IN THE MISSOURI SUPREME COURT

No. SC90601

ASHLEE RUHL,
Respondent,

v.

LEE'S SUMMIT HONDA,
Appellant.

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

The Honorable Jack R. Grate, Circuit Judge

SUBSTITUTE OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Jurisdictional Statement 1

Statement of Facts 3

Points on Appeal 8

Argument 10

1. First Point on Appeal 10

A. Standard of Review 10

B. The Parties' Arbitration Agreement Falls Within The Federal Arbitration Act 11

C. Disputes Regarding The Unauthorized Practice Of Law Are Arbitrable. 14

D. Respondent's Claims Fall Within The Scope Of The Arbitration Agreement. 18

E. As Respondent's claims are arbitrable and those claims fall within the scope of the arbitration agreement, the trial court's judgment must be reversed and arbitration must be compelled. 21

2. Second Point on Appeal 23

A. Standard of Review 23

B. General Principles Regarding Unconscionability. 24

C. The Trial Court's Finding Of Procedural Unconscionability Lacked Evidentiary Support, As Respondent Presented No Evidence On This Issue 26

D. The Trial Court Erred In Holding That Substantive Unconscionability Was Present. 31

(1) The Presence Of A Class Action Waiver, Standing Alone, Does Not Render An Arbitration Agreement Substantively Unconscionable. 33

(a) Missouri State Cases Have Held Class Action Waivers To Be Unconscionable Only When Significant Procedural Unconscionability Has Also Been Present. 33

(b) Recent Federal Decisions Applying Missouri Law Have Upheld Arbitration Agreements With Class Action Waivers. 37

(c) The Arbitration Agreement, Here, Is Not Substantively Unconscionable Because The Class Action Waiver Is Not Tainted By Procedural Unconscionability Or Other Contract Terms That Insulate Appellant From Liability. 39

(d) The State Procedural Class Action Device Cannot Supercede The Substantive Federal Right To Arbitration. 43

(2) There Exists No Alternative Basis To Find The Parties' Arbitration Agreement Unenforceable Due To Substantive Unconscionability. 44

(3) This Court should not unilaterally alter the parties' agreement by severing the class action waiver. 48

Conclusion 51

Certificate of Compliance 53

Certificate of Service 54

TABLE OF AUTHORITIES

CASES

Bass v. Carmax Auto Superstores, 2008 WL 2705506 (W.D. Mo. July 9, 2008) ... 8, 9, 15, 16, 17, 30, 33, 37, 38

Burge Corp. v. Perryville Feed & Produce, 688 S.W.2d 837 (Mo. 1985) 12

Charles v. Spradling, 524 S.W.2d 820 (Mo. banc 1975) 43

Craft v. Philip Morris Companies, Inc., 190 S.W.3d 368 (Mo. App. 2005)..... 43

Delta Funding Corp. v. Harris, 912 A.2d 103 (N.J. 2006) 46

Dominium Austin Partners, LLC v. Emerson, 248 F.3d 720 (8th Cir. 2001)..... 44

Duggan v. Zip Mail Svcs., Inc., 920 S.W.2d 200 (Mo. App. 1996) 12

Dunn Ind. Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003).... 11, 13, 19

Funding Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624 (Mo. App. 1979) 25

Getz Recycling, Inc. v. Watts, 71 S.W.3d 224 (2002) 12

Gilmer v. Interstate-Johnson Lane Corp., 500 U.S. 20 (1991) 11

Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson, 2010 WL 1189557 (U.S. March 30, 2010) 51

Gras v. Associates First Capital Corp., 346 N.J.Super. 42, 786 A.2d 886 (2001) 47

Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000) 41

Greenpoint Credit LLC v. Reynolds, 151 S.W.3d 868 (Mo. App. 2004) 46

Gutierrez v. State Line Nissan, Inc., 2008 WL 3155896 (W.D. Mo. August 4, 2008) 8, 15, 17, 33, 37, 39

Harris v. AG Edwards & Sons, 273 S.W.3d 540 (Mo. App. 2008) 19

In re Piper Funds, Inc., 71 F.3d 298 (8th Cir. 1995) 43

Ingle v. Illinois Cent. Gulf R. Co., 608 S.W.2d 76 (Mo.App. 1980)..... 50

Kansas City Urology, P.A. v. United Healthcare Svcs., 261 S.W.3d 7 (Mo. App. 2008) 18, 19

Kates v. Chad Franklin Nat'l Auto Sales North, Inc., 2008 WL 5145942 (W.D. Mo. December 1, 2008)..... 9, 33, 37, 39, 43, 45

Lawrence v. Manor, 273 S.W.3d 525 (Mo. banc 2009)..... 24

Livingston v. Associates Fin., Inc., 339 F.3d 553 (7th Cir. 2003)..... 47

McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881 (Mo. App. 1993).. 8, 11

Milavetz, Gallop & Milavetz, P. A. v. United States, 2010 WL 757616 (U.S. March 8, 2010) 51

Paetzold v. American Sterling Corporation, 247 S.W.3d 69 (Mo. App. 2008)..... 10, 23

Pleasants v. American Express Co., 541 F.3d 853 (8th Cir. 2008)..... 25, 33, 37, 41

Rains v. Foundation Health Sys. Life & Health, 23 P.3d 1249 (Colo. Ct. App. 2001)..... 47

Randolph v. Green Tree Fin. Corp., 255 F.3d 814 (11th Cir. 2001) 47

Salley v. Option One Mortgage Corp., 925 A.2d 115 (Pa. 2007) 46

Scott v. Blue Springs Ford, Inc., 215 S.W.3d 145 (Mo. App. 2006) 41

Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002)..... 47

State ex rel. Dixon v. Darnold, 939 S.W.2d 66 (Mo. App. 1997)..... 27

State ex rel. MCS Bldg. Co. v. KKM Medical, 896 S.W.2d 51 (Mo. App. 1995) 19

State ex rel. Telecom Management, Inc. v. O'Malley, 965 S.W.2d 215 (Mo.App. 1998) 12

State ex rel. Vincent v. Schneider, 194 S.W.3d 853 (Mo. banc 2006) 10, 23, 24, 30

Swain v. Auto Services, Inc., 128 S.W.3d 103 (Mo. App. 2003) 13, 30

United Student Aid Funds, Inc., v. Espinoza, 2010 WL 1027825 (U.S. March 23, 2010) 51

Wages v. Young, 261 S.W.3d 711 (Mo. App. 2008) 42

Whitney v. Alltel Communications, Inc., 173 S.W.3d 300 (Mo. App. 2005) ... 9, 24, 25, 30, 31, 32, 33, 34

Woods v. Mehlville Chrysler-Plymouth, 198 S.W.3d 165 (Mo. App. 2006) 42

Woods v. QC Financial Services, Inc., 280 S.W.3d 90 (Mo. App. 2008).. 9, 33, 34, 35, 36, 40

STATUTES

§ 435.350, RSMo 2000 12

§ 435.440.1, RSMo 2000 1

9 U.S.C. § 1, *et seq.* 11

9 U.S.C. § 16(a)(1)(B) 1

9 U.S.C. § 2 11

Chapter 435, RSMo 2000 11

JURISDICTIONAL STATEMENT

This matter arises from an action brought by Respondent Ashlee Ruhl in the Circuit Court of Jackson County, Missouri. Respondent was charged a Dealer Administration Fee by Appellant in a motor vehicle purchase transaction. Legal File at 16. Respondent contends that the charging of this fee constituted the unauthorized practice of law and that this, in turn, violated the Missouri Merchandising Practices Act. Legal File at 11-13. Respondent brings both individual claims and seeks to represent a putative class consisting of all Missouri residents who were charged the fee by Appellant. Legal File at 9.

Appellant filed a Motion to Compel Arbitration in the trial court, requesting that Respondent be ordered to arbitrate her individual claims. Legal File at 33-41. The trial court denied that Motion. Legal File at 123. The trial court subsequently amended its ruling to denominate it as a judgment for purposes of appeal. Legal File at 145. This Court has jurisdiction to hear an immediate appeal of the denial of Appellant's motion to compel arbitration under 9 U.S.C. § 16(a)(1)(B) and/or § 435.440.1, RSMo 2000.

