MISSOURI SUPREME COURT

Appeal No. SC 90647

BEVERLY BREWER,

Plaintiff/Respondent,

vs.

MISSOURI TITLE LOANS, INC.,

Defendant/Appellant.

Appellant's Substitute Brief

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JURISDICTIONAL STATEMENT

This is an appeal from an order entered by the Circuit Court for the City of St. Louis finding a class action and class–wide arbitration waiver unconscionable in response to Defendant's Motion to Dismiss or Stay and Compel Arbitration ("Motion to Dismiss") filed by Missouri Title Loans, Inc. ("Missouri Title Loans"). The order was entered December 19, 2008, and, upon a finding of no just reason for delay, denominated a judgment. Legal File ("LF") 1163. A notice of appeal was timely filed January 26, 2009. LF 1164.

The appeal raised no issue in the exclusive jurisdiction of the Missouri Supreme Court and therefore the Missouri Court of Appeals had original appellate jurisdiction. Mo. Const. art. V, § 3. After opinion, this Court granted Missouri Title Loans' transfer motion and therefore this Court now has jurisdiction. Mo. Const. art. V, § 10.

STATEMENT OF FACTS

Missouri Title Loans is a Missouri company licensed by Missouri's Division of Finance as a consumer credit loan company under § 367.100, *et seq.*, and as a small loan company under § 408.500, *et seq.* LF 45. The company also has a title loan license under § 367.500, *et seq.* LF 45–46. As a financing institution licensed under § 364.010, *et seq.,* Missouri Title Loans offers a variety of statutorily authorized consumer loans. LF 46.

Respondent made a $2,215 consumer loan from Missouri Title Loans and signed a Loan Agreement, Promissory Note and Security Agreement ("Loan Agreement") dated December 12, 2006. LF 287–88, 277B–77C . The loan was secured by the title to Respondent's 2003 Buick Rendezvous and the finance charges for the thirty day loan were $564.37. LF 287. The Loan Agreement, in relevant part, provided:

> **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, <u>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,</u>) 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.**

LF 288.

Also, immediately above the borrower's signature line is a sentence that states: "**THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.**" LF 288. As shown by the language above, and Respondent does not dispute, the FAA applies to the parties' transaction.

Respondent obtained her loan and signed the Loan Agreement at Missouri Title Loans' store located at 8900 St. Charles Rock Road, St. Louis, Missouri

63114. LF 287. In October or November, 2006, Respondent was working as a legal secretary at Husch & Eppenberger in Clayton, Missouri and was in need of some money to buy Christmas presents. LF 272, 276. Respondent searched the Internet for different places to get loans including title loans. LF 276–77. She found approximately 20 different loan sources and selected three to follow up with and took down their telephone numbers. LF 277–77A.

Respondent called one of the three sources, Missouri Title Loans, but testified that nothing prevented her from visiting the other loan sources or looking at other stores on the list of 20 different loan sources. She decided to visit Missouri Title Loans but there was no reason she could not have gone to the other two loan sources on the list or other sources on the Internet. LF 277A.

Respondent went to Missouri Title Loans on December 12, 2006. After several people in line ahead of her were helped, she was quickly presented a contract and asked various questions about the loan transaction. LF 270. The contract was laid out in front of her and she had an opportunity to read it before signing. LF 270, 277C. Respondent testified that she decided it was not important for her to read the loan agreement before signing. LF 277C. Also, while Respondent recalled rushing and that there were other people in the store, she testified that the Missouri Title Loans representative never told her not to read the Loan Agreement and that Respondent was handed the Loan Agreement

before she signed it. LF 277C–77D. Respondent testified that instead of reading though the contract, she just thought to herself that it contained contract language she didn't need to read. LF 277D.

Respondent also testified about her employment and personal background. Before going to work as a legal secretary at Husch & Eppenberger in June, 2004, Respondent worked for two years as a legal secretary at Thompson Coburn in St. Louis. LF 272. She was also involved in several lawsuits brought by her landlords. LF 273. In one of the lawsuits where Respondent was represented by counsel, the landlord sought to enforce a lease provision for automatic renewal and rent increase. Respondent testified she was surprised by the lease provision in part because she had not read the lease before signing it. LF 273–74. Before signing her next apartment lease, Respondent checked to be sure there was not similar language providing for rent increase and automatic renewal. LF 275.

Respondent testified to her expectations and knowledge of the terms in the Loan Agreement she chose not to read. She testified that she had no expectation in signing the contract that she could give away the right to join with other people if the law was violated. LF 271. She also testified that she had no knowledge that a company could do that. LF 271.

Respondent's class action petition requested declaratory relief to find the arbitration clause and waiver of class action provision unconscionable. Missouri Title Loans countered with a motion to dismiss or compel arbitration. The trial court held the evidence outlined above and found that the case should go to arbitration without any prohibition against class action treatment at arbitration. LF 1129, 1162. The court ordered Missouri Title Loans to pay all filing fees and arbitration costs, excluding expert testimony, attorney's fees and other fees incurred by Respondent in preparation of her case. The Court's judgment also found that there was no just reason for delay and that the order could be appealed immediately. LF 1162-63. After the Missouri Court of Appeals issued its opinion, this Court granted transfer.

