

IN THE SUPREME COURT OF MISSOURI

No. SC90601

ASHLEE RUHL,

Plaintiff-Respondent vs.

LEE'S SUMMIT HONDA

Defendant-Appellant.

**Appeal from the Circuit Court of Jackson County State of Missouri Division 17 –
Hon. Jack R. Grate
Circuit Court Case Number 0816-CV01272**

SUBSTITUTE BRIEF OF RESPONDENT

**Mitchell L. Burgess # 47524
Keith C. Lamb # 56761
Burgess and Lamb, PC**

**Ralph Phalen # 36687
Phalen Law Firm**

**1000 Broadway Street, Ste. 400
Kansas City, Missouri 64105
(816) 471-1700; (fax) (816) 471-1701
Attorneys for Respondent**

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ARGUMENT

I. THE COURT DID NOT ERR IN ITS DENIAL OF APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE RESPONDENT'S CLAIMS DO NOT FALL WITHIN THE ARBITRATION AGREEMENT AS MISSOURI COURTS ARE THE SOLE ARBITERS OF WHAT CONSTITUTES THE PRACTICE OF LAW IN VIOLATION OF RSMO SECTIONS 484.010.2 AND 484.020

1. Respondent's Claims Do Not Fall Within the Arbitration Clause at Issue

“Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate.” *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 (Mo. banc 2003). The relationship between the claim and the contract is not satisfied simply because the dispute would not have arisen absent the existence of the contract between the parties. *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995). “The claim subject to arbitration under a broad arbitration clause must raise some issue the resolution of which requires reference to or construction of some portion of the parties' contract.” *Rhodes v. Amega Mobile Home Sales, Inc.*, 186 S.W.3d 793, 798 (Mo. App. W.D. 2006) (quoting *Estate of Athon v. Conseco Finance Servicing Corp.*, 88 S.W.3d 26, 30 (Mo. App. W.D. 2002)). Where a [tort] claim is independent of the contract terms and does not require reference to the underlying

contract, arbitration is not compelled.” *Northwest Chrysler-Plymouth, Inc. v. Daimler-Chrysler Corporation*, 168 S.W.3d 693, 696 (Mo. App. E.D. 2005).

In this case, Respondent’s claims against the Appellant are based on Appellant’s actions in preparing legal documents and charging a separate fee in violation of RSMO Sections 484.010.2 and 484.020 as a violation of the statutory proscription against a non-lawyer practicing law. In addition, Respondent alleges that the preparation of such documents and charging of the corresponding separate fee is also in violation of the RSMO Sections 407.010 *et seq* of the Missouri Merchandising Practices Act. Neither of Respondent’s claims has anything to do with “any dispute with respect to the existence, scope or validity of this Agreement.”

None of the claims made by the Respondent arises out of, relates to, or are connected with the Agreement. None of the claims are based on actions connected to the Agreement or carried out under the Agreement. Respondent is not suing to enforce any terms of the contract. None of the allegations require reference to or construction of the Agreement. All of the claims alleged in the Petition could have been brought even if the Agreement had never been signed. The ultimate decision in this case on the merits does not even require the contract to be considered. The only issue is whether Appellant charged Respondent a separate fee for preparing legal documents in violation of Missouri law.

In considering what claims arise out of an agreement subjecting the claims to arbitration, Federal Court Judge Fernando Gaitan recently stated:

Plaintiffs' claims do not arise out of the Asset Purchase Agreement. The Asset Purchase Agreement defines a dispute as all claims 'arising out of, relating to, or connected with' the Agreement. Plaintiffs' claims do not relate to the Agreement. Plaintiffs have asserted claims against Atlas and Grindrod involving civil conspiracy, tortious interference with contract, aiding and abetting a breach of fiduciary duty and tortious interference with prospective business expectancy or prospective business relationship. They are not seeking in their petition to enforce or rescind the Agreement, nor are they seeking damages for a breach of the Agreement. Therefore, the Court finds that the Plaintiffs' petition does not fall within the scope of the Arbitration clause contained in the Asset Purchase Agreement.

Seaboard Corporation v. Grindrod Limited et al., 4:05-cv-01229-FJG, Order filed 08/01/2006.

Similarly in *Northwest Chrysler-Plymouth, Inc.*, 168 S.W.3d at 693 an auto dealership brought suit against an automobile manufacturer and distributor alleging negligence, product liability and res ipsa loquitur arising out of an automobile that caught fire in the dealership's showroom. In affirming the trial court's denial of the manufacturer's motion to compel arbitration, the Court of Appeals, Eastern District held that:

...Further, the resolution of the tort claims does not require an examination of the parties' respective obligations and performance under the Agreement. Respondent did not file the Petition on the basis of the

Agreement or a breach of it. . . Appellants do not identify any portion of the Agreement that would need to be referred to or interpreted to determine whether such a defect or defects existed. Although Respondent refers generally to the Agreement in the Petition, it does so by way of factual background not as the basis for liability under the tort claims. *Id.* at 696-697.