Appeal was originally taken to the Missouri Court of Appeals, Western District, as Jackson County is within the geographic boundaries assigned to that appellate court. This Court subsequently ordered transfer of this matter after opinion from the Missouri Court of Appeals, Western District, pursuant to Missouri Supreme Court Rule 83.04. This matter does not involve any of the issues reserved for the exclusive jurisdiction of

the Missouri Supreme Court under Article V, Section 3 of the Missouri Constitution, in that none of the issues in this matter concerns the validity of a treaty or statute of the United States, the validity of a statute or provision of the constitution of this state, the construction of the revenue laws of this state, the title to any state office, or a criminal conviction where the punishment imposed is death.

STATEMENT OF FACTS

On November 29, 2006, Respondent Ashlee Ruhl ("Respondent") purchased a new 2007 Honda Civic from Appellant Lee's Summit Honda ("Appellant") for a total selling price of $20,837.55. L.F. at 16.[1] As part of the purchase price of that vehicle, Appellant charged a Dealer Administration Fee of $199.95. L.F. at 16.

During the purchase transaction, the parties also executed an "Agreement To Arbitrate" (the "Arbitration Agreement"). In the Arbitration Agreement, the parties agreed to submit to binding arbitration all disputes involving:

> (1) the purchase/lease by Customer(s) of the above-referenced Vehicle; (2) any products and services purchased in conjunction with the Vehicle; (3) any financing obtained in connection with the transaction; and/or (4) any dispute with respect to the existence, scope, or validity of this Agreement. Matters that the Parties agree to arbitrate include, but are not limited to, disputes related to the Retail Purchase/Retail Lease Agreement and any documents incorporated therein by reference (whether such reference is made in the Agreement or in the document itself), the application for and terms of

[1] All further citations to the Legal File in this matter will be in the form of "L.F. at ____."

> financing for the transaction, the Finance/Lease Contract, any alleged promises, representations, and/or warranties made to or relied upon by the Parties, and any alleged unfair, deceptive, or unconscionable acts or practices.

L.F. at 39. The Arbitration Agreement further provided that Appellant would pay the entirety of the filing fee for the arbitration proceeding if the proceeding was initiated by Appellant.[2] *Id.* Respondent would also pay any administrative costs in excess of $750.00, regardless of who initiated the arbitration. *Id.*

The Arbitration Agreement excluded from its coverage claims that fell within the jurisdiction of "small claims" court proceedings. *Id.* It also left open Respondent's ability to file a complaint with the Attorney General's office and the parties' ability to participate in mediation programs offered by the Attorney General and the Better Business Bureau. *Id.* However, within the Arbitration Agreement, the parties relinquished their rights to a jury trial regarding covered disputes. *Id.* The parties also agreed to waive "their right to bring or participate in any class action or multi-plaintiff action in court or through arbitration." *Id.*

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[2] If Respondent initiated the arbitration, Appellant would (upon request by Respondent) pay any initial filing fees that would exceed what Respondent would otherwise be required to pay as filing fees in a state or federal court having proper jurisdiction over the claim. *Id.*

Respondent filed the present action on January 23, 2008. L.F. at 6. In her Petition, she alleges that the Dealer Administration Fee was charged for the preparation of legal documents[3] in the purchase transaction. L.F. at 7-8. She first contends that the charging of the fee constituted engaging in the unauthorized practice of law. L.F. at 11-12. She also contends that charging a fee that constituted the unauthorized practice of law is also a violation of the Missouri Merchandising Practices Act. L.F. at 12-13.

Appellant subsequently filed a motion seeking enforcement of the parties' Arbitration Agreement. L.F. at 33-53. In that motion, Appellant requested that the trial court order Respondent to arbitrate her individual claims and for dismissal of Respondent's class claims, due to the parties' express waiver of the ability to bring or participate in class action proceedings within the Arbitration Agreement. *See generally, id.* Respondent opposed that motion. *See generally*, L.F. at 54-89. However, Respondent did not present any affidavit, testimony, or other evidence discussing the circumstances of the Respondent's purchase transaction (either in general or specifically in regard to the execution of the Arbitration Agreement). L.F. at 77-89. There was no hearing held on the motion to receive other evidence or oral argument of counsel.

On July 31, 2008, the trial court denied Appellant's motion to compel arbitration. L.F. at 123-24. That denial was originally in the form of an order. *Id.* The trial court

[3] The Petition does not specifically identify particular documents, beyond the "Retail Installment Contract" and the "Buyer's Order and Bill of Sale." L.F. at 7.

subsequently amended its ruling to denominate it as a "judgment" for purpose of appeal. L.F. at 140-41. Appellant sought this amendment in light of this Court's previous dismissal of appeals in other matters where appeals had been taken from "orders" denying motions to compel arbitration. L.F. at 126-139.

In its September 24, 2008, Judgment, the trial court based its denial of Appellant's motion to compel arbitration on three principal grounds. The Court first held that "the claim that Defendant has engaged in the unauthorized practice of law is not subject to arbitration. […] Any decision by any arbitrator regarding what constitutes the practice of law clearly interferes with the exclusive authority of the Courts to adjudicate all issues regarding the practice of law." L.F. at 140. The Court also appeared to rest its holding upon a conclusion that the unauthorized practice of law claim was not arbitrable because it "does not require interpretation of the contract at issue" as it "does not seek to enforce or rescind the contract, nor does it seek damages for breach of the contract." *Id.*

The second and third grounds relied upon by the trial court in its judgment were procedural and substantive unconscionability, respectively. L.F. at 140-41. The Court stated its finding that procedural unconscionability was present because Respondent "was in a significantly inferior bargaining position, and was presented with a take-it-or-leave-it, preprinted 'Agreement to Arbitrate.'" L.F. at 140. With regard to the issue of substantive unconscionability, the Court held that the Arbitration Agreement was substantively unconscionable because of the waivers of the parties' right to jury trial and

the ability to bring or participate in class action (or other multi-plaintiff) proceedings. L.F. at 141.

After entry of the trial court's judgment, Appellant filed a timely notice of appeal, initiating the present appeal. L.F. at 142-48.

POINTS ON APPEAL

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

Bass v. Carmax Auto Superstores, 2008 WL 2705506 (W.D. Mo. July 9, 2008)

Gutierrez v. State Line Nissan, Inc., 2008 WL 3155896 (W.D. Mo. August 4, 2008)

McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881, 887 (Mo. App. 1993)

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

Whitney v. Alltel Communications, Inc., 173 S.W.3d 300, 308 (Mo. App. 2005)

Woods v. QC Financial Services, Inc., 280 S.W.3d 90 (Mo. App. 2008)

Bass v. Carmax Auto Superstores, 2008 WL 2705506 (W.D. Mo. July 9, 2008)

Kates v. Chad Franklin Nat'l Auto Sales North, Inc., 2008 WL 5145942 (W.D. Mo. December 1, 2008).

ARGUMENT

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

A. Standard of Review.

The question of whether an arbitration agreement should be enforced is an issue of law, subject to *de novo* review. *Paetzold v. American Sterling Corporation*, 247 S.W.3d 69, 71 (Mo. App. 2008), citing *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. banc 2006).

B. The Parties' Arbitration Agreement Falls Within The Federal Arbitration Act.

In Missouri, there are two alternative sets of statutory provisions that may apply to the question of whether compliance with the parties' arbitration agreement should be compelled. One set is provided by federal law, through the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. ("FAA"). This federal act was established to reverse the long-standing judicial hostility to arbitration agreements and to place such agreements upon the same footing as other contracts. *Gilmer v. Interstate-Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA establishes a liberal policy favoring arbitration agreements so the disputes may be resolved without resort to the courts. *Dunn Ind. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427 (Mo. banc 2003). Under the FAA, a written agreement to submit a dispute arbitration is valid, enforceable, and irrevocable, except upon such grounds as exist at law or equity for the revocation of any contract. *McCarney v. Nearing, Staats, Prelogar & Jones*, 866 S.W.2d 881, 887 (Mo. App. 1993); 9 U.S.C. § 2. Under the FAA, an arbitration clause will be construed in favor of arbitration unless the clause positively cannot be interpreted to cover the parties' dispute. *McCarney*, 866 S.W.2d at 887.

