IN THE SUPREME COURT OF MISSOURI

No. SC91728

LAVERN ROBINSON

Plaintiff/Respondent

v.

TITLE LENDERS, INC., d/b/a
MISSOURI PAYDAY LOAN

Defendant/Appellant

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

RULES

INTRODUCTION

As Defendant/Appellant Title Lenders, Inc. has noted throughout these proceedings, the arbitration agreement at issue here does not deprive Plaintiff/Respondent Lavern Robinson of any claim, or limit her access to damages or attorneys fees in any way. She had a full day to reject its terms on each occasion that she signed it, but she failed to do so. As to the sole basis that the trial court noted for its finding of unconscionability - the presence of a class action waiver - soon after the filing of Appellant's Brief, the United State Supreme Court's ruling in *Concepcion v. AT&T Mobility LLC*[1] made clear that such a ruling was in error.

Because the trial court found the arbitration agreement to be otherwise enforceable (and not unconscionable), *Concepcion* requires that this case be remanded with instruction for the trial court to stay these proceedings and order the parties to adjudicate this dispute in an individual (and not class) arbitration.

[1] *Concepcion v. AT&T Mobility LLC*, 563 U.S. ___ (2010).

REPLY ARGUMENT

I. The decision of the United States Supreme Court in *Concepcion v. AT&T Mobility, LLC,* requires that the Parties' agreement to arbitrate all disputes on an individual (and not class) basis be enforced, as the Court's vacatur of *Brewer* shortly thereafter makes clear. [This responds to Section One of Plaintiff's Brief.]

A. To the extent class arbitration is judicially manufactured rather than consensual, it is inconsistent with the FAA.

The Supreme Court unequivocally held that a state may not condition enforcement of an agreement to arbitrate on the availability of class relief, either expressly or by operation of law. The Court's holding in *Concepcion* was broad, and was not limited by or tied to facts unique to the arbitration agreement at issue in that case. Underscoring this, one week after it issued its decision in *Concepcion*, and expressly relying on it, the United States Supreme Court granted certiorari and vacated the judgments in three other cases where the lower courts had held that the waiver of class relief in an arbitration agreement violated public policy.[2] None of these three cases (which included *Brewer*) involved arbitration agreements with the attorney's fee provision or other idiosyncrasies allegedly present in the arbitration agreement in *Concepcion*, by which Plaintiff attempts

[2] *See Missouri Title Loans, Inc. v. Brewer,* No. 10-1027 (U.S. May 2, 2011), *Sonic Automotive v. Watts*, No. 10-315 (U.S. May 2, 2011), and *Cellco Partnership v. Litman*, No. 10-398 / *Litman v. Cellco Partnership*, No. 10-551 (U.S. May 2, 2011).

to distinguish that case. Instead, the Court's holding rested squarely in the language of, and congressional purpose behind, the FAA:

> The overarching purpose of the FAA, evident in the text of §§2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of class-wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.[3]

This principle applies to ***any*** attempt to condition enforcement of an arbitration agreement on the availability of class relief. "The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA."[4] This is because, "[a]rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."[5] While the FAA "preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[6] Here, that intent was to arbitrate on an individual basis before the AAA. The parties' arbitration agreement must be enforced on that basis.

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[3] *Concepcion*, (slip op., at 9).

[4] *Id.* (slip op., at 13) (*citing Discover Bank v. Superior Court*, 36 Cal. 4th 148, 113 P. 3d 1100 (2005)).

[5] *Id.* (slip op., at 17).

[6] *Id.* (slip op., at 9).

B. Following vacatur by the United States Supreme Court, and because it had the effect of requiring the availability of class relief in "small dollar" consumer cases, *Brewer* is no longer good law.