POINTS RELIED ON

I. **The trial court erred in striking the class action waiver in the arbitration clause because the waiver is not unconscionable in that the evidence was insufficient to show that the waiver is one that no man in his senses and not under delusion would make and as no honest and fair man would accept.**

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

State Dept. Social Services v. Brookside Nursing, 50 S.W.3d 273 (Mo. banc 2001)

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

II. **The trial court erred in striking the class action waiver in the arbitration clause inasmuch as the Federal Arbitration Act preempts the court's decision. The trial court's finding of "unconscionability" was outside the requirement of the FAA that to revoke a contract, or any parts, there must be "such grounds as exist at law or in equity for the revocation of any contract." No such grounds exist here.**

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

Gay v. CreditInform, 511 F.3d 369 (3rd Cir. 2007)

Repair Masters Construction, Inc. v. Gary, 277 S.W.3d 854 (Mo. App. 2009)

III. **The trial court erred in striking the class action waiver in the arbitration clause because, to the extent it functions as an exculpatory clause, the class action waiver is not prohibited as against public policy. The waiver is clearly worded and unambiguous and there is no unexpected surprise advantage.**

Alack v. Vic Tanney International of Mo., 923 S.W.2d 330 (Mo. banc 1996)

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

ARGUMENT

I. The trial court erred in striking the class action waiver in the arbitration clause because the waiver is not unconscionable in that the evidence was insufficient to show that the waiver is one that no man in his senses and not under delusion would make, and as no honest and fair man would accept.

Missouri courts define an unconscionable contract as one which "no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other." *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. 2003) (citing *Hume v. United States*, 132 U.S. 406, 415 (1889)). Missouri courts have used this definition of unconscionability for over 100 years. *Wenninger v. Mitchell*, 122 S.W. 1130, 1132 (Mo. 1909); *accord State Dept. Social Services v. Brookside Nursing,* 50 S.W.3d 273, 277 (Mo. banc 2001) (unconscionable contract is one where there is "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation of the inequality of it.") (quoting *Restatement (Second) of Contracts* § 153 (1981)); *cf. Blitz v. AT&T Wireless Services, Inc.*, No. 054-00281 (22nd Cir. Nov. 28, 2005) (finding that it cannot be said that a customer would have to be out of his senses or delusional to agree to defendant's class action waiver provision). LF 1144.

It is established under Missouri law that for a contract to be voided on the basis of unconscionability, it must be both procedurally and substantively unconscionable, although not necessarily in equal proportions. *Kansas City Urology, P.A., v. United Healthcare Services*, 261 S.W.3d 7, 15–16 (Mo. App. 2008). Procedural unconscionability refers to the contract formation process and focuses on the high pressure exerted on the parties, fine print of the contract, misrepresentations, or unequal bargaining position. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 95 (Mo. App. 2008). Substantive unconscionability refers to the so–called undue harshness in the contract terms themselves. *Id.* It is axiomatic that *both* procedural and substantive unconscionability must exist before a contract or provision can be voided. *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. App. 2005); *Repair Masters Construction v. Gary*, 277 S.W.3d 854, 858 (Mo. App. 2009).

A. The Class Action Waiver Is Not Procedurally Uncon-scionable.

Respondent argued that the contract was procedurally unconscionable because the arbitration provision was non–negotiable and in fine print. LF 1158. Respondent also urged the court to presume a disparity in bargaining power simply because Missouri Title Loans is a corporation. LF 1158–59. Respondent also suggested that the arbitration provision would be difficult for the average consumer to understand. LF 1158.

None of Respondent's arguments supports a finding of procedural unconscionability. The class action waiver is not in fine print; it conspicuously appears in bold print and capital letters in a separate paragraph:

> **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.**

LF 288.

Interestingly, the print in the class action waiver appears larger than the print used in portions of the arbitration provision that the trial court enforced and did not find unconscionable.

Respondent does not claim that she was pressured to take the loan or that her loan was the result of high pressure sales tactics. Respondent also does not claim that Missouri Title Loans made any misrepresentations or perpetrated any other fraud or deceit. In fact, there was no evidence that Missouri Title Loans pressured, or made any misrepresentations to, any of its customers during the loan application process.

Although Respondent argues the class action waiver was non–negotiable, the evidence failed to establish that the Loan Agreement with its class action waiver was a contract of adhesion. A contract of adhesion involves a form contract created by a party with greater bargaining power and usually offered to the other party on a "take this or nothing" basis. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 857 (Mo. banc 2006). The greater bargaining power enjoyed by one party often exists because the other party "is unable to look elsewhere for more attractive contracts." *Id.* In *Vincent*, the Supreme Court found that plaintiffs had failed to prove the contract was one of adhesion because they offered no proof that they were unable to look for a more attractive contract elsewhere. *Id.* The *Vincent* court made it clear that relators offered no proof of adhesion:

> Relators offered no proof that *all* St. Louis metropolitan area builders used the same arbitration terms or proof that they were

> forced to purchase their homes from McBride. Furthermore, there was no "unexpected surprise advantage" for McBride, because each of the Relators signed the contract and initialed the section of the contract providing for arbitration.

Vincent, 194 S.W.3d at 857 (emphasis in original).

