would Violate the Essential Purposes of the FAA.

Although Defendant is likely to argue the FAA requires the enforcement of the class action waiver and the arbitration clause in which it is contained, this would work an untenable result. In actuality, the FAA requires the striking of the arbitration clauses in *Brewer II* and this case.

As discussed above, nothing should be done by any court that is inconsistent with the purpose of the FAA. A primary purpose of the FAA is to enforce arbitration agreements as written. However, this purpose is clarified immediately by the majority in *AT&T*. The majority makes clear that clauses are enforced as written when it will promote “expeditious results.” *AT&T*, 131 S. Ct. at 1749. Justice Scalia’s opinion makes this clear, going so far as to quarrel with the dissent (who argued that expeditious resolution of claims was not a fundamental purpose of the FAA):

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

⁹⁹ This issue of exculpatory clauses is discussed in more detail in Plaintiff’s response to Point III of Defendant’s Brief (Section IV of this Brief).

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

With this in mind, it is easy to see why Justice Scalia held as he did in *AT&T*. The *AT&T* clause undisputedly encouraged efficient resolution of disputes, so striking it would have done harm to the general purpose of the FAA (enforcing arbitration clauses to encourage resolution of claims). Justice Scalia concluded that no state law could contravene this general purpose of the FAA. The final sentence in his majority opinion is enlightening in this regard:

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

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

No one, including the majority in *AT&T*, has ever asserted that the purpose of the FAA was to help companies avoid resolving disputes. Therefore, in addition to the fact

that the Missouri Title Loans clause at issue ran afoul of general state law (and was therefore invalid under the saving clause to the FAA), that clause also ran afoul of the essential purpose of the FAA, rendering it doubly unenforceable.

Put even more simply, both the primary purpose of the FAA and the FAA savings clause (Section 2) commanding the application of general state law require that the arbitration clause in this matter, as well as the clause in *Brewer*, be struck because they deny remedies in direct violation of the holding in *AT&T*. It is consistent with, and in fact required by, the text of the FAA and *AT&T* that the moment an arbitration clause ceases to promote resolution of disputes, and instead—in and of itself—eliminates the advantages of arbitration, it cannot be enforced. That is what this Court held in *Brewer I*, and that is what this Court should hold both in this case and in *Brewer II*.

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

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

If a contract with no arbitration clause included a class action waiver in a setting where its inclusion prevented resolution of claims, it would be unenforceable under the

rationale in *Brewer I*. However, if the party took the identical clause and moved it into the arbitration clause, it would suddenly become enforceable. Justice Scalia certainly could not have meant that companies can avoid state law entirely, simply by slipping otherwise impermissible clauses into the body of the arbitration agreement. If this were the case, why would Justice Scalia write that arbitration clauses are to be on equal footing with other contracts? *AT&T*, 131 S. Ct. at 1745 (stating that “courts must place arbitration agreements on an equal footing with other contracts”).

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

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

If *AT&T* is read to preempt general state contract law in almost all settings,

however, Section 2 of the FAA would be turned upside down. Instead of arbitration clauses being subject to state law, state law would be subject to almost always enforcing arbitration clauses. What is clearly “anti-preemptive” language in the saving clause would somehow be read to indicate an intent to preempt state law. Such a result is nonsensical and it is unsupported by law. It is also worth noting that to read the FAA to preempt expansively the ability of states to regulate their own affairs seems wildly inconsistent with many opinions issued by judges in the majority in *AT&T*.

In fact, this reading is inconsistent even with the language of *AT&T*, which carefully narrows its impact on the saving clause in holding only that the saving clause cannot be “construed as allowing a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act.” *AT&T*, 131 S. Ct. at 1748 (internal quotation omitted). The common law, statutory, and constitutional right to a remedy can hardly be read to be “inconsistent with the provisions of the act.” *Id.* (internal quotation omitted).

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

It is clear that Justice Scalia was gravely concerned that the *Discover Bank* rule was only a thinly veiled attack on arbitration, spending a full page discussing other ways a state might attempt to disguise hostility for arbitration. *See id.* at 1747. He suggests that states might concoct facially neutral rules (such as suggesting it is unconscionable to deny access to federal rules of civil procedure or requiring a panel of twelve arbitrators) in order to attack arbitration clauses. *Id.* Scalia rightfully points out that these concocted reasons would serve to eviscerate arbitration agreements entirely. *Id.* at 1748. He concludes the *Discover Bank* rule is not very different from these concocted ways to invalidate arbitration clauses. *Id.*

The case now before this Court is vastly different. This Court cannot possibly be accused of concocting a new rule designed to attack arbitration clauses. The principles in *Brewer I* were sound, and they were general contract law. They do nothing to threaten the core principles of arbitration. As a result, *Brewer I* is well-reasoned, good law, and in should be affirmed. Such an analysis also requires affirmation of the trial court in this matter.

