Case No. SC95066

IN THE SUPREME COURT OF MISSOURI

LASHIYA D. ELLIS,

Plaintiff/Respondent,

vs.

JF ENTERPRISES, LLC d/b/a JEREMY FRANKLIN'S SUZUKI OF KANSAS CITY,

Defendant/Appellant,

CONDOR CAPITAL CORP.,

Defendant

APPELLANT JF ENTERPRISES, LLC d/b/a JEREMY FRANKLIN'S SUZUKI OF KANSAS CITY'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the order denying Appellant Franklin's Motion to Compel Stay Proceedings and Compel Arbitration issued by the Circuit Court of Jackson County, Missouri, Division The Honorable Jack Grate presiding. (L. F. at 109-110). This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution because this case was transferred from the Court of Appeals by Order of this Court.

An appeal may be taken from an order denying an application to compel arbitration in the manner and to the same extent as from orders or judgments in a civil action. R.S.Mo § 435.440.1(1)-2. In addition, the Federal Arbitration Act ("FAA") provides that an appeal may be taken from an order denying a motion to compel arbitration or to stay proceedings pending arbitration. 9 U.S.C. §16(a)(1)(A)-(B). Therefore, Appellant sought immediate appeal from the trial court's Order. *Sennett v. Nat'l Healthcare Corp.*, 272 S.W.3d 237, 240 (Mo. App. S.D. 2008); *Jackson Cnty. V. McClain Enters., Inc.*, 190 S.W.3d 633, 639 n. 8, (Mo. App. W.D. 2006); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 306 (Mo. App. W.D. 2005); *Reis v. Peabody Coal Co.*, 935 S.W.2d 625, 629 (Mo. App. E.D. 1996)(citing *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 202 (Mo. App. E.D. 1996); *McClellan v. Barrath Const. Co.*, 725 S.W.2d 656, 658 (Mo. App. E. D. 1987).

STATEMENT OF FACTS

This appeal arises out of an order issued by the trial court on or about October 12, 2014, denying Appellant Jeremy Franklin's Motion to Stay Proceedings and Compel Arbitration pursuant the Federal Arbitration Act and the Arbitration Agreement entered into by the parties to an automobile purchase transaction. (L. F. at 104, Appx. at A1-A2). The trial court determined that:

> . . . .no title to the 2012 Hyundai Sonata was provided to plaintiff Lashiya Ellis at the time of the sale or since, and therefore, pursuant to section 301.210 RSMo, the contract is fraudulent and void, and that the arbitration provision which is to be construed with the other contract documents is subject to the Plaintiff's contract defenses of fraud and lack of consideration and is void, and therefore, not enforceable.

(L. F. at 104, Appx. at A1-A2).

Respondent filed her Petition on or about July 11, 2014, alleging that Appellant Jeremy Franklin violated the Missouri Merchandising Practices Act and made fraudulent misrepresentations regarding the delivery of title to a vehicle purchased by Respondent from Appellant on or about November 4, 2013. (L. F. at 1-2). Specifically, Respondent claims that Appellant Franklin failed to deliver title to the vehicle pursuant to R.S.Mo. § 301.210 and that she was unable to register the Hyundai Sonata purchased from Appellant Jeremy Franklin without the title. (L. F. at 34, 41, 42, 44, 46). Respondent also filed suit against Condor Capital Corporation, the assignee of the Retail Installment

Contract entered into by Respondent. (L. F. at 34, 38). Respondent contends that Condor Capital Corporation violated the Missouri Merchandising Practices Act and made fraudulent misrepresentations in requiring her to continue to make payments under the Retail Installment Contract. (L. F. at 34, 47, 49).

Appellant Jeremy Franklin filed an Answer to the Petition on or about August 20, 2014. (L. F. 22). On the same date, Appellant Franklin filed a Motion to Stay Proceedings and Compel Arbitration. (L. F. at 33). In that Motion and the Suggestions filed in support, Appellant Franklin asked the trial court to enforce an Arbitration Agreement entered into by Respondent and Appellant Franklin. (L. F. 35-36). Appellant Franklin argued that the separate Arbitration Agreement entered into by the parties was enforceable and applicable since it covered all disputes arising out of Respondent's purchase transaction. (L. F. at 35, 61).