The second set of statutory provisions that may control an arbitration agreement is provided by the Missouri Uniform Arbitration Act ("MUAA"), Chapter 435, RSMo 2000. The MUAA is fashioned after the FAA and establishes the same public policy

favoring enforcement of arbitration agreements. *State ex rel Telecom Management, Inc. v. O'Malley*, 965 S.W.2d 215, 218 (Mo. App. 1998). Missouri law is clear that "a written agreement to submit any existing controversy to arbitration or a provision in the written contract … is valid and enforceable and irrevocable…." *See* § 435.350, RSMo 2000. "Arbitration clauses are to be construed so as to favor arbitratability and an order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause does not cover the asserted dispute." *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 229 (2002). "Generally a court must stay litigation if it determines that the parties agreed to arbitrate." *Id*.

Given the existence of these two bodies of law, the threshold question concerns which body of law applies – the FAA or the MUAA. If the FAA applies to the arbitration agreement, then it takes precedence over the MUAA. *See Burge Corp. v. Perryville Feed & Produce*, 688 S.W.2d 837, 839 (Mo. 1985); *Duggan v. Zip Mail Svcs., Inc.*, 920 S.W.2d 200, 202 (Mo. App. 1996). The FAA applies whenever the parties' contract affects interstate commerce and the parties' dispute falls within the scope of a valid arbitration agreement. 9 U.S.C. § 2. Here, it is without dispute that the FAA applies to the parties' arbitration agreement.

In the proceedings, below, Appellant presented evidence that interstate commerce was involved in the transaction. L.F. at 38. The vehicle purchase transaction occurred in Lee's Summit, Missouri. *Id*. However, the vehicle was obtained by Appellant from

outside of Missouri. *Id.* In addition, the financing for Respondent's purchase of that vehicle came from an out-of-state lender. *Id.* This evidence was undisputed by Respondent. Nor did Respondent otherwise dispute applicability of the FAA to the parties' arbitration agreement. *See* L.F. at 57-58 (applying provisions of the FAA). Thus, in this appeal, enforceability of the parties' arbitration agreement must be determined through application of the FAA.

Applying the FAA, Missouri courts have held that arbitration must be compelled if a two-prong test is met. *See Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. 2003) (citing *Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-28 (Mo. banc 2003)). First, the court determines whether the parties have entered into a valid agreement to arbitrate. *See Swain*, 128 S.W.3d at 103. Second, the court determines whether the dispute falls within the scope of the arbitration agreement. *See id.* In the following sections, Appellant will show that both prongs of this test are satisfied in this matter.[4]

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[4] The trial court's judgment addressed these two prongs in reverse sequence, addressing the scope issues first and the validity of the arbitration agreement second. *See* L.F. at 140. For purposes of clarity in reviewing the trial court's judgment, Appellant will discuss these issues in the sequence they were considered by the trial court.

C. Disputes Regarding The Unauthorized Practice Of Law Are Arbitrable.

The first ground relied upon by the trial court in its Judgment denying Appellant's Motion to Compel Arbitration is the court's conclusion that claims concerning the unauthorized practice of law cannot be submitted to arbitration because claims regarding the practice of law in Missouri must be decided by the Missouri judiciary. L.F. at 140.[5] While this conclusion does not squarely fit into the two-prong test discussed above, it would appear to generally fall within the second prong, as it concerns the question of the scope of the parties' Arbitration Agreement and whether claims for the unauthorized practice of law can fall within the scope of an arbitration agreement, rather than the validity of the underlying agreement.

Prior to the opinion issued by the Missouri Court of Appeals, Western District, in this matter, Appellant is aware of no decision issued by the Missouri appellate courts addressing the specific question of whether the parties to an arbitration agreement can agree to submit to arbitration disputes that involve allegations that a party has engaged in the unauthorized practice of law. However, this precise issue has been considered by the U.S. District Court for the Western District of Missouri on at least two occasions. In

[5] The trial court's analysis on this issue is solely directed to Respondent's unauthorized practice of law claim, and does not apply to Respondent's Missouri Merchandising Practices Act claim.

Bass v. Carmax Auto Superstores, 2008 WL 2705506 (W.D. Mo. July 9, 2008),[6] and *Gutierrez v. State Line Nissan, Inc.*, 2008 WL 3155896 (W.D. Mo. August 4, 2008), the plaintiffs sought to bring putative class actions raising claims that the defendant motor vehicle dealerships had engaged in the unauthorized practice of law by charging "document preparation fees." *Bass* at *1; *Gutierrez* at *1. In each matter, the defendant dealerships moved to compel arbitration pursuant to written arbitration agreements. *See Bass* at *1; *Gutierrez* at *1.

The *Bass* court specifically addressed the question of whether an arbitrator can be authorized to decide a dispute that involves allegations that one of the parties engaged in the unauthorized practice of law. *See Bass* at *2. It began its analysis of this issue by noting that the only authority discussing the role of Missouri courts in deciding what conduct constitutes the unauthorized practice of law speaks only with regard of the role of the courts in relation to the legislature. *See id.* at *2. The court correctly noted that Missouri precedent is silent as to what role an arbitrator can play with regard to disputes involving allegations of the unauthorized practice of law. *See id.* Given that observation,

[6] *Bass* was decided after briefing had closed on Appellant's motion, but Appellant sought leave to presented this additional authority to the Court (including a complete copy of the decision). L.F. at 114-122. In an order dated, August 1, 2008, the trial court granted that motion and acknowledged that the trial court had considered this additional authority in reaching its ruling upon Appellant's motion to compel arbitration. L.F. at 125.

the *Bass* court held that "nothing [the Missouri appellate courts] said can be interpreted as precluding arbitration of a private dispute," even if the dispute involved claims concerning the unauthorized practice of law. *Id.*

The *Bass* court further reasoned that there exists a crucial distinction between *defining* what constitutes the unauthorized practice of law and *applying* that definition to a private dispute. *See id.* As the *Bass* court stated:

> More importantly, it is the arbitrator's duty to apply the law, regardless of its source. There are many contexts in which one branch of government is obligated to apply a particular law, and there are many contexts in which one branch of government is primarily obligated to address the law in a given area. These observations do not preclude an arbitrator from deciding a dispute between private parties who agree to arbitrate; otherwise no arbitrator could decide anything because arbitrators are not ceded any governmental power. Moreover, this "hostility toward arbitration" is the very reason the FAA exists.

Id. Arbitrators, having no inherent power to resolve disputes, obtain their authority through the parties' agreement to arbitrate a dispute. *See id.* Thus, the *Bass* court ultimately concluded that the parties could authorize an arbitrator to resolve disputes

involving allegations of the unauthorized practice of law, just as they could authorize the arbitrator to resolve any other dispute between them. *See id.* The *Gutierrez* court, following the reasoning of the *Bass* decision, also concluded that "[t]he Missouri Supreme Court's decision in *Eisel* does not preclude an arbitrator from applying Missouri law to plaintiffs' case to determine if defendant's conduct constitutes the unauthorized practice of law or doing law business." *Gutierrez* at *3.

Turning to the facts of the case at bar, the express terms of the Arbitration Agreement require the arbitrator to apply all applicable state and federal law in reaching an award. L.F. at 39. The Arbitration Agreement also requires arbitrators to either be attorneys or retired judges. *Id.* This provision provides that the arbitrator will be a person with training and experience in reviewing and applying the law to the facts presented. *See id.* In light of these provisions, it would be unreasonable to presume that an arbitrator would be unable to review the body of Missouri case law discussing the unauthorized practice of law and to apply that case law to the evidence presented during the arbitration proceeding. In short, the parties should be free to enter into contracts by which they elect to refer such disputes to binding arbitration, just as they can choose to have disputes regarding other legal questions resolved in such a manner.

To hold that only Missouri courts can adjudicate claims that a party's conduct constituted the unauthorized practice of law would lead to absurd results. In particular, such a holding would, by extension, suggest that the federal courts, including the U.S.

Supreme Court, could not decide such claims in cases where the federal courts had original jurisdiction, either under federal question jurisdiction or diversity jurisdiction. Rather than adopt such an irrational position, this Court should follow the well-reasoned opinion of the *Bass* court and conclude that claims concerning the unauthorized practice of law are arbitrable, provided that the claims otherwise fall within the scope of an enforceable arbitration agreement.