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

The *AT&T* Court discusses reasons why a party could not be required to class arbitration (lack of appeal, lack of qualification of arbitrators, pressure to settle, etc.). *AT&T*, 131 S. Ct. at 1751–52. The majority concludes from this discussion that requiring class arbitration would be unfair to a defendant in a class action. *Id.* at 1752. This

concern does not arise in this case. Nothing in this Court's decision in *Brewer I* or the trial court's order in this matter would require parties to class arbitration. Instead, when any contract (arbitration or not) would prevent a party from vindicating his or her statutory rights, *Brewer I* stands for the proposition that the case must proceed in court. There, the defendant's rights are protected via procedural safe guards, trained judges, and the right to appeal; likewise, the plaintiff's right to a remedy for illegal acts is also protected.

II. RESPONSE TO POINT I: THE DEFENDANT'S ARBITRATION CLAUSE IN THIS CASE IS PROCEDURALLY UNCONSCIONABLE.

Following the holdings of *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005) and *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 94 (Mo. Ct. App. 2008), *Brewer I* enumerated various indicia of procedural unconscionability. "Procedural unconscionability relates to the formalities of the making of an agreement and encompasses, for instance, fine print clauses, high pressure sales tactics or unequal bargaining positions." *Brewer I*, 323 S.W.3d at 22.

In this case, numerous indicia of procedural unconscionability existed. They have been set forth in the Supplemental Statement of Facts (Items 7, 8, 10, 11, 12, 13, 14, 15, 17, 18, and 20). These factors include the unequal bargaining power of the parties, the fine print, and text that is incomprehensible to average consumers. The existence of this

considerable evidence disproves Defendant's claim that there was "no basis" for holding that Defendant's arbitration agreement was procedurally unconscionable."¹⁰⁰

Strangely, Defendant argues that its class waiver was set out in adequate font when, in reality, the font was tiny.¹⁰¹ Defendant also argues that the contract in *Woods* was different in that the *Woods* agreement was "illegible and buried in fine print."¹⁰²

Plaintiff would ask the Court to consider, however, that Defendant's arbitration provisions consist (beginning on the fourth paragraph of the second page of its contract) of more than 750 words crammed into about ¾ of one side of paper. Consumers would need to trudge through four daunting paragraphs of legalese before reaching the class waiver; the second paragraph alone contains a single sentence that is more than 180 words long. There is no better tactic than concocting sentences like this to convince reasonable consumers to stop reading fine print.

Defendant's font and word spacing are absolutely comparable to the boilerplate provisions in the *Woods* contract and *Brewer*. If double-spaced at 13-point font (this Court's reasonable formatting requirements), Defendant's ¾ page of boilerplate would require three full sheets of paper.¹⁰³ One need not wonder how any appellate court would

¹⁰⁰ Def.'s Br. 24–27.

¹⁰¹ Def.'s Br. 27, 46.

¹⁰² *Id.*

¹⁰³ *Id.*

respond had Defendant filed its appellate briefs using the miniscule formatting that it used for its arbitration clause.

Plaintiff would point out that Defendant's presentation in its Brief (at page 50), entirely consistent with this Court's formatting rules, appears much like this:

FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS PERTAINING TO ANY DISPUTE SUBJECT TO ARBITRATION.

This formatting is a far cry from the formatting found in Defendant's arbitration clause. Defendant's presentation of this above information to its customers looks like this:

that would extend to any loan other than your own.

BY, AGREEING TO ARBITRATE ANY DISPUTE, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT DISPUTE IN COURT, OR TO HAVE A JURY TRIAL ON THAT DISPUTE, OR ENGAGE IN DISCOVERY PROCEEDINGS EXCEPT AS PROVIDED FOR ABOVE OR IN THE ARBITRATION RULES. FURTHER, YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS PERTAINING TO ANY DISPUTE SUBJECT TO ARBITRATION. THE ARBITRATOR'S DECISION WILL BE FINAL AND BINDING, EXCEPT TO THE EXTENT IT IS SUBJECT TO REVIEW IN ACCORDANCE WITH APPLICABLE LAWS GOVERNING ARBITRATION AWARDS, OTHER RIGHTS THAT YOU OR WE WOULD HAVE IN COURT MAY ALSO NOT BE AVAILABLE IN ARBITRATION.