Desperate to avoid individual arbitration, Plaintiff in her Brief attempts to minimize *Concepcion* and limit it to its facts. Among other things, Plaintiff speculates as to the possible outcome had the United States Supreme Court considered this Court's decision in *Brewer v. Missouri Title Loans, Inc.*[7] ("Brewer"), instead of the lower court's decision in *Concepcion*. Extrapolating from her hypothetical, Plaintiff confidently asserts that *Brewer* "remains good law." But reality tells a contrary story. Only one week after it issued its decision in *Concepcion*, the United States Supreme Court granted certiorari and vacated the holding in *Brewer* "in light of" the Court's holding in *Concepcion*. This Court therefore need not speculate as to whether the United States Supreme Court would have upheld *Brewer* – the Court itself has expressly stated that it would not. Given this clarification of substantive federal law construing the FAA, and for the reasons set forth in Title Lenders' initial brief, it is clear that the trial court's refusal to enforce the parties' arbitration agreement based solely on the presence of language waiving access to class relief was error.

Plaintiff's argument that *Concepcion* does not apply in state court is likewise specious. The United States Supreme Court has long held that the FAA applies in state court:

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[7] *Brewer v. Missouri Title Loans, Inc.*, 323 S.W.3d 18 (Mo. banc 2010).

> Subsequently, in *Southland Corp.*, we held that the FAA 'create[d] a body of federal substantive law,' which was 'applicable in state and federal courts.' [Quoting *Southland Corp. v, Keating*][8] We rejected the view that state law could bar enforcement of § 2, even in the context of state-law claims brought in state court.[9]

The vote by a majority of the justices in its favor established *Concepcion* as good law. More than twenty-five years of binding United States Supreme Court precedent dictates that it is binding on this Court. *Concepcion* controls here, and it requires that the trial court's order denying the Motion to Stay be reversed.

C. *Concepcion* is squarely on point, is controlling precedent, and the factual distinctions between this case and it are immaterial.

The decision in *Concepcion* was founded on broad principles relating to the interplay between state law governing the enforceability of contracts and the FAA. The actual terms of the arbitration agreement at issue in *Concepcion,* other than the waiver of class relief, were immaterial to the holding. Nevertheless, seeking to avoid individual arbitration, Plaintiff in her brief makes much of the distinction between the terms of the arbitration at issue here and that at issue in *Concepcion*, and in particular its allowance

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[8] *Southland Corp. v. Keating*, 465 U. S. 1, 12, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (internal quotation marks omitted).

[9] *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445, 126 S. Ct. 1204, 1208-09, 163 L. Ed. 2d 1038 (2006), *citing id.*, 465 U.S. at 10-14.

for a recovery of $7,500 in attorney's fees.[10] But this issue is a red herring. Notably, the majority in *Concepcion* essentially ignores the specific terms of the arbitration agreement entirely. That is, after describing its terms in the first four pages of its opinion, in the context of the case procedural history and factual background, the majority does not mention them again until the penultimate paragraph of the opinion, on page 17. Even then, the majority addresses the terms of the arbitration agreement only in what is arguably dicta.

Seeking to bolster her argument that *Concepcion* should be "read as a case decided only on the facts before it," Plaintiff relies on an out-of-context statement made by Justice Alito during a public speech in St. Louis.[11] In that speech, Justice Alito stated, among other things, that "[s]ome of our opinions mean less than a lot of people think. . . . if you read more into it, if you read it as having a much broader application, you may or may not be correct."[12] Based solely on the offhanded remark of a single justice made outside of a courtroom setting, Plaintiff would have this Court entirely ignore the doctrine of *stare decisis.* Her argument borders on frivolous. Pronouncements by the United States Supreme Court mean something, particularly when their implications are as broad and far-reaching as those at issue here. Certainly this Court does not intend for its decisions to be read once, filed away and forgotten about, and neither does the United

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[10] *See* Plaintiff's Brief at pp. 37-38.

[11] *Id.* at pp. 38-39.

[12] *Id.*

States Supreme Court. A court decision, and particularly a decision by a Supreme Court (whether state or federal), adds important context and detail to our understanding of the law. This is particularly true in the arbitral context, where the FAA creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[13] The holding in *Concepcion* is broad-ranging, not limited to its facts, and governs this dispute.