D. Respondent's Claims Fall Within The Scope Of The Arbitration Agreement.

The trial court made a number of other findings that appear to be directed to the question of whether the parties' dispute was encompassed by the scope of the arbitration agreement. The trial court held that the dispute did not require interpretation of the parties' contract. L.F. at 140. It also held that the dispute did not seek to invalidate or enforce any of its provisions. *Id.* It appears that these findings were intended to support an argument that the claims in this matter fall outside of the scope of the Arbitration Agreement. *See id.*

Under the FAA, "arbitrability of a claim does not turn on whether or not the claim can be maintained without referring to the underlying contract but on whether or not the arbitration clause's scope is broad." *Kansas City Urology, P.A. v. United Healthcare Svcs.*, 261 S.W.3d 7, 12 (Mo. App. 2008). Where the scope of the arbitration agreement

is broad, as is the case, here,[7] there is a "*strong presumption in favor of arbitrability* and the circuit court should order arbitration of any issue that 'touches' matters covered by the parties' contract." *Id.* (italics added). Moreover, due to the strong public policy favoring arbitration "'once an agreement to arbitrate is proven, the arbitration clause will be construed in favor of arbitration unless the clause positively cannot be interpreted to cover the asserted dispute.'" *Harris v. AG Edwards & Sons*, 273 S.W.3d 540, 542 (Mo. App. 2008) (quoting *State ex rel. MCS Bldg. Co. v. KKM Medical*, 896 S.W.2d 51, 53 (Mo. App. 1995)).

The trial court's findings on this issue cannot be squared with either the evidence presented by the parties or the remainder of the record before the court. The claims clearly require reference to the parties' agreement. The claims within Respondent's Petition concern whether Respondent was wrongfully charged a Dealer Administration Fee. *See* L.F. at 11-13. This fee is one of the express, itemized terms of the parties'

[7] "A broad arbitration provision covers all disputes arising out of a contract to arbitrate; a narrow provision limits arbitration to specific types of disputes." *Dunn Indus. Group, Inc., v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). Here, the arbitration agreement is broad because encompasses "any dispute" between the parties that arises from the vehicle purchase; the purchase of goods or services in conjunction with the vehicle; the vehicle's financing; or the scope, existence, or validity of the arbitration agreement. L.F. at 39. In essence, it covers all disputes arising out of any aspect of the parties' transaction.

contract in the motor vehicle purchase transaction, appearing within the Retail Purchase Agreement. L.F. at 16. The front[8] of the Retail Purchase Agreement was part of the record before the Court, as an exhibit to Respondent's Petition. *See id.* Indeed, in order to resolve the merits of Respondent's claims, one of the central issues concerned the definition and purpose of the Dealer Administration Fee. Thus, the trial court's position that the parties' dispute required no reference to the parties' contract cannot be reconciled with the evidence presented in that court.

Likewise, the trial court's finding that the dispute did not seek "to enforce or rescind the contract" is similarly contradicted by the record, given that the purpose of Respondent's claims in this matter (under both the unauthorized practice of law and Missouri Merchandising Practices Act theories alleged) was to invalidate one of the terms of the parties' contract, namely the payment of the Dealer Administration Fee. Thus, the trial court's finding that the Respondents claims in this matter did not seek to invalidate at least one provision of the parties' contract cannot be reconciled with the record before the Court, including documents specifically relied upon by Respondent in her Petition.

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[8] The copy of the Retail Purchase Agreement filed as an Exhibit to Respondent's Petition did not include a copy of the reverse side of that document, which sets forth additional terms of the parties' contract. None of those additional terms were at issue in the proceedings below.

Given that the claims alleged in the Petition (under both theories of recovery) concern the validity of one of the terms set forth within the Retail Purchase Agreement, those claims fall squarely within the express terms of the Arbitration Agreement. The Arbitration Agreement specifically includes "disputes related to the Retail Purchase/Retail Lease Agreement" within the coverage of the Arbitration Agreement. L.F. at 39. Thus, the claims raised in the Petition are well within the scope of the Arbitration Agreement, rendering arbitration of those claims proper.

E. As Respondent's claims are arbitrable and those claims fall within the scope of the arbitration agreement, the trial court's judgment must be reversed and arbitration must be compelled.

The trial court erred as a matter of law in holding that Respondent's claims in this matter are not arbitrable. Even if Missouri courts have the exclusive right to *define* what conduct constitutes the unauthorized practice of law, this does not prohibit the parties from entering into an agreement to have an arbitrator *apply* that definition to the evidence presented in an arbitration proceeding. The specific body of law to be applied, here, does not make it impermissible for the parties to delegate, via contract, the authority to decide disputes between them. Rather, the parties' contract must be upheld, requiring them to arbitrate the present dispute.

Arbitration must also be compelled because the present dispute is arbitrable and it falls within the scope of the parties' Arbitration Agreement. The claims of the Petition

are a direct attack upon the enforceability of a term of the parties' contract, and it therefore falls squarely within the scope of the Arbitration Agreement. As the claims set forth within the Petition fall within the express scope of the parties' Arbitration Agreement and are otherwise arbitrable, the trial court's Judgment should be reversed and remanded with directions to compel Respondent to arbitrate her individual claims to arbitration.

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

A. Standard of Review.

This Court's review of the trial court's ruling is subject to the same, *de novo* standard of review set forth under Point One. The question of whether an arbitration agreement should be enforced is an issue of law, subject to *de novo* review. *Paetzold v. American Sterling Corporation*, 247 S.W.3d 69, 71 (Mo. App. 2008), citing *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. banc 2006)

B. General Principles Regarding Unconscionability.

Under federal law, an arbitration agreement is subject to the same state-law based defenses as are applicable to any contract, such as unconscionability, fraud, or duress. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. App. 2005). In the proceedings below, Respondent asserted that the parties' Arbitration Agreement should be held unenforceable upon an argument that the arbitration agreement is unconscionable.

Two types of unconscionability are considered by Missouri courts in determining whether a contract is unenforceable on grounds of unconscionability: procedural unconscionability and substantive unconscionability. "Procedural unconscionability deals with the formalities of making the contract." *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. banc 2006). It concerns inequities in the contract formation process, such as unequal bargaining position, "high pressure sales tactics, unreadable fine print, or misrepresentation." *Id.*; *Whitney*, 173 S.W.3d at 308. In comparison, substantive unconscionability, as applied to an agreement to arbitrate, concerns the terms of the agreement and whether a reasonable person signing the agreement would anticipate, under the totality of the circumstances, that the dispute in question would be referred to arbitration. *See id.*

As a general proposition, both procedural unconscionability and substantive unconscionability must be present to render an arbitration agreement unenforceable. *Lawrence v. Manor*, 273 S.W.3d 525, 531 (Mo. banc 2009) (citing *Whitney*); *Funding*

Sys. Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624, 634 (Mo. App. 1979). *See also Pleasants v. American Express Co.*, 541 F.3d 853, 859 (8th Cir. 2008) (concluding that precluding discovery on the issue of procedural unconscionability was harmless given the lack of any substantive unconscionability in the arbitration agreement). However, Missouri courts have applied a "balancing" test to both types of unconscionability. *See Whitney*, 173 S.W.3d at 308. Where there is evidence of a great deal of procedural unconscionability, little evidence of substantive unconscionability will be required. *See id.* Likewise, a showing of gross substantive unconscionablity will only require a minimal showing of procedural unconscionability to render a contract unenforceable. *See id.*

Here, the trial court concluded that the Arbitration Agreement could not be enforced due to the existence of both procedural and substantive unconscionability. *See* L.F. at 140. The trial court erred in reaching both conclusions. In the following discussion, Appellant will discuss the applicable Missouri precedent, in order to demonstrate that neither the circumstances under which the Arbitration Agreement was formed nor the terms of that agreement render that agreement unconscionable.

C. The Trial Court's Finding Of Procedural Unconscionability Lacked Evidentiary Support, As Respondent Presented No Evidence On This Issue.

With regard to the question of procedural unconscionability, the trial court specifically made two express findings of fact. The trial court first held that procedural unconscionability was present because the Arbitration Agreement was presented as a "take-it-or-leave-it" document. L.F. at 140. The trial court also held that the parties had unequal bargaining power. *Id.* Both of these findings of fact are erroneous, as they lacked any evidentiary support in the record before the court.