Like in the cases set forth above, Respondent here is not seeking to enforce or rescind the Agreement nor is she seeking damages for a breach of the Agreement. Clearly, the plain language of the Agreement indicates it is limited to suits regarding the vehicle and/or its financing. It was never anticipated to cover a claim based on the unauthorized practice of law. The only relevance the contract has here is that Appellant lists the fee it charges for preparing the documents on the “buyer’s order”, and what the fee is for. That is the sole extent of the connection. Based on the claims raised in Respondent’s Petition, the Arbitration Agreement is not applicable here.

2. The Courts are the Sole Arbiters of what constitutes the practice of law in violation of RSMO Section 484.010 and 484.020

The Missouri Supreme Court has recently reiterated the standard for determining what constitutes the practice of law and who has the authority to make such a determination. “The judiciary is necessarily the sole arbiter of what constitutes the practice of law. Statues may aid by providing machinery and

criminal penalties but may not extend the privilege of practicing law to persons not admitted to practice by the judiciary.” See *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335 at 338 (Mo.banc 2007) (emphasis added). In *Eisel*, this Court held that the legislature could not usurp the authority of the judiciary in regulating the practice of law. Clearly then, an arbitrator, no matter his status as a former judge or current attorney, should not be allowed to render a ruling which could be in conflict with the judiciary’s authority. The appropriate arbiter of the practice of law in the State of Missouri would be a member of the Missouri or Federal judiciary currently appointed and sitting on the bench. This Court has made it clear it is the courts, and not arbitration, that are the appropriate venue for such questions.

If the Court determines that Respondent’s claims do not fall under the terms of the arbitration clause or that the claims asserted cannot be arbitrated due to the fact the judiciary reserves the authority to determine the issues raised in Respondent’s Petition, this Court need go no further in its analysis and must affirm the Trial Court’s denial of Appellant’s Motion to Compel Arbitration.

Assuming, *arguendo*, the Court finds that the arbitration agreement here does cover Respondent’s claims and that such claims can be arbitrated, the Arbitration Agreement at issue is nevertheless unconscionable and must be stricken.

**II. THE TRIAL COURT DID NOT ERR IN DENYING’ APPELLANT’S
MOTION TO COMPEL ARBITRATION BECAUSE THE**

**ARBITRATION AGREEMENT WAS BOTH SUBSTANTIVELY
AND PROCEDURALLY UNCONSCIONABLE.**

- 1. The Arbitration Clause at issue here is Unconscionable**
 - a. Unconscionability**

The Federal Arbitration Act (“FAA”) provides that arbitration clauses are enforceable “**save upon such grounds as exist at law or in equity for the revocation of any contract.**” 9 U.S.C.A. § 2 (emphasis added). The United States Supreme Court explained this language in *Perry v. Thomas*, stating that:

[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.

Perry v. Thomas, 482 U.S. 483, 495, fn.9 (1987).

Missouri state law relating to unconscionability is law that applies to any contract, not merely to arbitration contracts. Therefore state law in regards to unconscionability is enforceable and does not transgress the FAA.

Citing to *Perry*, this Court held in *Triarch Indus., Inc. v. Crabtree*, 158

S.W.3d 772, 776 (Mo. 2005), that “the FAA places arbitration agreements on an equal footing with other contracts, and courts will examine arbitration agreements in the same light as they would examine any contractual agreement.”

If a contract or provision therein is unconscionable, it is unenforceable. There are two types of unconscionability, procedural and substantive. *Bracey v. Monsanto Co.*, 823 S.W.2d 946, 950 (Mo. banc 1992). There is a “balancing between the substantive and procedural aspects . . . if there exists gross procedural unconscionability then not much is needed by way of substantive unconscionability.” *Id.* The same “sliding scale” will be applied if there is “great substantive unconscionability but little procedural unconscionability.” *Id.* Under Missouri law, substantive unconscionability has been enough to invalidate offensive clauses. *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006).

