

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

FILED
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LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT

LAVERN ROBINSON,)
)
Plaintiff/Respondent,)
)
v.)
)
TITLE LENDERS, INC.,)
d/b/a MISSOURI PAYDAY LOAN,)
)
Defendant/Appellant.)

Appeal No. ED 95867 91722

FILED

JUN 6 2011

~~CLERK, SUPREME COURT~~

APPEAL FROM CITY OF ST. LOUIS CIRCUIT COURT
THE HONORABLE DONALD L. McCULLIN, JUDGE

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to the Missouri Uniform Arbitration Act, Mo. Rev. Stat. §§ 435.440.1(1) and 435.440.1(6), and the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(B), which provide for an appeal from an order denying an application to compel arbitration. On September 22, 2008, Appellant filed a Motion to Stay and Compel Arbitration in the trial court, seeking to compel individual arbitration as required by the parties' contracts. In an Order dated March 13, 2009, the trial court granted in part, and denied in part, this Motion by staying the trial court proceedings and compelling arbitration, but only on a class basis. Subsequently, in a final Order and Judgment dated January 18, 2011, the trial court: (1) vacated its March 13, 2009 Order and (2) denied Appellant's Motion to Stay and Compel Arbitration in its entirety. In so doing, the trial court found language in the arbitration agreement that prohibited class arbitration or participation in a class action to be unconscionable, and entered judgment for Respondent on her declaratory judgment claim that the class action waiver was unconscionable. Appellant filed a timely notice of appeal. The Circuit Court of the City of St. Louis is within the territorial jurisdiction of this Court. *See* Mo. Rev. Stat. § 477.050. This Court has jurisdiction because this case does not involve any issue within the exclusive jurisdiction of the Missouri Supreme Court. *See* Mo. Const. art. V, § 3.

STATEMENT OF FACTS

I. TITLE LENDERS, INC. AND THE STRICT REGULATION OF PAYDAY LENDING UNDER MISSOURI LAW

Petitioner Title Lenders, Inc. (“TLI”) is licensed and regulated by the Missouri Division of Finance (the “Division”) under Mo. Rev. Stat §§ 408.500, 408.505 and 408.506 (Lenders of Unsecured Loans Under \$500) (the “Act”). *See* Record (“R.”) 000724-729. The Division, which is charged with enforcement under the Act, describes the Act’s provisions as follows:

[The Act] subject[s] this type of lender to a host of consumer safeguards, i.e., places a 75% cap on interest and fees on the initial loan and renewals, limits renewals to no more than six, limits the term of the loan to 14-31 days, applies daily interest calculations, etc. **[The Act] sections contain some provisions which go well beyond most “consumer protections”: for example, the lender must conspicuously post rates and a borrower who repays a loan before the close of the lender’s next full business day pays no interest or fees...(emphasis added)** The relevant page from the Division’s website is included at R. 000842-844.

The Act requires that TLI allow a borrower to renew her loan – *i.e.*, pay the interest, but not the principal – up to six times. Pursuant to the Act, TLI charges a fee of \$18 per \$100 loaned. In addition, the Act governs the font size and content of consumer disclosures,

including that the following notice be provided:

MISSOURI NOTICE TO BORROWER:

Please read and understand the terms of this agreement before signing.

You may cancel this loan without costs by returning the full principal balance to the lender by the close of the lender's next full business day.

Mo. Rev. Stat. § 408.500.

The Division audits all companies, including TLI, licensed under the Act, and addresses complaints it receives regarding the licensees. In addition, the Division reviews all loan agreements for compliance with the Act. The Division is required by the Act to perform a semi-annual payday lender survey and report to the Missouri legislature on its results. In its 2007 and 2009 surveys, the Division reported that most complaints to the Division were resolved with an explanation of the Act to the complaining consumer, and that the remaining complaints were resolved directly by the affected licensee. See Defendant Exhibit ("Def's Exh.") D-4.

To apply for a loan from TLI, a customer must have an open and active checking account, and proof of income. *See* Silverman Dep. Tr. at 103:11-104:2 (Def's Exh. D-14). When a customer is approved for a loan by TLI, she must sign a Loan Agreement containing all disclosures required by Missouri and federal law, and provide a personal check in the amount of the customer's loan plus TLI's transaction fee. *Id.* at 104:3 - 104:8.

As required by the Act, TLI's Loan Agreement affords its customers, including Respondent, the opportunity to "cancel" their "loan without cost by returning the full principal balance to" TLI "by the close of the . . . next business day." *See* TLI's Appendix ("App.") at A11. This allows every TLI customer an entire day to review TLI's contract and effectively provides the customer with a no-interest 24-hour loan. (R. 000052). To date, no customer in TLI's history (including Respondent) has ever requested a single change in TLI's standard form agreements. *See* Silverman Dep. Tr. at 102:10-14 (Def's Exh. D-14).

The Loan Agreement also contains an arbitration agreement (which contains a class action waiver) like the one signed by Respondent on 13 separate occasions. TLI did business between June 2000 and March 2003 without the use of a class waiver in its arbitration provision. (R. 000788-804). Since the Spring 2003, TLI has used a class waiver only upon the advice of legal counsel that such clauses are permissible under Missouri law. *See* Kaplan Dep. Tr. at 70:21-72:8. (Def's Exh. D-15). No customer ever filed a class action against TLI in the years it did not use a class waiver.

TLI's loan agreements prominently display the Missouri Division of Finance's address and phone number for consumer complaints, and a sign is posted near the counter in each store advising customers of TLI's Customer Hotline. (R. 000842). If a customer calls to complain about her experience with TLI, the complaint is resolved to the customer's satisfaction. *See* Silverman Dep. Tr. at 149:15-151:15; 171:2-172:17; 175:7-13 (Def's Exh. D-14).

II. WHO USES THE MISSOURI PAYDAY LOAN PRODUCT?

Despite its name, a payday loan does not involve the pledge of a paycheck, and is not a product available to the “unbanked”: to obtain a payday loan, a consumer must have an open and active checking account and steady income. A typical TLI customer earns between \$20,000 and \$75,000 annually, likes TLI’s services, and lives near a TLI Location. *See* Silverman Dep. Tr. at 20:16-22 (Def’s Exh. D-14).

Consumers choose payday loans for a number of reasons: the fees are less expensive than fees incurred for bouncing checks; the loans are unsecured –i.e., if you do not pay, nothing is repossessed; and using the product helps to avoid credit card and utility late fees. As the Office of the Comptroller of the Currency has noted, without a payday loan, “[a]s a last resort, they might bounce a check – and face \$50 or more in overdraft fees plus the risk of having the account closed – or, if they own their own home, apply for a home equity loan and wait weeks for a line of credit far larger than they actually need.” (R. 000882).

If calculated over the course of an entire year, the fees authorized by the Act can amount to between 300-400% APR. *See* Silverman Dep. Tr. at 108:3-12 (Def’s Exh. D-14). But calculating an annualized interest rate for a short-term loan product is akin to estimating the cost of a cross-country car trip based upon a taxicab’s rate per mile. *See* Silverman Dep. Tr. at 110:5-18. (Def’s Exh. D-14). And, when matched with other annualized fees, the APR compares favorably. For example:

- If a Bank of America customer bounces a check of any amount, she will be charged a returned check fee of \$35. Assuming that a customer

bounces one check for \$50 each month, the fee results in an APR of 840%.

- Similarly, if a consumer who is not a Bank of America customer uses a Bank of America ATM, she is charged a fee of \$3. Assuming that the consumer withdraws \$20 per week from Bank of America's ATM, the fee results in an APR of 780%.

In 2007, the Federal Reserve Bank of New York (the "Fed") issued two comprehensive studies of the payday loan product. In the first, it concluded that payday lending is not "predatory" lending. "Defining and Detecting Predatory Lending," January 2007 (Def's Exh. D-10). In the second, it determined that households suffer when the payday loan product is removed from a community, with consumers filing for bankruptcy at a higher rate and incurring a greater number of bounced check fees. "Payday Holiday: How Household Fare After Payday Credit Banks," November 2007 (Def's Exh. D-11).

III. LAVERN ROBINSON

Lavern Robinson is a St. Louis resident who is well-versed in the use of multiple types of consumer credit. After having obtained *secured* loans from pawn shops, from installment lenders and from her credit union, she began obtaining *unsecured* payday loans in 2000 with America's Cash Express ("ACE"), and has continued to obtain payday loans from multiple licensed lenders, including Quik Cash, Advance Loans, AmeriCash Loans, E\$Z Payday Loan, and Missouri Title Loans. *See* Robinson Dep. Tr. at 68:25-69:7, 146:20-147:17 (Def's Exh. D-1).

Respondent prefers the unsecured payday product to the secured pawn and installment loans she continues to obtain. When asked by the trial court why she had used pawnshops in the past, Respondent replied, “I didn’t know anything about payday loans” – i.e., had she known about the unsecured payday product, she would not have borrowed money from pawn shops. (R. 000997).

Respondent did business with TLI from September 2005 to September 2006, during which time she entered into 13 separate Loan Agreements with TLI, each of which was approved by the Missouri Division of Finance. (R. 000805-807). In addition to providing all required Missouri and federal disclosures, each Loan Agreement contained a prominently disclosed arbitration agreement (“Arbitration Agreement”) governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (“FAA”), which:

- explains what arbitration is;
- permits Respondent to assert her claim in a small claims tribunal;
- provides for arbitration before the American Arbitration Association (AAA) in a location convenient to her; and
- provides for payment of Respondent’s arbitration filing fees and costs.