Simply put, there was no evidence before the trial court regarding the circumstances surrounding the execution of the Arbitration Agreement. In particular, there was neither any testimony by Respondent herself nor even any affidavit offered by her. Thus, she offered no evidence regarding the specifics of the purchase transaction or the execution of the arbitration agreement. Instead, Respondent's counsel made a number of unsupported arguments asserting the existence of specific facts in their Suggestions in Opposition regarding the circumstances of the transaction, including arguments that the Arbitration Agreement was presented as a "take-it-or-leave-it" document that Respondent had no opportunity to negotiate. *See* L.F. at 64. Respondent's counsel also made other arguments regarding what constituted "common practice in the automobile sales business" regarding arbitration agreements. *See id. None of those*

arguments were supported by any evidence, however.[9] *See id.* Respondent provided no citations to the record before the court that would support those arguments. *See id.* Nor did Respondent present to the court any affidavit, documents, or other evidence that would otherwise lend support to the fact allegations in the arguments raised by Respondent's counsel. *See id.* It its reply brief filed in the trial court, Appellant discussed Respondent's failure to offer any evidence to support her claims of procedural unconscionability. *See* L.F. at 97, 102.

Respondent's only presentation regarding the circumstances of the transaction consisted of the arguments of her counsel. Those arguments are not evidence, however. "[T]he unsworn statements by counsel are not evidence of the facts asserted." *State ex rel. Dixon v. Darnold*, 939 S.W.2d 66, 69 (Mo. App. 1997) (citing collected cases).

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[9] Indeed, the only "evidence" cited by Respondent consists of citations to other trial court decisions (many from other jurisdictions) finding other dealerships' arbitration agreements to be unenforceable on various grounds and discussions of congressional testimony of a representative of the Texas Automobile Dealer's Association and a letter from the National Automobile Dealer's Association regarding arbitration agreements, without any evidence that either of these statements could be imputed to Appellant. *See* L.F. at 65-66. In short, these items were utterly irrelevant and were properly disregarded by the trial court.

Thus, those arguments could not provide a basis from which the Court could make any *factual* findings with regard to procedural unconscionability.

Nor does the record allow the Court to reasonably reach inferences that would support a finding of procedural unconscionability. Turning first to the trial court's finding that the Arbitration Agreement was presented as a "take it or leave it" proposition, there was no basis from which the Court could conclude that Respondent was not provided an opportunity to negotiate the Arbitration Agreement. At best, the trial court could reasonably infer that the Arbitration Agreement is a pre-printed form document. It does not follow, however, that its terms could not be negotiated or altered. Indeed, the express terms of the Arbitration Agreement provide for its amendment or modification, stating that it can be so modified "by a separate written agreement signed by customer(s) and an authorized dealership representative." L.F. at 39. While there was no separate written agreement modifying the Arbitration Agreement before the court, one cannot infer from this that Respondent was not provided an opportunity to negotiate the terms of the Arbitration Agreement. Respondent offered no evidence that suggests that she was not provided an opportunity to negotiate the Arbitration Agreement. Thus, the trial court's finding that the Arbitration Agreement was not negotiated and was a "take-it-or-leave-it" proposition is utterly unsupported by any evidence in the record.

The trial court also rested its conclusion that procedural unconscionability was present upon a specific finding that there was a disparity of bargaining power between the

parties. L.F. at 140. Again, however, Respondent offered no evidence regarding the circumstances surrounding the transaction, not even an affidavit from the Respondent. Thus, there was no evidence before the Court regarding Respondent's economic situation, or her education, experience or sophistication. Indeed, we do not even know how many vehicles Respondent had previously purchased. Nor is there evidence to shed light on how aggressive Respondent was in the purchase negotiations or whether she had engaged in comparison shopping before deciding to purchase a vehicle from Appellant.

The Court improperly assumed that the Appellant held greater bargaining power in the transaction, as it lacked any evidence to support that conclusion. Respondent, however, had the ultimate veto in the transaction. If she was unhappy with the proposed terms of the vehicle purchase, she could take her business elsewhere. Indeed, in the *Bass* matter, addressing a similar argument by the plaintiff, that court concluded that the availability of other vendors eliminated any bargaining disparity:

> Accepting that Defendant had greater bargaining power than Plaintiff, Plaintiff was not obligated to execute the contract because there are a multitude of other (1) sellers of used cars and (2) sources of financing for used cars. Plaintiff was not obligated to buy a car from Defendant, was not obligated to finance the purchase, and was not obligated to obtain financing from the Defendant. The mere fact that the contract

> was a "form contract" and is used in all of Defendant's transactions -- even on a "take it or leave it" basis -- does not make the contract unenforceable.

Bass, 2008 WL 2705506, at *2. Here, there is no evidence that Respondent was under any pressure or obligation to enter into a motor vehicle purchase agreement with Appellant or to obtain financing for the purchase of that vehicle through Appellant. There was also no other evidence of a disparity in bargaining power. Absent such evidence (rather than merely argument by her counsel) that would support a conclusion of a disparity of bargaining authority, the trial court could not find that there was a significant disparity in bargaining power. Thus, it erred in making such findings in this matter.

Respondent "cannot simply allege that a pre-printed form contract is a contract of adhesion and offer no other proof of the matter." *State ex rel. Vincent*, 194 S.W.3d at 857. Any rule that would automatically invalidate form contracts (including form arbitration agreements) would be utterly unworkable in today's society. *See id.* (quoting *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. 2003)). Instead, to render a contract unenforceable upon grounds of procedural unconscionability, there must be circumstances surrounding the execution of the Arbitration Agreement that allow a finding that there were high pressure sales tactics employed or other methods employed to mislead or misdirect the other party into signing the agreement. *See, e.g.*, *Whitney*,

173 S.W.3d at 310. These methods can include using "small print," placing arbitration clauses on the reverse side of documents, etc. *See id*.

There is no evidence that any deceptive tactics were used here, however. The parties' Arbitration Agreement was contained on a separate page titled "AGREEMENT TO ARBITRATE," that was separately signed by Respondent. L.F. at 39. There was no argument before the trial court that the document was printed in "small type" that was difficult to read, nor did the trial court make any such finding. Respondent offered no evidence regarding the circumstances attendant to the purchase transaction and the execution of the Arbitration Agreement. Thus, there was no evidence of high pressure tactics, or any attempt to rush the transaction or otherwise prevent Respondent from reading the documents presented to her. Lacking such evidence, the trial court could not find that the transaction was tainted by procedural unconscionability. Consequently, the trial court erred by holding the Arbitration Agreement unenforceable on grounds of procedural unconscionability.

D. The Trial Court Erred In Holding That Substantive Unconscionability Was Present.

The second form of unconscionability is substantive unconscionability, which concerns the actual terms of a contract. *See Whitney*, 173 S.W.3d at 308. An agreement is substantively unconscionable if the contract terms are unduly harsh. *Id.* "Standing alone, '[a]n agreement choosing arbitration over litigation, even between parties of

unequal bargaining power, is not unconscionably unfair,' and '[a] provision so requiring is not unenforceable on the basis that it is a contract of adhesion.'" *Id.* at 310-11 (citations omitted). Instead, Missouri courts apply a "reasonable expectations" test in evaluating whether an arbitration agreement is substantively unconscionable. Under that test, the Court considers whether the provisions of the arbitration agreement would comport with the reasonable expectations of "the average member of the public who accepts such a contract," rather than the subjective expectations of the particular litigant. *Id.* at 310. If "an average, reasonable person would reasonably expect that the dispute at issue, arising from the agreement, might be resolved through arbitration rather than litigation, the arbitration provision is not unreasonably unfair." *Id.* at 311.

Here, the sole issue raised by Respondent with regard to the question of substantive unconscionability is the provision of the Arbitration Agreement through which the parties relinquished their ability to bring or participate in a class action proceeding. *See* L.F. at 66-74. As will be discussed below, no Missouri decision prior to the Court of Appeals' opinion in the instant matter has held that the mere existence of a class action waiver, standing alone, renders an arbitration agreement unenforceable. Instead, class action waivers have only been held to invalidate arbitration agreements when they have been combined with either substantial procedural unconscionability or other contract provisions that are substantively unconscionable. Here, as there is no evidence to support a finding of any procedural unconscionability nor any other

provisions upon which to ground a finding of substantive unconscionability, the parties' Arbitration Agreement (including its class action waiver) must be enforced.

(1) The Presence Of A Class Action Waiver, Standing Alone, Does Not Render An Arbitration Agreement Substantively Unconscionable.