Instead, the majority in *Concepcion* based their decision not on the particular terms contained in the arbitration agreement at issue there, but instead on three core tenets of the FAA:

1. "First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."[14] And,

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[13] *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

[14] *Concepcion* (slip op., at 14) (quotation omitted).

2. "Second, class arbitration requires procedural formality. . . . If procedures are too informal, absent class members would not be bound by the arbitration."[15] And,

3. "Third, class arbitration greatly increases risks to defendants. . . . [W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."[16]

For these reasons, the majority held that state court rules that conditioned arbitration on the availability of class relief were incompatible with the FAA. Specifically, because "the overriding goal of the Arbitration Act was not to promote the expeditious resolution of claims, but to ensure judicial enforcement of privately made agreements to arbitrate," the state law requirements favoring class relief must yield to the FAA.[17] "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations."[18] Judicially manufactured class arbitration is inconsistent with this requirement.

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[15] *Id.* (slip op., at 15).

[16] *Id.* (slip op., at 15-16).

[17] *Id.* (slip op., at 10-11) (citations and quotations omitted).

[18] *Id.* (slip op., at 17) (citation omitted).

Leaving aside the broad scope of the majority's holding in *Concepcion*, the *Discover Bank* rule that was found to be preempted in that case is essentially identical to the holding in *Brewer*:

Discover Bank	**Brewer**
"[W]hen the waiver is found in a consumer ***contract of adhesion*** in a setting in which disputes between the contracting parties predictably involve ***small amounts of damages***, and when it is alleged that the party with the ***superior bargaining power*** has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are	"[T]here was evidence that the loan ***agreement was non-negotiable*** and difficult for the average consumer to understand and that Missouri Title Loans was in a ***superior bargaining position***. . . . it would be very hard, 'if not impossible,' for a consumer to find counsel to handle a claim. . . it would not be financially viable for an attorney because of the complicated nature of the case and ***the small damages at issue***. . . . the class action is often the only effective way to halt and redress such exploitation. . . ."[20]

unconscionable under California law and should not be enforced."[19]	

Both *Discover Bank* and *Brewer* operated to condition arbitrability on the availability of class relief. Following *Concepcion*, *Brewer* is preempted by the FAA and is not "good law."[21]

Plaintiff's remaining arguments are specious. Nothing in her agreement with Title Lenders limits her claims in any way, or the relief she may seek. As set forth above, the $7,500 attorney's fees provision contained in the arbitration agreement at issue in *Concepcion* was immaterial to the majority's decision. As to the Merchandising Practices Act ("MMPA"), the Missouri legislature *allowed for*, but did not *require*, class based relief: "The MMPA allows for class actions, see Mo.Rev.Stat. § 407.025.2, but does not suggest that public policy favors class actions or that the wrongs sought to be remedied by the MMPA would continue unabated without the availability of class actions."[22] The MMPA does not stipulate that the availability of class relief may not be

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[19] *Concepcion* (slip op., at 5-6) (quoting *Discover Bank*, 36 Cal. 4th at 162, 113 P. 3d, at 1110) (other quotations omitted) (emph. supplied).

[20] *Brewer*, 323 S.W.3d at 23 (citations and quotations omitted) (emph. supplied).

[21] Plaintiff's Brief at p. 31.

[22] *Cicle v. Chase Bank USA*, 583 F.3d 549, 556 (8th Cir. 2009).

waived.[23] The Missouri legislature also determined that the potential for an award of attorney's fees was a sufficient inducement for counsel. Finally, given that the holding in *Brewer* neatly tracks that in *Discover Bank*, reading *Concepcion* broadly would not lead to "absurd real-world results."[24]

Concepcion stands for the broad principle that a court may not condition arbitration on the availability of class relief. Because the trial court here did precisely that, this court should reverse.

II. The trial court did not find that the parties' arbitration agreement was procedurally unconscionable, but instead found that once the waiver of class relief was severed, the arbitration agreement was fully enforceable. [This responds to Section Two of Plaintiff's Brief.]

