

IN THE MISSOURI SUPREME COURT

Appeal No. SC 90647

BEVERLY BREWER,

Plaintiff/Respondent,

vs.

MISSOURI TITLE LOANS, INC.,

Defendant/Appellant.

Substitute Brief of Plaintiff/Respondent

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POINTS RELIED ON

I. The trial court did not err in striking Defendant’s contract clause that waived Plaintiff’s right to bring any class action or class arbitration because this “class waiver” immunized Defendant and was thus unenforceable in that it was procedurally and substantively unconscionable and it violated Missouri public policy.

[This Point Responds to Defendant’s Point I].

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

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

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

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

II. The trial court did not err in striking a provision of Defendant’s contract that waived Plaintiff’s right to bring any class action or class arbitration, which Defendant had placed in the middle of its arbitration clause, because Section 2 of the Federal Arbitration Act provides that an agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, ‘save upon such grounds as exist at law or in equity for the revocation of *any* contract,’ in that unconscionability and prohibitions against exculpatory clauses, the defenses raised by the Plaintiff, are both generally applicable state law contract defenses.

[This Point Responds to Defendant’s Point II].

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

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

Doctor's Assocs., Inc. v. Casarotto, 116 S.Ct. 1652 (1996).

Lowden v. T-Mobile USA, Inc., 512 F.3d 1213 (9th Cir. 2008).

III. The trial court did not err in striking Defendant's contract provision that prohibited Plaintiff from bringing any class action or class arbitration because this waiver functioned as an improper exculpatory clause, in that Defendant's class waiver was not clear, conspicuous or unambiguous with regard to the vast scope of claims being waived by customers.

[This Point Responds to Defendant's Point III].

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

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

Supplemental Statement of Facts

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

In order to qualify for loans issued by Defendant Missouri Title Loans, Defendant required each of its customers to hand over the original titles to their cars and a set of their car keys.¹ The title and keys were required by sections 2 and 10 of Defendant's contract.²

Plaintiff alleges that she took out a \$2,215 loan from Defendant. Her loan accrued interest at a rate of 300%. Over the next two months, Plaintiff paid Defendant two separate payments totaling about \$1,147.00. These two payments reduced her loan principal by six cents (\$.06).³ Plaintiff has alleged that Defendant violated Missouri loan laws not only with regard to Plaintiff, but with regard to tens of thousands of other Missouri citizens. In her Petition, Plaintiff asked Defendant to compensate its Missouri customers for all damages caused by Defendant violations of Missouri laws.⁴

¹ LF 353, 287(Fields Dep. 34:9-10, February 11, 2008); (Pl's Loan Agreement)

² A copy of Defendant's contract can be found at LF 287-288 and this Appendix at A2-3.

³ LF 119-120.

⁴ LF 117. 147.

Plaintiff Beverly Brewer filed this class action against Defendant, alleging that Defendant systematically violated Missouri statutes pertaining to title loans.⁵ Plaintiff has alleged that Defendant is subject to Missouri laws that prohibit each of the following:

- Omitting disclosures on the loan agreement as mandated by Missouri law (§§ 367.518.4, 367.518.5, and 367.518.6 RSMo);
- Omitting the required notice provision from Plaintiffs’ and Class Members’ loan agreements as required by Missouri law (§ 367.525.1 RSMo);
- Failing to tell Plaintiffs and Class Members that frequent renewals of loans would result in interest and fees that far exceeded the actual value of the loan (§ 367.512.4 RSMo);
- Paying excess interest and fees because the Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals (§ 367.512 RSMo);
- Representing to Plaintiffs and Class that they were eligible for a title loan when in fact Defendant did not evaluate the Plaintiffs’ and Class Members’ ability to pay before loaning money (§ 367.525.4 RSMo).⁶

⁵ LF 119.

⁶ LF 134.

Plaintiff has also alleged that Defendant violated the above-cited laws by doing the following:

- a. Failing to disclose the monthly interest rates on the loan agreements.
- b. Failing to provide separate acknowledgement and disclosure of the required statement:

“You may cancel this loan without any costs by returning the full principal amount to the lender by the close of the lender’s next full business day.”

- c. Failing to disclose the location where titled personal property may be delivered if the loan was not paid and the hours of operation of such locations receiving such deliveries.

- d. Failing to provide customers with this required statement:

NOTICE TO BORROWER (1.) Your automobile title will be pledged as security for the loan. If the loan is not repaid in full, including all finance charges, you may lose your automobile. (2.) This lender offers short-term loans. Please read and understand the terms of the loan agreement before signing. I have read the above NOTICE TO BORROWER and I understand that if I do not repay this loan that I may lose my automobile. _____Borrower _____Date

- e. Failing to assess the customers’ ability to repay their loans.
- f. Failing to reduce the principal of the loan by 10% upon the third and subsequent renewals; and

g. Including provisions in its contract which attempt to waive rights and protections of the borrower, in violation of § 367.527(3) RSMo.⁷

Plaintiff has further alleged that the Plaintiff and Class Members have incurred the following damages as a result of Defendant's actions:

- a. They paid principal, fees and interest on loans that Defendant issued without considering the ability of its customers to repay these loans;
- b. They paid excess interests and fees because Defendant failed to reduce the principal by at least 10% upon the third and subsequent renewals;
- c. They were subjected to violations regarding statutorily required notice provisions.
- d. They were required to pay fees and incur costs in violation of § 367.506.2 and § 367.527.2 RSMo.⁸

Defendant's contract contains a class waiver barring Plaintiff from filing any sort of class claims, including both class actions and class arbitrations.⁹ Defendant's contract required that any claims needed to be resolved through arbitration. Based on the terms of its loan contract, Defendant filed a motion to compel individual arbitration of this case.¹⁰

⁷ LF 123.

⁸ LF 135

⁹ LF 287 & 288.

¹⁰ LF 45.

Plaintiff countered that Defendant's Class waiver is unconscionable.¹¹ Instead of individual arbitration, Plaintiff seeks to resolve this dispute through class arbitration.

The trial court considered only the issue of whether Defendant's contract was unconscionable because it barred plaintiff from bringing her claim as part of a class. At the hearing, Plaintiff presented the following evidence¹²:

- Loan Agreement of Ms. Brewer.¹³
- Loan Agreement of Mr. Pipkens.¹⁴
- Deposition of Plaintiff's attorney expert witnesses, John Ammann,¹⁵ Bernard Brown,¹⁶ and Dale Irwin.¹⁷
- Deposition of Defendant's corporate representative, Terry Fields.¹⁸
- Articles of Incorporation for Missouri Title Loans.¹⁹

¹¹ LF 61.

¹² The list of the exhibits introduced by Plaintiff can be found at LF 286.

¹³ LF 287.

¹⁴ LF 290 (At one time, Mr. Pipkens was part of this case. He was voluntarily dismissed).

¹⁵ LF 294.

¹⁶ LF 424.

¹⁷ LF 575.

¹⁸ LF 333.

¹⁹ LF 764.

- Defendant's First Amended Responses to Plaintiff's Interrogatories.²⁰
- Plaintiff's First Amended Petition.²¹
- Affidavit of Brian Connolly.²²

Defendant's arbitration clause, part of a much larger contract, appeared much like the image that can be seen on page A1 of the attached Appendix.²³ Defendant's entire contract can be found in this Appendix at A2-A3.

Many of the facts presented by Plaintiff at the trial court hearing were uncontested; Defendant did not provide evidence disputing most of these facts. They are presented here in summary fashion, divided into those that pertain to the issues of substantive unconscionability versus procedural unconscionability. The witnesses providing these uncontested facts included three experienced Missouri consumer attorneys called by plaintiff as expert witnesses²⁴. Additional uncontested facts were presented to the Court by reference to the deposition of Mr. Terry Fields, Defendant's Corporate Representative.

²⁰ LF 769.

²¹ LF 793.

²² LF 838.

²³ LF 287. The clause is presented at this point in this Brief, for the convenience of this Court, in a size that approximates the font used in Defendant's title loan contract. See also a full reproduction of the Defendant's arbitration clause in this Appendix.

²⁴ John Ammann, Bernard Brown and Dale Irwin.

Additional uncontested facts were introduced to the trial court through the use of documents.

At the trial court, the Plaintiff presented the following uncontested facts relating to procedural unconscionability:

- 1) Defendant Missouri Title Loans is a corporation that specializes in making small loans to consumers.²⁵
- 2) Missouri Title Loans is a large company with 50 stores in Missouri. Defendant has had at least 14,895 Missouri customers since 2001.²⁶
- 3) Defendant Missouri Title Loans has included arbitration clauses in its loan contracts since it began doing business in 1998.²⁷
- 4) The loan contract forms, including the arbitration clause, were drafted by attorneys hired by Defendant Missouri Title Loans.²⁸
- 5) Customers do not and may not negotiate the terms of Defendant's arbitration clause.²⁹

²⁵ LF 764 (Def's Articles of Incorporation, Article 8).

²⁶ LF 342 (Fields Dep. 16:3-5, February 11, 2008); LF 790 (Def's Answers to Pl.'s Am. Count I Interrogs, # 40).

²⁷ LF 771 (Def's Answers to Pl.'s Am. Count I Interrogs # 11, 13).

²⁸ LF 368-9 (Fields Dep. 59-62, February 11, 2008).

- 6) Defendant's arbitration clause was printed on the second page of its loan agreement.³⁰
- 7) Consumers are simply unable to comprehend the meaning and import of Defendant's arbitration clause. Many consumers would become confused by reading it.³¹
- 8) Many consumers seeking title loans are financially stressed.³²
- 9) Consumers were required to provide the title to their vehicle and a copy of the car key in order to obtain a loan from Defendant.³³
- 10) Defendant Missouri Title Loans did not conduct any studies to evaluate the readability of the arbitration clause used in its loan contracts.³⁴

²⁹ LF 363 (Fields Dep. 51:10-13, February 11, 2008); LF 323 (Ammann Dep. 109:5-9, 115:1-10, July 14, 2008); LF 790 (Def's Answers to Pl.'s Am. Count I Interrogs #39).

³⁰ LF 287 (Pl's Loan Agreement with Def.). Another copy can be found at A2-A3 of this Appendix.

³¹ LF 531-534 (Brown Dep. Pp. 107-110, June 26, 2008); LF 671, 717 (Irwin Dep. 95:19-96:4, 141:3-18, June 26, 2008); LF 321, (Ammann Dep. 109:5-9, July 14, 2008).

³² LF 322 (Ammann Dep. 110, July 14, 2008).

³³ LF 353 (Fields Dep. 34:9-10, February 11, 2008); LF 288 (Pl's Loan Agreement)

³⁴ LF 784 (Def's Answers to Pl.'s Am. Count I Interrogs, #14).

At the trial court, the Plaintiff presented the following uncontested facts relating to substantive unconscionability.

- 1) Actual damages involved in this case are “a few hundred to a few thousand dollars.” This case is therefore a small damages case.³⁵
- 2) Missouri Title Loans is a large company, with 50 stores in Missouri. It has had at least 14,895 Missouri customers since 2001.³⁶
- 3) Missouri Title Loans has never been involved in any arbitration involving any of its consumers; it hasn’t filed any against its customers and its customers haven’t filed any against Defendant.³⁷
- 4) Defendant admitted that Missouri Title Loans has never brought a class action against its consumers.³⁸
- 5) Defendant admitted that by signing Defendant’s arbitration provision, Defendant’s customers are giving up various legal rights, including the right to go to court, the

³⁵ LF 119 (Pl.’s Amended Petition, ¶¶ 1, 3, 7); LF 504 (Brown Dep. 80:18-21, June 26, 2008). LF 311 (Ammann Dep. 68: 1-19).

³⁶ LF 342 (Fields Dep. 16:3-5, February 11, 2008); LF 790 (Def’s Answers to Pl.’s Am. Count I Interrogs, # 40).

³⁷ LF (Fields Dep. 71:4-72:17,73:7-15, February 11, 2008); LF 785 (Def’s Answers to Pl.’s Am. Count I Interrogs. #18, 20).

³⁸ LF 374 (Fields Dep. 71:14-18, February 11, 2008).

right to a jury trial and the right to serve as a class representative in a class action.³⁹

6) Defendant admitted that Defendant's contract allows Missouri Title Loans to repossess its customers' vehicles by using the court system, without going through arbitration.⁴⁰

7) Missouri Title Loans does not notify customers about lawsuits filed against it by other customers.⁴¹

As indicated above, Plaintiff's three expert witnesses were experienced consumer attorneys practicing law in Missouri: Bernard Brown, Dale Irwin and John Ammann. Mr. Brown and Mr. Irwin are in private practice. Mr. Ammann is the Director of the Law Clinic of the St. Louis University School of Law, which handles cases primarily for indigent clients, non-profits or government agencies.⁴² These three experts provided the following evidence; none of which was disputed by any evidence introduced by Defendant:

³⁹ LF 74-77 (Fields Dep. 74:25-76:22, February 11, 2008).

⁴⁰ LF 376-7 (Fields Dep. 73:17-20, 74:13-20, February 11, 2008); (Pl's Loan Agreement, Section 12).