Two recent Missouri appellate decisions discuss the enforceability of arbitration agreements containing such waivers, *Whitney v. Alltel*, *supra*, and *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. 2008). While each of these cases held that their respective arbitration agreements were unenforceable, the analysis underlying these opinions supports Appellant's position that arbitration should be compelled, here. A number of recent federal cases have also considered the question of the enforceability of arbitration agreements containing class action waivers and upheld those agreements. *See, e.g., Pleasants v. American Express Co.*, 541 F.3d 853 (8th Cir. September 9, 2008); *Kates v. Chad Franklin Nat'l Auto Sales North, Inc.*, 2008 WL 5145942 (W.D. Mo. December 1, 2008); *Gutierrez, supra; Bass, supra.*

(a) Missouri State Cases Have Held Class Action Waivers To Be Unconscionable Only When Significant Procedural Unconscionability Has Also Been Present.

In *Whitney*, both procedural and substantive unconscionability combined to invalidate the arbitration agreement. *See Whitney*, 173 S.W.3d at 314. As discussed above, procedural unconscionability was present due to the arbitration agreement being

contained in "fine print" on the reverse of a page included with the customer's telephone bill, as well as due to evidence that the agreement was not negotiated and the inferiority of the customer's bargaining position. *See id.* at 310. There were also numerous contract terms which combined to make the arbitration agreement substantively unconscionable and unfair when combined with the class action waiver. *See id.* at 313-14.

First, the arbitration agreement required the telephone customer to pay the entire cost of the arbitration proceeding. *Id.* at 313. Second, the agreement "prohibited an award of any incidental, consequential, punitive, or exemplary damages." *Id.* Third, the agreement also barred any award of attorney's fees. *Id.* The dispute at issue concerned charges of an eighty-eight cent charge. *See id.* By requiring claimants to pay substantial up-front charges and prohibiting awards of anything other than actual damages, "the costs would be so prohibitively expensive as to preclude, for all practical purposes, an aggrieved party from seeking redress for violation of the Missouri Merchandising Practices Act." *Id.* at 314. By extension, this Court concluded that no average person would reasonably expect that disputes over the charge would be required to be resolved through individual arbitrations. *See id.*

In the matter of *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. 2008), the Missouri Court of Appeals, Eastern District considered the enforceability of an arbitration agreement entered into between a creditor providing "payday" lending services and a debtor who had entered into a number of loan contracts with the creditor.

Id. at 92. The debtor brought a declaratory judgment action in the Circuit Court of St. Louis County, seeking to invalidate the arbitration agreement. *See id.* The debtor also sought certification of the case as a class action. *See id.* One of the central issues litigated was the whether the agreement, which contained a class action waiver, was unconscionable. *See id.* at 93. The trial court found the class action waiver to be unconscionable and severed that provision from the arbitration agreement, but upheld the remainder of the agreement, ordering the class claims into arbitration. *See id.*[10]

On appeal of the trial court's decision in *Woods*, the Eastern District concluded that the arbitration agreement was <u>both</u> procedurally and substantively unconscionable and upheld the trial court's judgment. *See id.* at 96, 98-99. Turning first to procedural unconscionability, the appellate court identified several factors that supported a finding that the arbitration agreement was substantively unconscionable. First, the court noted that there was evidence presented that the arbitration agreement was a form agreement that was never negotiated, despite being presented in roughly 2.8 million transactions. *Id.* at 96. Moreover, the court also found that there was a dramatic difference in bargaining power, with the creditor occupying a "much superior bargaining position," because the transaction involved loans against the debtor's next paycheck. *Id.* As a result:

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[10] Respondents, here, may attempt to argue that this Court should follow the *Woods* holding in this context. However, Appellant will establish that *Woods* is readily distinguishable from the case at bar and should not be followed here.

> there is a great deal of economic compulsion motivating [the creditor's] customers, in that they are living paycheck to paycheck, and not even that, since [the creditor's] business is based on the fact that its customers need loans before they even receive their next paycheck, and thus are forced by dire personal economic circumstances to patronize [the creditor's] business and incur rates of up to 400 percent.

Id. In essence, the court concluded that the debtor was forced by "dire" economic circumstances into the transaction. *See id.* In addition to this dramatic difference in the parties' economic positions, the court looked to expert testimony which discussed the legibility of the arbitration agreement, as "words from adjacent lines touched and an optical scanner was unable to make out the characters." *Id.* at *8. Thus, there was gross procedural unconscionability at play in the *Woods* transaction.

Turning to the issue of substantive unconscionability, the *Woods* court expressed concern regarding the presence of a class action waiver within the arbitration agreement, especially given the procedural unconscionability issues previously discussed. *See id*. at 97-98. In particular, the opinion discusses how the effect of the class action waiver, *as applied to the specific facts before the court*, was to "insulate" the creditor from suit, given that disputes between the parties would "predictably involve small amounts of money." *Id.* at 99. Thus, the *Woods* decision is necessarily tied to its specific facts, and

suggests that the enforceability of an arbitration agreement containing a class action waiver must be determined on a case-by-case basis, requiring consideration of both the terms of the agreement and the circumstances of the parties.

Whitney and *Woods* represent opposite sides of the same balancing test. In *Whitney*, this Court was presented with gross substantive unconscionability due to the severe limitations on recoverable damages and the requirement for the party bringing claims to pay the arbitration fees together with a lesser degree of procedural unconscionability. In contrast, the Eastern District in *Woods* was confronted with a situation with massive procedural unconscionability, given the stark contrast in the parties' bargaining power due to the payday loan borrower's tenuous economic situation, combined with the class action waiver. However, each stands for the proposition that arbitration agreements containing class action waivers will be held unenforceable only when <u>both</u> procedural and substantive unconscionablity are present.

(b) Recent Federal Decisions Applying Missouri Law Have Upheld Arbitration Agreements With Class Action Waivers.

A number of recent decisions have issued from the U.S. District Court for the Western District of Missouri that have upheld arbitration agreements that have also contained class action waivers: *Pleasants v. American Express Co.*, 541 F.3d 853 (8th Cir. September 9, 2008); *Kates v. Chad Franklin Nat'l Auto Sales North, Inc.*, 2008 WL 5145942 (W.D. Mo. December 1, 2008); *Gutierrez, supra; Bass, supra.* As discussed

above, both the *Bass* and *Gutierrez* cases involved cases concerning claims against motor vehicle dealerships that are essentially identical to the case at bar.

With regard to the issue of substantive unconscionability, the *Bass* court distinguished *Whitney*, primarily for the reasons that the terms of the agreement did not limit a claimant's ability to seek relief and provided for payment of the costs of the arbitration by the defendant dealership:

> There are provisions for Defendant to pay the costs of the arbitration, and there are no limits on a claimant's ability to obtain relief. These two characteristics distinguish cases in which Missouri courts have invalidated arbitration provisions. Plaintiff can obtain full and complete relief either in small claims court (in which case arbitration could not have been compelled) or in arbitration by virtue of the fee provisions contained in the parties' contract.

Bass, at *3 (footnotes and internal citations omitted). In light of these findings, the *Bass* court concluded that the arbitration agreement was not unconscionably unfair and that it did not "insulate Defendant from claims." *Id.* In *Gutierrez*, the federal court reached a similar conclusion, finding that the arbitration agreement contained no provisions that would "limit the claimant's ability to obtain relief" or "insulate the defendant from

liability." *Gutierrez* at *3. Likewise, in *Kates v. Chad Franklin National Auto Sales North, LLC,* the federal court, applying Missouri case law, concluded that "the mere existence of a class action waiver within an arbitration agreement does not render the Arbitration Agreement substantively unconscionable, absent limitations on the remedies available to claimants." *Kates*, at * 5.

(c) The Arbitration Agreement, Here, Is Not Substantively Unconscionable Because The Class Action Waiver Is Not Tainted By Procedural Unconscionability Or Other Contract Terms That Insulate Appellant From Liability.

None of the cases discussed above have held that a class action waiver, standing alone, is unenforceable. Instead, the above cases have refused to enforce arbitration agreements or severed class action waivers when the waiver was combined with other circumstances that supported a finding of unconscionability. In *Whitney*, the class action waiver was joined with other provisions that rendered it economically infeasible for a customer to file suit, as well as deceptive tactics that made it likely for a customer to overlook the arbitration clause. In *Woods,* the class action waiver and arbitration agreement where involved in a payday loan transaction, a transaction that is sought out only by those already in serious economic duress, giving rise to procedural unconscionability.