“[A]s with all contracts, the courts seek to enforce the reasonable expectations of the parties garnered not only from the words of a standardized form imposed by its proponent, but from the totality of the circumstances surrounding the transaction.” *Hartland Computer Leasing Corp v. Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo. App. E.D. 1989); *see also Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005). “‘Because standardized contracts address the mass of users, the test for ‘reasonable expectations’ is objective, addressed to the average member of the public who accepts such a contract, not the subjective expectations of an individual

adherent.” *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (quoting *Hartland Computer Leasing Corp.*, 770 S.W.2d at 527-28). “Only such provisions of the standardized form which fail to comport with such reasonable expectations and which are unexpected and unconscionably unfair are held to be unenforceable.” *Hartland Computer Leasing Corp.*, 770 S.W.2d at 527; *see also Smith v. Kriska*, 113 S.W.3d 293, 298 (Mo. App. E.D. 2003).

Substantive unconscionability deals with an undue harshness in the contract terms themselves. *Whitney*, 173 S.W.3d at 308. “[P]rocedural unconscionability concerns the contract formation process, and focuses on high pressure exerted on the parties, fine print of the contract, misrepresentation, or unequal bargaining position.” *Funding Sys. Leasing Corp. v. King Louie Int’l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. W.D. 1979). “Adhesion contracts usually involve the unequal bargaining power of a large corporation versus an individual and are often presented in pre-printed form contracts.” *Swain*, 128 S.W.3d at 107. Adhesion contracts are not necessarily unconscionable. While involving aspects of procedural unconscionability, such contracts “are not ‘inherently sinister and automatically unenforceable.’” *Id.* (quoting *Hartland*, 770 S.W.2d at 527).

Here, the Trial Court made an unequivocal finding in this case regarding the validity of the arbitration contract, stating:

“... this Agreement to Arbitrate is procedurally and substantively unconscionable. Procedural unconscionability ‘in general [,] is involved with the contract formation process and focuses on high pressure exerted on

the parties, fine print of the contract, misrepresentation, or unequal bargaining position.’ *Funding Systems Leasing Corp. v. King Louie International, Inc.*, 597 S.W. 2d 624, 634 (Mo. App. 1979). The Court finds that Respondent was in a significantly inferior bargaining position, and was presented with a take-it-or-leave-it, preprinted “Agreement to Arbitrate.” Thus, the Court finds that this agreement was procedurally unconscionable.

“Substantive unconscionability has been described as ‘an undue harshness in the contract terms themselves.’ *Id.* Here, the Court finds that the Agreement to Arbitrate was unduly harsh in its restrictions, including Respondent’s ‘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.’ Taken as a whole, considering both procedural and substantive aspects of unconscionability, the Court finds the ‘Agreement to Arbitrate’ is unconscionable. L.F. at 140-141.

It is a common practice in the automobile sales business for car dealers to present consumers with arbitration agreements and for them to limit the consumer’s ability to enter into any meaningful negotiations, because the arbitration provisions are employed by most other dealerships to which the consumer could go.

It is worth noting that Plaintiff was presented with the arbitration provision without being told that car dealers themselves consider mandatory binding pre-

dispute arbitration clauses so unconscionable that they persuaded Congress to relieve them from the oppression imposed by manufacturers that included such clauses in their franchise agreements. *See* the testimony of Gene Fondren, speaking before a congressional committee in March, 2000, on behalf of car dealers in support of S. 1020. At page 11 of his testimony, Mr. Fondren makes the point that “by placing an arbitration clause in this ‘take it or leave it’ contract, the stronger party may impose mandatory binding arbitration on an unwitting or unwilling dealer and circumvent state and federal law designed specifically to regulate the relationship that is the subject of the agreement.”

<http://judiciary.senate.gov/oldsite/312000gf.htm>.

Interestingly, in response to Rep. Richard Nadler’s criticism of car dealers objecting to arbitration clauses in their franchise agreements and then turning around and imposing arbitration on consumers, a spokesman for the National Automobile Dealers Association had this to say:

I realize that you and others have expressed concerns about the use of mandatory binding arbitration clauses in other contracts of adhesion, including consumer contracts. For the record, the National Automobile Dealers Association (NADA) does not support or encourage the use of mandatory and binding arbitration in any contract of adhesion, whether a motor vehicle franchise contract between a manufacturer and dealer or a consumer contract.