⁴¹ LF 398 (Fields Dep. 111:4-23, February 11, 2008).

⁴² LF 295; LF 303.

- 1) Consumers are generally not aware of their statutory rights. For this reason, class actions serve to provide notice of violations to consumers.⁴³
- 2) Class actions serve a valuable role in society.⁴⁴
- 3) It is nearly impossible to obtain legal representation in Missouri in a small damages consumer claim such as this.⁴⁵ Even seasoned consumer attorneys are not able to handle this type of case because the expenses involved are high and customers could not afford retainers of “several thousand dollars.”⁴⁶
- 4) It is extremely difficult for consumers in low damages cases like this to persuade attorneys to represent them. Class actions are the only way for a consumer to get representation on claims like this.⁴⁷
- 5) Class action waivers in cases like this deny consumers any chance to obtain legal representation.⁴⁸

⁴³ LF 501 (Brown, Dep. 77, 82, 140, 141, June 26, 2008).

⁴⁴ LF 527(Brown Dep. 103:6-104:3, June 26, 2008); LF 709-711 (Irwin Dep. 137:25-138:15, 136:24-137:18, June 26, 2008).

⁴⁵ LF 658, 710 (Irwin, Dep. 82:16-25, 82:16-25, 134:12-135:7, June 26, 2008);

⁴⁶ LF 311(Ammann Dep. 67:2-25, July 14, 2008); LF 658 (Irwin, Dep. 82:16-25, 82:16-25, 134:12-135:7, 97:22-98-14, June 26, 2008); LF 711-712 (Brown Dep. 81:8-82:7, June 26, 2008).

⁴⁷ LF 500, 504, 515 (Brown Dep. 76-77, 80, 91, 6/6/2008).

- 6) These consumer lending cases are complicated cases with damages ranging from a few hundred to a few thousand dollars. It is extremely difficult for consumers to find experienced attorneys to handle these cases because there are relatively few consumer savvy attorneys in Missouri. Further, because these cases are legally complex with relatively low damages, they are not “financially viable” for attorneys to handle regardless of the fee arrangement.⁴⁹
- 7) These cases against title lenders are complex, involving a wide variety of statutes; they tend to require expert testimony and they involve “a multitude of issues.”⁵⁰
- 8) Attorneys are not able to handle cases like this case against Defendant, even when a statute allows for attorneys fees. Judges will not award an attorney a \$30,000 fee for a \$1,500 recovery.⁵¹
- 9) It’s “very difficult, next to impossible, to find lawyers to represent [consumers] in these cases.”⁵²
- 10) Consumers have an extraordinarily difficult time trying to understand contracts such as Defendant’s.⁵³

⁴⁸ LF 500, 527-530 (Brown Dep. 76-77, 103-105 6/6/2008).

⁴⁹ LF 311, 315 (Ammann Dep. 67-68, 83-84, July 14, 2008).

⁵⁰ LF 316 (Ammann Dep. 86-90, July 14, 2008).

⁵¹ LF 312, 317, 318 (Ammann Dep. 69-70, 91-92, 95 July 14, 2008).

⁵² *Id.*

11) Lawyers and judges would have a difficult time understanding Defendant's arbitration provisions.⁵⁴

12) Businesses often utilize arbitration clauses for the purpose of limiting liability.⁵⁵

13) Waiver of class actions encourages businesses to continue illegal conduct.⁵⁶

Proceedings before the trial court

At the conclusion of that hearing⁵⁷, in open court, Defendant submitted a statement to the Court that in an attempt to retract the following provision of its loan agreement: "The parties agree to be responsible for their own expenses, including fees for attorneys, experts and witnesses."⁵⁸ In open Court Defendant admitted that this provision "puts a very high burden on somebody who might not have sufficient funds to pay a lawyer and these other expenses."⁵⁹

Defendant did not present the Court with any evidence, beyond a signed copy of its

⁵³ LF533-536 (Brown Dep. 109-111).

⁵⁴ LF 542 (Brown Dep. 118).

⁵⁵ LF 709-710 (Irwin Dep. 137:25-138:15, June 26, 2008).

⁵⁶ (Irwin Dep. 136:24-137:18, June 26, 2008).

⁵⁷ The Transcript of the Hearing begins at LF 229.

⁵⁸ LF 283; Defendant's written statement can be found at LF 940.

⁵⁹ LF 283.

loan agreement.⁶⁰ Based on the evidence before it, the trial court partially granted Defendant's Motion to Compel Arbitration, ruling that Defendant's class waiver was unconscionable and therefore unenforceable, and agreeing with the Plaintiff that the parties should proceed to class arbitration.⁶¹

The trial court found ample evidence of both procedural and substantive unconscionability.⁶² With regard to procedural unconscionability, the trial court referred to Plaintiff's evidence, indicating as follows:

- A) Defendant's arbitration provision was "non-negotiable and was in fine print";
- B) Evidence showed that the arbitration provision would be difficult for consumers to understand; and
- C) Evidence showed that there was disparity in bargaining power between Plaintiff and Defendant.⁶³

With regard to substantive unconscionability, the trial court referred to the following evidence:

- A) Defendant's arbitration clause denies Plaintiff her right to a class action under the

⁶⁰ LF 277F – 284.

⁶¹ LF 1123. The trial court amended its Judgment; this Amended Judgment also directed the parties to class arbitration. LF 1156.

⁶² LF 1156.

⁶³ LF 1158-9.

MPA,

B) Class actions are necessary to provide notice and adequate legal representation to potential plaintiffs,

C) Absent notice, these types of violations would not be apparent to average consumers,

D) These kinds of cases could not be handled on an individual basis because of the high cost and low potential recovery;

E) The fundamental purposes of arbitration are not being promoted in this case, and

F) Defendant's arbitration provision is "entirely one-sided, with Plaintiff giving up a host of rights while Defendant gives up nothing."⁶⁴

The Court concluded that Defendant's arbitration clause prohibits all class actions and all class arbitrations in situations:

A) where the class members have no reasonable way to know that they were victims of the alleged violations by Defendant; and

B) where Plaintiff and class members would be highly unlikely to find or hire attorneys to represent their interest regarding these types of claims were they forced to pursue such claims individually.⁶⁵

⁶⁴ LF 1159.

⁶⁵ LF 1157.

The trial court concluded that “Defendant’s class action/arbitration ban improperly functions to immunize and exculpate Defendant.”⁶⁶

⁶⁶ LF 1157.

Arguments

Argument I.

The trial court did not err in striking Defendant’s contract clause that waived Plaintiff’s right to bring any class action or class arbitration because this “class waiver” immunized Defendant and was thus unenforceable in that it was procedurally and substantively unconscionable and it violated Missouri public policy.

Introduction to Argument I:

Contrary to Defendant’s brief, this case is not about arbitration, and it certainly isn’t the right time to question evidence that was undisputed in the trial court. The real issue is whether a company can immunize itself from suits based on Missouri consumer protection laws by inserting a “class waiver” (a contract provision that prohibits class actions and class arbitrations) into its contract, especially where that class waiver invites systematic and egregious violations of the law that profits the company, but causes financial damages to consumers.

Before Plaintiff can address the law and facts of this case, Plaintiff must squarely address Defendant’s subtle attempts to shift the focus of this case. First, Defendant is trying to persuade this Court to treat its class waiver gingerly simply because Defendant buried it within its arbitration clause, even though settled law provides that arbitration clauses should be treated like any other kind of contract: no better and no worse.

Contract terms should not be treated favorably simply because they appear within an

arbitration clause; such bias would run afoul of the Federal Arbitration Act (FAA).

Second, Defendant is attempting to deny undisputed testimony (of three expert witnesses) that Defendant's class waiver completely immunizes Defendant. In the trial court, Defendant had the opportunity to introduce contrary evidence, but Defendant failed to introduce any such evidence. As such, Plaintiff is bound by the factual record established in and recognized by the trial court.⁶⁷ That record clearly demonstrates that Defendant's class waiver immunizes Defendant from legitimate customer claims.

Third, with regard to Defendant's "Motion to Dismiss or Stay and Compel

⁶⁷ That the clause produces immunity is not genuinely disputed in the record. Consider the following undisputed facts:

- Defendant's class waiver was not negotiable and was incomprehensible to consumers.
- Defendant has never arbitrated any case.
- Attorneys cannot afford to handle cases like these on an individual basis.
- The class waiver makes it almost impossible for consumers to hire attorneys.
- Businesses use class waivers to immunize themselves.
- Class waivers encourage businesses to systematically engage in illegal conduct.
- Defendant unilaterally imposed the class waiver on every one of its customers.
- Defendant's alternative dispute resolution clause has never resolved a dispute.

Arbitration,” Plaintiff’s allegations must be taken as true. Plaintiff has alleged that Defendant owes refunds of the interest paid by thousands of customers to whom it made loans bearing interest rates of 300% or more. This case thus presents the question of whether consumers victimized by these types of illegal acts have any remedy at all.

Viewed within the context set forth above, one can then turn to what this case is really about. What follows is this case in a nutshell:

Can a company that systematically violates the law immunize itself from all legal claims so that its illegal conduct remains perpetually profitable while consumers who suffer damage from its conduct remain permanently without remedy?

The answer is a resoundingly *no*. Defendant’s class waiver is both A) unconscionable and B) an unenforceable exculpatory clause. Pursuant to the consumer laws and public policy of Missouri, and by all reasonable measures of justice, no entity should be allowed to draft its own get-out-of-jail-free card, thereby nullifying the expressed will of the Missouri Legislature.

When examined carefully, Defendant’s “arbitration clause” reveals itself as a wolf in sheep’s clothing. It is dressed up to look like part of a dispute resolution clause, but Defendants clause, poisoned by the class waiver contained within, has so far guaranteed that Defendant’s clear violations of Missouri law have never been challenged. Only if this Court strikes Defendant’s class waiver will there be any opportunity to take a close look at how Defendant conducts its loan transactions.

Until now, Defendant has guaranteed itself protection from any legal claims by placing its class waiver clause deep within its larger fine-print arbitration clause from which attorneys, consumers and courts have shied away, perhaps because they assume that arbitration clauses should always be enforceable or perhaps they assume that all challenges to arbitration clause are preempted by the FAA. It has only been in the last five years that Missouri courts (and courts in other jurisdictions) have realized that arbitration clauses must be examined just like the provisions of every other type of contract.

Even though class action waivers don't contain the word "immunize," they function to immunize companies. This is the way that they have been consciously designed. When consumers are forced to pursue small damage claims individually, they cannot find attorneys to represent them. This occurs because the consumers cannot afford hourly fees on small damage cases, and attorneys cannot afford to take small damage cases on a contingency fee. Even if a consumer could independently afford to hire counsel on an hourly basis, it would be economically irrational for the consumer to do so on these sorts of "negative value" claims (claims where the cost of litigating exceeds the expected verdict).

This difficulty of finding an attorney is compounded by the veil of secrecy associated with individual arbitrations. Even if a consumer finds an attorney, pursues an individual arbitration claim and prevails, these arbitration decisions are not reported, and precedent is therefore not created. Because class notice is not sent on individual cases, other

consumers are not alerted to statutory violations. All of this combines to shelter Defendant from scrutiny of any sort. Even in its worst case scenario, the Defendant could lose a few individual claims here and there while continuing to violate the rights of thousands of other consumers. This minimal cost of breaking the law is built into the business model of many predatory lenders; the small costs of these illegal business practices are but a tiny set-off from the vast profits.

Defendant's class waiver performs an Orwellian function because it turns Defendant's "arbitration clause" into an *anti*-arbitration clause.⁶⁸ No customer of Defendant has ever used his or her "right" to arbitrate. The Defendant argues that its arbitration clause promotes resolution of claims even though it has never resolved any dispute through arbitration.

Upholding class waivers in the context of small damage claims would functionally repeal all of Missouri's consumer laws for this Defendant and others. For these reasons, the trial court's decision to strike Defendant's class action waiver must be affirmed. The remainder of this brief elaborates, defends and illustrates the above principles.

⁶⁸ This case presents other Orwellian paradoxes. Defendant argues that its arbitration clause promotes efficiency, but Defendant is resisting the consolidation of thousands of potential claims into one efficient class arbitration. Defendant relies on the FAA to argue that striking the clause is prohibited, yet it is Plaintiff who is embracing the right to class-arbitrate this case.

Standard of Review:

When reviewing a declaratory judgment, an appellate court's standard of review is the same as in any other court-tried case: the trial court's decision should be affirmed unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 94 (Mo.App. E.D. 2008). The Court's review of the arbitrability of this dispute is de novo. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo.banc 2006). Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate. *Woods*, 280 S.W.3d at 94. These standards of review pertain to all of the arguments addressed in this brief.