Here, as in *Vincent*, Respondent failed to prove that she was forced to make her loan only from Missouri Title Loans or that all other St. Louis lenders offering loans secured by car titles use the same class action waiver. Indeed, it is undisputed that Respondent testified that there were nearly 20 other consumer lenders she could have approached for a loan. It is also undisputed that she had selected two other lenders to contact about making a loan. LF 277. *Cf. Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868, 873 (Mo. App. 2004) (agreement to settle disputes through arbitration is not unconscionably unfair even between parties of unequal bargaining power).

It is the general rule that a person is bound by the terms of a contract she signs. *Heartland Health Systems v. Chamberlin*, 871 S.W.2d 8, 10 (Mo. App. 1993). She will not be heard to say she was ignorant of its contents, and therefore not bound by its provisions. *Id.* Although Respondent testified that she decided not to bother reading the contract, the average consumer reading the contract would plainly see (in bold print) that "**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[, and] . . . BORROWER HEREBY AGREES BORROWER MAY NOT PARTICIPATE IN A CLASS ACTION OR A CLASS-WIDE ARBITRATION[.]"

The evidence here, considered under the totality of the circumstances, is insufficient to support a finding of procedural unconscionability. The class action waiver was not presented in fine print but in a plain and conspicuous manner. Moreover, the consumer is again informed of the arbitration provision by the plainly worded sentence appearing just above the signature line that states: "**THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.**" Further, there is no evidence that the class action waiver was presented to Respondent under sales pressure or misrepresentation. Also, as in *Vincent*, Respondent failed to prove the class action waiver was a contract of adhesion; she testified to having numerous alternative lenders available for her needs. Nothing in the process of discussing or forming the contract involved an inequality between the parties so strong, gross, and manifest that it is impossible to state it to one with common sense without producing an exclamation of the inequality of it. In short, Respondent here, as in *Vincent*, did not seriously attempt to demonstrate that the disputed contract was a contract of adhesion.

Pleasants v. American Express Company, 541 F.3d 853 (8th Cir. 2008), illustrates the lack of procedural unconscionablity here. In *Pleasants*, American Express sent plaintiff, an individual, three pre–paid cards to be used like credit cards for a total of $40. Accompanying the cards was a document entitled, "Card Terms and Conditions" that contained an arbitration clause incorporating a class action waiver. The provision read as follows:

> **Significance of Arbitration: IF ARBITRATION IS CHOSEN BY ANY PARTY WITH RESPECT TO A CLAIM, NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE THAT CLAIM IN COURT OR TO HAVE THEIR CLAIMS RESOLVED EXCEPT AS PROVIDED FOR IN THE CODE OF PROCEDURES OF THE NAF, JAMS, OR AAA, AS APPLICABLE (THE "CODE"). FURTHER YOU AND WE WILL NOT HAVE THE RIGHT TO PARTICIPATE IN A REPRESENTATIVE CAPACITY OR AS A MEMBER OF ANY CLASS OF CLAIMANTS PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.**

Id. at 855.

Plaintiff in *Pleasants* had argued that the class action waiver was procedurally unconscionable, but the district court, noting the "conspicuous manner in which the arbitration clause was presented[,]" concluded that there

was "little, if any, procedural unconscionability present in this matter." *Pleasants v. American Express Co..* U.S. Dist. LEXIS 60747, *14 (E.D. Mo., Aug. 17, 2007) (citations omitted). On appeal, the Eighth Circuit "agree[d] with the district court that there are not strong indicia of procedural unconscionability, given the conspicuous manner in which the class–action waiver appeared." *Pleasants*, 541 F.3d at 859.

The class action waiver appears in the Loan Agreement between Missouri Title Loans and Respondent at least as conspicuously as the one in *Pleasants*. Here, as in *Pleasants*, the waiver is presented in bold upper case print. Additionally, the arbitration clause in which the class action waiver appears is referenced again just above the signature line in plain language and bold capitalized print.

The present case is distinguishable from *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 95 (Mo. App. 2008). In *Woods*, the arbitration clause and class action waiver were in print so fine that "words from adjacent lines touched and an optical scanner was unable to make out the characters." *Id.* at 96. Missouri Title Loans conspicuously presented the arbitration and class waiver provisions in a separate paragraph in bold and capitalized print larger than the font used throughout the agreement. Unlike the defendant in *Woods*, Missouri Title Loans is not a large national company; while it has sister companies in

other states, it is a Missouri company that conducts its business solely in Missouri. The consumer loan here was not a small loan made against Respondent's next paycheck, but a $2,200 loan secured only by the title to her vehicle and, in this case, the loan was made to buy Christmas presents. LF 276.

The present case is also distinguishable from *Ruhl v. Lee's Summit Honda*, 2009 Mo. App. LEXIS 1543 (W.D. Mo. Nov. 3, 2009) and *Shaffer v. Royal Gate Dodge,* 2009 Mo. App. LEXIS 1720 (E.D. Mo. Dec. 8, 2009). Both *Ruhl* and *Shaffer* involved MPA claims involving actual damages of only a few hundred dollars each. Neither case analyzed the issue of unconscionability under Missouri's long–standing definition of that term, as discussed above. Finally, although the arbitration agreements in *Ruhl* and *Shaffer* were each governed by the FAA, the court of appeals failed to analyze the federal preemption concept found in myriad decisions, including the gold standard decision in *Perry v. Thomas*, 482 U.S. 483 (1987) discussed below.