See July 12, 2000, letter of H. Thomas Greene.

b. There is Sufficient Evidence of Unconscionability in this Case

1. Substantive unconscionability

Appellant attempts to confuse this Court by alleging Respondent didn't meet her burden in showing substantive unconscionability. It is well settled law in Missouri that an arbitration clause that immunizes a party from liability by attempting to prevent consumers from having meaningful resolutions of their claims is substantively unconscionable. *See Woods*, 280 S.W.3d at 96. This principle is easy to understand and the policy behind the law is clear. To the extent Appellant, vis-à-vis its arbitration clause, requires customers to individually litigate their modest claims against Appellant, no customer would ever attempt to litigate any such claim because of the insufficient heft to attract the services of an attorney. *Id.* at 99 (“...Individualizing each claim absolutely and completely insulates and immunizes Appellant from scrutiny and accountability for its business practices and also serves as a disincentive for [Appellant] ... to avoid the type of conduct that might lead to class action litigation in the first place”); *see e.g. Brewer v. Missouri Title Loans, Inc.*, 2009 WL 4639889 (Mo. App. E.D. 2009); *Shaffer v. Royal Gate Dodge, Inc.*, 2009 WL 4638850 (Mo. App. E.D. 2009); *Doerhoff v. General Growth Properties*, 2006 WL 3210502 (W.D. Mo. 2006); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. App. W.D. 2005) (“An arbitration clause that defeats the prospect of class-action treatment in a setting where the practical effect affords the defendant immunity is unconscionable”). This is not a factual determination, as Appellant suggests, but an

idea so inherent in the waiver of class rights that it is followed by Missouri Courts, which have been unequivocal and clear in their distaste for class waivers, holding them procedurally and substantively unconscionable. *Id.*

Sitting en banc in *Huch v. Charter Communications, Inc.*, this Court recently cited to *Whitney*, holding, “to allow companies to avoid the protections established in the act would effectively strip consumers of the protections afforded to them under the Merchandising Practices Act and unfairly allow companies... to insulate themselves from the consumer protection laws of this State.” 290 S.W.3d 721 (citing *Whitney*, 173 S.W.3d at 314). “This result would be unconscionable and in direct conflict with the legislature’s declared public policy as evidenced by the Merchandising Practices Act and similar statutes.” *Id.* Missouri case law is clear that “an arbitration clause that defeats the prospect of class-action treatment in a setting where the practical effect affords the defendant immunity is substantively unconscionable and therefore unenforceable. *Shaffer*, 2009 WL 4638850.

Here, Appellant’s arbitration clause is substantively unconscionable because it reduces the possibility that victimized consumers can find attorneys who would be willing to represent them and effectively immunizes Appellant from liability. Even if an individual consumer were inclined to pursue a claim for the relatively small processing fee, “[a]n attorney will not find it an attractive risk to represent consumers on these claims because the potential recovery is so low.” *Id.* citing *Ruhl*, 2009 Mo. App. W.D. LEXIS 1543, *17 (Mo. App. W.D. 2009).

2. Procedural unconscionability

In evaluating procedural unconscionability, a court considers, among other factors, the contract formation process, small font size, unequal bargaining positions of the parties and pre-printed form contracts. *Woods, Id.* at 95.

In *Shaffer v. Royal Gate Dodge, Inc.*, a case virtually identical to *Ruhl*, the Eastern District noted, “the indicia of procedural unconscionability [was] present in the contract formation process. Specifically, the arbitration agreements were pre-printed form contracts, the parties did not negotiate the terms of the arbitration agreements, Royal Gate enjoyed a superior bargaining position, and the arbitration agreement contained in the Missouri Retail Installment Contract’s arbitration agreement appeared in fine print. *Id.*; see also *Woods*, 280 S.W.3d 90, 96; *Whitney*, 173 S.W.3d at 310.

The *Shaffer* Court further held that in light of the arbitration agreements “considerable substantive unconscionability,” they did not need to find significant procedural unconscionability. 2009 WL 4638850.

Considering the gross substantive unconscionability, combined with the well settled law that Missouri considers unconscionability on a “sliding scale,” only minimal, if any, procedural unconscionability is necessary in order to find an arbitration clause unconscionable and unenforceable. See *State ex rel. Vincent*, 194 S.W.3d 853; *Whitney*, 173 S.W.3d 300.

Appellant argues that Respondent presented no evidence to support her assertion of unconscionability. This is false on its face and contrary to the most apparent facts associated with the transaction, however it is noteworthy that Respondent made a genuine effort to obtain additional facts specifically regarding the arbitration issue through written discovery and a corporate deposition only to be denied all requested information and testimony that would have no doubt bolstered Respondent's assertion of unconscionability. L.F. 1-4.

Although Respondent was denied discovery regarding the Arbitration issue, it is without question that the Appellant never negotiated its arbitration clause and that the arbitration clause is a form contract. Clearly the Respondent and members of the class have unequal bargaining power when compared to the corporate Appellant. When a large corporation does business with an individual consumer, there is almost always disparity in bargaining power. In the context of these facts, the disparity is all the more apparent. At no time was Respondent able to change or negotiate any of the terms contained within the Arbitration Agreement. She had no opportunity to change or modify any of the terms or conditions. It is without question that the contract at issue was a pre-printed form and manifested the unequal bargaining power between the Appellant, a corporation, and the Respondent, an individual consumer.