Argument

Defendant made high interest loans. In order to qualify for Defendant's 300% interest loans, Defendant required each of its customers, including plaintiff, to hand over the original titles to their cars and a set of their car keys.⁶⁹ Plaintiff alleges that she took out a \$2,215 loan from Defendant. That loan accrued interest at a rate of 300%. Over the next two months, Plaintiff paid Defendant two separate payments totaling about

⁶⁹ LF 353, 287(Fields Dep. 34:9-10, February 11, 2008); (Pl's Loan Agreement); A copy of Defendant's contract can be found at LF 287-288.

\$1,147.00. These two payments reduced her loan principal by only six cents (\$.06).⁷⁰

Plaintiff has alleged that Defendant flagrantly violated Missouri loan laws regarding thousands of Missouri citizens. She further alleges that Defendant should compensate its Missouri customers for the damages caused by Defendant.

A. The Reasoning of *Woods v. Q.C. Financial* Resolves this Case

A “class waiver” is a contract provision that prohibits a customer from bringing any sort of claim as part of a group. To the extent that a class waiver might be enforced by a court, it would prohibit a customer from filing a class action (in court) or filing a demand for a class arbitration (before an arbitrator). In this case, Plaintiff is asking this Court to declare Defendant’s class waiver unenforceable and to allow Plaintiff to proceed with her class arbitration against Defendant.

Defendant inserted its class waiver into every one of the title loan contracts that it required each of its customers to sign. Defendant’s “class waiver,” located on the back side of Defendant’s customer contract, contained (among other verbiage) the following 57-word sentence:

⁷⁰ LF 119-120.

Further, unless a claim is already certified before the date of this agreement, borrower hereby agrees borrower may not participate in a class action or a class-wide arbitration, either as a representative or member of a class or claimants pertaining to such claim and borrower hereby expressly waives borrower’s right to join or represent such a class.⁷¹

The legal reasoning of the recent case of *Woods v. QC Financial Services, Inc.*, is clear and careful, and it fully resolves this case. 280 S.W.3d 90 (Mo.App. E.D. 2008).⁷² In *Woods*, the Eastern District of the Missouri Court of Appeals held that class action waivers in consumer form contracts are unconscionable and therefore unenforceable to the extent that they “reduce the possibility of attracting competent counsel to advance the cause of action,” and to the extent that they “functionally exculpate wrongful conduct.” *Woods*, 280 S.W.3d at 97 (citing *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 96 (N.J. Super.Ct. App. Div 2006)). Because the claims of Plaintiff (and class members) are too small to justify hiring an attorney to litigate them individually, Defendant’s class waiver functions to immunize (“exculpate”) Defendant

⁷¹ See LF 288 (or A2-A3 of this Appendix) to see Defendant’s class waiver in the context of Defendant’s entire two-page contract.

⁷² It is the legal reasoning in *Woods* that informed the decision of the Missouri Court of Appeal in this case.

from any wrongful acts, even if it engages in mass-scale intentional wrongdoing. To the extent that a court enforces Defendant's class waiver, the relatively small size of these claims would immunize Defendant.

In *Woods*, the Court analyzed the class waiver used by "Quik Cash," a payday loan company that operated more than 100 stores across Missouri. Quik Cash, a payday lender, had inserted a class waiver into the arbitration clause of its customer contract. That class waiver in *Woods* functioned exactly as the class waiver in this case.

In both *Woods* and in this case, the class waivers make it almost impossible for small loan customers to find attorneys to represent them. Both class waivers unfairly eliminated notice of claims and they virtually guaranteed that individual claims would not be pursued. *Id.* at 98. In both cases, the class waivers exculpated the lender by sheltering the lender from any accountability, as well as sheltering the lender from legal precedent. The many similarities between *Woods* and this case are summarized in the chart on the following pages:

Factor	<i>Woods v. QC</i>	<i>Brewer v. MTL</i>
Plaintiff took out a loan contract with Defendant and interest exceeded 300%.	✓	✓
The claims involve small damages. (Ms. Woods paid \$1,800 in interest to QC⁷³; Ms. Brewer paid about \$1,200 to MTL).	✓	✓
Fine print contract was difficult to read.	✓	✓
Defendant drafted the contracts.	✓	✓
Contract provisions were not negotiable.	✓	✓
Class members would be highly unlikely to find attorneys to represent them individually.	✓	✓
Plaintiff gave up a many legal rights while Defendant gave up nothing.	✓	✓
Defendant had dozens of locations in Missouri and thousands of customers.	✓	✓

⁷³ See LF 41 of *Woods v. QC*, ED 90949, filed with this Court.

There were also a few differences between these cases:

Factor	<i>Woods v. QC</i>	<i>Brewer v. MTL</i>
Consumer must pay all filing, administrative and arbitrator’s fees.		✓
Defendant’s contract allows Defendant to repossess its customers’ vehicles without going through arbitration.⁷⁴		✓

These above differences between *Woods* and this case involve additional burdens that this Defendant placed upon its customers. These differences mean that the form contract currently before this Court is more onerous than the Quik Cash contract.

In this case, the trial court appropriately followed the precedent of *Woods* when it refused to require individual arbitration. The trial court ruled that the class waiver provision of Defendant’s contract was unconscionable.⁷⁵ The trial court ruled that Defendant cannot use its class waiver to force the Plaintiff to arbitrate her claim individually. Rather, Plaintiff may proceed to litigate her claim as a named plaintiff in a

⁷⁴ LF 376 (Fields Dep. 73:17-20, 74:13-20, February 11, 2008); (Pl’s Loan Agreement, Section 12).

⁷⁵ LF 1156.

class arbitration.⁷⁶ In this appeal Plaintiff asks this Court to affirm the trial court and to allow her to proceed with her claim (in arbitration) as a class representative. Affirming the trial court would solidify the now established principle in Missouri that no company may, through a class action waiver, immunize itself from liability. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo.App. W.D. 2005); *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. E.D. 2008); *Shaffer v. Royal Gate Dodge, Inc.* 300 S.W.3d 556 (Mo. App. E.D. 2009).

B. Governing Legal Principles

In *Woods*, the Court reaffirmed that determining whether to enforce an arbitration clause was an objective test and that it was not to be determined by reference to any subjective thought process of any particular consumer. Courts should thus consider the reasonable expectations of the average consumer when evaluating a form contract and courts should consider the totality of the circumstances when weighing the evidence as to whether the contract is substantively unconscionable. *Woods*, 280 S.W.3d at 95; *See also*

⁷⁶ *Id.*

Whitney v. Alltel Communications, Inc., 173 S.W.3d 300 (Mo. App. W.D. 2005), to which this Court has cited three times with approval.⁷⁷

C. The Title Loan Transaction Under Consideration in this Case

Plaintiff has alleged that Defendant is a title lender that offered high interest (300%) loans to its customers. When Defendant's customers take out loans, Defendant requires them to surrender the titles to their cars and a set of keys.⁷⁸

The heart of the present dispute is that Defendant unilaterally imposed an unwanted and unfair method of resolving disputes upon every one of its loan customers, in that Defendant's class waiver prohibits both class actions and class arbitrations.⁷⁹ Based on Plaintiff's allegations and the undisputed evidence, Defendant's class waiver functions to totally immunize Defendant from any conceivable wrongdoing relating to the way it dispenses its high-interest loans. To the extent that Defendant has immunized itself through its class waiver, this tactic subjects customers to an unfair business practice without a remedy.

⁷⁷ See *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006), *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. 2009), and *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009).

⁷⁸ LF 353, 287(Fields Dep. 34:9-10, February 11, 2008); (Pl's Loan Agreement).

⁷⁹ LF 287.

Defendant’s arbitration clause (which contains the class waiver) requires Defendant’s customers to give up a host of legal protections, including the right to go to court, the right to a jury trial, the right to a bench trial, and the right to participate in a class action.⁸⁰ To add insult to injury, Defendant’s arbitration clause carves out an exception that permits Defendant to repossess customers’ vehicles without resorting to arbitration.⁸¹

D. Procedural and Substantive Unconscionability

As recognized by *Woods v. QC Financial Services, Inc.* and many previous appellate decisions, there are two types of unconscionability, procedural and substantive. *Woods*, 280 S.W.3d at 94-96; *See also, Bracey v. Monsanto Co.*, 823 S.W.2d 946, 950 (Mo. banc 1992). Courts have recognized 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.” *Woods* at 95. Under Missouri law, substantive unconscionability alone is arguably enough to invalidate offensive arbitration clauses. *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006) (in which this Court found the

⁸⁰ LF 74-77 (Fields Dep. 74:25-76:22, February 11, 2008).

⁸¹ LF 376 (Fields Dep. 73:17-20, 74:13-20, February 11, 2008); LF 287 (Pl’s Loan Agreement, Section 12).

contract was not one of adhesion, but held that specific portions of the clause were unconscionable because they would deprive one party of a meaningful, neutral arbitration). The next two sections of this Brief consider the ways in which Defendant's arbitration clause is both substantively and procedurally unconscionable.

E. Procedural Unconscionability

Following the holding of *Whitney v. Alltel*, 173 S.W.3d 300 (Mo. App. W.D. 2005), the *Woods* Court enumerated various indicia of procedural unconscionability, including small font size. *Woods*, 280 S.W.3d at 94. Procedural unconscionability also considers the contract formation process, high pressure exerted on the parties, misrepresentations, or unequal bargaining position. *Id.* at 95.

In this case, there are numerous additional indicia of procedural unconscionability:

- 1) Defendant Missouri Title Loans is a large corporation that specializes in making small loans to financially desperate consumers.⁸²
- 2) In order to qualify for Defendant's 300% interest loans, Defendant required each of its customers to hand over the original title to their cars and a set of their car keys.⁸³

⁸² LF 764 (Def's Articles of Incorporation, Article 8).

⁸³ LF 353, 287 (Fields Dep. 34:9-10, February 11, 2008); (Pl's Loan Agreement)

- 3) Missouri Title Loans is a large company, with 50 stores in Missouri. Defendant has had at least 14,895 Missouri customers since 2001.⁸⁴ Plaintiff is an individual consumer.
- 4) Defendant Missouri Title Loans has included arbitration clauses in every one of its loan contracts since it began doing business in 1998.⁸⁵
- 5) Defendant's loan contract is a form contract that includes an arbitration clause; these forms were drafted by attorneys hired by Defendant Missouri Title Loans.⁸⁶
- 6) Customers do not and may not negotiate the terms of Defendant's arbitration clause.⁸⁷
- 7) Defendant's arbitration clause was printed on the second page of Defendant's convoluted fine-print loan contract dominated by boilerplate.⁸⁸

⁸⁴ LF 342 (Fields Dep. 16:3-5, February 11, 2008); LF 790 (Def's Answers to Pl.'s Am. Count I Interrogs, # 40).

⁸⁵ LF 771 (Def's Answers to Pl.'s Am. Count I Interrogs # 11, 13); LF 771 (Def's Answers to Pl.'s Am. Count I Interrogs # 11, 13).

⁸⁶ LF 368-9 (Fields Dep. 59-62, February 11, 2008);

⁸⁷ LF 363 (Fields Dep. 51:10-13, February 11, 2008); LF 323 (Ammann Dep. 109:5-9, 115:1-10, July 14, 2008); LF 790 (Def's Answers to Pl.'s Am. Count I Interrogs #39).

⁸⁸ LF 287 (Pl's Loan Agreement with Def.).

- 8) Consumers have an extraordinarily difficult time trying to understand contracts such as Defendant's.⁸⁹ Many consumers become *more* confused by reading it.⁹⁰
- 9) Consumers seeking these high interest title loans are financially stressed.⁹¹
- 10) Defendant Missouri Title Loans did not conduct any studies to evaluate the readability of the arbitration clause used in its loan contracts.⁹²

Plaintiff has included Defendant's entire arbitration clause in the Appendix of this brief (at A2-A3) and urges this Court to view it in its native font to provide proper context to this appeal. Defendant argues that its class waiver is not in fine print, and that it is "conspicuous."⁹³ Plaintiff hereby urges this Court to consider that Defendant's arbitration clause was not given to consumers in a font as large as the version Defendant printed on page 12 of Defendant's brief. The Brief version appears to be printed in 15-point font, whereas the version on Defendant's contract appears to be 10-point. Needless to say, the difference between 15-point and 10-point is enormous in terms of readability (hence the rules of this Court, which disqualifies briefs printed at less than 13-point font).

⁸⁹ LF533-536 (Brown Dep. 109-111).

⁹⁰ LF 531-534 (Brown Dep. Pp. 107-110, June 26, 2008); LF 671, 717 (Irwin Dep. 95:19-96:4, 141:3-18, June 26, 2008); LF 321, (Ammann Dep. 109:5-9, July 14, 2008).

⁹¹ LF 322 (Ammann Dep. 110, July 14, 2008).

⁹² LF 784 (Def's Answers to Pl.'s Am. Count I Interrogs, #14).

⁹³ Defendant's Brief, p. 12.