Because there was no evidence of procedural unconscionability, this Court need not analyze any other aspect of the class action waiver. Missouri courts have consistently held over many decades that a clause is not unconscionable unless there is *both* procedural unconscionability and substantive unconscionability. *See, e.g., Lawrence v. Beverly Manor*, 273 S.W.3d 525, 531 (Mo. banc 2009) ("In general, *both* procedural and substantive aspects of

unconscionability must exist for an arbitration provision to be unenforceable" (emphasis added)); *Funding Systems Leasing Corp. v. King Louie International*, 597 S.W.2d 624, 634 (Mo. App. 1979).

B. The Class Action Waiver Is Not Substantively Uncon-scionable.

The trial court erred in finding that the class action waiver denied Respondent a substantive right to a class action under the Merchandising Practices Act ("MPA"), § 407.010, *et seq.*, RSMo. Simply stated, Respondent has no vested rights under the MPA because the statute expressly does not apply to any company that, like Missouri Title Loans, is under the direction and supervision of the director of the Missouri Division of Finance. § 407.020, RSMo.[1]

Moreover, even if Respondent did have certain rights under the MPA, including the procedural right to seek a class action, the amended petition raises individual issues of fact and law that would trump any common questions of law or fact because Respondent's loan was not made pursuant to § 367.500, *et seq.*, RSMo. *See* LF 288; *cf.* § 367.100, *et seq.,* RSMo. Respondent would not be able to meet the many requirements and prerequisites for certifying this case as a

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[1]Section 407.020 Unlawful practices, penalty–exceptions:

2. Nothing contained in this section shall apply to:

(2) "any ... company, or entity that is subject to ... licensing, or regulation by ... the director of the division of finance ..."

class action under Rule 52.08 of the Missouri Rules of Civil Procedure. In short, and in any event, a class action is unavailable to Respondent in pursuing her alleged claims against Missouri Title Loans.

Even assuming Respondent could assert an MPA claim against Missouri Title Loans, the MPA's reference to a class action is conditional. While allowing class actions under certain circumstances, neither the MPA nor Missouri Rule 52.08 gives litigants a guarantee of a class action. The MPA, in relevant part, provides:

> An action may be maintained as a class action in a manner consistent with Rule 23 of the Federal Rules of Civil Procedure and Missouri rule of civil procedure 52.08 to the extent such state rule is not inconsistent with the federal rule[.]

Id. at §407.025, RSMo.

Accordingly, a class action can only be maintained under the MPA if it can meet the requirements of Federal Rule 23 and Missouri Rule 52.08. Thus, to the extent the rights under Rule 23 are procedural and not substantive, as discussed below, Respondent's right to a class action under the MPA, even assuming Respondent has an MPA claim, are similarly limited.

The trial court also erred in finding Respondent has a substantive right to a class action under Rule 52.08 and the MPA. Missouri law does not regard

a provision allowing a class action as a non-waivable right because class actions are a procedural tool, not a substantive right: "Rule 52.08 is procedural rather than substantive." *Charles v. Spradling*, 524 S.W.2d 820, 824 (Mo. 1975). Mindful of this distinction, the Missouri Supreme Court in *Spradling* flatly rejected plaintiffs' argument that "if their class action is not allowed, individual members of the class will be without a remedy" due to the small amount of individual damages. *Id.* The Supreme Court's analysis and holding in *Spradling* clearly demonstrates that a litigant's inability to bring a class action under Rule 52.08 does not violate public policy.

The distinction between "procedural" and "substantive" rights has served as the touchstone for enforcing contractual class action waivers in Missouri. See, e.g., *Owner-Operator Indep. Drivers Assoc. v. United Van Lines, LLC*, 2006 U.S. Dist. LEXIS 97022, *13 n.5 (E.D. Mo. Nov. 15, 2006) ("The Eighth Circuit, along with other circuits, has enforced arbitration agreements that prohibit class actions, so long as the agreement is valid and enforceable"); *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 729 (8th Cir. 2001) (enforcing arbitration agreement as individuals because agreement silent on class actions); *Bass v. Carmax Auto Superstores, Inc.*, 2008 U.S. Dist. LEXIS 52107 at *8-9 (W.D. Mo. July 9, 2008). Here, unlike *Emerson*, the arbitration agreement specifically precluded a class arbitration. Since the contract is otherwise valid

and enforceable, the Court should reverse the trial court's ruling and order the case to individual arbitration.

Rule 52.08 of the Missouri Rules is identical to Rule 23 of the Federal Rules. Both regulate class actions, and Missouri courts applying Rule 52.08 regularly consider and apply decisions from other jurisdictions interpreting Rule 23. *See e.g. State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 378 (Mo. App. 1997) (interpretations of Rule 23 considered in interpreting Rule 52.08); *see also State ex rel. American Family Mut. Ins. Co. v. Clark*, 106 S.W.3d 483, 490 (Mo. banc 2003) (Rule 52.08 was adopted "nearly word–for–word" from Rule 23); Mo. R. Civ. P. 52.08, Committee Notes 1974.