The pre-printed form contract in this case was part of the record. Therefore, the trial court did, in fact, find enough evidence in the record to support a finding that the class waiver was procedurally unconscionable.

c. Class Action Waivers in Consumer Contracts in which Individual Representation is Unlikely Are Inherently Unconscionable

Appellant has contended that many courts enforce class action waivers; however, if one actually reads the decisions regarding class action waivers, a clear trend emerges. Early decisions (largely of federal courts) sometimes upheld class action waivers. As discussed in some detail in *Cooper v. QC Financial Services, Inc.*, 503 F.Supp.2d 1266 (D. Ariz. 2007), these early cases were often based on the Truth in Lending Act (“TILA”); those early cases considered whether the statutory intent was to vest individuals with the right to pursue a class action. Many of these early courts concluded that because statutory damages exist and because there is no legislative history to indicate that class actions are favored under federal statutes, an arbitration clause prohibiting class claims is enforceable. The courts of several states, including Texas, Maryland, Utah and North Dakota, have latched onto these early holdings.

In recent years, these early cases have been soundly rejected throughout the country, including in Missouri. Beginning with the Missouri case of *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d at 300, discussed in detail *infra*, the modern trend of appellate courts around the country has been to strike class action waivers in the consumer context when damages are not likely to be large enough to encourage individual resolutions. See e.g. *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88 (N.J. 2006); *Kinkel v. Cingular Wireless*, 223 Ill.2d 1 (Ill. 2006); *Scott v. Cingular Wireless*, 161 P.3d 1000 (Wa. 2007);

Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005); *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 953 (Or. App. 2007); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008); *Leonard v. Terminix*, 854 So.2d 529 (Ala. 2002); *Fiser v. Dell Computer Corporation*, 188 P.3d 1215 (N.M. 2008). *G.R. Homa v. American Express Co.* 558 F.3d 225,231 (3rd. Cir. 2009. (having decided that ... “class arbitration waiver violates fundamental New Jersey public policy as applied to small sum cases.”)

Following *Whitney’s* lead, two Missouri federal cases have also taken issue with class waivers. In *Doerhoff v. General Growth Properties*, the court ruled that an arbitration clause prohibiting class actions was unconscionable. 2006 WL 3210502, 6 (W.D. Mo. 2006). So strong is Missouri law’s distaste for class waivers, that in *Doerhoff*, a choice of law analysis led the federal court to conclude that New York law applied; however, the Court refused to apply New York law because it might require enforcing the class waiver. *Id.* Instead the *Doerhoff* Court applied Missouri law and refused to enforce the offensive clause. *Id.*

The second federal case is *Sprague v. Household International*, 473 F.Supp.2d 966, 973 (W.D. Mo. 2005). In that case, despite the fact that Respondent was not bringing a class action, the court noted that class waivers were “one-sided in [their] practical effect” and “weigh[ed] heavily in favor of a finding of substantive unconscionability.” Judge Laughrey also struck a class waiver provision in *Cicle v. Chase Bank USA* citing *Whitney* and *Doerhoff* and holding “Therefore, the class-action waiver and cost-splitting provisions contained in

the arbitration agreement are substantively unconscionable as applied to Cicle's Missouri Merchandising Practices Act claim.”

Coupled with the test laid out in *Whitney v. Alltell*, and the similar tests employed by courts throughout the nation, the arbitration clause at issue here impermissibly immunizes Appellant from the realistic possibility of meaningful legal accountability for its illegal activities. It is unconscionable for a business to prohibit consumer class actions when the case involves damages that are relatively small and when the practical result is immunity for the Defendant.

In the present case, Respondent contends that class waiver is unconscionable for a number of reasons. First, Respondent asserts that the clause serves as an obstacle which prevents consumers from learning that their rights may have been violated. This line of thinking, that class notice is an important function of class actions, is in line with the reasoning of multiple courts as well as legal scholars who write about this issue. In *Muhammad*, citing to scholarly articles, the Court noted:

Moreover, without the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged. . . . When they are being charged an excessive interest rate or a penalty for check bouncing, for example, few know or even sense that their rights are being violated. *Muhammad*, 912 A.2d 88 (N.J. 2006) (citing Jean R. Sternlight and Elizabeth J. Jensen, *Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business*

Practice or Unconscionable Abuse, 67 *Law & Contemp. Prob.* 75, 88 (2004)).