See generally, Def’s Exh. D-1B, at 2. Significantly, the Arbitration Agreement does not limit claims, damages, remedies or attorneys fees in any way. *Id.*

While the Arbitration Agreement does not result in the waiver of any claims, remedies or damages, in **bold, ALL CAPS** type, it provides for a waiver of a jury trial and access to the class action procedural mechanism, as follows:

**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.**

App. at A12. (emphasis in original) in addition to placing her signature directly below this **bolded, ALL CAPS** disclosure, Respondent acknowledged with a separate signature as follows: "By signing this Agreement you acknowledge that you have read, understand, and agree to all of its terms and conditions including the arbitration

provision. . . .” *Id.* at A12.

According to Respondent, she was never pressured into signing any of her 13 Loan Agreements. *See* Robinson Dep. Tr. at 109:14-16, (Def’s Exh. D-1); (R. 000995-996). She never attempted to negotiate any of the terms of these agreements. (R. 000828, 000888); Robinson Dep. Tr. at 94:11-14, 109:6-13 (Def’s Exh. D-1). No one in TLI’s stores ever threatened her in any way. *See* Robinson Dep. Tr. at 77:2-3 (Def’s Exh. D-1); (R. 000995-996). She did not ask any questions of TLI’s employees about the agreements. *See* Robinson Dep. Tr. at 94:2-7, 94:21-24, 104:21-105:8, 108:20-109:5 (Def’s Exh. D-1). And no one working for TLI made her feel rushed in any way. *See id.* at 94:18-20 (Def’s Exh. D-1); (R. 000996-997). In short, no one forced her to contract with TLI. *See* Robinson Dep. Tr. at 102:2-4 (Def’s Exh. D-1).

Significantly, Ms. Robinson had an entire day in which to review the agreement and return the principal, interest-free, should she change her mind. She never once did. Despite this relaxed atmosphere, Respondent chose not to read the arbitration clauses at the time she signed the Loan Agreements. *See* Robinson Dep. Tr. at 105:13-17, 148:14-24 (Def’s Exh. D-1); (R. 000996-997).

Respondent has long been aware of her borrowing options. During the time period relevant to this action, Respondent:

- “had three credit cards;” (R. 000894); Robinson Dep. Tr. at 150:10-13 (Def’s Exh. D-1).
- used, and continues to use, the services of *many* other payday lenders; *see* Robinson Dep. Tr. at 136:19-23, 138:17-139:13,

139:23-144:3, 147:22-25 (Def's Exh. D-1).

- obtained several installment loans, including a loan from a lender that did *not* require her to sign a class action waiver; true and correct copies of documents pertaining to loans Respondent took out from King of Kash on May 1, 2006 and Aug. 18, 2006, were provided to the trial Court (R. 000849-873).
- used at least two different pawnbrokers, (R. 000822-823); Robinson Dep. Tr. at 122:6-9 (Def's Exh. D-1).; (R. 000997) at least one of which did *not* require her to sign a class waiver; a true and correct copy of documents pertaining to a pawnshop transaction Respondent engaged in with Sam Light Loan & Mercantile on November 8, 2004, was provided to the trial Court (R. 000846-000848); and
- took out a title loan on her car that did *not* require her to sign a class waiver. A true and correct copy of documents pertaining to a title loan Respondent engaged in with Sam Light Loan & Mercantile on or about July 3, 2007, are included in Defendant's exhibits (R. 000846-000848).

Respondent has never been denied any credit she has requested from any lender. (R. 000819). As of September 30, 2007, there were hundreds of payday lenders, licensed pawnbrokers and licensed installment lenders in St. Louis from which Respondent could choose. (R. 000837-841). Notwithstanding all of these different options, Respondent chose to do business with TLI and agreed to TLI's clear and conspicuous arbitration

clause. (Supplemental response to interrogatory No. 18, stating “Mrs. Robinson did not contact any banks, financing companies, or other sources of credit at the time she took out loans from” TLI) (R. 000894); Robinson Dep. Tr. at 120:14-24 (Def’s Exh. D-1); (R. 000995-997).

IV. THE INSTANT ACTION, AND RESPONDENT’S CONTINUED USE OF PAYDAY LOANS

According to Respondent, she had no complaints regarding TLI or any other lender until her sister told her that Gateway Legal and the Simon Passanante law firm wanted to sue payday lenders. *See* Robinson Dep. Tr. At 47:23-54:17 (Def’s Exh. D-1). On October 24, 2006, Respondent sued TLI, alleging that TLI’s lending practices (though conducted in accordance with the Act) violate the Missouri Merchandising Practices Act (Counts II and III) as well as various statutes regulating the type of legislatively permissible loans at issue (Counts IV to VII). In direct disregard of the Arbitration Agreements, Respondent sought to represent herself and a putative class of borrowers in Missouri. In response to the Complaint, TLI filed a Motion to Stay and Compel Arbitration, asking the Court to require Respondent to arbitrate her claims individually, or pursue them individually in a small claims tribunal.¹

TLI is not the only lender Respondent has sued or plans to sue. In addition to this lawsuit, she is the named plaintiff in a case styled *Robinson v. Advance Loans II, LLC*,

¹ A plaintiff’s class has not been certified in this action, and no rulings have been made as to liability.

Cause Number 0622-CC063 I, Division 22, in the Circuit Court of St. Louis City (hereinafter referred to as the “*Advance Loans*” case). (R. 000809). She also intends to sue Quik Cash. *See* Robinson Dep. Tr. at 70:5.6 (Def’s Exh. D-1). Notwithstanding her professed opinion that payday loans are usurious and illegal, Respondent has continued to take out payday loans – and has signed multiple agreements containing class action waivers – even after filing suit against Advance Loans and TLI. *See id.* at 136:19-23, 138:17-139:13, 139:23-144:3, 147:22-25 (Def’s Exh. D-1). She has done so without bothering to read the agreements or consult with her attorneys. *See id.* at 136:19-23, 137:20-22 (Def’s Exh. D-1). Despite her alleged concerns about the legality of TLI’s lending practices, Respondent has never filed any complaint, formal or informal, with the Missouri Division of Finance or the Better Business Bureau. (R. 000820); Robinson Dep. Tr. at 118:3-11 (Def’s Exh. D-1).

V. PETITIONER’S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION

Seeking to enforce the Arbitration Agreement that it entered into with Respondent on 13 separate occasions, Petitioner filed a Motion to Stay Proceedings and Compel Arbitration (“Motion To Stay”). Opposing the Motion To Stay, Respondent argued that the class waiver contained in the Arbitration Agreement rendered the Arbitration Agreement “unconscionable” because it “prohibits all class actions . . . resulting in an immunization for [TLI],” and the class action waiver “functions as an exculpatory clause that is unenforceable under Missouri law because it is not clear and unambiguous.” *See* March 13, 2009 Order at 5 (R. 001215). Among other things, TLI argued that the Court

was prohibited from ordering arbitration on anything other than an individual basis. (R. 001167).

The trial court held argument on the Motion To Stay on September 22, 2008, and requested post-hearing briefs from the parties, which were filed in December 2008. In support of her unconscionability defense, Respondent submitted no evidence that the Arbitration Agreement had resulted in a TLI customer not being able to retain counsel. Her sole proffer of “evidence” regarding substantive unconscionability was provided in the form of “expert” testimony from two lawyers who – without engaging in any studies, interviews, or analysis – “opined” that no Missouri “consumer lawyer” would take a case against TLI unless he could pursue a class action. *See* Apr. 10, 2008 Dep. Tr. of Dale Irwin (“Irwin Dep.”) at 18:19-20:8 (Def’s Exh. D-12); Apr. 10, 2008 Dep. Tr. of Bernard Brown (“Brown Dep.”) at 37:11-38:20 (Def’s Exh. D-13).

In a final Order dated March 13, 2009, the trial court granted the Motion to Stay, but struck the class action waiver. Without clearly delineating its findings of procedural and substantive unconscionability, the court held as follows:

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 a class. As such, the Arbitration Agreement was both procedurally and substantively unconscionable to the extent that it prohibits class actions. (R. 001221-1222).

On April 22, 2009, TLI timely appealed. Although the trial court had not enforced the arbitration agreement “as written,” and 9 U.S.C. § 16 notwithstanding, on February 23, 2010, this Court dismissed the appeal and remanded. The Court held that because the trial court's Order did not address which party would pay the costs of arbitration, an issue raised by the declaratory-relief count, the Order was not ripe for appeal. *See Robinson v. Title Lenders, Inc.*, 303 S.W.3d 638 (Mo. Ct. App. E.D. 2010).