As discussed above, there was no evidence in the proceedings below from which the trial court could find that procedural unconscionability was present. There was no evidence that there was any disparity of bargaining power between the parties. There was no evidence that Respondent was under any compulsion or pressure (economic or otherwise) to purchase a new vehicle, let alone any vehicle from Appellant, who was one of many motor vehicle dealers in the Kansas City area. The evidence of dramatic economic disparity, verging on duress, that existed between the debtor and creditor in the *Woods* matter, and which was extensively discussed in that decision, is absent here. Moreover, unlike *Woods* here, there was no evidence presented (let alone expert testimony, as offered in *Woods*) to suggest that the formatting of the arbitration agreement was difficult to read or understand that might yield other grounds for finding procedural unconscionability. Thus, at the very outset, this matter presents a radically different set of facts from either *Woods* or *Whitney*.

Further distinguishing *Woods* is the *Woods* court's observation that the arbitration agreement concerned disputes between the parties that would "predictably involve small amounts of damages." *Woods*, at 99. Here, the parties Arbitration Agreement concerned disputes arising out of a motor vehicle purchase transaction. The selling price of that motor vehicle was approximately twenty thousand dollars. *See* L.F. at 16. This is not a context where the disputes arising from the Retail Purchase Agreement would "predictably involve small amounts of money." Where, as here, disputes arising out of a motor vehicle purchase have involved the Missouri Merchandising Practices Act, the

amounts at issue can readily reach six figures or more, even regarding an individual transaction. *See, e.g., Scott v. Blue Springs Ford, Inc.*, 215 S.W.3d 145, 154-55 (Mo. App. 2006)(MMPA claim regarding a single motor vehicle purchase transaction resulted in a (remitted) compensatory damages award of $24,367 and a punitive damages verdict of $840,000).

While Respondent argued that the effect of the class action waiver would be to immunize Appellant from liability on the claims alleged, she failed to make a showing to support such a conclusion. While she offered a conclusory argument that the potential recovery "would be less than the cost of filing and administrative costs," she presented no evidence as to what the actual those filing and administrative costs would be. L.F. at 69-70. It was Respondent's burden to show that arbitration was prohibitively expensive as well as the likelihood of incurring such costs. *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000); *Pleasants*, 541 F.3d at 859.

Under the express language of the arbitration agreement, in order to initiate the arbitration process, Respondent was only responsible to pay an amount equal to what would otherwise be required to file suit upon the claim in state court. *See* L.F. at 39. Thus, she would be no worse off in initiating the arbitration process than she would be seeking relief from the trial court. There was no evidence of what, if any, additional "administrative fees" would be charged upon Respondent's claims. Thus, there is no basis to conclude that administrative fees rendered arbitration economically unfeasible.

Nor did Respondent make any showing that the potential relief available in arbitration rendered her individual claim economically unfeasible. While the payment of a charge in the amount of $199.95 was at issue, Respondent was also seeking (a) treble damages ($599.85) under the unauthorized practice of law statutes, (b) punitive damages under the Missouri Merchandising Practices Act (which could be as much as $500,000 under Section 510.265, RSMo 2005, or, if limited to a single-digit multiplier, $1,799.55), and (c) an award of attorney's fees. *See* L.F. at 11-15. Respondent made no showing that such amounts would be insufficient for her to seek relief in a small claims proceeding or that prospect of an attorney's fee award would have been insufficient to encourage counsel to represent Respondent. Even a cursory review of other reported cases suggests that plaintiffs seeking to bring Missouri Merchandising Practices Act claims can find representation, even where relatively modest amounts are at issue. *See, e.g.*, *Woods v. Mehlville Chrysler-Plymouth*, 198 S.W.3d 165, 167-68 (Mo. App. 2006)(dispute over purchase of vehicle for $1,500); *Wages v. Young*, 261 S.W.3d 711 (Mo. App. 2008)(dispute concerning $1,800 car repair).

Given the lack of any evidence to support a finding of *any* procedural unconscionability, the arbitration agreement should be upheld, even if this Court were to conclude that the presence of a class action waiver yields *some* degree of substantive unconscionability. The balancing test adopted by the Missouri courts in evaluating unconscionability does not support invalidating an arbitration agreement merely because the agreement contains a class action waiver. Instead, Missouri law is clear that the mere

existence of such a provision will only invalidate an arbitration agreement where either evidence of severe procedural unconscionability or other contract provisions are present that limit remedies so as to create gross unfairness. *See Kates*, 2008 WL 5145942, at *5. Such is simply not the case in the present dispute.

Prior to the Court of Appeals' opinion in this matter, no Missouri appellate opinion had held that an arbitration agreement is rendered unconscionable (in whole or in part) solely because it contained a provision by which the parties relinquished the opportunity to bring or participate in a class action proceeding. This Court should decline Respondent's invitation to make a radical departure from the prior precedent established by this Court by issuing such a holding here.

(d) The State Procedural Class Action Device Cannot Supersede The Substantive Federal Right To Arbitration.

The ability to bring or participate in a class action proceeding is merely a procedural mechanism, rather than a substantive right. *See Charles v. Spradling*, 524 S.W.2d 820, 824 (Mo. banc 1975); *Craft v. Philip Morris Companies, Inc.*, 190 S.W.3d 368, 377 (Mo. App. 2005). It would distort all notions of federal preemption to allow the federal substantive right of the parties to agree to arbitrate disputes, as guaranteed by the Federal Arbitration Act, to be defeated because it waives the ability to pursue a particular procedural device provided by state law. As observed by the Eighth Circuit in *In re Piper Funds, Inc.*, 71 F.3d 298, 303 (8th Cir. 1995), a party's "contractual and statutory

right to arbitrate may not be sacrificed on the altar of efficient class action management." Instead, that Court has repeatedly held class action waivers in arbitration agreements are valid and enforceable. *See, e.g., Dominium Austin Partners, LLC v. Emerson*, 248 F.3d 720, 728 (8th Cir. 2001).

(2) There Exists No Alternative Basis To Find The Parties' Arbitration Agreement Unenforceable Due To Substantive Unconscionability.

In the briefing before the trial court, Respondent raised one additional argument, in support of their contention that the parties' Arbitration Agreement should be invalidated. Specifically, they argued that the arbitration agreement should be held unenforceable because it was "one sided," in favor of Appellant. Respondent's argument before the trial court asserted that the Arbitration Agreement was one sided because (a) only Respondent was effectively waiving her ability to participate in class actions and (b) Appellant was retaining the right to exercise self-help remedies (such as replevin). L.F. at 72-73. While this issue was not discussed by the trial court in its Judgment, Appellant will demonstrate that this argument does not yield an alternative basis for affirming the trial court's denial of Appellant's motion to compel arbitration.

The Arbitration Agreement, here, provided that *both* of the parties relinquished the ability to bring or participate in class action proceedings. L.F. at 39. However, the agreement also reserved to the parties certain alternative avenues for seeking relief, such

as self-help remedies, small claims proceedings, and administrative complaints to the attorney general's office:

> Notwithstanding any other provisions in this Agreement, the Parties agree that they are not waiving the right to exercise any self-help or provisional remedy available by law or pursuant to an agreement between them. Nor is either party required to arbitrate any individual claim that is filed and properly within the jurisdiction of a small claims court or equivalent state court.
>
> […]
>
> Neither party is precluded from filing a complaint with the Office of the Attorney General of this State or from participating in a mediation program administered by the Attorney General or Better Business Bureau, but the Parties agree that by entering into this Agreement, they are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff action in court or through arbitration.

L.F. at 39. Similar language has been held to constitute a mutual waiver. *See Kates*, *supra*, at *5 (citing *Bass* and *Gutierrez*). There is no reported case, interpreting Missouri

law, that has held that a mutual class action waiver renders an arbitration agreement "one sided" and unconscionably unfair.

Respondent correctly noted in the proceedings below that the Arbitration Agreement excluded certain claims from the arbitration requirement. Respondent focused on the exception for "self help" remedies.[11] *See* L.F. at 73. In the proceedings below, Respondent argued that the exception for "self help" and "provisional" remedies operated to the sole benefit of Appellant. However, this argument misrepresented the express language of the Arbitration Agreement, which states that *both* parties retain the right to "self help" or provisional remedies. *See* L.F. at 39. In those circumstances where an exception to arbitration for "self help" remedies was made available only to one of the parties, courts have invalidated the provision restricting the remedy to only one party, rather than invalidating the arbitration agreement altogether. *See, e.g., Greenpoint Credit LLC v. Reynolds*, 151 S.W.3d 868, 875 (Mo. App. 2004)(reforming arbitration agreement to allow debtor to raise claims and defenses arising out of the repossession of collateral in state court replevin proceeding). In addition, that same clause also carved out exceptions

[11] These self help remedies include replevin, which is "uniquely judicial in character" and not readily conducted in an arbitral forum. *See, e.g., Delta Funding Corp. v. Harris*, 912 A.2d 103 (N.J. 2006); *Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 128 (Pa. 2007).

for arbitration for small claims proceedings from the arbitration requirement, which would operate to avoid arbitration altogether in small disputes.