All statute of limitations that are applicable to any Dispute shall apply to any arbitration between you and us.

Defendant stresses that its agreement contained some provisions that were in bold and all-caps.¹⁰⁴ This is true, but this is no different than the *Woods* agreement. Plaintiff invites this Court to judge for itself whether the use of some bold formatting and capital letters make Defendant's agreement legible or understandable. Consumer attorney Bernard Brown, who has spent almost 30 years reading contracts with consumers,

¹⁰⁴ Def.'s Br. 46.

testified regarding these issues and his testimony was admitted into evidence. This Court may also wish to compare the clause at issue with the *Brewer I* clause and the *Woods* arbitration clause, part of the public record of the Missouri Court of Appeals for the Eastern District.¹⁰⁵

In another puzzling part of its Brief, Defendant argues that the trial court ruled against Defendant because Defendant's class waiver was allegedly part of an "adhesion contract" and the trial court held it made the contract *per se* unconscionable.¹⁰⁶ Although the trial court suggested that Defendant's contract was an adhesion contract, the court specifically added that "contracts of adhesion are not automatically unenforceable."¹⁰⁷

An adhesion contract is:

[A] standardized contract form offered to consumers of goods and services on essentially a 'take it or leave it' basis without affording the consumer a realistic opportunity to bargain and under such conditions that the consumer cannot obtain the desired product or services except by acquiescing in the form of contract...[T]he distinctive feature of a contract of adhesion is that the weaker party has no realistic choice as to its terms.

Woods, 280 S.W.3d at 96 (internal quotations omitted).

¹⁰⁵ See L. F. 140–41 of *Woods v. QC Fin. Servs.*, 280 S.W.3d 90 (Mo. Ct. App. 2008), reprinted in Pl.-Resp't App. 3.

¹⁰⁶ Def.'s Br. 22–23.

¹⁰⁷ L. F. 1220.

Defendant argues that adhesion contracts involve unequal bargaining power of a large corporation versus an individual and are often presented in pre-printed form contracts.¹⁰⁸ That is exactly right and that is one principal reason for concluding that Defendant's contract is an adhesion contract. The trial court made a specific finding that there was "unequal bargaining position between the parties."¹⁰⁹ Defendant's contract was also an adhesion contract because it was a "take it or leave it" pre-printed form contract.

The trial court's holding, that procedural unconscionability was present and served at least as a partial basis for considering the clause unconscionable, is consistent with this Court's holding in *Brewer I*. "Under Missouri law, unconscionability can be procedural, substantive or a combination of both." *Brewer I*, 323 S.W.3d at 22. To reach its conclusion, the trial court relied on a record packed with additional evidence of procedural unconscionability, as identified in detail in the Supplemental State of Facts.¹¹⁰

Defendant persists, however, arguing that its contract was not an adhesion contract because Plaintiff could have borrowed money from other establishments.¹¹¹ This argument does not fly. *Brewer* expressed no such test, nor did *Woods* before it. Further, given the ubiquitous nature of arbitration cases before this Court and appellate courts in

¹⁰⁸ Def.'s Br. 26.

¹⁰⁹ L. F. 1221.

¹¹⁰ See *infra* Supplemental Statement of Facts, Items 6, 7, 8, 9, 10, 11, 13, 14, 17, 18, and 20.

¹¹¹ Def.'s Br. 24.

this state, it stretches reality to suggest consumers have meaningful choice in the market place. In addition, the record indicates that payday lenders, and some of other lenders patronized by Plaintiff also used similar arbitration clauses.¹¹²

III. RESPONSE TO POINT II: SUBSTANTIVE UNCONSCIONABILITY

This Court will decide how to measure the procedural unconscionability, but one cannot help but wonder how this class action waiver could stand, even if Defendant were not a payday lender, even if the clause were not in fine print, even if it were not non-negotiable and even if the class waiver were not standard fare for the payday loan industry. In such a situation, there would still be tremendous substantive unconscionability. As this Court ruled in *Brewer I*, substantive unconscionability alone has invalidated arbitration clause provisions. “Under Missouri law, unconscionability can be procedural, substantive or a combination of both.” *Brewer I*, 323 S.W.3d at 22; *see also Vincent v. Schneider*, 194 S.W.3d 853, 858–61 (Mo. banc 2006) (in which the court first held that the contract was not an adhesion contract and then struck a substantively unconscionable provision).