Class notices often serve as the only way that a consumer can learn of violations that are not intuitively sensed by consumers. Given the complexity of the transactions at issue here and the issue of violations of Missouri's prohibition against consumer protection laws, consumers are unlikely to be familiar enough with their legal rights to know whether or not Appellant has violated the law. Even if it were established in an individual arbitration that Appellant's actions violated Missouri law, the absence of class notice would keep other victims from learning of the possibility that they, too, were victimized.¹

Respondent also asserts that even if an individual were to learn of a potential violation by Appellant, it would be difficult for them to find adequate legal representation due to the limited value of the claims. Even assuming that an attorney could recover attorney fees under the arbitration clause or under the statutes, there is insufficient incentive for attorneys to take on cases like the Respondent's. As stated by the court in *Cooper*, "there is no indication that attorney fees are an adequate substitute for the class action mechanism." *Cooper*,

¹ As noted by the *Cooper* Court, by allowing Arbitration, Defendant would be sheltered from negative precedent and the possibility that final decisions issued by judges in the light of day would serve as at least minimal notice of illegal activity.

503 *F.Supp.2d* at 1289; *Muhammad*, 2006 912 A.2d at 9; *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 (1st Cir. 2006).

Although the threshold amount for a “small damages” case differed from expert to expert, it is clear that when a case involves potential damages of less than a few thousand dollars, most attorneys are not willing to take such case on a contingent basis nor will their clients pay hourly rates, which would quickly exceed any potential recovery. And, in this case, the customer is responsible for the initial filing fee for the arbitration and for the first \$750.00 of any administrative costs. *See Exhibit 1*. Finding an attorney to take a case involving a \$199.95 claim, which, even if trebled, would be less than the cost of filing and administrative costs would be virtually impossible.

Respondent asserts that in the improbable case where a customer learns of a violation and finds representation in a small damages case there is still the possibility that by requiring the customer to engage in individual arbitration there may not be adequate incentive for the litigant to pursue the claim. In *Muhammad*, the court noted “The class-action mechanism also overcomes the problem that small individual recoveries may fail to provide an adequate incentive for a litigant to investigate a claim or bring suit even if the litigant could secure representation.” 912 A.2d at 92; *see also Leonard*, 854 So.2d at 539; *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 885-886 (Pa. Super. 2006).

Respondent asserts that though attorney fee awards and statutory damages were available in the arbitration agreement it would still be unconscionable. The

Missouri Court of Appeals for the Eastern District agreed recently in *Woods v. QC Financial Services Inc.*, in which the court rejected an argument for the conscionability of an arbitration agreement where such awards were provided stating the availability was “illusory if it is unlikely that counsel would be willing to undertake the representation.” 2008 WL 5454124, 6 (Mo. App. E.D. 2008). And the waiver of class action suits could further discourage representation without a source of contingency fees for potential attorneys. *Id.*

Respondent asserts that any individual litigant would be unlikely to pursue a claim in individual arbitration because, even if Appellant advanced the basic arbitration fees, the consumers would still have to compensate an attorney, miss work, and undergo all of the normal stresses of a legal claim—things they would not have to do if they were members of a class action. Respondent asserts that the “costs” of arbitration, in terms of money, time and stress, would, in most cases, and certainly in cases like this involving such small sums of money, often exceed the potential recovery. One of the primary benefits of a class action is that it spreads these costs among a class, allowing the members of that class to avoid most of the difficulties of a legal action while still obtaining access to justice.

This was the rationale for the recent decision by the Court in, *In re American Express Merchants’ Litigation*, in which the court struck down an arbitration clause that contained a class action waiver because the costs virtually precluded suit against the Defendant due to the costs of arbitration. 2009 WL 214525 (C.A.2 (N.Y.)).

Similarly, in this case the fee in dispute was \$199.95 and would not justify the \$125.00 arbitration filing fee and costs that the Respondent would risk in such a situation. The costs associated with arbitration would effectively preclude anyone from taking the risk of incurring such costs for such a small fee.

Respondent points out that *Whitney*, in adopting a test first set out by the U.S. Supreme Court, notes that an arbitration clause is measured by whether it would allow claimants to vindicate their statutory rights in the arbitral forum. 173 S.W. 3d at 311. Respondent asserts that in addition to the reasons referenced above, there is a more fundamental reason for holding that Arbitration Agreement is unconscionable. Respondent has brought some of its claims under the Missouri Merchandising Practices Act, RSMo. §407.010 *et seq.* (hereinafter “MPA”). The MPA, as well as the Missouri Rules of Civil Procedure, specifically vests consumers with the right to the class mechanism at §407.025.2 and Rule 52.08.