Respondent, through her Missouri Merchandising Practices Act claim, seeks an award of attorney's fees. A number of courts have held that the availability of an attorney's fee award makes it possible for a claimant to obtain a meaningful recovery, even if they have waived the ability to bring or participate in a class action. *See Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp.*, 255 F.3d 814, 818 (11th Cir. 2001). Given the potential availability of attorneys fees on the legal theories pleaded, and in absence of any showing by Respondent that the economic costs of arbitration outweigh the potential recovery, there is no basis for this Court should not conclude that the Arbitration Agreement immunizes Appellant from claims or that the Agreement is otherwise unconscionable. *See Gras v. Associates First Capital Corp.*, 346 N.J.Super. 42, 786 A.2d 886, 892 (2001); *Livingston v. Associates Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (no factual showing by claimant opposing arbitration that arbitration would impose prohibitive costs); and *Rains v. Foundation Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001).

Thus, Respondent's alternative substantive unconscionability arguments do not yield a basis to hold the Parties' agreement unenforceable, and the trial court's judgment cannot be sustained on such grounds. Accordingly, the trial court's judgment should be reversed.

(3) This Court should not unilaterally alter the parties' agreement by severing the class action waiver.

The trial court ultimately found the parties' Arbitration Agreement was unenforceable as a whole. Respondents may attempt to argue, as they did, in passing, in the proceedings below, that the class action waiver should be severed from the Agreement if the agreement, generally is found to be otherwise enforceable. Appellant maintains that the class action waiver is valid and enforceable under Missouri law, given the lack of any evidence of procedural unconscionability or any grounds to find substantive unconscionability that would invalidate either the class action waiver or the arbitration agreement as a whole.

While the Arbitration Agreement provides a mechanism for severance of provisions if they are found to be unenforceable, severance in this instance would essentially vitiate the parties' intent. It would also give rise to potentially unsolvable problems that could not be resolved. If the class action waiver is severed from the agreement, this would raise the question of whether the entire class action must be referred to arbitration. As discussed by Appellant in the proceedings below, this would give rise to an entire host of questions as to whether any ruling in the arbitral forum would be binding on the class members (particularly those who either did not sign an arbitration agreement or who signed *different* arbitration agreements than the agreement signed by Respondent). If class arbitration would not bind other members of the

proposed class, this would expose Appellant to multiple liability. There would also appear to be serious due process concerns raised by class arbitration for class members who did not enter into arbitration agreements with Defendant or who entered into materially different arbitration agreements than Respondent. As such, it is Appellant's position that the class action waiver is so integral to the arbitration agreement that it cannot be reasonably severed from the agreement.

The Court should note that a matter currently pending before the United States Supreme Court may considerably clarify the law on this issue. Specifically, on June 15, 2009, one month after briefing of this matter concluded in the Missouri Court of Appeals concluded, the United States Supreme Court accepted *certiorari* in the matter of *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation* , U.S. Supreme Court Case No. 08-1198. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 129 S.Ct. 2793 (2009). *Stolt-Nielsen* is a case arising out of the Second Circuit, focusing upon the question of whether class arbitration can be ordered under the Federal Arbitration Act in circumstances where an arbitration agreement is silent as to whether class arbitration is authorized. *See generally, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85 (2nd Cir. 2008). In *Stolt-Nielsen*, the 2nd Circuit was reviewing a district court's judgment concluding that an arbitration panel had manifestly disregarded the law in ordering class arbitration. *See id.* at 90. The party challenging class arbitration argued that ordering class arbitration was in manifest disregard of the law, principally "because the arbitration clause was silent, the parties intended not to permit class arbitration." *Id.* at 89. On appeal, the

Second Circuit reversed the district court, finding that the arbitration panel did not manifestly disregard the law and acted within its authority in ordering class arbitration. *See id.* at 101. The U.S. Supreme Court granted certiorari, to resolve the following Question Presented: "[w]hether imposing class arbitration on parties whose arbitration clauses are silent on that issue is consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq." *See* http://www.supremecourt.gov/qp/08-01198qp.pdf.

Many of the issues raised in the *Stolt-Nielsen* appeal echo the arguments Appellant raised in the trial court proceedings below and before the Court of Appeals with regard to the impact of severing the class action waiver from the parties' Arbitration Agreement, here. Ultimately, the U.S. Supreme Court's disposition of the *Stolt-Nielsen* litigation will have a direct impact upon the issues before this Court, especially if the U.S. Supreme Court concludes that, under the Federal Arbitration Act, class arbitration cannot be ordered unless the parties' arbitration agreement specifically permits class arbitration. If the Supreme Court determines that class arbitration is impermissible where the arbitration agreement, as in *Stolt-Nielsen* is silent as to whether class arbitration is authorized, it would follow that courts applying the Federal Arbitration Act cannot order class arbitration in circumstances where the parties' arbitration agreement, as here, expressly forbids class arbitration. The opinion issued by the U.S. Supreme Court upon a matter of substantive federal law is binding upon Missouri state courts applying that law. *Ingle v. Illinois Cent. Gulf R. Co.*, 608 S.W.2d 76, 82 (Mo. App. 1980). Thus, a decision by the U.S. Supreme Court applying substantive federal law (the Federal Arbitration Act) will

be controlling, here. *See id.* Accordingly, this Court should defer decision in this matter until the *Stolt-Nielsen* matter is resolved by the U.S. Supreme Court.

Fortunately, an opinion in the *Stolt-Nielsen* litigation is anticipated in the near future. Oral argument in the *Stolt-Nielsen* matter was held before the U.S. Supreme Court on December 9, 2009. Thus, a ruling upon that case is likely imminent. *Compare Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 2010 WL 1189557 (U.S. March 30, 2010) (argued November 30, 2009); *United Student Aid Funds, Inc., v. Espinoza*, 2010 WL 1027825 (U.S. March 23, 2010) (argued December 1, 2009); *Milavetz, Gallop & Milavetz, P. A. v. United States*, 2010 WL 757616 (U.S. March 8, 2010) (argued December 1, 2009).

CONCLUSION

For the reasons discussed above, the trial court's judgment denying Appellant's Motion seeking to compel arbitration must be reversed. The trial court erred as a matter of law in holding that a dispute cannot be arbitrated when the dispute include claims that a party has engaged in the unauthorized practice of law. The express language of the parties' contract contradicts the court's finding that the scope of the arbitration agreement did not encompass Respondent's claims. There was no evidence presented by Respondent that would allow a finding of procedural unconscionability. Nor did Respondent offer evidence that would support a conclusion that the Arbitration Agreement operated in a manner that was substantively unconscionable. Given the lack

of any other grounds to support findings of procedural or substantive unconscionability, the trial court deviated from Missouri law and erred by invalidating the parties' Arbitration Agreement merely due to the presence of a class action waiver.

Accordingly, Appellant respectfully requests that the judgment of the trial court be reversed and the case remanded with directions to the trial court to enter an order compelling Respondent to arbitrate her individual claims and dismissing the class claims of Respondent's Petition.

Respectfully submitted,

Case & Roberts P.C.

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CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Respondent states that this Brief is in compliance with the limitations of Rule 84.06(b), is in Microsoft Word format using Times New Roman 13 point font and contains 11,698 words, exclusive of the cover, Certificate of Compliance, Certificate of Service, signature block, and appendix. CD-ROMs, which have been scanned for viruses and are virus free containing the full text of the Brief in Microsoft Word format have been provided to the Clerk and to counsel for Respondent.

_____

Kevin D. Case

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Supreme Court Rules 84.01, 84.05(a), 84.07, and 84.11 that two copies of Appellant's Brief and a CD-ROM containing same were mailed, via regular U.S. mail, first class, postage prepaid this 8th day of April, 2010, to:

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APPENDIX

Table of Contents

Document:	**Page:**
Agreement to Arbitrate	A2
September 24, 2009, “Modification Judgment”	A3