A. The Arbitration Clause at Issue Is Substantively Unconscionable.

Defendant claims there is no credible evidence that Defendant's agreement was substantively unconscionable. Defendant's statement would be true only if one ignores hundreds of facts, a full-day hearing full of evidence, expert testimony, Defendant's own admissions, and the perfect parallels of this case to *Brewer I* and *Woods*.

¹¹² Tr. 100.

Substantive unconscionability refers to the undue harshness in the contract terms themselves. *Brewer I*, 323 S.W.3d at 22; *Woods*, 280 S.W.3d at 96. As evidenced in *Brewer I*, *Woods*, and *Whitney*, 173 S.W.3d at 314, Missouri appellate courts look to the real-world effects of arbitration clauses. In this case, Defendant’s arbitration clause attempts to immunize Defendant by attempting to prevent customers from having meaningful resolutions of their claims. *Brewer I*, 323 S.W.3d at 23. Defendant requires customers to litigate their small-damage claims individually, one-by-one, but no customer would ever attempt to litigate any such claim because no individual claim is of sufficient heft to attract the services of an attorney or to justify the expense in terms of time and money spent by the would-be plaintiff. Defendant’s arbitration clause is also substantively unconscionable because it reduces the possibility that victimized consumers can find attorneys even when attorney fees are available. *Brewer I*, 323 S.W.3d at 23–24; *Woods*, 280 S.W.3d at 97–98.

Defendant’s discussion of the availability of remedies in its clause is much ado about nothing.¹¹³ The clause at issue in *Brewer I* did not limit substantive remedies explicitly, yet it was struck. Similarly, even after specifically recognizing that the *Woods* arbitration provision did not limit the customers’ substantive remedies in arbitration, the Eastern District Court of Appeals struck the class waiver. *Woods*, 280 S.W.3d at 97. This was a reinforcement of a principle adopted by the *Whitney* court: “[A]n arbitration clause

¹¹³ Defendant sets forth the purported availability of remedies from its arbitration clause at page 32–33 of its Brief.

that defeats the prospect of class-action treatment in a setting where the practical effect affords the defendant immunity is unconscionable.” *Whitney*, 173 S.W.3d at 308 (Mo. Ct. App. 2005) (citing *Leonard v. Terminix International Company, L.P.*, 854 So.2d 529, 536 (Ala. 2003)); *see also Brewer I*, 323 S.W.3d at 23–24. Many cases from jurisdictions outside of Missouri have used similar reasoning to invalidate class waivers in arbitration clauses.¹¹⁴

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

One additional aspect of substantive unconscionability deserves special treatment. In the absence of a class case, notice and the opportunity for remedies for other class members are non-existent. This is true because even if one assumes that consumers are sufficiently zealous to file lawsuits based on amounts ranging from a few hundred to a few thousand dollars each and even if they can find lawyers to indulge them, they would still be unlikely to bring these claims because the claims are opaque to most consumers. Payday lending statutes are rare reading for lawyers, much less the average consumer. For this reason, Defendant’s prohibition of class proceedings hurts consumers in yet

¹¹⁴ For example, *see Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006); *Kinkel v. Cingular Wireless* 857 N.E.2d 250 (Ill. 2006); *Cooper v. QC Fin. Servs., Inc.*, 503 F.Supp.2d 1266 (D. Ariz. 2007); *Vasquez v. Beneficial Oregon*, 152 P.3d 940 (Or. App. 2007); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005); *Tillman v. Commercial Credit Loans*, 655 S.E.2d 362 (N.C. 2008); *Fiser v. Dell*, 188 P.3d 1215 (N.M. 2008); *Feeney v. Dell, Inc.*, 98 N.E.2d 753 (Mass. 2009).

another way: it prevents consumers from learning that their rights are being violated. As indicated by the expert witnesses in this case, consumers have an extraordinarily difficult time trying to understand contracts such as Defendant's or the fact that the contract is illegal.¹¹⁵

Courts have noted this important function, reasoning that “. . . without the availability of a class-action mechanism, many consumer fraud victims may never realize that they have been wronged.” *Muhammad v. County Bank of Rehoboth Beach, Del.*, 912 A.2d 88 (N.J. 2006). The *Woods* court also noted the importance of involving more than the named plaintiff when it spoke of the need for “precedential effect” of dispute resolution and the need for “scrutiny and accountability” that would be destroyed without the possibility of class proceedings. *Woods*, 280 S.W.3d at 98. This language contradicts Defendant's assertion that class proceedings are not necessary for purposes of providing notice to and representation for other potential claimants.¹¹⁶

This Court has been equally skeptical of placing the burden on consumers to recognize complicated forms of illegal activity. In *Eisel*, the Court noted:

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

Eisel v. Midwest Bankcentre, 230 S.W.3d 335, 339 (Mo. banc 2007). Allowing class

¹¹⁵ Brown Dep. 109–111 (L. F. 533–536).