The class action waiver of Defendant's arbitration provision was in tiny type that ran almost completely across Defendant's 8 ½" wide form contract. Defendant's class waiver followed eleven other paragraphs of abstruse fine print.⁹⁴

Defendant argues that there isn't any procedural unconscionability in this case.⁹⁵ It seems to base this argument on its claim that its contract was supposedly not an adhesion contract. Defendant's argument is untenable. Plaintiffs offered clear proof that the Defendant's contract *was* an adhesion contract (see points 3, 5, 6, 7 and 8 in the 10-point list starting on page 32 of this brief). Defendant prepared all of the loan paperwork and Defendant's arbitration clause was presented in the form of a take-it-or-leave-it adhesion contract. As recognized by *Woods*, an "adhesion contract" is:

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

280 S.W.3d at 96.

⁹⁴ LF 288. Also at A2-A3 of this Appendix.

⁹⁵ Defendant's Brief, p. 11.

It is also important to note that the existence of an adhesion contract is only one of many factors used by the courts to determine whether procedural unconscionability exists. Therefore, even if Defendant's contract were not an adhesion contract, the above list of factors relating to procedural unconscionability provides plenty of additional evidence establishing procedural unconscionability⁹⁶.

Defendant relies on *State ex rel. Vincent v. Schneider* when it claims that its contract was not an "adhesion contract." More specifically, Defendant argues that A) Plaintiffs "offered no proof that they were unable to look for a more attractive contract elsewhere" and B) Plaintiff could have shopped for a loan at other institutions that didn't insert class

⁹⁶ Perhaps Defendant is arguing so strenuously that its contract is not an adhesion contract because it fears that a mere finding that it is an "adhesion" contract would mean that the arbitration clause of its contract would be automatically unenforceable pursuant to §435.350.⁹⁶ Plaintiff is not relying on §435.350, however. In fact, to the extent that Plaintiff would attempt to claim that the "adhesion" exception of §435.350 applies, that statute would be preempted by the Federal Arbitration Act because the Missouri "adhesion" exception is not an example of a contract defense that exists "at law or in equity for the revocation of any contract."⁹⁶ Defendant's contract was an adhesion contract in the sense described above by *Woods*, in that it is a standardized, take-it-or-leave-it contract. 280 S.W.3d at 96.

waivers into their loan contracts.⁹⁷ This case is not *Vincent*, however. In *Vincent*, this Court made it clear that the *Vincent* Defendant “offered no proof that these were contracts of adhesion.” 194 S.W.3d at 857.

A finding that a contract is one of adhesion (in the *Woods* sense rather than the § 435.350 RSMo sense) “is the beginning, not the end, of the inquiry” into whether a contract, or any specific term therein, should be deemed unenforceable based on policy considerations. *Id.* The *Woods* Court required “a sharpened inquiry concerning unconscionability” whenever a contract of adhesion is involved.” *Id.* Such a “sharpened inquiry would consider each of the above factors in the above list (beginning on page 32) relating to procedural unconscionability. The evidence summarized in that list clearly establishes procedural unconscionability in this case.

Further, even if Defendant’s class waiver was not a contract of adhesion, it should *still* be stricken as unconscionable even if there is “great substantive unconscionability but little procedural unconscionability.” *Woods* at 95; *Ruhl v. Lee's Summit Honda*, 2009 WL 3571309, (Mo.App.W.D. 2009). Further, this case is laden with *substantive* unconscionability, thus satisfying the rule set forth in *Woods* (see the next section for a detailed discussion on “substantive unconscionability”). *Woods*, 280 S.W.3d at 94-96; *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo.App. W.D. 2005); *Ruhl v. Lee's Summit Honda*, 2009 WL 3571309, (Mo.App.W.D. 2009); and *Shaffer v. Royal*

⁹⁷ Defendant’s opening Brief, p. 12.

Gate Dodge, Inc. (Mo.App. E.D. 2009). Under Missouri law, it can even be argued that substantive unconscionability alone is sufficient to invalidate an unfair contract provision. *See Vincent v. Schneider*, 194 S.W.3d 853 (Mo. en banc 2006).

F. Substantive Unconscionability

Substantive unconscionability is the undue harshness in the contract terms themselves. *Woods*, 280 S.W.3d at 96. In this case, Defendant’s class waiver purports to immunize Defendant by invoking a “divide and conquer” strategy designed to make it economically unfeasible for any one person to employ an attorney. *Woods*, 280 S.W.3d at 96. This principle is easy to understand. To the extent that Defendant (through its class waiver provision) requires customers to individually litigate their modest claims against Defendant one-by-one, no customer would ever attempt to litigate any such claim, because no individual claim is of sufficient heft to attract the services of an attorney.

Defendant’s class waiver (which it inserted into its arbitration clause) also functions as an improper immunity clause, in essence, a “get out of jail free” card. *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1101 (Cal. Ct. App. 2002); *Woods* at 99. This issue was thoroughly discussed by the *Woods* Court:

The terms of the arbitration provision in Appellant's loan contract leave consumers like Respondent with no meaningful avenue of redress through the courts.

Additionally, the arbitration terms are advantageous to Appellant by prohibiting Respondent and others from initiating or participating in an action against

Appellant. By denying class arbitration, Appellant “has precluded the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone ... this is an advantage that inures only to” Appellant. The provision also insulates Appellant from the spectre of a ruling that would have precedential effect and value, such as application of collateral estoppel, on Appellant's business practice as a whole. 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.’

Woods at 99.

Defendant’s class waiver is substantively unconscionable because it reduces the possibility that victimized consumers can find attorneys willing to represent them, even though the statute under which the claim is brought allows the plaintiff to claim attorneys fees:

A class-action waiver in a payday loan contract **reduces the possibility of attracting competent counsel to advance the cause of action**, and thus can functionally exculpate wrongful conduct. Appellant maintains that Missouri courts have consistently found that the availability of attorney's fees provides a strong incentive for attorneys to take an individual's case if the individual has a legitimate claim. However, the availability of attorney's fees and costs is illusory if it is

unlikely that counsel would be willing to undertake the representation. *Id.* Also, the class action waiver can prevent an aggregate recovery that can serve as a source of contingency fees for potential attorneys in light of the small dollar amount at issue. . . A class-action waiver in a payday loan contract reduces the possibility of attracting competent counsel to advance the cause of action, and thus can functionally exculpate wrongful conduct.

Woods, 280 S.W.3d at 97-98 (citing *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 100 (N.J. Super.Ct. App. Div 2006) (Emphasis added).

The *Woods* court struck the class waiver of the payday lender's arbitration provision, even after specifically recognizing that the *Woods* arbitration provision did not limit the customers' substantive remedies in arbitration. *Id.* at 97. The *Woods* Court started from and branched out from the same test for class action waivers that had earlier been announced by the *Whitney* Court in a decision by the Western District Court of Appeals:

An arbitration clause that defeats the prospect of class-action treatment in a setting where the practical effect affords the defendant immunity is unconscionable.

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

I. This Case is Not About Arbitration.

It should be once again emphasized that the offending part of Defendant's contract is its class waiver, not its provision requiring that all disputes be arbitrated. It just so

happens that in this case the Defendant has placed its class waiver provision in an arbitration provision.

Many cases from jurisdictions outside of Missouri have used the reasoning set forth by *Woods* to invalidate these sorts of class waivers. Many of these cases also dealt with class waivers that the defendants had also tucked into their arbitration clauses. For example, see *Muhammad v County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88 (N.J. 2006); *Doerhoff v. General Growth Properties*, 2006 WL 3210502 (W.D. Mo. 2006); *Kinkel v. Cingular Wireless* 857 N.E.2d 250 (Ill. 2006); *Cooper v. QC Financial Services, Inc.*, 503 F.Supp.2d 1266 (D.Ariz.2007); *Vasquez v. Beneficial Oregon* 152 P.3d 940 (Or. App. 2007); *Discover Bank v. Superior Court*, 113 P.3d 1100 (Ca. 2005); *Tillman v. Commercial Credit Loans*, 655 S.E.2d 362 (N.C. 2008), *Fiser v. Dell Computer Corp.*, 188 P.3d 1215 (N.M. 2008) and *Feeney v. Dell, Inc.*, 908 N.E.2d 753 (2009).

Why is it that so many merchants place these toxic class waivers into arbitration provisions? It would seem that it is because they can then argue that A) their class waiver is an inextricable part of their arbitration clause and B) that state courts shouldn't mess with their arbitration clauses because they are "preempted" by the Federal Arbitration Act. These arguments are ludicrous, as explained in Point II of this brief; there is no feasible argument that any of Plaintiff's defenses to Defendant's class waiver are preempted.

It would be apparent to unscrupulous merchants that they never could get away with sticking class waivers into contracts that did not have arbitration clauses. If they ever tried to do this, their class waivers would stand out; the courts would recognize that when used in small or modest damages cases, these class waivers had absolutely no function other than to immunize such merchants. Without the smoke screen of an arbitration clause to confuse the issue, courts would quickly remedy the injustice caused by bare class waivers by striking them down as unconscionable.⁹⁸

Class waivers present the same problem in all small or modest damage cases, whether or not the contract contains an arbitration clause. As indicated above, class waivers tend to show up in contracts that also involve arbitration clause because this gives the Defendant “cover.” Making sure that the contract also has an arbitration clause allows the Defendant to attempt to argue that “all we’re trying to do is arbitrate, and state courts are preempted from interfering with our right to arbitrate pursuant to the FAA.”

⁹⁸ A parallel example is helpful. If a defendant placed a clause that eliminated most types of damages in any sort of contract, this might well be unenforceable under general Missouri law. Whether or not such a provision is in an arbitration clause covered by the FAA is irrelevant. However, such limitations on damages were routinely placed in arbitration clauses until courts began to strike them down. See e.g. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 311 (Mo.App. W.D. 2005); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 577 (Fla.Dist.Ct.App.1999).

What is noteworthy is how defendants who assert that they prefer arbitration respond when they are actually sent to arbitration. In this case, Defendant has appealed a decision that sent it to arbitration, precisely because the arbitration would involve more than one consumer. Arguments about the purported efficiency of arbitration are quickly discarded when that efficiency could result in full liability for illegal acts, however. This happened in *Woods*. The trial court noted that the arbitration clause of “Quik Cash” was more than 1,300 words. QC had also placed a three-sentence class waiver into its lengthy arbitration clause.⁹⁹ Despite QC’s previous arguments that the arbitration clause was included because arbitration was “better than court,” QC began to argue strenuously to the Court of Appeals that its class waiver could not be severed from its arbitration clause, and that Plaintiff’s case should instead proceed in court. These flip-flops prove Plaintiff’s position: defendants do not care about arbitration, only about exculpation. Once an immunity clause (i.e., the class waiver) is stripped from the arbitration clause by a trial court, “pro-arbitration” defendants quickly file an appeal or ask that the entire arbitration clause (which they chose to include in their contracts) be wiped away.

Several additional aspects of substantive unconscionability deserve special treatment, and they will be discussed in the following sections.

⁹⁹ *Woods v. QC Financial, Inc*, 2007 WL 4688113 (Mo. Cir. Ct. 21st Dist. Dec. 31, 2007).

II. Notice to and Remedies for Other Potential Class Members

Even if one assumes that consumers are sufficiently zealous to file lawsuits based on amounts ranging from a few hundred to a few thousand dollars each, they would still be unlikely to bring these claims because they would not be likely figure out that they had been charged illegal fees. It is important to recognize, then, that Defendant's class waiver hurts consumers in yet another way: it prevents consumers from learning that their rights are being violated. Various courts have noted this important function, reasoning that ". . . without the availability of a class-action mechanism, many consumer fraud victims may never realize that they have been wronged." *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88 (N.J. 2006).

The *Woods* Court also noted the importance of considering more than the named plaintiff when it spoke of the need for "precedential effect" of dispute resolution and the need for "scrutiny and accountability" that would be destroyed without the possibility of class proceedings. The *Woods* Court made it clear that remedies should not pertain only to individual plaintiffs, in cases where the many victims are similarly situated. *Woods*, 280 S.W.3d at 98. This language from *Woods* contradicts Defendant's assertion that class proceedings are not necessary for purposes of providing notice to and representation for other potential claimants.¹⁰⁰ See also, *Fiser v. Dell Computer Corporation*, 144 N.M. 464, 469, 188 P.3d 1215, 1220 (N.M. 2008), holding that beyond being a procedural tool,

¹⁰⁰ Defendant's Brief, p. 25.

“the class action functions as a gatekeeper to relief when the cost of bringing a single claim is greater than the damages alleged.”

It is highly unlikely that the potential class members in the instant case are aware that the title loan company they are dealing with was engaged in various illegal practices.¹⁰¹ As indicated by the expert witnesses in this case, consumers have an extraordinarily difficult time trying to understand contracts such as Defendant’s, as well as the fact that the business practices are illegal.¹⁰²

This Court has recognized that consumers do not always recognize complicated legal claims, holding that the “voluntary payment doctrine” did not apply to the unauthorized practice of law because to require consumers to recognize such claims would be “illogical and inequitable. “ *Eisel v. Midwest Bankcentre*, 230 S.W.3d 335, 339 (Mo. 2007). Allowing class arbitrations (which include notice to the entire class) provides a remedy for this knowledge deficit, allowing consumers to learn that their rights were violated.