Plaintiff correctly asserts that the parties extensively briefed and argued the issue of procedural unconscionability. Plaintiff is wrong, however, in her assertion that the arbitration agreement is procedurally unconscionable. The trial court made no such finding, and certainly Plaintiff would agree that under the applicable standard of review, the trial court's finding (or more precisely, the absence of any finding) should be afforded deference.[25]

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[23] Even if it had, following *Concepcion*, this provision would be preempted by the FAA.

[24] Plaintiff's Brief at p. 47.

[25] *See* Plaintiff's Brief at p. 29-31 (discussing standard of review).

The procedural history of this case makes clear that the trial court made no finding of procedural unconscionability. To the contrary, the trial court expressly held that the arbitration agreement was fully enforceable – albeit only once it was "blue-penciled" to allow for class-based relief. Prior to rendering this decision, the Court was presented with substantial "evidence" and legal argument on the issue of procedural unconscionability. This included testimony by Plaintiff as to her educational background and personal circumstances. Plaintiff also offered the same arguments regarding the font, presentation and format of her loan agreement that she repeats in her brief here.

This testimony and evidence notwithstanding, the trial court declined to find the arbitration agreement as a whole to be procedurally unconscionable. Instead, in its March 13, 2009 Order, the trial court held that the arbitration agreement was not unconscionable, but was fully enforceable except to the extent that it prohibited the class action mechanism. "[T]he arbitration Clause is both procedurally and substantively unconscionable to the extent that it prohibits class actions."[26] Otherwise, the trial court found that the law and the facts required it to enforce the arbitration agreement: "[t]he Court finds that the Arbitration Clause should be enforced without the class waiver provision."[27] The court severed the class waiver provision and ordered the parties to proceed in class arbitration before the American Arbitration Association.[28]

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[26] March 13, 2009 Order at pp. 11-12 (R. 001221-1222).

[27] *Id.* at p. 14 (R. 001224).

[28] *Id.* at p. 15 (R. 001225).

Title Lenders timely appealed. However, on February 23, 2010, the Missouri Court of Appeals for the Eastern District of Missouri dismissed the appeal, ruling that the trial court had not resolved "all issues as to all parties and claims."[29] On April 27, 2010, the United States Supreme Court decided *Stolt-Nielsen v. Animalfeeds Intern. Corp.*, 130 S. Ct. 1758 (2010), wherein it held that the FAA prohibited class arbitration where the arbitration agreement was silent on the issue. In light of the holding in *Stolt-Neilsen* that class arbitration could not be compelled where the parties had not affirmatively consented to it, the parties filed cross motions seeking reconsideration of the trial court's March 13, 2009 Order. Plaintiff requested an order striking the arbitration provision in its entirety; Title Lenders sought to have the trial court order arbitration on an individual basis. Acknowledging that it could no longer compel class arbitration, on October 12, 2010, the trial court vacated its March 13, 2009 Order and entered an order denying the Motion to Stay.[30] In the October 12, 2010 Order, the trial court again relied exclusively on the presence of the waiver of class relief as the basis for invalidating the entire arbitration agreement. The Court again made no finding that the arbitration agreement was otherwise procedurally or substantively unconscionable.

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[29] Feb. 23, 2010 Order at p. 3.

[30] On January 18, 2011, the trial court re-denominated the October 12, 2010 Order as an "Order and Judgment." It is the January 18, 2011 Order that Title Lenders appeals.

Concepcion, which involved individual damages of just $30.22, put to rest the argument that class relief must be made available in cases involving "small damages."[31] Because the trial court improperly conditioned arbitration solely on the availability of class relief, *Concepcion* requires that its Order denying the Motion to Stay be reversed.

III. The trial court's finding of substantive unconscionability improperly rested entirely on the parties' waiver of class relief. [This responds to Section Three of Plaintiff's Brief.]