¹¹⁶ Def.'s Br. 20.

arbitrations (which include notice to the entire class) provides a remedy for this knowledge deficit, allowing consumers to learn that their rights were violated.

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

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

The fundamental nature of a due process right to a jury trial demands that it be protected from an unknowing and involuntary waiver. The standard that is universally applied to prevent overreaching and to protect against unequal bargaining positions requires that the trial court determine whether the waiver was knowingly and voluntarily or intelligently made....Additionally, the courts have examined the following factors: negotiability of the contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision. Having determined that a party may contractually waive its right to a jury trial, it remains to be determined whether the defendant did so knowingly and voluntarily under

the facts of this case or whether there was an overreaching as a result of unequal bargaining positions.

Id. (internal citations omitted).

In this case, the trial court held that Defendant has disparate bargaining power compared to its customers, and that there was overreaching by the Defendant. The parties before this Court were not “commercial entities at arm’s length,” such that a fine-print clause on the back of a lengthy contract could be deemed to constitute a waiver of right to a jury. As the trial court stated:

The Court finds that there was an unequal bargaining position between the parties when the underlying contract was entered into, and the terms of the Arbitration Clause are unduly harsh and not commercially reasonable in the prohibition of class actions and the ability to arbitrate as a class.¹¹⁷

Consequently, a commercial lender’s use of fine print and buried contract terms to deprive customers of jury trials constitutes yet another instance of substantive unconscionability.

¹¹⁷ L. F. 1221 (Mar. 13, 2009 Trial Court Order at 13).

D. Additional Points Requiring Response

Defendant has raised several additional arguments that Plaintiff will briefly address in this section, as they generally relate to substantive unconscionability.

1. Defendant's Misleading References to Three Federal Cases

At page 47 of its Brief, Defendant argues that three federal cases from the U.S. District Court for the Eastern District of Missouri made rulings that now require this Court to uphold the use of Defendant's class waiver in this case. Defendant wrote:

Thus, for Respondent to prevail with her unconscionability challenge, there would have to necessarily be a finding that three separate federal judges each, independently, misconstrued the law of unconscionability in Missouri.¹¹⁸

The issues considered by these three federal courts not only have no bearing on this case but have been grossly mischaracterized by Defendant. It is improper for this statement to appear in a brief filed with this Court. Not even one of the three federal cases considered any aspect of unconscionability. Not one of them even *mentioned* "unconscionable" or "unconscionability." Not one of these cases considered whether the

¹¹⁸ Def.'s Br. 48. The three federal cases cited by Defendant are *Morrow v. Soeder*, Case No. 4:06-CV-01243-DJS, Order dated Oct. 3, 2006 (E.D. Mo.), *reprinted in* L. F. 730–735; *Nichelson v. Soeder*, Case 4:06-CV-01403-MLM, Order dated Oct. 27, 2006 (E.D. Mo.) *reprinted in* L. F. 736–742; and *Layden v. Soeder*, Case 4:06-CV-01173-CEJ, Order dated Dec. 18, 2006 (E.D. Mo.), *reprinted in* L. F. 743–748.

arbitration clause in question had a *class waiver*. Defendant is attempting to base its arguments on things federal judges *never said* in an attempt to gain an unfair advantage in this appeal. These three federal cases considered whether the defendant *waived arbitration*; they did not consider the entirely separate issue of the validity of a class-action waiver.

2. The Missouri Division of Finance Did Not Give Defendant a Clean Bill of Health

Defendants argues that its loan agreements were allegedly “approved by the Missouri Division of Finance”¹¹⁹ and that Division of Finance (DOF) periodically audited Defendant, as though any DOF involvement is a *per se* determination that Defendant is not defrauding its customers.¹²⁰ This is not the time for Defendant to be making its extensive arguments about the merits of this case.¹²¹

¹¹⁹ Def.’s Br. 2–4.

¹²⁰ Def.’s Br. 40–41.

¹²¹ Defendant argues the merits of the case for the first six pages of its Brief. If this were a proper time to argue the merits, Defendant would have some serious explaining to do, given its blatant admission in open court that the way it handles payday loan renewals is to *merely require its customers to pay the interest*, even though this procedure would constitute a *per se illegal* renewal. Defendant also admitted that customers qualified for payday loans merely by having a checking account, which would be a violation of Mo.