¹⁰¹ Class members may well have a sense that the loans were unfair, but that is far different from understanding the somewhat complicated statutory requirements for title lenders.

¹⁰² LF533-536 (Brown Dep. 109-111).

III. Stripping Away Rights Vested in the MPA Violates Public Policy

In addition to reasons already discussed, a Defendant should not be allowed to strip away the right to a class action for an even simpler reason. The MPA provides for a statutory right to consumer class actions. See § 407.025 RSMo. At a minimum, this statutory right translates into strong and clear public policy that Missouri consumers should have the opportunity to seek judicial remedies as part of a class. This right to a class action was specifically inserted into the MPA by the Missouri legislature, which directly contradicts Defendant's claim that Plaintiff had no substantive right to a class action.¹⁰³

As this Court recently affirmed in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. 2009), the MPA is designed to provide remedies for all consumer wrongs. Its protections are not subject to waiver. As such, requiring a customer to waive a right to resolve his or her dispute through a class action is impermissible in Missouri.

Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature clearly didn't want the protections of Chapter 407 to be waived by those deemed in need of protection. *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo.

¹⁰³ Defendant's Brief, p. 19-20.

1992). This same concern was articulated by the Court in *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 308, 314 (Mo. App. W.D. 2005), where the court specifically pointed out that a class waiver would violate the public policy of the MPA.

An average person would not reasonably expect that a dispute like the one at issue would be required to be resolved through arbitration on an individual case by case basis. Such a requirement, if found to bar actions such as this, would effectively strip consumers of the protections afforded to them under the Merchandising Practices Act & unfairly allow companies like [Defendant] to insulate themselves from the consumer protection laws of this State. This result would be unconscionable and in direct conflict with the legislature's declared public policy as evidenced by the Merchandising Practices Act & similar statutes.

Other states are equally protective of their consumer protection statutes. Consider, for example, *Feeney v. Dell, Inc.*, 908 N.E.2d 753 (Mass. 2009), where the Court noted that Massachusetts public policy strongly favors consumer class actions, as evidenced by its unfair and deceptive practices act (which is similar to Missouri's MPA). *Id.* The Court then concluded that any attempt to require the waiver of such rights, including the waiver of a consumer's right to a class action, was unconscionable. *Id.*

A Michigan federal court also recognized the importance of class actions, especially when offered as part of consumer protection laws, holding:

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).

Similarly, since at least 1991, it has been clear that arbitration is permissible only so long as statutory rights may be fully vindicated. *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct 1647 (1991). As such, the moment an arbitration clause strips away a statutory right, it runs afoul of the United States Supreme Court's own test for the enforceability of arbitration clauses. For this reason too, prohibition of class actions in Missouri is unconscionable in cases like this one.

According to the U.S. Supreme Court, "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Other courts have concurred. Judge Posner eloquently described the issue as follows:

It would hardly be an improvement to have in lieu of this single class action to have 17,000,000 suits each seeking damages of \$15.00 to \$30.00.... The *realistic* alternative to a class action is not 17,000,000 individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.00."

Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir.2004); *see also*

Kristian v. Comcast Corp., 446 F.3d 25, 54 (C.A.1 2006); *Muhammad*, 912 A.2d at 97.

It is impermissible to take away statutory rights, including the right to bring one's claim as a class proceeding. To prohibit class claims runs afoul of the fundamental rule that a plaintiff must be able to vindicate his or her statutory rights in the arbitral forum.

On page 19 of its brief, Defendant argues that Plaintiff has no substantive right to a class action because Chapter 407 doesn't apply to Defendant, because Defendant "is under the direction and supervision of the director of the Missouri Division of Finance." Defendant's argument presumes a finding of fact that is highly disputed. Therefore, Defendant's argument is not ripe for presentation to this Court. More importantly, the argument is irrelevant. Even if the MPA did not directly apply to this claim, the MPA nonetheless stands as a clear indicator that in Missouri, stripping citizens of their right to join together would violate fundamental public policy, as that policy is recognized in many places, including the MPA. For these reasons, Defendant's argument regarding the Division of Finance is unpersuasive, irrelevant, and premature.

IV. Defendant's Class Waiver is Unconscionable Because it Violates Public Policy

This case is not being litigated in a vacuum; the class waiver being scrutinized in this case was unheard of ten years ago. A Westlaw search of "class waiver" in the "Allcases" database returns 55 cases, virtually all of these cases decided since 2006. It is thus

important to give historical context to this arbitration dispute. How and why did class waivers come to be? This case is not about arbitration, but one needs to consider the evolution of “arbitration” in order to fully understand the genesis of class waivers.

In the early 20th Century, arbitration was largely disfavored by Courts, but in 1925 Congress passed the Federal Arbitration Act (“FAA”). As the United States Supreme Court would later explain, the FAA had the purpose of reversing “longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreement upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 24 (1991). The advent of the FAA gave rise to more frequent use of arbitration clauses in employment settings, including in contracts between unions and employers. As late as the 1970’s, most reported arbitration decisions concerned union/employer contracts and the U.S. Supreme Court seemed content to limit an arbitrator’s role to a party who applies the “law of the shop.” *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 54 (1974). The Court even suggested that arbitrators did not need to have formal legal training, that Congress never intended for arbitrators to decide substantive rights such as Title VII cases, and that fact-finding in arbitration cases was not comparable to fact-finding in a court. *Id.* at 57-58.

This mindset that not all types of legal disputes were appropriate for arbitration is the likely reason that arbitration clauses were not common in individual employment contracts or consumer transactions prior to the 1970’s. From the late 70’s through 1991, though, the Supreme Court quietly overruled much of *Gardner/Denver* and other cases

that limited the scope of issues arbitrators could decide. In *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20 (1991) the Supreme Court expanded the use of arbitration to resolve almost any legal issue between two parties. The Court wrote, “It is by now clear that statutory claims may be the subject of an arbitration agreement.” *Id.* at 26. In what has proved an enduring line, the Court held that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” *Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 28 (1991).

Gilmer made it clear that arbitration agreements were likely to be enforced in almost any legal context and that there would, in fact, be a presumption in favor of arbitration. This realization led to a massive proliferation of arbitration clauses. Arbitration clauses began to appear in everything from job applications to credit card agreements. Franchisors inserted arbitration clauses in their contracts with franchisees, for example. And whether one was doing business with an automobile dealer, a nursing home, or a payday lender, an arbitration clause was almost certain to be found. “Mandatory arbitration provisions have become ubiquitous in contracts for employment and consumer goods, forcing employees and consumers to arbitrate, rather than litigate, their statutory claims.”¹⁰⁴ How widespread is mandatory arbitration?

¹⁰⁴ Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 Fordham Urb. L.J. 803, 804 (2009).

Arbitration clauses are now regularly used by the securities industry for brokerage employees; by the health care industry as a condition of using hospital services; by the health insurance industry as a prerequisite to applying for health insurance; by the banking and finance industries in standard form consumer contracts; and, increasingly, by employers in employment contracts for non-unionized employees.¹⁰⁵

It is becoming the rule, more than the exception, for merchants to force their customers to submit all of their claims to binding arbitration. Perhaps “force” is somewhat of a strained use of the word, but the idea is all-too-often this: If the customer doesn’t agree to give up the treasured legal right to have a judge and jury decide their case, the merchant refuses to do business.¹⁰⁶

¹⁰⁵ Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. Rev. 1, 29 (2004).

¹⁰⁶ Law Professor Jeffrey Stempel contrasts the modern version of mass-produced arbitration with what he terms “old arbitration,” which was “confined to a subset of industry or social activity” involving “a system of relationships in which the participants form virtually their own miniature society or fraternity and are likely to have repeated contact with one another.” By contrast, “new arbitration” affects “large classes of persons or entities,” and involves a disputant who is a stranger to the arbitration process who “signed the form because it is required to engage in the activity offered by the

Though they were once unheard of, “class arbitrations” have become increasingly common, as a result of the Supreme Court’s decision in *Green Tree Financial Corp. v. Bazzle*, 123 S.Ct. 2402, 2403 (2003). In *Bazzle*, the Supreme Court, in a decision riddled with dissents and partial concurrences, held that an arbitration clause that was silent as to whether class arbitration could be interpreted by an arbitrator to allow class actions. *Bazzle* led to yet another mass-tweak of consumer contracts: “[I]n the wake of *Bazzle*, sophisticated employers and sellers modified their arbitration agreements explicitly to forbid class treatment of claims.”¹⁰⁷ Hence, the birth of the class waiver. Its inspiration was to prevent class arbitrations.

In this case, Plaintiff called three legal experts, each one of them a well-respected consumer lawyer: John Ammann,¹⁰⁸ Bernard Brown,¹⁰⁹ and Dale Irwin.¹¹⁰ As clearly indicated by their unopposed testimony, consumers have no ability to bring claims

vender who designed the standardized form containing an arbitration clause.” Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 UCINLR 383, 385 (2008).

¹⁰⁷ Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 Fordham Urb. L.J. 803, 804 (2009).

¹⁰⁸ LF 294.

¹⁰⁹ LF 424.

¹¹⁰ LF 575.

comparable to Plaintiff’s claim on an individual basis. Without the economy of scale offered by a class action, the cost of bringing this sort of case is greater than the potential damages recoverable (even assuming that the plaintiffs would win the case every time).

It is facetious for Defendant to describe the right to a class action as merely “procedural” when Defendant’s class waiver clearly illustrates the marriage of the procedural and the substantive. Without a “procedural” right to bring a class arbitration, especially against businesses that build illegality into their business models, the customers are deprived of real-life substantive rights. Without the “procedural” right to pursue a class arbitration in this case, the Plaintiff and Class have no meaningful legal rights at all and, to the extent Defendant has been engaged in a laundry list of illegal acts, it would be comforted to know that it will be business as usual.

There is one more aspect of public policy that deserves mention. Although Missouri courts recognize freedom of contract, “the Court will not recognize contractual provisions that are contrary to the public policy of Missouri as expressed by the legislature.” Inserting contract provisions that waive the rights and protections of the borrower despite a statutory prohibition of such terms, is a violation of § 367.527(3) RSMo.¹¹¹

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367.527. 1. A title lender shall not:

...

(3) Accept any waiver of any right or protection of a borrower;

Defendant's class waiver *waives* Plaintiff's right to a class proceeding and thus breaches Missouri public policy established by § 367.527(3). Missouri courts refuse to enforce contract provisions that violate the law or public policy, and Defendant's class waiver shouldn't be any exception to this sensible rule. *East Attucks Community Housing, Inc. v. Old Republic Sur. Co.*, 114 S.W.3d 311, 323 (Mo.App. W.D. 2003); *First Nat. Ins. Co. of America v. Clark*, 899 S.W.2d 520, 521 (Mo. 1995).

V. Defendant's Class Waiver Imposes Unfairly Disproportionate Burdens on the Parties.

Defendant's contract prohibits both parties, including Defendant from bringing any class action or class arbitration. This brings to mind the often-recited quote of Anatole France: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." The ability to bring a small damages claim is critical to a wronged customer. As indicated throughout this brief, that ability to bring a class claim is so incredibly important that a customer has no real-world means to bring any claim against without it. Defendant has no use for a class action, however. Defendant's corporate representative has admitted that that Missouri Title Loans has never brought a class action against its consumers.¹¹²

¹¹² LF 374 (Fields Dep. 71:14-18, February 11, 2008).

Defendant’s arbitration clause also prohibits customers from presenting any claims in court. The converse is not true. Defendant has specifically retained the right to make use of the courts with regard to some of its claims: “Lender’s right to seek possession of the Collateral in the event of a default by judicial or other process including self-help repossession.”¹¹³ Although “mutuality,” in and of itself, is not a basis for invalidating an arbitration clause, *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. 2006), mutuality is a factor to consider in the context of the overall fairness of a contract:

A bilateral contract “that contains mutual promises imposing some legal duty or liability on each promisor is supported by sufficient consideration to form a valid, enforceable contract.” *Sumners v. Serv. Vending Co.*, 102 S.W.3d 37, 41 (Mo.App. S.D.2003). However, to constitute sufficient consideration, a promise of one of the contracting parties must be binding on that party.

[A] promise *is not* good consideration unless there is mutuality of obligation, so that each party has the right to hold the other to a positive agreement. Mutuality of contract means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, *neither party is bound unless both are bound.*

Id.

¹¹³ LF 288

Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15, 30 (Mo.App. W.D. 2008). The unconscionability argument can be further substantiated, then, by the fact that Defendant is attempting to enforce a contract that imposes disproportionate burdens upon its customers, especially given that Defendant was the scrivener of this lopsided contract.

VI. Additional Factors Constituting Substantive Unconscionability.

The Plaintiff provided ample evidence of substantive unconscionability to the trial court, including the following:

- 1) Actual damages involved in this case are “a couple thousand dollars.” This case is therefore a small damages case.¹¹⁴
- 2) Missouri Title Loans is a large company, with 50 stores in Missouri. It has had at least 14,895 Missouri customers since 2001.¹¹⁵
- 3) Missouri Title Loans has never arbitrated any matter against its consumers.¹¹⁶

¹¹⁴ LF 119 (Pl.’s Amended Petition, ¶¶ 1, 3, 7); LF 504 (Brown Dep. 80:18-21, June 26, 2008). LF 311 (Ammann Dep. 68: 1-19).