On April 27, 2010, while this case was on remand, the United States Supreme Court issued its opinion in *Stolt-Nielsen S.A. v. AnimalFeeds Intern. Corp.*, -- U.S. --, 130 S.Ct. 1758, 76 L.Ed.2d 605 (2010). In it, the Supreme Court held that class arbitration could not be compelled where the parties had not expressly consented to proceed in that manner. In light of this holding and the presence of the class waiver in her Arbitration Agreements, on August 2, 2010, Respondent filed a motion requesting that the trial court enter an order denying TLI's Motion to Stay. (R. 001249). On September 17, 2010, TLI filed a motion requesting that the trial court deny Respondent's request and instead modify its March 13, 2009 Order so as to grant the Motion To Stay. On October 12, 2010, the trial court vacated its March 13, 2009 Order and entered an Order wherein it found that both *Stolt-Neilsen* and *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. 2010) precluded it from ordering arbitration on anything other than an individual basis. But reiterating its contention that the class waiver rendered the Arbitration Agreement "unconscionable," the trial court in its Order denied the Motion to Stay in its

entirety.² On November 19, 2010, TLI timely lodged this appeal.

² Consistent with Rule 74.01(a), on January 18, 2011, the trial court reentered its October 12, 2010 Order, denominating it as an “Order and Judgment.” It is this Order and Judgment from which TLI appeals.

POINTS RELIED ON

- I. The trial court erred in refusing to enforce the arbitration agreement because the agreement was not procedurally unconscionable, in that (1) the agreement is not an adhesion contract; (2) Respondent had a unilateral right of rescission; (3) Respondent had availed herself of numerous other financial alternatives, many without arbitration agreements or class waiver provisions; and (4) the trial court did not find high pressure tactics, fine print, misrepresentation of terms, or any other element of procedural unconscionability.**

Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624 (Mo. Ct. App. W.D. 1979)

Greenpoint Credit, LLC v. Reynolds, 151 S.W.3d 868 (Mo. Ct. App. S.D. 2004)

State ex rel. Vincent v. Schneider, 194 S.W.3d 853 (Mo.banc 2006)

Whitney v. Alltel Commc'ns, Inc., 173 S.W.3d 300 (Mo. Ct. App. W.D. 2005)

II. The trial court erred in finding that the arbitration agreement was substantively unconscionable, because (1) it does not expressly limit Respondent's claims or relief in any way; (2) it does not by operation inhibit her ability to obtain legal representation, or her ability to vindicate her claims in individual arbitration; (3) attorneys' fees awards and punitive damages are available, and TLI bears all costs of the arbitration; (4) testimony by two "attorney experts" was unreliable, contradictory and self-serving, and should have been excluded pursuant to Mo. Rev. Stat. § 490.065; (5) there are other plausible reasons for the absence of lawsuits against TLI; and (6) Respondent's claim is not a small dollar claim; rather, she seeks damages in excess of \$25,000, punitive damages, and attorneys' fees, among other relief.

Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624 (Mo. Ct. App. W.D. 1979)

Rigali v. Kensington Place Homeowners' Ass'n, 103 S.W.3d 839, 845 (Mo. Ct. App. E.D. 2003)

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)

III. The trial court erred in holding that the class waiver was exculpatory because (1) it failed to identify any evidence in support of this conclusion; (2) substantial evidence demonstrates that the class waiver provision is clear, unambiguous, and susceptible of only one interpretation; (3) the class waiver provision imposes no express limitation on TLI's liability but, instead, expressly preserves all Respondent's remedies and relief; (4) the class waiver provision does not by operation limit any of her remedies and relief, but instead provides incentives sufficient to allow Respondent to vindicate her claim on an individual basis; and, (5) the sole authority relied upon by the trial court is inapposite.

Alack v. Vic Tanny Intern. Of Mo., Inc., 923 S.W.2d 330 (Mo. banc 1996).

Vest v. Kansas City Homes, LLC, 288 S.W.3d 304 (Mo. Ct. App. 2009).

Am. Family Mut. Ins. Co. v. St. Clair, No. ED92492, 2009 WL 2868844 (Mo. Ct. App. E.D. Sept. 8, 2009).

ARGUMENT

By finding the Arbitration Agreement unconscionable under the facts present here, the trial court has created a bifurcated system of justice: one applicable to consumer finance contracts, and one applicable to everything else. If, instead of a payday loan contract, the trial court had been presented with a contract for a rental car, purchase of a household appliance, or one of the numerous other "standard form" contracts routinely employed in consumer transactions, there can be little doubt that the trial court would have enforced the Arbitration Agreement. The Arbitration Agreement does not require Respondent to waive any claims or damages; provides her with a full 24 hours to rescind; and requires TLI to pay the costs of arbitration here. Nor does the unavailability of the class action procedural vehicle impair Respondent's ability to retain counsel; indeed, one of her two "attorney experts" routinely accepted and successfully prosecuted cases with claims in similar amounts on an individual basis.

TLI is heavily regulated and licensed by the State of Missouri, and at all times complied with Missouri law. But TLI's compliance with its regulatory obligations is not the issue here. Instead, Respondent seeks to use this forum to do what the Missouri legislature has not done: namely, redraft the Missouri Merchandising Practices Act to provide for an unwaivable substantive right to the class action procedural vehicle. However, the legislature has not done so, and she may not do so here. That notwithstanding, governing federal law requires her to conduct her challenge in arbitration.

The principles of law governing this dispute are well-settled. The FAA creates a

body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the FAA. Section 2 of the FAA provides that an arbitration provision “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” The United States Supreme Court has repeatedly held that courts must “‘rigorously enforce’ arbitration agreements according to their terms.” *Volt Info. Scis., Inc. v. Bd. Of Trs. Of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). As the Supreme Court noted in *Green Tree Financial Corp. v. Randolph*, “[w]e are mindful of the FAA’s purpose to reverse the longstanding judicial hostility to arbitration agreements.” 531 U.S. 79, 89 (2000). Enforcement of arbitration agreements is not discretionary. 9 U.S.C. § 4; *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). When reviewing an arbitration agreement, a court must limit its analysis to the validity of the arbitration agreement itself, and not to the underlying contract. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).

Respondent seeks to void her arbitration agreement based on the state law contractual defense of unconscionability. Unconscionability may be either procedural or substantive.³ “Procedural unconscionability focuses on such things as high pressure sales

³ Courts in Missouri previously had required a party asserting an unconscionability defense to establish both procedural and substantive unconscionability. *See, e.g., Whitney v. Alltel Comm’cns, Inc.*, 173 S.W.3d 300, 308 (Mo. Ct. App. W.D. 2005) (so holding). Over strong dissents, the Missouri Supreme Court in *Brewer v.*

tactics, unreadable fine print, or misrepresentation among other unfair issues on the contract formation process.” *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. Banc 2006). “Substantive unconscionability means an undue harshness in the contract terms.” *Id.* While the trial court pronounced the Arbitration Agreement to be both procedurally and substantively unconscionable, the apparent grounds for that finding – that the “unequal bargaining power” of the parties and that the inclusion of the Arbitration Agreement in an “adhesion contract” made it procedurally unconscionable, and the presence of the class action waiver rendered it substantively unconscionable – are simply not supported by fact or law.

I. THE ARBITRATION AGREEMENT IS NOT PROCEDURALLY UNCONSCIONABLE UNDER MISSOURI LAW

The trial court erred in refusing to enforce the arbitration agreement because the agreement was not procedurally unconscionable, in that (1) the agreement is not an adhesion contract; (2) Respondent had a unilateral right of rescission; (3)

Missouri Title Loans, Inc., 323 S.W.3d 18 (Mo. 2010) abrogated this requirement, holding that an unconscionability defense may be predicated on either procedural or substantive unconscionability, or both. *Brewer*, 323 S.W.3d at 22 (so holding) (Price, J. and Breckenridge, J., dissenting). *See also Lawrence v. Manor*, 273 S.W.3d 525, 531 (Mo. 2009) (Norton, Sp.J, concurring) (“In general, both procedural and substantive aspects of unconscionability must exist for an arbitration provision to be unenforceable.”).

Respondent had availed herself of numerous other financial alternatives, many without arbitration agreements or class waiver provisions; and (4) the trial court did not find high pressure tactics, fine print, misrepresentation of terms, or any other element of procedural unconscionability.

Standard of Review:

This court owes no deference to the trial court because motions to compel arbitration are reviewed *de novo*. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. banc 2006) (“The question of whether or not McBride's motion to compel arbitration should have been granted is one of law, to be decided *de novo*”) (citation omitted).

Here, the trial court erred in concluding that the parties' agreement was an adhesion contract. This holding ignored language in the agreement providing Respondent with a unilateral right to rescind the contract after execution. The trial court also ignored significant evidence that she also repeatedly availed herself of the numerous other financial alternatives – many of which did not require arbitration. This alone defeats any finding that the contract was one of adhesion. *Id.* at 857 (Declining to characterize agreement as adhesion contract where "relators offered no proof that they were unable to look elsewhere for more attractive contracts. Relators offered no proof that all St. Louis metropolitan area builders used the same arbitration terms or proof that they were forced to purchase their homes from McBride."). This also undercuts a finding that there was a gross disparity in the parties' relative bargaining power – another element of procedural unconscionability.

Beyond that, adhesion contracts are not *per se* unconscionable in Missouri. *Id.* at 857-58. The trial court erred by failing to identify any factors, other than the fact that the agreement was allegedly a pre-printed “form” agreement, to support a finding that the contract was an unconscionable adhesion contract. *Id.* at 857. Under Missouri law, this is insufficient. The trial court also entirely failed to consider the circumstances surrounding Respondent’s execution of the loan agreement, including Respondent’s testimony that she was never pressured to enter into any of her thirteen loan agreements with TLI, and that the agreements’ terms were clearly disclosed and explained to her. The trial court thus erred by failing to analyze the “totality of the circumstances surrounding the transaction.” *Id.* at 857-858.