In making the argument that DOR involvement assures full compliance with the law, Defendant fails to explain why the Missouri Legislature passed Mo. Rev. Stat. § 408.562 to provide a private right of action. Despite the efforts of the Division of Finance, Chapter 408's private right of action is very much needed, just as the Merchandising Practices Act, codified as Mo. Rev. Stat. § 407.025 (2010), provides private rights of action to consumers despite the diligent consumer protection work by the Missouri Attorney General. The Division of Finance is only able to check on payday lenders by auditing them once a year for a few hours. There is certainly no evidence before this Court that the DOF noticed, for example, that Defendant was violating its own arbitration clause by suing its own customers in court.¹²² Under Defendant's reasoning, since there is an EEOC, there is no need for discrimination claims; the existence of the FTC should eradicate consumer fraud claims, and the SEC makes securities claims obsolete. Defendant's position would make for empty courts combined with rampant illegality.

Rev. Stat. § 408.500.7 (2010) (requiring Defendant to consider each borrower's ability to repay).

¹²² See *infra* Supplemental Statement of Facts (Facts 34–39).

3. Substantial Evidence Proves the Defendant's Clause Prevented Consumers from Bringing Claims.

Defendant argues that there is no evidence that Defendant's class waiver "prevented consumers from bringing claims against [Title Lenders, Inc.]."¹²³ Defendant makes this unsupported argument in lieu of producing even a single attorney willing to testify that handling these small damages payday loan cases individually would be economically feasible for attorneys. Defendant also makes this argument despite the fact that it has never been sued or been made to face an arbitration.¹²⁴

Plaintiff has produced the highly detailed testimony of two Missouri attorneys who have represented consumers for most of their careers, Dale Irwin and Bernard Brown. Their testimony has been summarized in the *Supplemental Statement of Facts* (this Brief), items 41 through 55. The Defendant fails to dispute the testimony of Mr. Brown and Mr. Irwin with any evidence; instead, it simply pretends that this evidence does not exist or argues that the evidence was not credible.

Mr. Irwin and Mr. Brown both opined that the only realistic way to handle small-value cases like these payday lender cases is as a class proceeding. Mr. Brown and Mr. Irwin also concur that people who are victims of unscrupulous payday lenders have no meaningful recourse whenever they are prohibited from proceeding as a class. Defendant

¹²³ Def.'s Br. 31.

¹²⁴ Kaplan Dep. 88:15-22 (Pl.'s Ex. 7).

argues that Defendant's class waiver is not a "get out of jail free card."¹²⁵ However, according to Mr. Brown and Mr. Irwin, who gave undisputed testimony, that is precisely what the clause is.¹²⁶

Defendant attempts to rebut the testimony of Mr. Brown and Mr. Irwin by calling their testimony self-serving, unverifiable and un-testable.¹²⁷ Yet, they offer no testimony of their own. Plaintiff disagrees with these arguments. The experience of Plaintiff's experts in representing consumers and their familiarity with the practices other consumer attorneys in Missouri bear directly on their factual observations and their conclusions. This factual basis for their expert testimony was gained first-hand by Mr. Brown and Mr. Irwin, and this sort of information is clearly a proper foundation for these sorts of expert opinions pursuant to Mo. Rev. Stat. § 490.065.3 (2010). The trial court admitted their testimony for this reason.

Defendant argues that the opinions of Mr. Brown and Mr. Irwin did not take into account the effect of fee-shifting statutes.¹²⁸ This claim is not true.¹²⁹ If Defendant really believes that the fee-shifting provision of the MPA allows Missouri attorneys to represent payday customers, Defendant should have called at least one attorney who makes a living

¹²⁵ See Def.'s Br. 47.

¹²⁶ Brown Dep. 6:19–17:7 (Pl.'s Ex. 6).

¹²⁷ Def.'s Br. 30–34, 42–43.

¹²⁸ Def.'s Br. 37.

¹²⁹ See *infra* Item 48 in the Supplemental Statement of Facts.

suing payday lenders or handling similar small-damage consumer claims. It did not any such attorneys as witness, likely because it could not find any attorney who was willing perjure himself or herself.

In general, Defendant's attacks on Dale Irwin and Bernard Brown are simply continuations of Defendant's demonstrably false attacks on these two honorable men set forth and disproven in the trial court.¹³⁰ They are in direct conflict with this Court's reliance on Mr. Irwin and Mr. Brown's opinions in *Brewer I* (323 S.W.3d at 23) and they should be soundly rejected.