¹¹⁵ LF 342 (Fields Dep. 16:3-5, February 11, 2008); LF 790 (Def.’s Answers to Pl.’s Am. Count I Interrogs, # 40).

¹¹⁶ LF (Fields Dep. 71:4-72:17,73:7-15, February 11, 2008); LF 785 (Def.’s Answers to Pl.’s Am. Count I Interrogs. #18, 20).

- 4) Defendant admitted that Missouri Title Loans has never brought a class action against its consumers.¹¹⁷
- 5) Defendant admitted that by signing Defendant's arbitration provision, Defendant's customers are giving up various legal rights, including the right to go to court, the right to a jury trial and the right to serve as a class representative in a class action.¹¹⁸
- 6) Defendant admitted Defendant's contract allows Missouri Title Loan to repossess its customers' vehicles without going through arbitration.¹¹⁹
- 7) Missouri Title Loans does not notify customers about lawsuits filed against it by other customers.¹²⁰
- 8) Consumers are generally not aware of their statutory rights. For this reason, class actions serve to provide notice of violations to consumers.¹²¹
- 9) Class actions serve a valuable role in society.¹²²

¹¹⁷ LF 374 (Fields Dep. 71:14-18, February 11, 2008).

¹¹⁸ LF 74-77 (Fields Dep. 74:25-76:22, February 11, 2008).

¹¹⁹ LF 376 (Fields Dep. 73:17-20, 74:13-20, February 11, 2008); (Pl's Loan Agreement, Section 12).

¹²⁰ LF 398 (Fields Dep. 111:4-23, February 11, 2008).

¹²¹ LF 501 (Brown, Dep. 77, 82, 140, 141, June 26, 2008).

- 10) It is nearly impossible to obtain legal representation in Missouri in a small damages consumer claim such as this.¹²³ Even seasoned consumer attorneys are simply not able to handle this type of case because the expenses involved are too high and customers could not afford retainers of “several thousand dollars.”¹²⁴
- 11) It is extremely difficult for consumers in low damages cases like this to persuade attorneys to represent them. Class actions are the only way for a consumer to get representation on claims like this.¹²⁵
- 12) Class action waivers in cases like this kill off any chance for consumers to obtain legal representation.¹²⁶
- 13) These cases are complicated consumer cases with damages ranging from a few hundred to a few thousand dollars. It is extremely difficult for consumers to find experienced attorneys to handle these cases because there are relatively few

¹²² LF 527(Brown Dep. 103:6-104:3, June 26, 2008); LF 709-711 (Irwin Dep. 137:25-138:15, 136:24-137:18, June 26, 2008).

¹²³ LF 658, 710 (Irwin, Dep. 82:16-25, 82:16-25, 134:12-135:7, June 26, 2008);

¹²⁴ LF 311(Ammann Dep. 67:2-25, July 14, 2008); LF 658 (Irwin, Dep. 82:16-25, 82:16-25, 134:12-135:7, 97:22-98-14, June 26, 2008); LF 711-712 (Brown Dep. 81:8-82:7, June 26, 2008).

¹²⁵ LF 500, 504, 515 (Brown Dep. 76-77, 80, 91 June 6, 2008).

¹²⁶ LF 500, 527-530 (Brown Dep. 76-77, 103-105 June 6, 2008).

consumer savvy attorneys. Further, because these cases are legally complex with relatively low damages, they are not “financially viable” for attorneys to handle regardless of the fee arrangement.¹²⁷

14) Businesses often utilize arbitration clauses for the purpose of limiting liability.¹²⁸

15) Waiver of class actions encourages businesses to continue illegal conduct.¹²⁹

Each of the above-described evidence points to the fact that this case is rife with substantive unconscionability. It follows that, if Defendant were allowed to compel arbitration, it would in reality be concocting its own immunity, and sheltering itself from any precedent regarding its alleged systematic illegalities.

G. Additional Arguments Raised by Defendant Regarding Point I

Defendant has raised several additional points that will be briefly addressed in this section.

I. Definition of “Unconscionability”

On page 10 of its Brief, Defendant claims that a contract provision is unconscionable only to the extent that “no man in his senses and not under delusion would make, on the

¹²⁷ LF 311, 315 (Ammann Dep. 67-68, 83-84, July 14, 2008).

¹²⁸ LF 709-710 (Irwin Dep. 137:25-138:15, June 26, 2008).

¹²⁹ (Irwin Dep. 136:24-137:18, June 26, 2008).

one hand, and no honest and fair man would accept.” *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. 2003). For each of the reasons already stated previously in this Appellate Point, Defendant’s class waiver is squarely captured by this definition.

It should be noted, however, that the *Swain* Court applied its “delusion” test to the question of whether a dispute should be arbitrated at all, and didn’t specifically apply this test to various onerous provisions that pertained to the manner in which that dispute would be arbitrated. *Swain*, 128 S.W.3d at 107-8. Most of the factually relevant cases—those concerning class waivers—do not make any reference to this “delusion” language.¹³⁰

The *Woods* test considers the various indicia of procedural and substantive unconscionability and ultimately considers whether the Defendant has immunized itself. That is exactly what the trial court did in this case. In doing so the trial court concluded that Defendant’s arbitration clause prohibits all class actions and all class arbitrations in situations:

A) where the class members have no reasonable way to know that they were victims of the alleged violations by Defendant; and

¹³⁰ See *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo.App. 2008); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. App. 2005); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006); and *Bracey v. Monsanto*, 823 S.W.2d 946 (Mo. banc 1992).

B) where Plaintiff and class members would be highly unlikely to find or hire attorneys to represent their interest regarding these types of claims were they forced to pursue such claims individually.¹³¹

II. Defendant's Conduct as Not Egregious

At page 11 of its Brief, Defendant seems to be claiming that the above indicia of procedural and substantive unconscionability are insufficient because Defendant's conduct was not even worse. For instance, Defendant argues that there is no claim that Defendant used high pressure sales tactics or made misrepresentations. High pressure and misrepresentation are undeniably indicia of procedurally unconscionability, but they are not required elements of this case. The trial court found ample evidence of both procedural and substantive unconscionability in this case.¹³²

III. Amount in Controversy

In *Woods*, loans of up to \$500 were allegedly renewed illegally, with damages alleged to reach \$2,000. Those damages were too small to attract attorneys on an individual basis.

At page 18 of its brief, Defendant argues that this case is not determined by *Woods* because the amount in controversy is supposedly greater than in *Woods*. Defendant is

¹³¹ LF 1157.

¹³² LF 1156 ff.

mistaken. Whereas Ms. Woods paid \$1,800 in interest to QC over the course of her multiple (allegedly illegal) loan renewals,¹³³ Ms. Brewer paid a somewhat *smaller* amount of interest to Defendant, about \$1,200 with regard to her loan.¹³⁴ These amounts are functional equivalents when it comes to analyzing a class waiver for unconscionability. More to the point, unconscionability is not mechanically determined by the monetary value. Rather, the test is whether a person with a claim for either of these relatively small values would be in a position to find an attorney to represent them. The undisputed evidence in this case is that they cannot find attorneys.

IV. Inability to Find Attorneys

The undisputed expert testimony before this Court squarely contradicts Defendant's argument (page 19 of Defendant's Brief) that there is insufficient evidence supporting substantive unconscionability. Plaintiff has produced *undisputed* evidence that Defendant's title loan customers would not be able to hire attorneys to represent them on their individual claims given this relatively low value.¹³⁵ Even seasoned consumer attorneys would not handle this type of case because the expenses involved are

¹³³ See LF 41 of the legal file of Woods v. QC, ED 90949, filed with this Court.

¹³⁴ See Defendant's Brief at p. 8.

¹³⁵ LF 658, 710 (Irwin, Dep. 82:16-25, 82:16-25, 134:12-135:7, June 26, 2008);

high and customers could not afford retainers of “several thousand dollars.”¹³⁶ Class actions are the only way for a consumer to get representation on claims like this ¹³⁷ and class action waivers in cases like this kill off any chance for consumers to obtain legal representation.¹³⁸ Defendant failed to provide evidence that any attorney would be willing to handle these claims on an individual basis.

Consumers cannot find *individual* representation due to the relatively small damages of their claims, but Defendant has tried to cut off the only alternative: class actions/class arbitrations. This amounts to immunity. Defendant’s arbitration clause is unconscionable because it “defeats the prospect of class-action treatment in a setting where the practical effect affords the defendant immunity.” *Woods*, 280 S.W.3d at 100.

Defendant certainly had the right to call even one attorney who might claim that he or she would be able to handle individual payday loan cases or individual title loan cases as part of a rational business model. Defendant failed to call a single attorney. Therefore, the only evidence on this point is the evidence provided by Plaintiff’s three experts.

¹³⁶ LF 311(Ammann Dep. 67:2-25, July 14, 2008); LF 658 (Irwin, Dep. 82:16-25, 82:16-25, 134:12-135:7, 97:22-98-14, June 26, 2008); LF 711-712 (Brown Dep. 81:8-82:7, June 26, 2008).

¹³⁷ LF 500, 504, 515 (Brown Dep. 76-77, 80, 91 6/6/2008).

¹³⁸ LF 500, 527-530 (Brown Dep. 76-77, 103-105 6/6/2008).

V. Defendant Allegedly Not “Large.”

On page 18 of its Brief, Defendant argues that Defendant is not a “large” company, even though it operates fifty stores in Missouri.¹³⁹ That largeness bears on the disparate bargaining power of the parties to the contract.

VI. State and Federal Cases Cited by Defendant

Defendant spends considerable energy citing to non-controlling cases, including trial court decisions from state and federal courts and cases from jurisdictions outside of Missouri.¹⁴⁰ There is no need to refer to any of these cases given the fact that the issues in this case are directly addressed by Missouri appellate cases. Including the holding of the Missouri Court of Appeals on this case, five Missouri state appellate courts have recently concluded that it is unconscionable to enforce class waivers in small damage consumer claims. The other four cases include:

- *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo.App. W.D. 2005);

¹³⁹ LF 342 (Fields Dep. 16:3-5, February 11, 2008); LF 790 (Def’s Answers to Pl.’s Am. Count I Interrogs, # 40).

¹⁴⁰ For example, on page 22 of its Brief, Defendant cites to *Bass v. Carmax Auto Superstores, Inc.*, 2008 U.S. Dist. Lexis 52107 at *8-9 (W.D. Mo. July 9, 2008); at page 10 of its brief, Defendant cites to the trial court ruling in *Blitz v. AT&T Wireless Services, Inc.*, No. 054-00281 (22nd Cir. Nov. 28, 2005).

- *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90 (Mo. App. E.D. 2008);
- *Ruhl v. Lee's Summit Honda*, 2009 WL 3571309, (Mo.App.W.D. 2009); and
- *Shaffer v. Royal Gate Dodge, Inc.* (Mo.App. E.D. 2009).

In fact, no Missouri state appellate court case supports Defendant's Motion to compel.

Defendant argues that the outcome of this case is determined by a federal case from the Eighth Circuit, *Pleasants v. American Express Company*, 541 F.3d 853 (8th Cir. 2008). Plaintiff disagrees. In addition to *Pleasants* not being from a controlling jurisdiction, *Pleasants* was issued on September 9, 2008, several months prior to *Woods*. Therefore, *Woods* dictates what should have been done in *Pleasants*. In *Pleasants*, the claims arose under the Truth in Lending Act (many of the federal cases that enforce class waivers are based on TILA claims). TILA, unlike the Missouri Merchandising Practices Act, disallows class actions in its statutory text. TILA also provides for statutory damages, ensuring a base value for each claim. In the trial court proceedings of *Pleasants*, no evidentiary record was developed. Based on the scant evidence before the trial court, the Eighth Circuit concluded that the class action waiver did not immunize the defendant. That decision was case specific and doesn't bear on this case in the least.

Curiously, although this case indisputably turns on Missouri state law, current Eighth Circuit precedent stands for precisely opposite result reached by Missouri courts. In a case not cited by Defendant, *Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009), the Eighth Circuit recently held that class action waivers were enforceable. *Cicle* concerned allegedly illegal credit card charges, and the issue before the Eight Circuit was whether

the class action waiver in the arbitration clause was enforceable. The *Cicle* Court reached this result even after acknowledging the following: “Before a contract will be deemed unenforceable on the grounds of unconscionability, a court applying Missouri law must find it both procedurally and substantively unconscionable.” 583 F.3d at 554.

The Eight Circuit issued its decision in *Cicle* almost a year after the Court held oral argument. During this interim *Woods* was decided. In addition, the Missouri Supreme Court case of *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo.,2009), held that a party could not be asked to waive rights under the Missouri Merchandising Practices Act, including the right to a class action. Despite these holdings, the *Cicle* Court never cited to *Woods* or *Huch*. Since *Cicle*, Missouri appellate courts have held three more times that class action waivers in low damage consumer claims are unconscionable. See the Court of Appeals decision in this case, as well as *Ruhl v. Lee's Summit Honda*, 2009 WL 3571309, (Mo.App.W.D. 2009) and *Shaffer v. Royal Gate Dodge, Inc.* (Mo.App. E.D. 2009).