Courts interpreting Rule 23 consistently have found that a class action is a procedural device and was never intended to trump contract rights. *See Capital Life Ins. Co. v. Gallagher*, 839 F. Supp. 767, 769 (D. Colo. 1993), *aff'd* 47 F.3d 1178 (10th Cir. 1995); *Sanders v. Robinson Humphry/American Express, Inc.*, 634 F. Supp. 1048, 1065 (N.D. Ga. 1986), *aff'd in part and rev'd in part on other grounds*, *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718 (11th Cir. 1987); *Coleman v. Nat'l Movie-Dine, Inc.*, 449 F. Supp. 945, 948 (E.D. Pa. 1978). In holding that Rule 23 is a procedural device that cannot trump a contractual right to arbitrate, the *Sanders* court held:

> In conjunction with the strong tendency of the courts to favor enforcement of arbitration agreements is the express provision in 28 U.S.C. § 2072 of the enabling act of the Federal Rules of Civil Procedure whereby Congress stated that the "rules shall not abridge, enlarge, or modify any substantive right . . ." Rule 23 is a procedural device provided by Congress to allow the court discretion in applying class action status to plaintiffs and those other class members similarly situated. The right to arbitration is contractual and therefore substantive. Congress did not intend that procedural class action certification be used to abrogate the contractual rights employed in the execution of the arbitration agreements by the defendants and some members of the proposed classes.

Sanders, 634 F. Supp. at 1065.

The Third Circuit in *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007) recently held that repeated references to "class actions" in a statute do not create a "right" to file claims on a class action basis. *Id.* at 381. Other courts interpreting Rule 23 have also made it clear that a class action is a procedural mechanism and not a substantive right. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 164 (Mo. App. 2006) ("by their very nature, they [class actions] are a procedural exception to the general principle of jurisprudence . . ."). *See also*

Johnson v. West Suburban Bank, 225 F.3d 366, 371 (3d Cir. 2000) ("Though the statute clearly contemplates class actions, there are no provisions within the law that create a right to bring them, or evince an intent by Congress that claims initiated as class actions be exempt from binding arbitration clauses"). In *Sherr v. Dell, Inc.*, U.S. Dist. LEXIS 51864 (S.D.N.Y. July 27, 2006), the court held that under Rule 23:

> [P]laintiff is not entitled to a class action suit or class-wide arbitration to vindicate the rights of everyone else with a similar problem. The FAA's primary purpose is not to create a right to sue as a class. Its main purpose is to "ensure that private agreements to arbitrate are enforced according to their terms."

Id. at *20–21 (quoting *AutoNation USA Corp. v. Leroy*, 105 S.W.3d 190, 200 (Tex. App. 2003)).

Here, the trial court erred when it looked outside of the terms of the contract in finding that the class action waiver is substantively unconscionable simply because class actions, according to plaintiffs, are necessary to provide notice and adequate legal representation to potential plaintiffs. This conclusion finds no support under Missouri law. As with all contracts, courts must seek to enforce the reasonable expectations of the parties garnered not only from the words of the standardized form but from the totality of the circumstances

surrounding the transaction. *Hartland Computer Leasing Corp. v. The Insurance Man, Inc.,* 770 S.W.2d 525, 527 (Mo. App. 1987). "Only such provisions of the standardized form which fail to comport with such reasonable expectations and which are unexpected and unconscionably unfair are held to be unenforceable." *Id.* (citations omitted). Because standardized contracts address the mass of users, "reasonable expectations" are determined on the objective standard of an average consumer, and as an objective standard, "'reasonable expectations' might or might not be what a party actually expected." *Heartland Health Systems. v. Chamberlin*, 871 S.W.2d 8, 11 (Mo. App. 1993).

A customer would not have to be "out of her senses or delusional" to agree to the class action waiver in Missouri Title Loans' arbitration clause. It plainly states in capital letters and bold type that borrower is agreeing to arbitrate disputes and agrees not to participate in a class action or a class–wide arbitration. The class action waiver does not leave Respondent without a remedy or means of seeking redress.[2] While the parties agree to be responsible for their

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[2] Missouri Title Loans sought, and received, a ruling requiring arbitration and Respondent has not disagreed. As Respondent's counsel stated at the hearing, "I'll be very clear. We are not fighting arbitration. We recognize the Courts often prefer it." LF 243. The class action waiver is obviously the only real issue here.

own attorney's fees, nothing in the arbitration provision imposes prohibitive costs on the consumer or prohibits an award of attorney's fees or costs by the arbitrator(s). In fact, as discussed earlier, the bulk of the arbitration costs may be paid by Missouri Title Loans. Additionally, the arbitration provision contains no prohibition on punitive, exemplary or consequential damages. In sum, the arbitration clause and class action waiver do not present terms to which a customer would have to be out of her senses to or delusional to agree.

Finally, the trial court erred in refusing to enforce the class action waiver simply because, in the court's view, the waiver's practical effect required Respondent to relinquish a host of rights. In *Vincent*, the plaintiffs argued that the arbitration clause was unconscionable because it required them to surrender a disproportionate share of rights. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006). The court rejected this argument and held that "[a]s long as the requirement of consideration is met, mutuality of obligation is present, even if one party is more obligated than the other." *Id.* at 859. Here, both parties exchanged consideration in processing the loan, and under *Vincent*, the class action waiver should not be stricken for lack of consideration or mutuality of obligation. Respondent received everything she bargained for.