IV. RESPONSE TO POINT III — EXCULPATORY CLAUSES

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

This is true because, on an entirely separate ground raised by Defendant Missouri Title Loans in an entirely separate point on appeal in *Brewer I*, this Court held that the

¹³⁰ In the trial court, Defendant attacked Mr. Brown and Mr. Irwin for their handling of the "Fields" class action (Tr. 228), yet the presiding trial judge and the mediator (a retired federal judge) praised them for their admirable work and the terrific result they achieved (*See* L. F. 402–404).

arbitration clause failed because it was exculpatory but failed to clearly say so. This judicial reasoning is completely sound, and it could never be criticized as being based on law specific to arbitration clauses. The law requiring exculpatory clauses to be clear, conspicuous and unambiguous dates back at least 100 years and has been applied almost exclusively in general contract cases.

The law relating to exculpatory clauses is ancient and settled. It could never be suggested that it is unique to arbitration clauses or that the application of the law in *Brewer I* was somehow different from the application of the law to other contracts for more than one hundred years. See, e.g., *Phoenix Assur. Co. of N.Y. v. Royale Investment Co.* 393 S.W.2d 43, 47 (Mo. Ct. App. 1965); *Meyer Jewelry Co. v. Prof'l Building Co.*, 307 S.W.2d 517, 520–21 (Mo. Ct. App. 1957); *Thomas v. Skelly Oil Co.*, 344 S.W.2d 320, 322 (Mo. Ct. App. 1960) (“the contract before us does not clearly and in unequivocal terms provide that defendant shall be indemnified or saved harmless from liability resulting from its own negligence”); *Hartman v. Chicago, B. & Q.R. Co.*, 182 S.W. 148, 151 (Mo. Ct. App. 1915) (noting that “court look with extreme disfavor upon forfeitures designed to destroy valuable rights bought and paid for...and will not enforce them unless compelled by the plain letter of the contract”); *Och v. Mo., K. & T. RY. Co.*, 31 S.W. 962 (1895).

This law was reviewed and explicitly laid out in *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 334 (Mo. banc 1996). Although exculpatory clauses in contracts releasing an individual from his or her own future negligence are disfavored, they are not

prohibited as against public policy. *Id.* However, contracts exonerating a party from acts of future negligence are to be strictly construed against the party claiming the benefit of the contract, and clear and explicit language in the contract is required to absolve a person from such liability. *Id.* (internal citations and quotations omitted). It is a well-established rule of construction that a contract provision exempting one from liability for his or her negligence will never be implied but must be clearly and explicitly stated. *Id.* And “there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest. *Id.* This Court concluded that to be enforceable, a clause must be “explicit.” *Id.* at 336. The clause must be “clear, unambiguous, unmistakable, and conspicuous.” *Id.* at 337.

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

In its final point on appeal, Missouri Title Loans argues that the class arbitration waiver is permissible because it functions as an unambiguous exculpatory clause. A defendant cannot exculpate itself from liability unless the language is clear and unambiguous. *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 334 (Mo. banc 1996). Missouri Title Loans asserts that the class arbitration waiver is clear and unambiguous and that the average consumer would understand that he or she is giving up the right to class arbitration. This argument is without merit because the real issue is not whether the consumer realizes he or she is forsaking class arbitration but, instead, is whether the consumer realizes that he or she effectively is bypassing the opportunity to retain counsel to litigate a claim against the lender. The net result is that the class arbitration waiver effectively immunizes the loan company from liability, creating an economic impediment to the consumer's retention of counsel for litigating his or her claim. Nothing in the language of the class arbitration waiver unambiguously informs the consumer that the net result of the waiver is that the lender effectively is immunized from liability. As was the case in *Woods*, the class arbitration waiver here will not be enforced as a valid exculpatory clause.

Brewer I at 24.

Although the title lender in *Brewer I* argued the clause only needed to be clearly

worded regarding the fact that arbitration was required, this Court disagreed. Requiring that a clause be clear about its express terms but do nothing to explain the actual effect of the clause would only encourage creative exculpation. For example, consider a merchant who foisted a contract clause onto its customers requiring that all disputes arising from the transaction “must be resolved in Collin County, Missouri.” The clause reads clearly on its face, and under Appellant’s theory, would be readily enforceable. However, it would guarantee immunity for the defendant if enforced literally, because there is no such place as Collin County, Missouri. Similarly, if a defendant included a clause that indicated that “you must pay \$50,000 to the arbitrator to proceed with any arbitration claim against us,” the express terms would be clear, but it seems far-fetched that any court would enforce such an exculpatory clause.