Neither *Pleasants* nor *Cicle* can be squared with existing Missouri law. This inexplicable schism will resolved by this Court’s holding in this case.

Summary of Point I

Because Defendant’s class waiver has illegally immunized Defendant, it is unconscionable and cannot be enforced. By precluding class actions, Defendant is

engaging in, what Sternlight & Jensen have termed, “do-it-yourself tort reform,” allowing Defendant to free itself from liability without going through the legislature.¹⁴¹

The evidence presented at this hearing demonstrates that Missouri Title Loans has forfeited nothing, yet gained absolute immunity, by forcing its arbitration clause on its customers. Meanwhile the arbitration clause casts aside important legal rights of Defendant’s customers, giving them nothing in return.

This issue is of immense importance, as it will determine whether Missouri consumers have real remedies for real wrongs or whether Missouri law will give Defendant carte blanche to “push the boundaries of good business practices to their furthest limits” since Defendant and similar corporations will know that customers will rarely be ever even to attempt to seek a legal remedy. *Szetela v. Discover Bank*, 97 Cal.App.4th 1094, 1101 (Cal. Ct. App. 2002).

For each of these reasons, the trial court must be affirmed.

¹⁴¹ Jean Sternlight & Elizabeth Jensen, *Using Arbitration To Eliminate Consumer Class Actions: Efficient Business Practice Or Unconscionable Abuse?* 67 Law & Contemp. Prob. 75, 103 (2004).

Argument II

II. The trial court did not err in striking a provision of Defendant’s contract that waived Plaintiff’s right to bring any class action or class arbitration, which Defendant had placed in the middle of its arbitration clause, because Section 2 of the Federal Arbitration Act provides that an agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law, ‘save upon such grounds as exist at law or in equity for the revocation of any contract,’ in that unconscionability and prohibitions against exculpatory clauses, the defenses raised by the Plaintiff, are both generally applicable state law contract defenses.

[This Point Responds to Defendant’s Point II].

In Point II of its Brief, Defendant argues that the Federal Arbitration Act requires the trial court to fully enforce Defendant’s class waiver, even if it is unconscionable.¹⁴² Plaintiff disagrees.

Even if Plaintiff’s suit were framed as a challenge to an arbitration clause, such challenges are to be resolved by a court. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 440, 445-446 (2006). 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

¹⁴² See Defendant’s Brief, pp. 2, 24.

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).

At page 30 of its brief, Defendant improperly construes the second paragraph above as though it conflicts with the first paragraph, even though both of these paragraphs are from the same footnote of the same case. Defendant is interpreting *Perry* such that a court would be violating the Federal Arbitration Act if it dared to consider any *facts* underlying a claim of unconscionability. Defendant's reading of *Perry* is a tortured one. The above two paragraphs are easily harmonized, and they amount to this: a court may not invalidate arbitration provisions on special laws developed to disparage arbitration, but such clauses may be invalidated based on general principles of state contract law.

Missouri state law relating to unconscionability is law that applies to any contract, not merely to arbitration contracts. Therefore state law regarding unconscionability is exactly the type of law that is enforceable and does not transgress the FAA. Citing to *Perry*, the Missouri Supreme Court case of *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. 2005), held 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.”

The Missouri Arbitration Act also provides that arbitration clauses are subject to defenses “as exist at law or in equity for the revocation of any contract.” § 435.350 RSMo. This provision was interpreted by *Woods v. QC Financial*: “As a matter of contract law of the State of Missouri, unconscionable provisions in contracts will not be enforced.” 280 S.W.3d at 99. *Woods* was following the well-established holding of *Swain v. Auto Servs., Inc.*, where the Missouri Court of Appeals explained that “generally applicable state law contract defenses, such as fraud, duress and unconscionability, may be used to invalidate arbitration agreements without contravening the FAA.” *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003) .

In this case, the trial court showed that it was well aware that it needed to place Defendant’s arbitration agreement on equal footing with any other contract when it cited to *Perry v. Thomas*¹⁴³ and wrote: “This Court’s decision does not reflect hostility for

¹⁴³ LF 1160.

arbitration as a whole but, rather, is the result of the application of general contract laws to the arbitration clause at issue.”¹⁴⁴

Beginning at page 29 of its brief, Defendant spends considerable time discussing *Gay v. CreditInform*, 511 F.3d 369 (3rd Cir. 2007), as though Plaintiff were attacking the agreement to arbitrate her dispute with Defendant. Plaintiff’s attack on Defendant’s class waiver should not be seen as an attack on any agreement to arbitrate. As indicated throughout this brief, Plaintiff is not opposed to arbitration. Plaintiff’s attack on Defendant’s class waiver does not contravene *Gay*’s advice that attacks on arbitration contracts are valid only to the extent that they are based on “the validity, revocability, and enforceability of contracts generally.”

Plaintiff’s attack on Defendant’s class waiver is perfectly allowable, and even invited pursuant to the FAA. See, for example, *Doctor's Assocs., Inc. v. Casarotto*, 116 S.Ct. 1652 (1996), where the Supreme Court stated:

[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed

¹⁴⁴ LF 1162.

“upon the same footing as other contracts.”

Id. at 687, 116 S.Ct. 1652 (citations omitted). To do what Defendant urges--to prohibit Plaintiff from attacking Defendant’s class waiver--would violate the FAA, because it would put Defendant’s arbitration clause (into which Defendant had tucked its ominous class waiver) on a different footing as other contracts.

In the recent case of *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008), the Court put the “same footing” concern into vivid context. The *Lowden* Court also succinctly addressed the same FAA preemption concerns raised by Missouri Title Loan, taking aim at Defendant’s often-cited case of *Gay v. CreditInform*, 511 F.3d 369 (3d Cir.2007) in the process.

In *Lowden*, customers had sued a phone service provider for breach of contract and violation of Washington Consumer Protection Act (CPA). The Defendant moved to compel arbitration based on its service agreements, arguing that determining whether Defendant’s class waiver was unconscionable was preempted by Federal Arbitration Act (FAA). Much as the Defendant is doing in this case, the *Lowden* defendant argued that the District Court’s holding (that Defendant’s class action waiver was unconscionable) was “not a contractual rule of general applicability under the FAA.” The Court disagreed, holding that it was applying state law and quoting from *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100 (2005):

"We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which

disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' (Civ.Code, § 1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

Lowden v. T-Mobile USA, Inc., 512 F.3d at 1220.

The *Lowden* Court held that when the potential for individual gain is small, very few plaintiffs, if any, will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers. The Court further held that the FAA did not preempt California law, because the defendant's unconscionability provisions did not subject the defendant's arbitration agreements to "special scrutiny." *Id.* Rather, unconscionability was deemed to be a "generally applicable contract defense," which could be applied to invalidate an arbitration agreement without contravening the FAA. *Id.* The Court reasoned (primarily based on its earlier decision of *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir.2007)) that Congress's primary purpose behind the FAA "requires that we enforce the terms of arbitration agreements like other contracts, not more so."

The *Lowden* Court went further, though, holding that it would *contravene* the FAA—

it would fail to put arbitration clauses on the same footing as other contracts--to hold that “unconscionability law may be applied only to invalidate a class action waiver, but not a class arbitration waiver.” The Court found no basis for concluding that the FAA “implicitly exalted individual arbitration but disfavored class arbitration.” *Id.* at 1221.

The Court then addressed the Third Circuit's holding in *Gay v. CreditInform*, 511 F.3d 369 (3d Cir.2007), a case on which Defendant heavily relies in this case. The *Lowden* Court commented as follows: Unlike the Third Circuit's conclusion as to the applicable state law in *Gay*, we determine that the Washington Supreme Court in *Scott* does not hold “that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate.” *Id.* The Court did not find any basis for concluding that the “FAA requires a state to enforce a class action waiver merely because it lies within an arbitration agreement,” holding that such a position would also contravene the FAA’s mandate of “equal footing” between arbitration and other forms of dispute resolution. *Id.*

The Defendant’s reliance on *Gay* was also shown to be misguided by the *Woods* Court, which held as follows: [The holding of *Gay*] “*supports* the trial court's holding, in that as a matter of contract law of the State of Missouri, unconscionable provisions in contracts will not be enforced.” 280 S.W.3d at 90.

For all of these reasons, Plaintiff’s challenge to the class action waiver is not preempted by any existing law.¹⁴⁵

¹⁴⁵ Defendant’s Contract is attached to this brief at A2-A3.

Argument III

III. The trial court did not err in striking Defendant's contract provision that prohibited Plaintiff from bringing any class action or class arbitration because this waiver functioned as an improper exculpatory clause, in that Defendant's class waiver was not clear, conspicuous or unambiguous with regard to the vast scope of claims being waived by customers.

As a prelude to this Point, it should be noted that when Defendant gave its customers information regarding the class waiver, it was not printed in a huge font like the version found on pages 39 of Defendant's Brief. Rather, the class waiver was in tiny type and it functioned as the sort of unlawful exculpatory clause specifically prohibited by Missouri courts:

A defendant cannot exculpate itself from liability unless the language is clear and unambiguous. *Alack v. Vic Tanny Intern. of Mo., Inc.*, 923 S.W.2d 330, 337-38 (Mo.banc 1996). Here, because this Court concludes the mandatory arbitration class action waiver clause does serve to immunize Appellant, any exculpatory language cannot be enforced against Respondent.

Woods at 99. In this case too, the Defendant's class waiver fails to provide any clear and unambiguous language that by signing Defendant's contract, the customers were knowingly and intentionally foregoing any legal or practical rights they might have had to prosecute even their own individual cases, as a result of waiving their rights to any

class proceeding. Defendant's contract *surreptitiously functioned* as an agreement that Plaintiff would refrain from ever suing Defendant for any unfair practices, even though Defendant's arbitration clause fails to set out this critically important fact in plain language.

A Defendant cannot exculpate itself from liability unless the language is clear and unambiguous. *Alack v. Vic Tanny Intern of Missouri, Inc.*, 923 S.W.2d 330, 337-38 (Mo. 1996). As this Court has explained, "There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving." *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 337 -338 (Mo. 1996). In this case, Plaintiff was waiving *all* of her legal rights against Defendant (for the reasons set forth in Point I). It is also worth noting that a defendant cannot exculpate itself from intentional wrongdoing. *Id.*

Alack and other Missouri cases, such as *Schafer v. Roberson*, 854 S.W.2d 493, 495 (Mo. App. E.D. 1993), reveal that Missouri courts strike down even reasonably clear exculpatory terms if doing so would result in injustice. Here, Plaintiff presented evidence that Defendant's class action waiver was in fact an exculpatory clause because it immunized Defendant. Defendant failed to disclose this exculpatory effect of its clause (there is no language, for example, that by signing Defendant's contract, the customer was agreeing that Defendant would be functionally immunized from claims).

Defendant's arbitration clause is therefore unenforceable. Other courts have considered this same issue and agreed. *See Scott v Cingular Wireless*, 161 P.3d 1000,

1006-07 (Wash. 2007) and *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88, 96 (N.J. Super.Ct. App. Div 2006)), in which the Supreme Courts of Washington and New Jersey noted that class action waivers were unconscionable, and on independent grounds, were unenforceable as *de facto* exculpatory clauses that violated state law.

Defendant's use of a class waiver is an attempt to disgorge fundamental rights from consumers. Substantial justice requires far more than pointing to a class waiver on the back side of a fine print contract to have assurance that there was real bargaining, real consideration, and a meaningful meeting of the minds.

CONCLUSION

Defendant's arbitration clause is unenforceable because it is unconscionable and because it functioned as an impermissible exculpatory clause. Under the Federal Arbitration Act, this Court is fully empowered to review and nullify contract provisions based on these two general state law contract defenses. Neither of these defenses is anti-arbitration and therefore neither of these state law defenses is preempted by the FAA.

For these reasons, Plaintiff asks this Court to affirm the holding of the trial court and the Court of Appeals.

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By: _____

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Certificates of Service, Brief Form and Virus Scanning

1. Two copies of the foregoing were mailed this 10th day of April, 2010 to attorneys for the Appellant:

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2. This brief complies with Rule 55.03, the limitations contained in Rule 84.06(b) and Local Rule 360, limiting Appellant's brief to 90% of 31,000 words, which equals 27,900 words. This brief contains 17,943 words, as determined by the word count feature of MS Word (including Cover, Certifications and Appendix).

3. Pursuant to Rule 84.06(g) and Local Rule 362, Appellant hereby certifies that the CD-ROM accompanying the paper version of this brief has been scanned for viruses and that it is virus-free.