A Michigan federal court considered the same argument and held:

Further, even if the waiver of judicial forum was not substantively unconscionable with respect to TILA claims, under the Michigan Consumer Protection Act, the availability of class recovery is explicitly provided for and encouraged by statute. Because the arbitration agreement prohibits the pursuit of class relief, it impermissibly waives a state statutory remedy. *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1105 (W.D. Mich. 2000) (internal citations omitted).

In this matter, it is clear the MPA allows class actions to be brought under §407.025.2. This right is in addition to the class action procedure provided by Missouri Rules of Civil Procedure 52.08. By requiring its customers to sign a contract that takes away their rights to pursue their claims via the class mechanism, Appellant has thwarted the intent of the MPA, Missouri consumer laws and Missouri Rules of Civil Procedure. This violates the above-mentioned fundamental tenet that an arbitral forum is valid only when it allows litigants to vindicate their statutory rights.

Individual arbitrations are far less efficient than class arbitrations; holding thousands of individual arbitrations rather than a single class arbitration would frustrate the goals of efficiency Appellant purports to advance. Courts around the country have noted that the only “efficiency” promoted by a class waiver is the reduction in total claims due to the chilling effect on dispute resolution. *See e.g. Muhammad*, 912 A.2d at 92-93; *Vasquez v. Superior Court of San Joaquin County*, 4 Cal.3d 800, 809 (Cal. 1971); *Kinkel*, 223 Ill. 2d at 37-38; *Sprague*, 473 F.Supp.2d at 973.

Respondent further contends that the Appellant’s arbitration clause is entirely one-sided in that the Appellant has really given up nothing, but gained absolute immunity. In *Sprague v. Household International*, despite the fact that plaintiff was not bringing a class action, the court noted that class waivers were “one-sided in [their] practical effect” and “weigh[ed] heavily in favor of a finding

of substantive unconscionability.” 473 F.Supp.2d at 973 (W.D. Mo. 2005). Stated even more eloquently, the *Vasquez* court wrote:

We are reminded of the observation by a character in an Anatole France novel that “the majestic equality of the laws forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.” Anatole France, *The Red Lily*, 95 (Winifred Stephens trans., Frederic Chapman Ed. 1894). Although the arbitration rider with majestic equality forbids lenders as well as borrowers from bringing class actions, the likelihood of the lender seeking to do so against its own customers is as likely as the rich seeking to sleep under bridges.

Vasquez-Lopez, 210 Or. App. at 569 (Or. App. 2007); see also *Sprague* 473 F.Supp.2d at 973 .

Here, Appellant’s arbitration clause allows their right to exercise “self help or provisional remedy available by law. . .” Appellant is thus allowed to repossess the automobile at issue which is the only real remedy Appellant would ever need to protect itself in these types of transactions. If a clause is so one-sided that it is fundamentally unfair, it cannot be enforced. This one-sidedness is at the heart of unconscionability analysis. Average consumers would not reasonably expect that any contract would require them to A) lose fundamental rights, B) gain nothing, and C) immunize the party with which they are dealing.

Appellant's Arbitration Agreement allows Appellant to circumvent Missouri law by insulating it from negative precedent and class actions. *Woods*, 2008 WL 5454124 Courts have been skeptical of business altruism as a sufficient deterrent to the temptation to push the boundaries of the law.

[Defendant] has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect.

Szetela v. Discover Bank, 97 Cal. App. 4th 1094, 1101 (Cal. App. 4. Dist. 2002)

It is fundamental to our legal system to have meaningful enforcement of the law via a mechanism that can realistically hold a defendant liable for its actions to all wronged parties, rather than at best a few. As Supreme Court Justice Louis Brandeis once said, "Sunshine is the best disinfectant." The class waiver prevents Defendant from facing the "specter" of negative decisions and precedent.

d. Severability

Under Missouri law, if an offending provision can be removed, and the contract retains meaning, the contract is generally preserved. In *Vincent*, the Missouri Supreme Court struck two provisions of an arbitration clause but preserved the clause itself. 194 S.W.3d at 861 (Mo. en banc 2006).

The Court of Appeals applied a similar approach in *Swain* when it held that a provision requiring arbitration in Arkansas was unconscionable but the rest of the clause survived. *Swain*, 128 S.W.3d 108, 109. Similarly, it recently took this course in its *Woods* holding in which they struck the class action waiver as unconscionable and severable from the agreement as a whole. 2008 WL 5454124 at 8. This is also the route taken by the Courts in other states in which class arbitration waivers were declared unconscionable. See *Muhammad*, 912 A.2d at at 103; *Kinkel*, 223 Ill.2d at 47. The court in *Cooper* did the same. 503 F.Supp.2d at 1292.