According the Arbitration Agreement executed by Respondent and Appellant Jeremy Franklin:

> In this Arbitration Agreement "you" refers to the buyer(s) signing below. "We," "us," and "our" refer to the Dealer signing below and anyone to whom the dealer assigns this Arbitration Agreement.
>
> Any claim or dispute, whether in contract, tort, statute or otherwise (including interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, your purchase or

financing contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase or financing contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Agreement shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www. arb-forum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 100017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

(L. F. at 36, 58, Appx. at A5). Defendant Condor Capital Group is not a signatory to the Arbitration Agreement. (L. F. at 58, Appx. at A5).

This Arbitration Agreement requires that any dispute regarding the arbitrability of an issue is to be submitted to the arbitrator. (L. F. at 36, 58, Appx. at A5). This Arbitration Agreement also provides that "this Arbitration Agreement shall be governed

by the Federal Arbitration Act (9 U.S. C. § 1 et. Seq) and not by any state law concerning arbitration." (L. F. at 58, Appx. at A5).

In the underlying transaction, Respondent purchased a 2012 Hyundai Sonata VIN KMHEC4A4XCA026203 from Appellant Jeremy Franklin. (L. F. at 34, 52, Appx. at A2). According to the Retail Buyer's Order, Respondent agreed to purchase the vehicle for $21,104.95. (L. F. 34, 52, Appx. at A3). Respondent traded in a 2003 Chevrolet Tahoe with over 200,000 miles on it when she purchased the Hyundai Sonata. (L. F. at 52).

In her claim for fraudulent misrepresentation against Appellant Franklin, Respondent alleges that:

> 26. Defendant failed to execute an Assignment of Title required by Section 301.210 R.S.Mo. (1978, as amended), all intending that Plaintiff rely upon the misrepresentation that Defendant owned the vehicle and was able to sell and transfer to the Plaintiff and provide the title to the vehicle.

(L. F. at 42). In her claim for violations of the Missouri Merchandising Practice Act against Appellant Jeremy Franklin, Respondent alleges:

> 34. That Missouri Merchandising Practices Act (MMPA) Section 407.010 RSMO prohibits unfair and deceptive acts and practices in the sale of goods and services in Missouri to persons for personal, family or household use.
>
> 35. That the sale or purported sale of the 2012 Hyundai by Defendant Jeremy Franklin to Plaintiff was a sale for purchases under the MMPA and

the sale was primarily for personal, family or household purposes, as were the financial services provided to Plaintiff by Defendants.

36. That in connection with the void sales transaction Defendant Jeremy Franklin committed the following unfair, deceptive acts and practices:

a. acting, using and employing fraud, false pretenses, false promises, misrepresentations, concealment, suppression and omission of material facts in connection with the sale and/or advertisement of the 2012 Hyundai motor vehicle sold to Plaintiff.

b. selling a motor vehicle without a certificate of title, which is in violation of 301.210.4 RSMo and was thus a deceptive act or unlawful practice.

c. charging Plaintiff fees for services of little or no value, including a gap coverage and administrative fee.

d. refusing and continuing to refuse either to tender a certificate of title to Plaintiff or rescind the void sale.

e. selling Plaintiff a vehicle and having Plaintiff enter into a Retail Installment Contract when Defendant failed to provide a title to the vehicle to Plaintiff.

(L. F. at 44-45).

Respondent has not contested the applicability of the Federal Arbitration Act nor has she contested the fact that she signed and executed the Arbitration Agreement in conjunction with the purchase transaction. (L. F. at 68-78; 99-103).

In its Motion to Compel Arbitration, Appellant Franklin argued that:

3. Plaintiff's Petition alleges that Defendant Jeremy Franklin violated the Missouri Merchandising Practices Act and made fraudulent misrepresentations regarding delivery of title to a vehicle purchased by Plaintiff on or about November 4, 2013.