Erich Vieth #29850

Appendix

Appendix Table of Contents

The physical appearance of Defendant's arbitration agreement	A1
Copy of Defendant's Contract with Plaintiff, including the purported class waiver.	A2-A3

[Appearance of Defendant's Arbitration Clause, on the back side of its title loan agreement]

ARBITRATION PROVISIONS

12. Arbitration and Waiver of Jury Trial and Limitation on Class Action Participation. BORROWER and any CO-BORROWER (hereinafter collectively "BORROWER") and LENDER agree that the transactions contemplated by, and occurring under, this Agreement involve "commerce" under the Federal Arbitration Act ("FAA") (9 U.S.C. §§ 1 et seq.). Any and all disputes, controversies or claims (collectively, "claims" or "claim"), whether preexisting, present or future, between the BORROWER and LENDER, or between BORROWER and any of LENDER's officers, directors, employees, agents, affiliates, or shareholders, arising out of or related to this Agreement (including LENDER'S right to seek a money judgment against BORROWER in the event of default, but excluding LENDER's right to seek possession of the Collateral in the event of default by judicial or other process including self-help repossession,) shall be decided by binding arbitration under the FAA. Any and all claims subject to arbitration hereunder, asserted by any party, will be resolved by an arbitration proceeding which shall be administered by the American Arbitration Association. The parties agree to be responsible for their own expenses, including fees for attorneys, experts and witnesses. The parties agree to be bound by the decision of the arbitrator(s). Any issue as to whether this Agreement is subject to arbitration shall be determined by the arbitrator. The arbitration shall take place, at the option of BORROWER, in either the county where this Agreement was executed, or in the county of the BORROWER'S residence. This agreement to arbitrate will survive the termination of this Agreement.

BY AGREEING TO ARBITRATE DISPUTES, BORROWER WAIVES ANY RIGHT BORROWER MAY OTHERWISE HAVE HAD TO LITIGATE CLAIMS THROUGH A COURT OR TO HAVE A JURY TRIAL. FURTHER, UNLESS A CLAIM IS ALREADY CERTIFIED BEFORE THE DATE OF THIS AGREEMENT, BORROWER HEREBY AGREES BORROWER MAY NOT PARTICIPATE IN A CLASS ACTION OR A CLASS-WIDE ARBITRATION, EITHER AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OR CLAIMANTS PERTAINING TO SUCH CLAIM AND BORROWER HEREBY EXPRESSLY WAIVES BORROWER'S RIGHT TO JOIN OR REPRESENT SUCH A CLASS.

IMPORTANT NOTICE REGARDING CUSTOMER PRIVACY

A-1

LOAN AGREEMENT, PROMISSORY NOTE AND SECURITY AGREEMENT

Lender: Missouri Title Loans, Inc. Address: 8900 ST. CHARLES ROCK ROAD SAINT LOUIS, MO 63114 (314)426-7440		Today's Date: 12/12/2006 04:13 PM	Contract #: TL-MO0320-061212-1144-00
Borrower Information: Name: BEVERLY BREWER Address: 9536 LEWIS AND CLARK SAINT LOUIS, MO 63136 (314)867-7732		Maturity Date: 01/12/2007	Motor Vehicle: Make: BUICK Model: RENDEZVOUS Year: 2003 Vin#: 3G5DA03E03S549840 License: 8307824
Co-Borrower: Name: Address:			

Disclosures Made in Compliance with Federal Truth in Lending

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate. 300.00 %	FINANCE CHARGE The dollar amount the credit will cost you. \$ 564.37	Amount Financed The amount of credit provided to you or on your behalf. \$ 2215.00	Total of Payments The amount you will have paid after you have made all payments as scheduled. \$ 2779.37
--------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------

Security: You are giving a security interest in the above described motor vehicle.

Filing Fees: \$ 65.00

Prepayment: If you pay off early, you will not have to pay a penalty, and you will not be entitled to a refund.

Payment Schedule:

1 @ \$ 2779.37

Due on: 01/12/2007

See below for any additional information about nonpayment, default, any required repayment in full before the scheduled date, and prepayment refunds and penalties.

Itemization of Amount Financed:

\$ 2000.00	Amount given to you directly
\$ 0.00	Amount paid on your prior account
Amount paid to others on your behalf	
\$ 65.00	Amount paid for lien fees to the Dept. of Motor Vehicles
\$ 150.00	to Continental Car Club* (optional)
\$ 2215.00	Amount Financed (Total)

* To the extent permitted by law, we may retain or receive a portion of this amount.

This Loan Agreement, Promissory Note and Security Agreement ("Agreement") is executed by and between BORROWER and LENDER on the date set forth above.

- Promise to Pay.** Borrower and Co-Borrower, jointly and severally, (collectively referred to as "BORROWER") promises to pay to LENDER in immediately available United States currency, the Total of Payments shown above at LENDER's address when due in accordance with the Payment Schedule shown above until the Amount Financed together with accrued and unpaid finance charge has been fully repaid together with any recoverable costs incurred by LENDER in foreclosing upon its lien. All sums due hereunder shall be paid without prior demand, notice or claim of set off. BORROWER, without penalty, has the right to fully prepay the Amount Financed at any time prior to maturity and will not be obligated to pay any unaccrued finance charge.
- Collateral.** To secure the BORROWER's obligations under this Agreement and any extensions or renewals thereof, BORROWER hereby grants to LENDER a security interest in the Motor Vehicle described above, all accessories and accessories to the Motor Vehicle, and all proceeds related thereto, including all insurance proceeds or refunds of insurance premiums related to the Motor Vehicle (all such property referred to as "Collateral"). BORROWER promises to reimburse LENDER upon its request for any recoverable costs incurred by LENDER in perfecting its lien or enforcing its rights against the collateral.
- Interest Calculation; Payment Applications.** Interest under this Agreement will be calculated on a simple interest basis and shall accrue at a Daily Rate of no more than 1/365 of 300.00% multiplied by the unpaid principal balance (the Amount Financed less the amount it has been reduced by payments) for each day that any amount remains due to LENDER. All payments shall be applied first to any costs due to LENDER, then to accrued interest, and finally to the unpaid principal amount.
- Renewals.** IF BORROWER FAILS TO PAY THE TOTAL OF PAYMENTS ON OR BEFORE THE ORIGINAL MATURITY DATE THIS AGREEMENT WILL AUTOMATICALLY RENEW FOR AN ADDITIONAL ONE-MONTH PERIOD, and shall continue to renew thereafter for additional consecutive one-month periods until either: (a) the Amount Financed, together with all accrued finance charges and other allowed fees, has been fully paid; (b) LENDER has obtained possession of the Motor Vehicle; or (c) either LENDER or BORROWER provides written notice to the other party regarding the intention not to further renew this Agreement. Finance charges shall continue to accrue on the unpaid principal balance during each renewal period at the Daily Rate set forth in paragraph three (3) of this Agreement. The new maturity date of each renewal period shall be one-month after the previous maturity date, as extended.
- Minimum Interest Payment Obligation.** Notwithstanding automatic renewals of this Agreement (see paragraph (4)), Borrower promises to pay at least the outstanding accrued finance charge on their original maturity date and on each subsequent maturity date, as extended. Failure to pay at least the outstanding accrued finance charge at maturity, and on each subsequent maturity date as extended, shall constitute an event of default under this Agreement.
- BORROWER's Representations and Warranties.** BORROWER represents and warrants that BORROWER has the right to enter into this Agreement, is at least 18 years of age, and understands that no credit insurance is offered by LENDER with this Agreement. BORROWER represents and warrants that the Motor Vehicle is not stolen, has no liens or encumbrances against it, that BORROWER will not attempt to transfer any interest in the Motor Vehicle until all obligations under this Agreement have been paid in full, and that the Motor Vehicle will not be moved from the BORROWER's state of residence. BORROWER further warrants that until such time all amounts due hereunder are fully repaid, BORROWER will not attempt to seek a duplicate title to the Motor Vehicle.

EXHIBIT

7. **Event of Default.** The following constitute events of default under this Agreement: (a) BORROWER does not pay the full amount of any required payment when due; (b) BORROWER fails to keep any other promise contained within this Agreement; or (c) any representation or warranty made by BORROWER is false.

8. **LENDER'S RIGHTS IN THE EVENT OF DEFAULT.** Upon the occurrence of any event of default, and after serving any notices required by law, the LENDER may at its option do any one or more of the following: (a) declare the whole outstanding balance due under this Agreement due and payable at once and proceed to collect it; (b) foreclose upon its lien and liquidate any collateral securing this Agreement according to law, including by using self-help repossession; (c) exercise all other rights, powers and remedies given by law; and (d) recover from BORROWER all charges, costs and expenses, including all collection costs and reasonable attorney's fees incurred or paid by the LENDER in exercising any right, power or remedy provided by this Agreement or by law. In the event of default, finance charge shall continue to accrue until the Amount Financed, together with all accrued and unpaid finance charge and costs is fully repaid.

9. **Notices.** Any notice that LENDER is required to provide under this Agreement or applicable law will be declared reasonable if sent to BORROWER at the address set forth above via regular mail.

10. **General.** (a) BORROWER will deposit a duplicate set of keys to the Motor Vehicle upon execution of this Agreement; (b) BORROWER agrees to pay the maximum amount allowed by law in connection with any check given to LENDER which is not honored for any reason; (c) BORROWER shall bear the entire risk of loss or damage to the Motor Vehicle while it is in BORROWER'S possession and agrees to indemnify and hold LENDER harmless from any and all claims for property damages or personal injuries arising from the operation of the Motor Vehicle, including but not limited to, all judgments, attorney's fees, court costs and any incurred expenses; (d) if more than one BORROWER executes this Agreement, each BORROWER will be jointly and severally liable; (e) time is of the essence for this Agreement; and (f) this Agreement constitutes the entire Agreement between the parties and no other agreements, representations or warranties other than those stated herein shall be binding unless reduced in writing and signed by both parties.

11. **Governing Law; Enforceability.** This Agreement shall be construed, applied and governed by the laws of the State of Missouri, and by the interest rate allowed pursuant to RSMo. § 408.100. The unenforceability or invalidity of any portion of this Agreement shall not render unenforceable or invalid the remaining portions hereof.

12. **Arbitration and Waiver of Jury Trial and Limitation on Class Action Participation.** BORROWER and any CO-BORROWER (hereinafter collectively "BORROWER") and LENDER agree that the transactions contemplated by, and occurring under, this Agreement involve "commerce" under the Federal Arbitration Act ("FAA") (9 U.S.C. §§ 1 et. seq.). Any and all disputes, controversies or claims (collectively, "claims" or "claim"), whether preexisting, present or future, between the BORROWER and LENDER, or between BORROWER and any of LENDER'S officers, directors, employees, agents, affiliates, or shareholders, arising out of or related to this Agreement (including LENDER'S right to seek a money judgment against BORROWER in the event of default, but excluding LENDER'S right to seek possession of the collateral in the event of default by judicial or other process including self-help repossession,) shall be decided by binding arbitration under the FAA. Any and all claims subject to arbitration hereunder, asserted by any party, will be resolved by an arbitration proceeding which shall be administered by the American Arbitration Association. The parties agree to be responsible for their own expenses, including fees for attorneys, experts and witnesses. The parties agree to be bound by the decision of the arbitrator(s). Any issue as to whether this Agreement is subject to arbitration shall be determined by the arbitrator. The arbitration shall take place, at the option of BORROWER, in either the county where this Agreement was executed, or in the county of the BORROWER'S residence. This agreement to arbitrate will survive the termination of this Agreement.

BY AGREEING TO ARBITRATE DISPUTES, BORROWER WAIVES ANY RIGHT BORROWER MAY OTHERWISE HAVE HAD TO LITIGATE CLAIMS THROUGH A COURT OR TO HAVE A JURY TRIAL. FURTHER, UNLESS A CLAIM IS ALREADY CERTIFIED BEFORE THE DATE OF THIS AGREEMENT, BORROWER HEREBY AGREES BORROWER MAY NOT PARTICIPATE IN A CLASS ACTION OR A CLASS-WIDE ARBITRATION, EITHER AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OR CLAIMANTS PERTAINING TO SUCH CLAIM AND BORROWER HEREBY EXPRESSLY WAIVES BORROWER'S RIGHT TO JOIN OR REPRESENT SUCH A CLASS.

IMPORTANT NOTICE REGARDING CUSTOMER PRIVACY

We collect non-public personal information about you from the following sources:

- Information we receive from you on applications or other forms;
- Information about your transactions with us, our affiliates, or others;
- Information we receive from a consumer reporting agency.

We do not disclose any nonpublic personal information about our customers or former customers to anyone except to our affiliates and nonaffiliated third parties working on our behalf as provided by law.

We restrict access to nonpublic personal information about you to those employees who need to know that information and to our affiliates and nonaffiliated third parties working on our behalf to provide products and services to you, to administer your account, or to collect any money or collateral due us. We maintain physical, electronic and procedural safeguards that comply with federal regulations to guard this nonpublic personal information.

DO NOT SIGN THIS AGREEMENT BEFORE YOU HAVE READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU WILL RECEIVE A COMPLETED COPY OF THIS AGREEMENT.

THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.

LENDER

Borrower

Co-Borrower

By: Its Authorized Representative

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