Under Missouri law, the physical appearance of the clause matters too. What if a party explicitly agreed that it was being released from all claims for negligence arising from a certain activity, but included its provision in three-point font? The clause would be an unenforceable exculpatory clause because, although its language would be clear, it would not be physically conspicuous. Provisions that are not clear and conspicuous are fully capable of tricking even savvy consumers into giving up virtually any legal right, even the right to the protection afforded to consumers by the Missouri legislature.¹³¹

Therefore, arbitration language may not be buried in legalese and jargon. Even those lenders that make some effort to state that arbitration is mandatory have failed to

¹³¹ See, e.g., Merchandising Practices Act, Mo. Rev. Stat. § 407.020 (2010).

make the proper disclosures whenever they fail to explain the real-world effect of their clause: the complete exculpation of the lender. This type of “coded exculpatory clause” is impermissible under Missouri law for the reasons this Court clearly recognized in *Brewer I*.

AT&T has no effect on this holding because *AT&T* did not consider Missouri’s law regarding exculpatory clauses. Although the term “exculpatory” appears in *AT&T*, the trial court had not applied a separate and distinct test (such as Missouri’s test) barring contract clauses for failing to be clear and conspicuous. Instead, the *AT&T* opinion used the term “exculpatory” as a shorthand term referencing unconscionability. *See AT&T*, 131 S. Ct. at 1745. *AT&T* never suggests a clause may run afoul of well-worn contract law, thereby depriving individuals of remedies, and yet remain enforceable. Because the evidence in this case establishes that the arbitration clause at issue was exculpatory, it could only be permissible if it clearly warned consumers that it would be impossible for them to find any way to pursue any claim against Defendant, whether as part of a class or individually. Defendant’s clause in this case did not make it clear that consumers were agreeing to this complete exculpation, and it is unenforceable as a result.

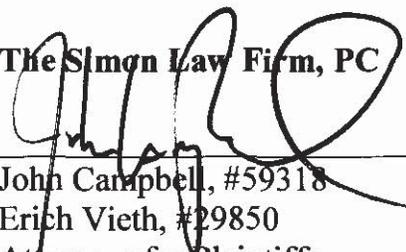
CONCLUSION

For these reasons, enforcement of the arbitration clause at issue would work harm to the essential purpose of the FAA, drastically distort and enlarge the holding of *AT&T*, strip consumers of all meaningful remedies, immunize the defendant, and run afoul of well-established Missouri contract law. As such, the trial court’s January 18, 2011 Order

denying Defendant's Motion to Dismiss and Compel Arbitration in its entirety should be affirmed so that this matter may proceed in the trial court as a putative class action.

The Simon Law Firm, PC

By:


John Campbell, #59318

Erich Vieth, #29850

Attorneys for Plaintiffs

800 Market St., Suite 1700

St. Louis, Missouri 63101

Telephone: (314) 241-2929

Facsimile: (314) 241-2029

CERTIFICATES OF SERVICE, BRIEF FORM AND VIRUS SCANNING

1. A copy of the foregoing was mailed this 6th day of July, 2011 to attorneys for the Appellant:

STINSON MORRISON HECKER LLP
Jane E. Dueker #43156
Cicely I. Lubben #53897
7700 Forsyth Blvd., Suite 1100
St. Louis, Missouri 63105
Phone: (314) 863-0800; Fax: (314) 2863-9388
jdueker@stinson.com
clubben@stinson.com

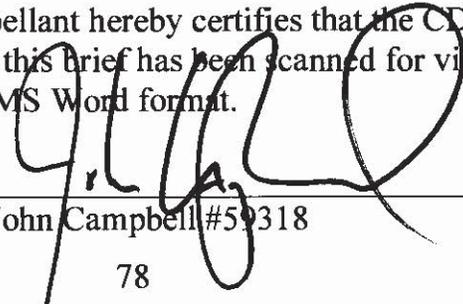
and

Claudia Callaway *pro hac vice*
Katten Muchin Rosenman LLP
2900 K Street NW, Suite 200
Washington, DC 20007-5118
Telephone: 202-625-3590
Fax: 202-298-1120

ATTORNEYS FOR DEFENDANT/APPELLANT TITLE
LENDERS, INC., d/b/a/ MISSOURI PAYDAY LOAN

2. This brief complies with Rule 55.03 and the limitations contained in Rule 84.06(b), limiting Appellant's brief to 90% of 31,000 words, which equals 27,900 words. This brief contains 16,374 words, as determined by the word count feature of MS Word. Plaintiff has complied with the rule requiring color cover in this Court for this Respondent's brief: "Cream or Buff."

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



John Campbell #59318