A. THE ARBITRATION AGREEMENT IS NOT PROCEDURALLY UNCONSCIONABLE.

Procedural unconscionability analyzes “the contract formation process, and focuses on high pressure exerted on the parties, fine print of the contract, misrepresentation, or unequal bargaining position.” *Funding Sys. Leasing Corp. v. King Louie Int’l, Inc.*, 597 S.W.2d 624, 634 (Mo. Ct. App. W.D. 1979). Respondent could not – and did not – establish procedural unconscionability because: (1) under Missouri law, the parties’ agreement is not an adhesion contract; (2) Respondent had a number of other options available to her other than TLI; and (3) TLI clearly and conspicuously disclosed the Arbitration Agreement.

B. THE COURT’S HOLDING THAT THE ARBITRATION AGREEMENT CONSTITUTED AN ADHESION CONTRACT CONTRADICTS MISSOURI LAW.

The trial court’s finding of procedural unconscionability was predicated in large part on its erroneous conclusion that the arbitration agreement was contained in an “adhesion contract.” *See* March 13, 2009 Order at 9-11 (R. 001219-1221). The Arbitration Agreement is not a contract of adhesion as that term is defined by Missouri law. Moreover, Missouri law makes clear that if it were, this alone is not enough to establish procedural unconscionability.⁴

“[A]n adhesion contract, as opposed to a negotiated contract, has been described as a form contract created and imposed by a stronger party upon a weaker party **on a ‘take this or nothing basis,’** the terms of which unexpectedly or unconscionably limit the obligations of the drafting party.” *Greenpoint Credit, LLC v. Reynolds*, 151 S.W.3d 868, 874 (Mo. Ct. App. S.D. 2004) (emphasis added) (quoting *Hartland Computer Leasing Corp., Inc. v. Ins. Man, Inc.*, 770 S.W.2d 525, 527 (Mo. Ct. App. E.D. 1989)). To establish that her agreement is an adhesion contract, Respondent must prove that she was

⁴ Nor are arbitration agreements in adhesion contracts precluded by statute, as Mo. Rev. Stat. § 435.350 is preempted by the FAA. *Kirby v. Grand Crowne Travel Network, LLC*, 229 S.W.3d 253, 255 (Mo. Ct. App. S.D. 2007) (“R.S. Mo. § 435.350 cannot be applied to circumvent a FAA-enforceable arbitration provision.”).

unable to look elsewhere for a more attractive contract – that is, one without a class waiver provision. *State ex rel. Vincent*, 194 S.W.3d at 857. But as Respondent admits and as her own records prove, she obtained credit from multiple sources that did not require her to waive access to the class action procedural vehicle. These included two different pawnbrokers, a title loan on her car, and three different credit cards she could have used – and none of the underlying agreements contained a class action waiver. (R. 000822-823); Robinson Dep. Tr. at 122:6-9 (Def’s Exh. D-1); (R. 000997); (regarding pawnbrokers) (R. 000894); Robinson Dep. Tr. at 150:10-13 (Def’s Exh. D-1). (regarding credit cards); (R. 000846-000848) (title loan documents). In addition to these other options, approximately 33 other licensed payday lenders operated out of approximately 62 locations in St. Louis during that time. As Respondent admits, in no way was she forced to do business with TLI.⁵

Furthermore, the Loan Agreement that contained the Arbitration Agreement was not provided on a “take it or nothing” basis. *Respondent had a full business day rescind the contract – with no penalty – after execution.* It was not an adhesion contract. *Smith*

⁵ Several cases in addition to *State ex rel. Vincent* have held that the availability of so many other options destroys any claim of procedural unconscionability. See *Bass v. Carmax Auto Superstores, Inc.*, No. 07-0883-CV-W-ODS, 2008 U.S. Dist. LEXIS 52107 (W.D. Mo. July 9, 2008) and *Guitierrez v. State Line Nissan, Inc.*, No. 08-0285-CV-W-FJG, 2008 U.S. Dist. LEXIS 59010 (W.D. Mo. Aug. 4, 2008).

v. Kriska, 113 S.W.3d 293, 298 (Mo. Ct. App. E.D. 2003) (“Because the defendant had the option of seeking employment elsewhere, the relative bargaining power of the Board does not make the [Employment] Agreement an adhesion contract or unconscionable.”) (citation omitted).

Leaving that aside, a contract is not procedurally unconscionable merely because it is a contract of adhesion. *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 310 (Mo. Ct. App. W.D. 2005) (“such contracts are not inherently sinister and automatically unenforceable”) (quoting *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. Ct. App. E.D. 2003)). “Adhesion contracts usually involve the unequal bargaining power of a large corporation versus an individual and are often presented in pre-printed form contracts.” *Id.* (quoting *Swain*, 128 S.W.3d at 107). But a “stronger party” has more bargaining power than a “weaker party” only if “the weaker party is unable to look elsewhere for more attractive contracts.” *State ex rel. Vincent*, 194 S.W.3d 853 at 857. “Because the bulk of contracts signed in this country are form contracts – a natural concomitant of our mass production-mass consumer society – any rule automatically invalidating adhesion contracts would be completely unworkable.” *Swain*, 128 S.W.3d at 107 (internal quotations omitted). Here, Plaintiff had numerous other options, and her agreement was not an adhesion contract. The trial court’s finding of unconscionability was error.

C. THE TRIAL COURT DID NOT FIND, AND RESPONDENT CANNOT ESTABLISH, ANY OTHER ELEMENT OF PROCEDURAL UNCONSCIONABILITY.

The trial court did not identify a basis for procedural unconscionability other than the (erroneous) “contract of adhesion” finding – such as high pressure tactics, fine print of the contract, or misrepresentation of a contract’s terms – for the simple reason that Respondent cannot make a credible argument for such a finding.

TLI’s arbitration clause is clear and conspicuous. It is in the same font and typeface as the rest of the customer agreement. It is clearly set out with a **boldface, ALLCAPS** heading entitled “**ARBITRATION PROVISION.**” And just above the signature line for the agreement, TLI again alerts the customer to its key terms in **bolded, ALLCAPS** font. Where an arbitration agreement includes a boldface, uppercase paragraph immediately above the signature proclaiming that the signer is waiving their right to bring claims in court and to bring class actions, as TLI’s does, the agreement is not procedurally unconscionable. *See Sprague v. Household Int’l*, 473 F.Supp.2d 966, 972 (W.D.Mo. 2005).⁶ Nor can Respondent point to high pressure tactics – or any pressure at all – in the consummation of her Arbitration Agreements. By her own

⁶ This is irrelevant, though, because Respondent did not even try to read TLI’s arbitration clause until she met with her lawyers. *See Robinson Dep. Tr.* at 105:13-17, 148:14-24 (Def’s Exh. D-1). Thus, Respondent, as putative class representative, could not challenge the readability of TLI’s arbitration clause.

account, she was never pressured to do business with TLI. *See* Robinson Dep. Tr. at 95:8-14; 102:2-4 (Def's Exh. D-1); (R. 000995-996).

The trial court's finding of procedural unconscionability must therefore be reversed.

**D. CASES IN WHICH MISSOURI COURTS HAVE FOUND
ARBITRATION AGREEMENTS TO BE PROCEDURALLY
UNCONSCIONABLE ARE INAPPOSITE.**

Other authority does not hold to the contrary. *Brewer*, for example, is distinguishable on its facts and inapposite. In *Brewer*, the court based its finding of procedural unconscionability on the fact that "the loan agreement was non-negotiable and difficult for the average consumer to understand and that Missouri Title Loans was in a superior bargaining position." *Brewer*, 323 S.W.3d at 23. None of these factors is present here. First, Respondent's loan agreements were not non-negotiable; she had a full 24 hours to rescind them. Second, Respondent's loan agreements were not difficult to understand; as set forth above, they were clearly disclosed in plain English, and used bold and capitalized font to alert her to important provisions. Respondent testified that she was not rushed to sign the loan agreements. Even assuming, *arguendo*, that the loan agreements were difficult to understand (and they were not), Plaintiff testified that she did not even attempt to read them. She therefore lacks standing to challenge their "readability." Beyond that, TLI customer service representatives were available to answer any questions she had and to help her with any difficulties she may have encountered. She did not seek any assistance with the agreements, and cannot now be

heard to complain that they are difficult to understand. Finally, TLI and Respondent were in a substantially closer bargaining positions than the parties were in *Brewer*. As discussed herein, Respondent availed herself of numerous other credit alternatives, including multiple pawn loans, three different credit cards, multiple title loans and numerous payday loans. Many of these credit products did not require her to waive the class action procedural vehicle. Despite having these numerous credit alternatives, she continued to take payday loans because she preferred them. This is a far different situation than *Brewer*, where none of these facts appear to be present.

Likewise, *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136 (Mo. 2010) is also distinguishable. The *Ruhl* court also focused on the "unequal bargaining power" and the use of a "preprinted form." *Id.* at 140. For the same reasons that *Brewer* is distinguishable – namely, that the parties here were in substantially closer in bargaining power, and that Respondent did not attempt to read her loan agreements, among other things – *Ruhl* is inapposite.