Moreover, the agreement at issue here provides, “if any part of the Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable.” While Respondent believes the entire arbitration clause should be stricken, at a minimum, striking the class arbitration waiver will allow Respondent and Appellant to proceed to the arbitral forum to allow a panel of arbitrators to decide if a class should be certified.

III. RELEVANCE OF THE RECENT U.S. SUPREME COURT DECISION IN THE MATTER OF *STOLT-NIELSEN S.A. V. ANIMAL FEEDS INT'L CORP.*, NO. 08-1198

The United States Supreme Court handed down a decision on April 27th, 2010 addressing primarily the issue of whether or not an arbitration panel may permit class arbitration when an arbitration is “silent” on that issue or doesn’t explicitly provide for arbitration of a class. The Court Held that the Arbitration

Panel exceeded its authority in allowing the arbitration to proceed as a class since it was not contemplated in the agreement itself and the commercial parties in that case so stipulated.

The Ruling is not on point, but the analysis of the facts in *Stolt-Nielsen*, and particularly Justice Ginsburg's Dissent are relevant reminders of the most fundamental and universal concepts we use to measure the validity of contracts. The Court's analyzed whether there was a "meeting of the minds" among the parties regarding the specific meaning of the Stolt-Nielsen arbitration case. The Court made repeated reference to the relevance of equal versus unequal bargaining power when noting that in this particular set of circumstances the parties subject to the arbitration agreement were large corporations, presumably represented by counsel all of whom had a hand in negotiating, drafting and finally agreeing to sophisticated business transactions of which the arbitration clause was very much a part of and the corporate parties and their respectful counsel were aware of. For frame of reference, the Plaintiff's putative class was made up of "...purchasers of parcel tanker transportation services globally for bulk liquid chemicals, edible oils, acids, and other specialty liquids..."

Fully conceding that the recent holding in *Stolt-Nielsen* is not directly related or authoritative in Ms. Ruhl's case, one would be remiss to ignore the relevance of the reiteration of these fundamental concepts by the High Court and the glaring lack of any degree of "meeting of minds."

In contrast to the parties in *Stolt-Nielsen*, Ms. Ruhl, a waitress and part time college student, most certainly unaccompanied by legal counsel, was presented several preprinted documents after an exhausting process of buying an automobile from a corporation. It would be challenging to create a hypothetical business transaction between to parties with greater disparity in bargaining power and less “meeting of minds” on issues of contractual significance.

IV. CONCLUSION

For the reasons set forth above it is clear that the case at issue does not fall within the Arbitration Agreement. Even assuming the Agreement applies here it is both substantively and procedurally unconscionable and should be stricken. At the very least, the offending provisions of Appellant’s Arbitration Agreement which prohibit class arbitrations are without question unconscionable under Missouri law and must be stricken.

For the foregoing reasons Respondent hereby respectfully requests this court uphold the trial court’s denial of Appellant’s Motion to Compel Arbitration.

Respectfully Submitted,

BURGESS & LAMB, P.C.
Mitchell L. Burgess, MO#47524
Keith C. Lamb, MO#56761
1000 Broadway, Suite 400
Kansas City, Missouri 64105
(816) 471-1700
(816) 471-1701 FAX

RALPH K. PHALEN ATTY AT LAW

Ralph K. Phalen, MO#36687

1000 Broadway, Suite 400

Kansas City, Missouri 64105

(816) 589-0753

(816) 471-1701 FAX

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c) AND 84.06(g)

COMES NOW Mitchell Burgess, counsel of record for Respondent Ashlee Ruhl, and being of lawful age and having been first duly sworn, states upon his oath that this Brief complies with the limitations contained within Supreme Court Rule 84.06(c). I further state this Brief contains 7,200 words (exclusive of the cover page), and that this brief was prepared with and formatted in Microsoft Word. I further state this Brief is in Times New Roman type, 13 font. I further state that a CD-ROM containing this Brief is being filed herewith and said disk has been scanned for viruses and is virus free.

MITCHELL BURGESS

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2010, a true and correct copy of the above and foregoing, and a copy of the CD-ROM submitted to the Court of Appeals, was mailed, via FedEx, postage prepaid, this 3rd day of May, 2010, to:

Kevin D. Case
Patric S. Linden
Case & Roberts, P.C.
Two Pershing Square
2300 Main Street, Suite 900
Kansas City, MO 64108
Phone (816) 448-3707
Fax (816) 448-3101
ATTORNEYS FOR APPELLANT

MITCHELL BURGESS