As with procedural unconscionability, the parties extensively briefed and argued the issue of substantive unconscionability. The trial court was indeed presented with "hundreds of facts, a full-day hearing full of evidence, expert testimony, Defendant's own [alleged] admissions,"[32] and repeated invocations of *Brewer* and *Woods v. QC Fin. Servs., Inc.*[33] For example, over Title Lenders' objections Plaintiff was allowed to present the testimony of two self-styled attorney "experts," each of whom opined that none of the thousands of attorneys in Missouri would agree to represent Plaintiff on anything other than a class action basis. "Small dollar" claims, such as those allegedly present here, were economically infeasible to prosecute on anything other than a class basis. The trial court allowed this testimony despite that (1) it was based entirely on unverifiable hearsay and un-testable, unspecified conversations with other anonymous

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[31] *Concepcion* (slip op., at 3).

[32] Plaintiff's Brief at p. 59.

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

attorneys; (2) as active members of the Plaintiffs' bar, each "expert" had a personal pecuniary interest in ensuring widespread access to the class action mechanism; and (3) at least one of the "experts," Dale Irwin, regularly litigated small dollar cases on an individual basis.

As with the issue of procedural unconscionability, the trial court considered and ultimately rejected nearly all of the "evidence" and arguments of Plaintiff's counsel with respect to substantive unconscionability. Instead, the trial court found that the only substantively unconscionable aspect of the arbitration agreement was the parties' waiver of class relief. The court concluded that once the class waiver was severed and stricken, governing federal and Missouri law required it to enforce the remainder of the arbitration agreement. As noted above, in its March 13, 2009 Order, the trial court did precisely that. Even when, following the decision in *Stolt-Neilsen*, the trial court was presented with a second bite at the apple and an opportunity to reconsider the basis for its March 13, 2009 Order, the trial court again based its finding of substantive unconscionability solely on the narrow issue of access to class relief. The trial court's October 12, 2010 Order incorporated verbatim lengthy portions of the March 13, 2009 Order, and simply summarized the remainder. The trial court thus twice held that the *only* substantively unconscionable aspect of the arbitration agreement – and, indeed, the only unenforceable provision in it - was the waiver of class relief.

As to the merits of the trial court's holding, *Concepcion* makes clear that it was error. Plaintiff succinctly frames the basis for the trial court's holding as follows:

> 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.[34]

But this analysis suffers multiple infirmities. First, it overlooks completely the fact that because Title Lenders is required to pay all costs of arbitration, arbitration is actually less expensive than litigation. It also minimizes the significance of the availability of an award of attorneys' fees. And it ignores completely the requirement that "a party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs" – something that Plaintiff has not done here.[35]

Most significantly, to remedy it would require the adoption of something that the FAA prohibits: namely, adoption of a *per se* rule requiring the availability of class relief in small dollar cases. Indeed, Plaintiff essentially urges this Court to adopt the very

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[34] Plaintiff's Brief at p. 60.

[35] *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 148 L.Ed.2d 373 (2000).

Discover Bank rule that the United States Supreme Court held to be preempted by the FAA in *Concepcion.* That is, Plaintiff would have this Court hold that in disputes in an adhesion setting, involving small amounts of damages and where the party with superior bargaining power is alleged to have cheated large numbers of consumers individually out of small sums of money, a waiver of class relief is unenforceable.[36] Following *Concepcion,* the Court may not. "The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."[37]

Finally, for these same reasons, Plaintiff's remaining arguments regarding substantive unconscionability are meritless. Neither the FAA nor any of the statutes under which Plaintiff brings her claims require that Title Lenders provide its other customers with notice of each lawsuit filed against it. And again, the only possible means of effecting such notice would be to condition arbitration on the availability of class relief – something that, following *Concepcion,* the FAA prohibits. Plaintiff's argument that Plaintiff did not knowingly waive her right to a jury trial is similarly specious. By her own admission, Plaintiff made no attempt to read any of the thirteen

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[36] *Concepcion* (slip op., at 6) (*quoting Discover Bank v. Superior Court,* 36 Cal. 4th 148, 162, 113 P. 3d 1100, 1110 (2005)).