II. THE ARBITRATION AGREEMENT IS NOT SUBSTANTIVELY UNCONSCIONABLE UNDER MISSOURI LAW.

The trial court erred in finding that the arbitration agreement was substantively unconscionable, because (1) it does not expressly limit Respondent's claims or relief in any way; (2) it does not by operation inhibit her ability to obtain legal representation, or her ability to vindicate her claims in individual arbitration; (3) attorneys' fees awards and punitive damages are available, and TLI bears all costs of the arbitration; (4) testimony by two "attorney experts" was unreliable,

contradictory and self-serving, and should have been excluded pursuant to Mo. Rev. Stat. § 490.065; (5) there are other plausible reasons for the absence of lawsuits against TLI; and (6) Respondent’s claim is not a small dollar claim. Rather, she seeks damages in excess of \$25,000, punitive damages, and attorneys’ fees, among other relief.

Standard of Review:

No deference is owed to the trial court because motions to compel arbitration are reviewed de novo. *State ex rel. Vincent*, 194 S.W.3d 853 at 856.

The trial court erred in finding that the class waiver provision renders the Arbitration Agreement substantively unconscionable, because the Arbitration Agreement neither expressly limits her substantive remedies and relief, nor does it by actual operation inhibit her ability to vindicate her rights in individual arbitration. The trial court’s failure to consider any of the terms and conditions of the agreement, including provisions for the recovery of fees, costs, punitive damages and attorneys’ fees, was error. This contravened *Green Tree Fin. Corp.-Alabama v. Randolph*, which requires that, where “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.” 531 U.S. 79, 92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

Instead, the trial court’s finding of substantive unconscionability rested entirely on the self-serving and internally contradictory testimony of two attorney “experts” proffered by Respondent. These experts testified that TLI’s arbitration clause allegedly

“immunized” TLI from any legal responsibility for its acts. The trial court found that if the class waiver were enforced, Respondent’s claims “would not be reasonably feasible to prosecute” and she would be unable to secure legal representation. (R. 001222). This was error, because this testimony was unreliable and inadmissible under Missouri Revised Statutes § 490.065. These “experts” improperly based their opinions exclusively on unverifiable and untestable sources, including hearsay conversations with other attorneys, their “readings,” and their experiences in representing consumers. The trial court also erroneously ignored that these “experts” had successfully represented consumers in individual actions concerning “small dollar” claims on numerous occasions. The trial court also erroneously concluded that this is a small dollar case. It is not: in her complaint, respondent seeks compensatory damages in excess of \$25,000, punitive damages and attorneys’ fees.

Finally, the trial court erred in holding that the class action waiver provision prevented customers from bringing claims against TLI because the record was devoid of any evidence of such a result. The trial court erred by ignoring numerous other plausible reasons for the absence of lawsuits against TLI, and the fact that TLI’s arbitration clause does not hinder regulatory supervision of TLI. The trial court’s holding also erroneously ignored the fact that the class action mechanism is a procedural right that may be freely waived. Cases relied on by the trial court are inapposite, as three separate Missouri federal court decisions enforcing the very arbitration agreement at issue here make clear.

A. THE ARBITRATION AGREEMENT IS NOT SUBSTANTIVELY UNCONSCIONABLE.

The trial court erred in holding that the arbitration agreement is substantively unconscionable and should be reversed. Substantive unconscionability analyzes the fairness of the contract terms themselves. *Funding Sys. Leasing Corp.*, 597 S.W.2d at 634. Respondent could not – and did not – establish substantive unconscionability because among other things the arbitration agreement: (1) does not expressly limit Respondent’s claims or relief in any way; (2) does not by operation inhibit her ability to obtain legal representation, or her ability to vindicate her claims in individual arbitration; (3) allows for awards of attorneys’ fees awards and punitive damages; (4) is consumer-friendly and entirely mutual; and (5) provides that TLI bears all costs of the arbitration. The inclusion of the class waiver in the Arbitration Agreement does not change these facts.

B. THE TERMS OF THE ARBITRATION AGREEMENT ARE FAIR, CONSUMER-FRIENDLY, AND PROVIDE SUFFICIENT INCENTIVES TO ALLOW RESPONDENT TO VINDICATE HER CLAIM ON AN INDIVIDUAL BASIS.

Inexplicably, the trial court ignored almost entirely the most important factor bearing on substantive unconscionability: the terms of the Arbitration Agreement itself. The Arbitration Agreement:

- does not limit claims, damages, remedies or attorneys fees;

- permits Respondent to assert her claim in a small claims tribunal, if she so chooses;
- provides for arbitration before the American Arbitration Association (AAA) in a location convenient to Respondent⁷;
- provides for payment of Respondent’s arbitration filing fees and costs by TLI; and,
- is entirely mutual – that is, both Respondent and TLI remain equally and mutually bound to arbitrate all disputes, except to the extent that either party elects to seek relief in small claims court. App. at A11-A12.

Perhaps most importantly, individual arbitration is not prohibitively expensive – indeed, it will in all likelihood be less expensive than litigation. In *Green Tree Fin. Corp.-Alabama v. Randolph*, the United State Supreme Court held that where “a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.” 531 U.S. 79, 92, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). Here, as the trial court found, TLI is contractually obligated to advance pay for the entire cost of the arbitration if, “it would be unfair or burdensome.” (R. 001224). Recovery of her attorneys’ fees is expressly provided for by the statute under which she brings her claims.

⁷ The Arbitration Agreement complies in all respects with the AAA’s Consumer Due Process Protocols, <http://www.adr.org/asp?id=22019>.

And, this is not a small dollar case: in her complaint, respondent seeks compensatory damages in excess of \$25,000, punitive damages and attorneys' fees.

C. TESTIMONY PROVIDED BY RESPONDENT'S "EXPERTS" WAS UNRELIABLE, INADMISSIBLE, AND CONTRADICTED HER CLAIMS THAT NO MISSOURI LAWYER WOULD TAKE A CASE LIKE HERS.

Respondent has consistently argued that absent access to the class action procedural vehicle, aggrieved consumers would be unable to seek legal redress. This is preposterous: if use of the class mechanism was a prerequisite to relief, law schools would empty out and scores of attorneys would find themselves unemployed, as individual actions by consumers withered on the vine. Nonetheless, Respondent argued – and the trial court found – that the class waiver here “immunizes” Defendant because it removes the incentive for counsel to take her case. (R. 001222; R. 001310). Rather than present factual evidence in support of her “immunization” theory, Respondent relied entirely on the self-serving and internally contradictory testimony of two attorney “experts.” But this “evidence” was unreliable, contradictory and inadmissible under Missouri Revised Statutes § 490.065. The trial court abused its discretion by admitting it. *Rigali v. Kensington Place Homeowners' Ass'n*, 103 S.W.3d 839, 845 (Mo. Ct. App. E.D. 2003) (“an expert’s opinion must be founded upon substantial information, not mere conjecture or speculation, and there must be a rational basis for the opinion”).

Respondent proffered the testimony of Bernard Brown and Dale Irwin, two members of the plaintiffs’ bar in Missouri whose practices focus on consumer finance

issues. As TLI argued first in a motion to strike (R. 000280-373), and again at oral argument on its motion to compel arbitration, this testimony is inherently unreliable. Brown and Irwin offered nearly identical opinions that class waivers in consumer cases involving “small dollar” claims “deprive consumers . . . of adequate access to the justice system in this country.” Irwin Dep. at 12:12-24 (Def’s Exh. D-13); Brown Dep. at 18:19-20:8 (Def’s Exh. D-12). More specifically, they opined that consumers with “small dollar” claims would be “highly unlikely” to find an attorney to represent them on an individual basis in the state of Missouri. Irwin Dep. at 16:14-23 (R. 000327). But they based their opinions exclusively on three unverifiable and untestable sources: (1) their experience in representing consumers; (2) unspecified and unnumbered discussions with unnamed “other consumer attorneys;” and (3) their “readings.” Irwin Dep. at 30:21-31:18 (Def’s Exh. D-13); Brown Dep. at 46:22-47:3; 48:1-14 (Def’s Exh. D-12). The primary source of their opinions – conversations with other attorneys – is unverifiable and unspecified hearsay. Not only did Brown and Irwin fail to actually speak with many other “consumer” attorneys on the issues presented here; neither conducted any other tests, studies, “readings,” or other research to support their opinions.

Furthermore, Irwin’s own experience directly contradicts his own conclusions. Irwin has taken numerous “small-dollar” cases over the years and done quite well for himself:

Q. Okay. It seems to me, you’ve hit on one of them, that you’ve taken a number of cases that have small actual damages over the years.