The present case is distinguishable from *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 95 (Mo. App. 2008). Unlike the arbitration clause in *Woods*,

the class action waiver here is not part of a contract of adhesion. Respondent testified she had a broad choice of lenders and she failed to prove that all those other lenders had the same class action waiver in their loan agreements.

Also, the amount in controversy here exceeds the amount in *Woods* and in each of the cases the court cited in support of its finding of substantive unconscionability. The payday loan in *Woods* was less than $500. §§ 408.500, 408.505, RSMo. In *Muhammad v. County Bank of Rehoboth Beach,* 912 A.2d 88, 96 (N.J. 2006), the amount in controversy was a $200 loan and $60 finance charge; in *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Ca. 2005), the amount was a small late fee on a credit card payment; in *Powertel, Inc., v. Bexley*, 743 So.2d 570, 576 (Fla. App. 1999), the amount in dispute was a $4.50 overcharge; and in *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308 (Mo. App. 2005), the disputed amount was an unbelievable $.88 monthly charge.

Here, the loan was more than $2,200, and if Respondent obtains the relief she is seeking in actual damages and interest, the recovery will be more than $4,000. LF.DS1, LF 119–50, 271, 287-88; § 408.040, RSMo. These potential damages are significantly greater than the claims considered by the court in *Woods* as insufficient to attract counsel. *Compare also, Ruhl v. Lee's Summit Honda*, 2009 Mo. App. LEXIS 1543, *2 (W.D. Mo. Nov. 3, 2009) (amount in controversy a $199.50 administrative fee); *Shaffer v. Royal Gate Dodge, Inc.*,

2009 Mo. App. LEXIS 1720, *1 (E.D. Mo. Dec. 8, 2009) (disputed amount a $75 processing fee).

The testimony adduced at trial by attorneys claiming familiarity with consumer law does not support the trial court's finding of substantive unconscionability. For example, the attorneys did not offer any testimony concerning the definition of unconscionability or its application here. Also, none of the attorneys offered any testimony of ever "handling these kinds of cases on an individual basis" and more importantly, there was no testimony that any of these attorneys knew the approximate amount of Respondent's recovery if she recovered everything she sought. LF 1159. It is well–known that many lawyers are equipped to handle claims when only $5,000 is at issue. *See, e.g., Kirby v. Grand Crowne Travel Network, LLC*, 299 S.W.3d 253 (Mo. App. 2007) (claim for $3,389 required arbitration); *Hartland Computer*, 770 S.W.2d at 528 (claim for $1,820).

II. The trial court erred in striking the class action waiver in the arbitration clause inasmuch as the Federal Arbitration Act preempts the court's decision. The trial court's finding of "unconscionability" was outside the requirement of the FAA that to revoke a contract, or any parts, there must be "such grounds as exist at law or in equity for the revocation of any contract." No such grounds exist here.

By its terms, the Loan Agreement between the parties with its arbitration clause and class action waiver is subject to the FAA, 9 U.S.C. § 1, *et seq.* Under the FAA, written agreements to arbitrate are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*, § 2. While courts recognize that applicable contract defenses, such as unconscionability, can invalidate an arbitration agreement, *e.g., Woods* at 99, courts may only invalidate an arbitration clause on the basis of state law governing all contracts, not just arbitration clauses. *Perry v. Thomas*, 482 U.S. 483 (1987). In *Perry,* the Supreme Court explained:

> 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. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

Id., at 493, n. 9 (1987) (citations omitted). The Supreme Court also admonished by way of further explanation:

> 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.

Id.

Under *Perry*, an agreement to waive class actions cannot be analyzed for unconscionabilty differently than an agreement, for example, to make repairs to a house. In other words, a court assessing unconscionability may not consider the impact a class action waiver might have on attracting competent counsel if attracting counsel is not something the court also considers in assessing the unconscionability of an agreement to repair a house as well as any other non–class action waiver agreement or any contract.

Federal courts analyzing the enforceability of class action waivers in arbitration clauses under the constraints in *Perry* have not only found them enforceable, but have found the state law bases for contract revocation preempted by the FAA. *Gay v. CreditInform*, 511 F.3d 369 (3rd Cir. 2007); *Litman v. Cellco Partnership*, U.S. Dist. LEXIS 87570 (D. N.J., Sept. 29, 2008). Moreover, when Missouri courts assess whether other contracts that do not contain class action waivers are unconscionable, no consideration is given to a party's ability to attract counsel, the ease or difficulty of handling a case on an individual basis, or the recovery potential. *See, e.g., Repair Masters Construction, Inc. v. Gary*, 277 S.W.3d 854 (Mo. App. 2009); *Smith v. Kriska*, 113

S.W.3d 293 (Mo. App. 2003); *Hartland Computer Leasing Corp. v. The Insurance Man, Inc.,* 770 S.W.2d 525 (Mo. App. 1987); *Liberty Financial Management Corp. v. Beneficial Data Processing Corp.*, 670 S.W.2d 40 (Mo. App. 1984).