[37] *Id.* (slip op, at. 17).

arbitration agreements she entered into.[38] And this argument simply repackages Plaintiff's argument that the arbitration agreement was procedurally unconscionable because it contained "fine print" – a conclusion that the trial court pointedly did not adopt. She also argues that "substantial evidence" proves that the class waiver prevented consumers from bringing claims.[39] But she ignores the fact that for three years, Title Lenders' customer agreement did not contain a class waiver, and during that time no consumer who did business with it brought suit. Obviously the absence of lawsuits during this period cannot be attributed to the presence of a class waiver.

While Plaintiff attempts to relitigate the issue of substantive unconscionability in her Brief, the trial court's order denying the Motion to Stay rested solely on the presence of the class waiver. *Concepcion* makes clear that this was error and must be reversed.

IV. The class waiver provision is not exculpatory, and *Concepcion* precludes the trial court from relying on the presence of the class waiver to find to the contrary. [This responds to Section Four of Plaintiff's Brief.]

The class waiver provision is not exculpatory, either by its terms or by operation. As an initial matter, the arbitration agreement does not require Plaintiff to waive any claims or relief. It therefore cannot be exculpatory. Likewise, the class waiver provision was prominently disclosed in bold, capitalized font located immediately above the line

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[38] R. 000996.

[39] Plaintiff's Brief at p. 68.

provided for Plaintiff's signature.[40] Because the entire loan agreement consisted of two pages, the class waiver provision was not "buried" in the middle of a lengthy, multi-page document. Had Plaintiff read her loan agreement – and despite having thirteen separate opportunities to do so, she did not – she would not have missed it.

Faced with these unhelpful facts, Plaintiff instead argues that the waiver of class relief is an unenforceable "exculpatory clause" by simply recharacterizing her argument that it is substantively unconscionable.[41] That is, she contends that the waiver of class relief is unenforceable because it allegedly operates to deny her access to legal counsel. Her argument is based on a single, false premise: namely, that absent the availability of class relief, *none* of the thousands of attorneys in Missouri would agree to represent her. Because the class action waiver would allegedly prevent her from obtaining legal representation *entirely*, it allegedly would thereby operate to exculpate Title Lenders from any liability.

Even accepting as true Plaintiff's faulty premise that the class waiver provision would render her wholly unable to obtain any legal representation (and the self-serving testimony of Plaintiff's two attorney "experts" notwithstanding, Plaintiff failed to offer any credible, admissible evidence that it is true), remedying this would require adoption of something that the FAA prohibits: namely, enforcement of a *per se* rule requiring the

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[40] *See* R. 000053.

[41] *See* Plaintiff's Brief at p. 60 (arguing that the waiver of class relief is substantively unconscionable because it operated to deprive Plaintiff of legal counsel).

availability of class relief. Clearly this would frustrate and disfavor arbitration, and following *Concepcion* it is prohibited.

Finally, and as the Court in *Concepcion* made clear, requirements grounded in state law that interfere with arbitration are preempted. This includes prohibitions on allegedly "exculpatory" provisions, regardless of how they are presented. Imagining a hypothetical arbitration provision that prohibited full discovery, the majority in *Concepcion* explained:

> [T]he court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. *See Discover Bank* [ ] (arguing that class waivers are similarly one-sided). And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by §2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.[42]

Although this hypothetical exculpatory provision facially applied to both arbitral and non-arbitral agreements alike, by operation it improperly interfered with arbitration. It would therefore be preempted, and prohibited, by the FAA. Here, too, the inchoate

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[42] *Concepcion* (slip op., at 7).

requirement that the import of a class waiver be fully "disclosed" interferes with arbitration.[43] Following *Concepcion,* it is preempted.

CONCLUSION

In *Concepcion,* the United States Supreme Court spoke clearly: a court may not either expressly or by operation of law condition arbitration on the availability of class relief. Because the trial court did precisely that, Appellant respectfully requests that this Court reverse the trial court's order, and direct that court on remand to stay these proceedings and compel arbitration on an individual basis.

[43] *See also id.* (slip op., at 12 n. 6) (while a state may impose disclosure requirements, "Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.")

Respectfully submitted,

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July 22, 2011

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 July 22, 2011.

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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 5275 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.

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