A. I have. *Id.* at 36:11-14 (Def's Exh. D-13).

For example:

- In *Jackson v. Ware* (Circuit Court in Clay County), Irwin represented a plaintiff with MMPA and odometer fraud claims pertaining to a “rusty” Ford Bronco. The actual damages amounted to only \$2-3,000. The plaintiff was awarded a judgment of \$20-30,000 in punitive damages and was awarded 100% of his attorney fees. *Id.* at 37:19-39:16 (Def's Exh. D-13).
- In *Cole v. Am. Family Mut. Ins.*, Irwin brought Fair Credit Reporting Act claims on behalf of a wife against her ex-husband even though his client had not suffered *any* out-of-pocket damages. *Id.* at 39:17-44:8 (Def's Exh. D-13).
- In *Montague v. Heater*, Irwin represented a car buyer with an odometer fraud claim against the seller. The claim was worth only \$1,400 in actual damages, which Irwin knew before taking the case. Nonetheless, the plaintiff received \$55,000 in punitive damages. *Id.* at 44:25-45:22, 46:12-20 (Def's Exh. D-13).
- In *Missouri ex. rel. Webb v. Hartford Cas. Ins.*, Irwin represented a plaintiff who paid only \$5,000 for a car that the seller never delivered, bringing claims alleging fraud and violation of the MMPA. Again, Irwin knew the claim was worth only \$5,000 when he accepted the case, but his client was awarded \$5,000 and also all

of his attorney fees. *Id.* at 47:7-48:23 (Def's Exh. D-13).

- In *Brockman v. Regency Fin. Corp.*, Irwin brought a claim worth only \$1,000, but won his client \$30,000 in punitive damages. *Id.* at 48:24-51:11 (Def's Exh. D-13).
- In *Chong v. Parker*, Irwin represented a car buyer with claims for fraud, violations of the Federal Odometer Act, and violations of the MMPA, even though the actual damages amounted to only \$2,000. *Id.* at 51:18-53:22 (Def's Exh. D-13).
- In *Williams v. Fin. Plaza, Inc.*, Irwin brought a Federal Odometer Act claim on behalf of a car buyer for \$4,000. The judge later trebled the award to \$12,000 and awarded Irwin nearly all of his attorney's fees, \$47,129.25. *Id.* at 53:23-54:24 (Def's Exh. D-13).

These cases also highlight some of the facts the experts' opinions ignore. First, their opinions unduly minimized the importance of the fee-shifting provisions found in most consumer protection statutes, including the MMPA. Irwin's own experiences establish that the statutory provision of attorney's fees provides a sufficient inducement to retain counsel.⁸ He admitted that the availability of statutory attorney's fees in a case makes it more likely that he will take the case. *Id.* at 56:19-57:3 (Def's Exh. D-13). Indeed, both Brown and Irwin do "a lot of fee shifting cases." *Id.* at 57:12-18 (Def's

⁸ Additionally, the arbitrator here is empowered to award attorney's fees, separate from any statutory allowance for them.

Exh. D-13); Brown Dep. at 125:22-126:12 (Def's Exh. D-12). And, as Irwin's case history proves, he "generally [has] been successful" with his attorney's fee applications, even where his fees have greatly exceeded the actual damages. Irwin Dep. at 58:12-16, 60:18-22 (Def's Exh. D-13). This comes as no surprise because the Missouri legislature drafted statutes like the ones implicated here "to provide an incentive for lawyers to take . . . small damages cases." *Id.* at 60:24-61:3 (Def's Exh. D-13); Brown Dep. at 126:13-19 (Def's Exh. D-12). Importantly, TLI's arbitration clause does not limit its customers' ability to recover attorneys' fees in any way.

Their opinions also ignored perhaps the most important economic factor in the decision on whether to take a particular case or not: punitive damages. Irwin's deposition testimony makes this clear: "[t]hat's generally what I base my decision on is whether to take the case or not, is the punitive potential, plus the fee shifting potential." Irwin Dep. at 63:14-23 (Def's Exh. D-13). Again, Irwin's case history corroborates this, as he repeatedly has won punitive damages awards that dwarf the actual damages. TLI's arbitration clause does not limit its customers' rights to obtain punitive damages either.

And, both Brown and Irwin admitted to deep-seeded and pre-existing biases against payday lenders. Both Brown and Irwin are long-standing and committed members of the National Association of Consumer Advocates ("NACA"). As a prerequisite for membership, both Brown and Irwin signed a "membership pledge," which was in fact written by Brown, binding them as follows:

I will not, so long as I am a NACA member, perform services
for any business or commercial client . . . on a matter where

that client's interests are adverse to the interests of a consumer or consumers. I also do not have any present intention or expectation of doing so in the future. *Id.* at 69:24-71:11 (Def's Exh. D-13); Brown Dep. at 84:3-7; 88:13-22 (Def's Exh. D-12).

Both Brown and Irwin abide by that pledge, Irwin Dep. at 69:24-71:13 (Def's Exh. D-13), and both agreed that this pledge prevents them from testifying that a class waiver does not make it more difficult for a consumer to obtain legal representation on an individual basis for "small dollar" claims.⁹ *Id.* at 72:8-22 (Def's Exh. D-13); Brown Dep. at 88:23-90:12 (Def's Exh. D-12).

Because their testimony was unreliable, failure to exclude it was an abuse of discretion. *Rigali*, 103 S.W.3d at 845; see also *Sermchief v. Gonzales*, 660 S.W.2d 683, 687 n.4 (Mo. banc 1983) (as to the proper vehicle for attorney opinion: "An appropriate

⁹ Irwin's bias against payday lenders manifested itself in an October 4, 2003, Kansas City Star editorial entitled "Where Have You Gone, FDR?" In it, Irwin railed against payday lenders, calling the industry "legalized usury," and referred to payday lenders such as TLI as "another great bunch of entrepreneurs." It comes as no surprise, then, that Irwin finds "payday lending to be predatory," "unconscionable and immoral." Indeed, he admitted that he came to this expert assignment with clear biases and prejudice towards TLI. *See* Irwin Dep. At 77:7-9 (Def's Exh. D-13).

and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*”) (quotation omitted).

D. THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THE COURT’S HOLDING THAT THE CLASS ACTION WAIVER PREVENTED TLI CUSTOMERS FROM FILING CLAIMS AGAINST TLI.

While the trial court found that the class action waiver contained in the Arbitration Agreement effectively prevents TLI customers from bringing claims against TLI, it was unable to point to any evidence of such a result. That is because there is no such evidence in the record. As such, Respondent failed to meet her burden in proving substantive unconscionability on this theory.

Moreover, Respondent ignored numerous other plausible reasons for the absence of lawsuits against TLI. For instance, no consumer who did business with TLI during the three-years when TLI’s contract did not contain a class waiver has ever filed suit. Respondent is, to date, the only person who has done so. Nor did she acknowledge that the absence of additional lawsuits could have resulted from either: (1) satisfaction with the payday loan product; or (2) the bar to entry caused by the pendency of this class action, as other plaintiffs lawyers, who would not be “first to the table” and thus would not get their attorney fees, are not motivated to file claims on these consumers’ behalf. Each of these reasons is just as likely as the class waiver to explain TLI’s impeccable customer service record.

Respondent’s “immunization” theory also fails because TLI’s arbitration clause

does not in any way hinder regulatory supervision of TLI's practices. The Missouri Division of Finance regularly audits TLI and has never raised any serious concerns about how TLI runs its business. *See* Silverman Dep. Tr. at 128:8-15, 148:15-149:12 (Def's Exh. D-14). Regulatory oversight means that TLI's arbitration clause can never "immunize" TLI from liability.

Moreover, class actions are procedural mechanisms, not substantive rights. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991). Courts have repeatedly rejected the argument that the inability to bring class claims renders an arbitration agreement unenforceable. *See Gilmer*, 500 U.S. at 32. In *Gilmer*, the United States Supreme Court reasoned, "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collection action does not mean individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32.

The Missouri Legislature could have written a right to class treatments into its consumer protection statutes. Some states have; Missouri has not. Nothing in the text or legislative history of the Missouri statutes at issue here gives potential plaintiffs an unwaivable right to class proceedings or class representation. If Respondent or her counsel seek a right to class proceedings, they must appeal to the Legislature, and not the trial court.

**E. CASES IN WHICH MISSOURI COURTS HAVE FOUND
ARBITRATION AGREEMENTS TO BE SUBSTANTIVELY
UNCONSCIONABLE ARE INAPPOSITE.**

Other cases do not support a finding of substantive unconscionability here. In *Brewer*, the Court sustained a defense of substantive unconscionability solely on the presence of a class waiver, which it claimed would render a consumer unable to retain counsel and with "no meaningful avenue of redressing complicated statutory and common law claims." *Brewer*, 323 S.W.3d at 23. As discussed above, the Arbitration Agreement provides Respondent with sufficient incentives to retain counsel. And notably, the *Brewer* court based this finding in large part on the self-serving and unreliable "expert" testimony of Messrs. Brown and Irwin. Irwin lacks any credibility in light of his testimony that he routinely accepted and successfully prosecuted on an individual basis cases with claims seeking damages in similar amounts. Irwin's own experience establishes that Respondent will be able to retain counsel to represent her on an individual basis. And admission of, and reliance on, the testimony of both Brown and Irwin was error, in light of their admitted reliance on unverifiable hearsay and unspecified "readings."