Since Missouri courts are bound by decisions of the United States Supreme Court on FAA issues, *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984); *Perry, supra*, any Missouri state court decision on the issue of preemption under the FAA must be in harmony with *Perry* and *Keating.* The trial court's decision here is not. Here, as explained in *CreditInform*, it would be sophistry, as the Supreme Court put it in *Perry*, to contend that the trial court's opinion at issue did not rely on the uniqueness of an agreement to individual arbitration as a basis for its holding that enforcement would be unconscionable. *CreditInform*, 511 F.3d at 394–95 (citations omitted). The trial court erred in considering Respondent's ability to attract counsel, the difficulty of handling her case on an individual basis, and the potential amount of recovery in assessing the unconscionability of the class action waiver at issue. *CreditInform*, 511 F.3d at 369.

CreditInform is instructive here and involved a consumer who brought class action claims relating to her purchase of credit repair services. *Id.* 375–76. Defendant moved to compel individual arbitration, and plaintiff argued the arbitration agreement was unconscionable and therefore unenforceable. *Id.* at 375–76.

In *CreditInform*, the Third Circuit analyzed unconscionability under Virginia and Pennsylvania law. *Id.* at 391. Virginia, like Missouri, defines an unconscionable bargain as "one that no man in his senses and not under delusion would make, on the one hand, and as no fair man would accept. The inequality must be so gross as to shock the conscience*." Id.* (internal quotations and citations omitted). Plaintiff had sought credit repair services from defendant but failed to demonstrate that defendant was the only supplier of such services.

Additionally, plaintiff in *CreditInform* did not contend that she was under any compulsion to sign the agreement and, as the court pointed out, she could have foregone obtaining the services from defendant and sought them somewhere else. *Id.* While plaintiff "surely did not have the same bargaining power as [defendant,]" the court did not find a basis to declare that the level of inequality was so gross as to shock the conscience and thus did not find the class action waiver unconscionable under Virginia law. *Id.* at 392.

On the other hand, the Third Circuit has recognized that Pennsylvania law provided support for plaintiff's claim of unconscionability. *Id.* (citing *Lytle v. CitiFinancial Services, Inc.,* 810 A.2d 643 (Pa. Super. Ct. 2002); *Thibodeau v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. Ct. 2006)).

These cases, the Third Circuit pointed out, are not the end of the unconscionability analysis because, as in the present case, the FAA controls and

state law must conform to the FAA. The Third Circuit correctly went on to consider the arguments and legal support for plaintiff's claim of unconscionability in light of *Perry*.

The Third Circuit examined plaintiff's arguments in *CreditInform* and pointed out her obvious reliance on the uniqueness of the arbitration provision in framing her argument. *Id.* at 392. The court noted that:

> Nothing could be clearer because her argument is not predicated on a contention that [defendant] misled her as to the Agreement's terms or forced her by some unlawful coercion to enter into it and accept the arbitration provision. Nor can she even fairly contend that she was under any compulsion to enter into the Agreement which she clearly views as having been essentially worthless to her. Quite the contrary she contends that the provision is unconscionable because of what it provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis.

Id. at 395.

Regarding the decisions of *Lytle* and *Thibodeau*, the Third Circuit observed that "[w]hatever the benefits of class actions, the FAA 'requires piecemeal resolution when necessary to give effect to an arbitration agreement.'"

Id. at 394 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 20 (1983)). Thus, to the extent state courts hold that a class action waiver in an arbitration provision constitutes an unconscionable contract, the court in *CreditInform* correctly held that "they are not based 'upon such grounds as exist at law or in equity for the revocation of any contract' pursuant to section 2 of the FAA, and therefore cannot prevent the enforcement of the arbitration provision" and class action waiver. *CreditInform*, 511 F.3d at 394 (3d Cir. 2007) (quoting 9 U.S.C. § 2).

The Third Circuit explained why *Lytle* and *Thibodeau* interfere with the appropriate application of the FAA and are therefore preempted:

> Certainly the Pennsylvania Superior Court panels were aware of Perry and thought that they were reaching outcomes in considering the unconscionability issues consistent with it as well as other Supreme Court cases. We, however, reject *Lytle* and *Thibodeau* for we do not agree with them as there is no escape from the fact that they deal with agreements to arbitrate, rather than with contracts in general, and thus they are not in harmony with Perry. It would be sophistry to contend, in the words of Perry, that the Pennsylvania cases do not "rely on the uniqueness of an agreement to arbitrate as a basis for a state–law holding that enforcement

> would be unconscionable." After all, though the Pennsylvania cases are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate. A finding that the arbitration provisions in those cases are unconscionable can be reached only by parsing the provisions themselves to determine what they provide.

Id. at 394–95.

Similarly, the court in *Litman v. Cellco Partnership*, U.S. Dist. LEXIS 87570 (D.N.J., Sept. 29, 2008), held that the FAA preempted a state court decision finding an arbitration class action waiver in a consumer contract unconscionable because the consumer has a small dollar claim. *Id.* at *17 (citing *Muhammad v. County Bank of Rehoboth Beach*, Del., 912 A.2d 88 (N.J. 2006)). Specifically, the court in *Litman* examined *Muhammad* and found its rationale inconsistent with, and thus preempted by, the FAA.

In *Muhammad*, the New Jersey Supreme Court determined that the arbitration clause was part of a contract of adhesion and therefore had some elements of procedural unconscionability. *Muhammad*, 912 A.2d at 97. The court in *Muhammad* also found that the small amount of damages effectively prevented plaintiffs from being able to vindicate their rights and that the class

arbitration waiver acted as an exculpatory clause and was therefore unconscionable and unenforceable. *Id.* at 99-101.