The plaintiff in *Brewer* also offered testimony by a third "expert" witness, who testified that "significant expertise and discovery" would be required for an attorney to successfully prosecute the claims at issue there. *Id.* Here, there was no offer of any such testimony, largely because significant technical expertise and discovery are not required here. This is not a document intensive case, and it appears likely that the only documents

Respondent requires to prevail on her claims are her loan agreements and loan file, including her payment history. To the extent that depositions are required to determine the merits Respondent's substantive claims, they will be limited to depositions of Respondent herself and a TLI corporate representative with knowledge of Respondent's loan history. Finally, there are no complicated relationships with banks or third-parties that might require special "expertise." Instead, Plaintiff simply requires counsel versed in the Merchandising Practices Act and other statutes under which she brings her claims. *Brewer* is therefore distinguishable.

Likewise, *Ruhl* involved a small-dollar claim where the plaintiff's maximum recovery was just \$600 – and just \$200 if she prevailed on her Merchandising Practices Act claim. *Id.*, 322 S.W.3d at 139. Here, by contrast, Respondent's claims total several thousand dollars. TLI is contractually obligated to pay all arbitration fees, and the arbitrator must award attorney's fees if she prevails. *Ruhl* therefore is also inapposite.

Other Missouri cases do not hold to the contrary. In its March 13, 2009 Order, the trial court had relied on two Missouri cases – *Whitney v. Alltel*, 173 S.W.3d 300 and *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 – in support of its finding that the presence of the class action waiver rendered the Arbitration Agreement substantively unconscionable. *See* Order at 8-9 (R. 001218-1219). However, as subsequent cases interpreting Missouri law have held, each of these cases differs significantly from this case in ways that dictate that TLI's Motion should have been granted.

Reliance upon *Whitney v. Alltel* is misplaced for at least four reasons. First, the Arbitration Clause here was presented to Respondent for her review and assent no less

than 13 separate times and each time was accepted by her at the time of contract. By contrast, in *Whitney*, Alltel added the arbitration provision in “Terms and Conditions” mailed with a subsequent bill after the formation of the contract, altering the original terms of Whitney’s contract. *Id.* at 304. The new Terms provided that Whitney need not do anything affirmatively to accept the new terms other than continue to use Alltel’s service. *Id.* Second, the *Whitney* clause attempted to limit damages normally recoverable under Missouri state law, including punitive and consequential damages, as well as attorneys’ fees and costs. *Id.* at 309. TLI’s arbitration clause has no such restriction. Third, while the arbitration clause at issue in *Whitney* was “in fine print on the back side of a sheet” sent to the plaintiff in a mailing after contract formation, *id.* at 308, the Arbitration Agreement here is clear, conspicuous and unambiguous: it appears either in bold or regular type (including an extensive explanatory portion in bold all-caps) and regular size text, directly above where Respondent signed her agreement. Fourth, Whitney’s claimed actual damages were exponentially smaller than Respondent’s. *Whitney* challenged a charge of 88 cents per month for a total of only \$24.64 in damages, *id.* at 309, 313; here, Respondent seeks damages (before addition of punitive damages, trebling, or attorneys fees) of at more than \$25,000.

State ex rel. Vincent also differs in important respects from this case. First, *Vincent* did not analyze the propriety of a class action waiver. Second, the arbitration clause included several unconscionable aspects not present in TLI’s clause, including: (1) it afforded only the defendant the right to select arbitration – no “mutuality of obligation”; (2) it gave the president of the defendant the sole discretion to choose the

arbitrator; and (3) it placed all costs of arbitration solely on the plaintiff. *State ex rel. Vincent*, 194 S.W.3d at 858-59.

While not cited by the trial court, *Woods v. QC Finan. Servs., Inc.*, 280 S.W.2d 90 (Mo. Ct. App. E.D. 2008) also differs significantly from this case. The trial court in *Woods* found that the arbitration agreement was contained in a “form contract,” presented on a “take it or leave it basis.” *Id.* at 96. Here, Respondent retained the right to unilaterally rescind the contract, with no penalty. And, Respondent repeatedly availed herself of numerous other financial alternatives which did not require individual arbitration.¹⁰ Finally, the *Woods* court placed particular importance on the fact that the arbitration agreement in that case was illegible and “buried” in fine print:

Respondent's expert testified that the spacing of the lines in the clause were so close that words from adjacent lines touched and an optical scanner was unable to make out the characters. The clause contains more than 1,300 words made to fit onto one page. When presented in a double-spaced, 12 point Times New Roman font, which is how this opinion is presented, the clause is six pages long. *Id.* at 96.

¹⁰ The *Woods* court also noted that Ms. Woods and other customers of QC Financial were “borrow[ing] money against their next paycheck.” That is not true here. Respondent’s loan here is completely unsecured. She did not pledge any collateral for it – either her paycheck or otherwise.

Here, there is no basis for Respondent to attack the “readability” of her agreement, and not surprisingly she offered no such expert testimony as to readability.¹¹ The parties’ entire agreement here fit onto two pages. The arbitration clause is clear, conspicuous and is in the same font and typeface as the rest of the customer agreement. It is clearly set out with a **boldface, ALLCAPS** heading entitled “**ARBITRATION PROVISION.**” And, just above the signature line, TLI again alerts the customer to the key terms of the arbitration provision in **bolded, ALLCAPS** font. The class waiver provision, which is the only aspect of the arbitration agreement that the trial court found to be unconscionable, consists of one sentence that is also prominently displayed in **bolded, ALLCAPS** font. And two full paragraphs of the arbitration clause – again, in the same font and typeface as the remainder of the customer agreement – are devoted to informing Respondent of the ramifications of the class waiver provision. This stands in sharp contrast to the agreement in *Woods*, where, “Appellant did not explain the arbitration terms to Respondent, but merely represented to Respondent that she was required to sign the agreement with the arbitration terms in order to get the loan.” *Id.* at 97.

Likewise, *Doerhoff v. Gen. Growth Props., Inc.*, No. 06-04099-CV-C-SOW, 2006 WL 3210502 (W.D. Mo. Nov. 6, 2006) is inapposite. The *Doerhoff* arbitration clause

¹¹ Nor could she, even if she wanted to: by her own admission, Respondent did not bother to even attempt to read any of the thirteen agreements she entered into with TLI. (R. 000996). As such, she lacks standing to challenge the readability of her agreements.

required the plaintiff to pay all filing, administrative and hearing fees in arbitration, whereas TLI is responsible for Respondent's fees here. *Compare id.* at *6 to Order at 14 (R. 001224). And in *Doerhoff*, unlike in Respondent's case, "the ultimate end user" was not present at the purchase of the gift card and did not agree to the arbitration clause. *Doerhoff*, 2006 WL 3210502 at *6.

For these reasons, denying Respondent's request that she be allowed to rewrite her contract so as to avail herself of the procedural class mechanism does not undermine her ability to vindicate her rights, nor does it in any way provide TLI a "get out of jail free card." *Woods* at 100.

F. THE ARBITRATION AGREEMENT AT ISSUE HAS BEEN ENFORCED THREE TIMES IN FEDERAL COURT.

In three separate actions before the United States District Court for the Eastern District of Missouri, the Arbitration Agreement has been enforced on motion of TLI. *See Morrow v. Soeder*, Case 4:06-cv-01243-DJS, Order dated Oct. 3, 2006, (R. 000730-735); *Nichelson v. Soeder*, Case 4:06-cv-01403-MLM, Order dated Oct. 27, 2006, (R. 000736-742); and *Layden v. Soeder*, Case 4:06-cv-01173-CEJ, Order dated Dec. 18, 2006, (R. 000743-748).

In each of these cases, default judgments were entered against debtors after TLI filed suit in Missouri small claims court to recover unpaid loans. The debtors then filed motions to vacate the default judgments on grounds that TLI collection counsel violated the federal Fair Debt Collection Practices Act by filing the respective state court actions. TLI removed the debtors' actions and filed motions to compel arbitration of the debtors'

claims.

In all three cases, the federal court compelled arbitration. 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. Should the trial court's decision stand, it could lead to the conclusion that the enforceability of an arbitration agreement will depend less upon the actual terms and conditions of the agreement, and more upon whether or not a claim is brought in state or federal court. Such a result is inconsistent with both Missouri law and the FAA.

**III. THE CLASS WAIVER IS CLEAR, UNAMBIGUOUS AND NOT
"EXCULPATORY" UNDER MISSOURI LAW**

The trial court erred in holding that the class waiver exculpatory because (1) it failed to identify any evidence in support of this conclusion; (2) substantial evidence demonstrates that the class waiver provision is clear, unambiguous, and susceptible of only one interpretation; (3) the class waiver provision imposes no express limitation on TLI's liability but, instead, expressly preserves all her remedies and relief; (4) the class waiver provision does not by operation limit any of her remedies and relief, but instead provides incentives sufficient to allow Respondent to vindicate her claim on an individual basis; and, (5) the sole authority relied cited by the trial court is inapposite.

Standard of Review:

As set forth above, this court owes no deference to the trial court because motions

to compel arbitration are reviewed de novo. *State ex rel. Vincent*, 194 S.W.3d 853 at 856.

In its March 13, 2009 Order, the trial court expressly held – and in its January 18, 2011 Order and Judgment here appears to still maintain - that the class waiver was exculpatory and unenforceable because it is allegedly unclear and unambiguous. Jan, 18, 2011 Order at 5 (“the inability to proceed with a class action effectively deprives her of any meaningful remedy”). This was error. The trial court not only ignored substantial evidence to the contrary, but also failed to identify *any* evidence in support of its conclusion. Instead, in its March 13, 2009 Order, the court improperly based its holding on a single unsupported, conclusory assertion: “In addition, the Court finds that the class action waiver is exculpatory and unenforceable because it is not clear and unambiguous.” Order at 13 (R. 001223). However, as a review of the arbitration agreement makes clear, the class waiver provision is clear, unambiguous and susceptible of only one interpretation. It does not expressly or, by operation, impliedly, impose any limitations on TLI’s current or future liability. Most importantly, the class waiver does not preclude – either expressly or by operation – Respondent from retaining counsel, which would thereby cause her to forego the opportunity to litigate any subsequent dispute. It does not “exculpate” TLI from any liability.

A. THE CLASS WAIVER PROVISION IS CLEAR, UNAMBIGUOUS, AND SUSCEPTIBLE OF ONLY ONE INTERPRETATION.

As even a cursory review of Respondent’s loan agreement with TLI makes clear, the class waiver provision was disclosed in clear, unambiguous and easy-to-read language. Respondent was alerted to the significance of the class waiver provision

through the use of **bold, ALLCAPS** font. The class waiver provision provides, in its entirety, that

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

App. at A12. The class waiver provision thus clearly and unambiguously provided in “layman’s terms” that, with respect to *any* dispute falling within the ambit of the Arbitration Agreement, Respondent was foregoing her procedural right to seek relief on anything other than an individual basis. So that there was no doubt as to the import of this provision, the following immediately preceded it:

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 dispute 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.

Id.

Thus, not only was the class waiver provision spelled out in prominently displayed, unambiguous, simple terminology, but its ramifications and practical effect were explained in full detail. Tellingly, neither the Respondent nor the trial court offered any testimony or other evidence demonstrating that Respondent was confused by the scope or effect of the class waiver, or that Respondent was in fact actually misled.

B. THE CLASS WAIVER DOES NOT EXPRESSLY OR BY OPERATION IMPOSE ANY LIMITATION ON TLI'S CURRENT OR FUTURE LIABILITY.

Moreover, as the explanatory language in Respondent's Loan Agreement makes clear, the class waiver provision did not in fact "exculpate" TLI at all. Instead, the class waiver provision expressly *preserves* all the remedies and relief available to Respondent had she pursued her claims in court: "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." Nor does the class waiver provision have the practical effect of limiting the remedies or relief available to Respondent. As set forth above, the consumer-friendly nature of the arbitration agreement provides sufficient incentives to counsel to allow Respondent to vindicate her claim on an individual basis. *See* Section II, *supra* (discussing absence of substantive unconscionability). She is not unwittingly foregoing the "right to litigate" by agreeing to arbitrate on an individual basis. Finally, it does not by operation impede her ability to retain counsel, as the testimony of Mr. Irwin makes clear.

Individual arbitration thus preserves all the rights and remedies available to Respondent. And, because TLI is responsible for all the filing fees and costs of arbitration, individual arbitration allows Respondent to vindicate her claims in a manner that is *less expensive* than litigation. By including an attorney's fees provision in the Missouri Merchandising Practices Act, the Missouri legislature ensured that aggrieved individuals such as Respondent would be able to retain competent counsel to represent them. In light of the strong federal and Missouri policies favoring arbitration, and because arbitration does not impose a prohibitive cost differential, federal and Missouri law require that the arbitration agreement be enforced as drafted.

Neither the trial court nor the Respondent were able to provide any evidence to the contrary. The Court's unsubstantiated assertion that the class waiver provision was ambiguous and exculpatory was clear error.

C. THE TRIAL COURT OFFERS NO AUTHORITY IN SUPPORT OF ITS CONCLUSION THAT THE CLASS WAIVER IS EXCULPATORY

In its January 18, 2011 Order and Judgment, the trial court offers no authority in support of its conclusion that the class action waiver exculpates TLI from any liability. App. at A01. Previously, in its March 13, 2009 Order, the trial court had relied on *Alack v. Vic Tanny Intern. of Mo., Inc.*, 923 S.W.2d 330, 337-338 (Mo. banc 1996), for its "exculpatory" conclusion. (R. 001223). But *Alack* does not support this conclusion.

Alack provides no support for the trial court's holding here that the class waiver provision is either exculpatory or ambiguous. Unlike the provision at issue in *Alack*,

which *expressly* purported to exonerate the defendant health club operator from its own acts of future negligence, the provision here *does not limit* the claims Respondent may bring or in any other way reduce the scope of the relief available to her – either expressly or by actual operation. And, as set forth above, the class waiver here clearly and unambiguously stated that *all* claims may only be brought on an individual (and not representative) basis. This is in no way ambiguous or misleading. See *Vest v. Kansas City Homes, LLC*, 288 S.W.3d 304, 310 (Mo. Ct. App. W.D. 2009) (“A contract is only ambiguous, and in need of a court’s interpretation, if its terms are susceptible to honest and fair differences.”) (quotation omitted). By contrast, in *Alack*, the contract’s broad disclaimer of liability for “any and all [future] claims” contravened Missouri law, which prohibits contracts exonerating a party for its own future gross negligence or intentional torts. *Id.* at 337. This, the court concluded, was a “latent” ambiguity that rendered the contract “duplicitous, indistinct and uncertain.” *Id.* (noting that “a latent ambiguity arises where a writing on its face appears clear and unambiguous, but some collateral matter makes the meaning uncertain.”) (quotations omitted). Finally, because punitive damages and statutory awards of attorney’s fees are both available here, the class waiver does not operate to exculpate TLI from liability.

The class waiver is neither exculpatory nor ambiguous and must be enforced as drafted. “Courts cannot create an ambiguity to enforce a particular construction,” and the trial court here committed clear error when it tried to concoct one. *Am. Family Mut. Ins. Co. v. St. Clair*, No. ED92492, 2009 WL 2868844, at *4 (Mo. Ct. App. E.D. Sept. 8, 2009) (citing *Rodriguez v. Gen. Acc. Ins. Co. of Am.*, 808 S.W.2d 379, 382 (Mo. banc

1991).

**D. CASES IN WHICH MISSOURI COURTS HAVE FOUND
ARBITRATION AGREEMENTS TO BE IMPERMISSIBLE
EXCULPATORY CLAUSES ARE INAPPOSITE.**

Other authority does not hold to the contrary. *Brewer*, for example, is inapposite. In that case, the defendant expressly contended that the class waiver provision in its customer agreement was an unambiguous exculpatory clause – something that is obviously not the case here. Noting that the clause was clearly and unambiguously disclosed, the defendant in *Brewer* argued that the exculpatory clause was permissible under Missouri law. The Missouri Supreme Court rejected that argument, stating that a consumer would not “realize[] that he or she is effectively bypassing the opportunity to retain counsel to litigate a claim against the lender.” *Brewer*, 323 S.W.3d at 24. As discussed above, here this issue is a red herring, as the loan agreements here contain sufficient inducements to retain counsel. Specifically, the loan agreements allow for the recovery of punitive damages and a statutory award of attorney's fees. They also contain no limitations on Respondent's claims or relief. And to the extent that actual, statutory or other damages are provided for by the statutes under which Respondent brings her claims, she may recover those as well. As the experiences of her own expert make clear, these incentives are more than adequate to ensure the availability of counsel. Respondent cannot argue that the class waiver is an improper exculpatory clause, and *Brewer* is inapposite.

CONCLUSION

Respondent elected to obtain loans from TLI on thirteen separate occasions. Each time, she voluntarily agreed to forego the ability to seek class-based relief. She did so despite the fact that she had numerous other financial alternatives available to her – many of which did not require her to waive this procedural right.

The terms of this class waiver provision were prominently disclosed, clear and unambiguous. The arbitration agreement within which it was contained provided sufficient incentives to allow Respondent to attract competent counsel to represent her. Because the arbitration agreement placed no limitation on her recovery or relief, Respondent is able to adequately vindicate her claims in individual arbitration. Neither Respondent nor the trial court offered any evidence to the contrary. Under these circumstances, it was clear error for the trial court to hold that the class waiver was unconscionable and unenforceable. Petitioner Title Lenders, Inc. respectfully requests that this Court reverse and remand the trial court's holdings regarding unconscionability, and direct that court on remand to stay these proceedings and compel arbitration on an individual basis.

Respectfully submitted,

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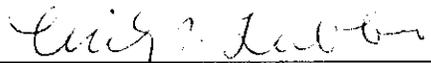
TITLE LENDERS, INC., d/b/a/

MISSOURI PAYDAY LOAN

April 18, 2011

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Mo. Rule 84.06(c), this brief (1) contains the information required by Mo. Rule 55.03; (2) complies with the limitations in Mo. Rule 84.06(b) and E.D. Rule 360; and (3) contains 14,356 words, exclusive of the sections exempted by Mo. Rule 84.06(b)(2) and E.D. Rule 360(c) and determined using the word count program in Microsoft Word 2007. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.



Cicely I. Lubben

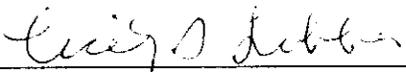
CERTIFICATE OF SERVICE

I certify that one copy of this brief and one copy on floppy disk, as required by Mo. Rule 84.06(g), were served on each of the counsel identified below by the means identified below, on April 18, 2011.

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