Relying on *CreditInform* and its progeny, the district court in *Litman* held that the FAA preempted the holding in *Muhammad*. *Litman*, U.S. Dist. LEXIS 87570, *21; *see e.g., Weinstein v. AT&T Mobility Corp.*, 2008 U.S. Dist. LEXIS 35666 (E.D. Pa., Apr. 30, 2008); *Halprin v. Verizon Wireless Services, LLC,* 2008 U.S. Dist. LEXIS 28840 (D.N.J. Apr. 8, 2008); see also *Enderlin v. XM Satellite Radio, Inc.*, U.S. Dist. LEXIS 27668, *23 (W.D. Ark. Mar. 25, 2008) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause[;]" such treatment places arbitration clauses on unequal footing and contrary to the FAA).

As discussed earlier, the trial court ruled that the class action waiver is unconscionable here because it is an agreement that denies Respondent the procedural right to a class action, eliminates a mechanism necessary to provide notice to other claimants, curtails a plaintiff's ability to get adequate legal representation, and tends to exculpate Missouri Title Loans from liability. Each of these reasons why the class action waiver is unconscionable arises or is because of what the waiver provides, i.e., arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis. Simply stated,

the trial court found the class action waiver is unconscionable because it is an agreement to waive class actions. Moreover, the trial court reached this finding only by parsing the provision itself to determine what its effect is or what it provides.

Based on the reasoning in *Perry, CreditInform* and *Litman*, the trial court's decision to strike the class action waiver clause as unconscionable is preempted by the FAA. Paraphrasing the Third Circuit in *CreditInform*, it would be fallacious to contend that the trial court did not rely on the uniqueness of a class action waiver as the basis for its holding that enforcement of the class action waiver would be unconscionable.

To avoid preemption under the FAA, the trial court's finding of unconscionability must be based upon such grounds as exist at law or in equity for the revocation of *any* contract. As shown above, the bases or grounds applied by the trial court in reaching a finding of unconscionability are not grounds which exist for the revocation of any contract, but instead, only arbitration clauses with a class action waiver. In sum, the trial court's finding that the class action waiver is unconscionable is preempted by the FAA and should be reversed.

III. The trial court erred in striking the class action waiver in the arbitration clause because, to the extent it functions as an exculpatory clause, the

class action waiver is not prohibited as against public policy. The waiver is clearly worded and unambiguous and there is no unexpected surprise advantage.

Under Missouri law, exculpatory clauses are not prohibited as against public policy but the exculpatory language must be clear and unambiguous. *Alack v. Vic Tanney International of Mo.,* 923 S.W.2d 330, 337–38 (Mo. banc 1996). There can be no unexpected surprise advantage. *Vincent*, 194 S.W.3d at 857.

The court erred in finding that the class action waiver was unenforceable because it would effectively immunize Missouri Title Loans from any liability. The court made no finding, and there is no evidence to support a finding, that the class action waiver is unclear or ambiguous. As discussed earlier, the class action waiver plainly informs the borrower and clearly states **"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[, and] . . . BORROWER HEREBY AGREES BORROWER MAY NOT PARTICIPATE IN A CLASS ACTION OR A CLASS-WIDE ARBITRATION[.]"** LF 288. For the average consumer reading this clause, there can be no unexpected surprise advantage here. The absence of any surprise is further evident by the sentence just above the signature line by which the consumer acknowledges "**THIS AGREEMENT CONTAINS A BINDING**

ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES." *Id.* The reasonable expectation of the average consumer reading the Loan Agreement with this language before taking out a $2,200 loan is, simply stated, that she is agreeing in exchange for the loan not to participate in a class action or a class-wide arbitration. This language is clear and unambiguous and therefore enforceable as an exculpatory clause.

CONCLUSION

These cases are very fact intensive and each case must be decided upon its unique set of facts. Whether or not the contract provision between the parties barring class actions is unconscionable depends upon the discussions leading up to the contract as well as the terms of the contract itself. Here, there is no evidence of procedural or substantive unconscionability. Missouri Title Loans urges the Court to uphold the contractual bar on class actions and direct the trial court to restate its arbitration order to bar class arbitration between the parties.

Respectfully submitted,

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ATTORNEY'S CERTIFICATE AND CERTIFICATE OF SERVICE

Pursuant to Rule 84.06(c), the signing attorney certifies:

1. Appellant's Substitute Brief, with Appendix, filed March 22, 2010 on behalf of appellant Missouri Title Loans, Inc., complies with the requirements of Rule 55.03.

2. The brief complies with the limitations in Rule 84.06(b).

3. The brief contains 9437 words, *including* the cover, table of contents, table of authorities, signature block, and this certificate, all of which are permitted to be excluded from the count.

4. Electronic copies of the brief, in both WordPerfect and Adobe PDF format, are on the enclosed CD-ROM, and have been scanned for viruses and are virus-free.

5. Two copies of the brief and a duplicate of the CD-ROM filed with the Court, have been served on counsel of record by mailing the same by U.S. Mail, first-class postage prepaid, on March 22, 2010 to: John G. Simon, Erich Vieth and John E. Campbell, counsel for Respondent, 701 Market Street, Suite 1450, St. Louis, MO 63101.

/s/ Martin M. Green

APPENDIX

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