4. Specifically, Plaintiff claims that Defendant Jeremy Franklin failed to deliver title pursuant to R.S.Mo 301.210 and that she was unable to register the Hyundai Sonata purchased from Defendant Jeremy Franklin without the title. (See Plaintiff's Petition at ¶¶ 16, 26, 36, 41, attached hereto as Exhibit "A").

. . . .

7. Plaintiff purchased a 2012 Hyundai Sonata VIN KMHEC4A4XCA0126203 from Defendant Jeremy Franklin. (See Retail Buyer's Order attached hereto as Exhibit "B")

8. According [to] the Retail Buyer's Order, Plaintiff agreed to purchase the vehicle for $21,104.95. (See Retail Buyer's Order attached hereto as Exhibit "B")

9. Plaintiff also executed a Retail Installment Contract, financing all $21,204.95 of the vehicle. (See Retail Installment Contract attached hereto as Exhibit "C").

10. Plaintiff traded in a 2003 Chevrolet Tahoe with over 200,000 miles on it when she purchased the Hyundai Sonata. (See Retail Buyer's Order attached hereto as Exhibit "B").

. . . .

15. As part of the purchase transaction for the 2012 Hyundai Sonata Plaintiff and Defendant Jeremy Franklin executed an Arbitration Agreement. (See Arbitration Agreement attached hereto as Exhibit "E").

. . .

18. Since the allegations in Plaintiff's Petition arise out of and relate to her purchase of the vehicle, Defendant Jeremy Franklin is entitled to arbitration of Plaintiff's claims against Defendant Jeremy Franklin.

(L. F. at page 4).

Respondent/Plaintiff's Petition for Damages, the Retail Buyer's Order, the Retail Installment Contract, and the Arbitration Agreement executed by the parties were all attached to Appellant's Motion. (L. F. 38-58).

In her response to the facts contained in Appellant's Motion to Compel Arbitration, Respondent/Plaintiff stated the following:

7. Plaintiff purchased a 2012 Hyundai Sonata VIN KMHEC4A4XCA0126203 from Defendant Jeremy Franklin. (See Retail Buyer's Order attached hereto as Exhibit "B")

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit*

Acceptance Corporation, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

8. According [to] the Retail Buyer's Order, Plaintiff agreed to purchase the vehicle for $21,104.95. (See Retail Buyer's Order attached hereto as Exhibit "B")

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

9. Plaintiff also executed a Retail Installment Contract, financing all $21,204.95 of the vehicle. (See Retail Installment Contract attached hereto as Exhibit "C").

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

10. Plaintiff traded in a 2003 Chevrolet Tahoe with over 200,000 miles on it when she purchased the Hyundai Sonata. (See Retail Buyer's Order attached hereto as Exhibit "B").

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit*

Acceptance Corporation, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

. . . .

15. As part of the purchase transaction for the 2012 Hyundai Sonata Plaintiff and Defendant Jeremy Franklin executed an Arbitration Agreement. (See Arbitration Agreement attached hereto as Exhibit "E").

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

. . . .

18. Since the allegations in Plaintiff's Petition arise out of and relate to her purchase of the vehicle, Defendant Jeremy Franklin is entitled to arbitration of Plaintiff's claims against Defendant Jeremy Franklin.

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013) and *Johnson v. JF Enterprises, LLC,* 400 S.W.3d 763 (Mo. 2013), where the documents are to be construed together and as the sale was void, no title was passed to Plaintiff, the entire agreement is void.

(L. F. at 81-85).

In the trial court, Respondent relied upon the Missouri Supreme Court decision of *Johnson v. JF Enterprises, LLC*, 400 S.W. 3d 763 (Mo. 2013) in support of the argument that all of the documents in the present case should be construed together so the Arbitration Agreement should be deemed void. Appellant Franklin relied on four (4) United States Supreme Court cases holding that an Arbitration Agreement is severable from the underlying contract and absent any defense to the enforcement of the Arbitration Agreement itself, arbitration should be ordered in such cases. *See e.g. Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204; 163 L. Ed. 2d 1038 (S. Ct. 2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Southland Corp. v Keating,* 465 U.S. 1, 4-5, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984); *Nitro-Lift Techs, LLC v. Howard*, 133 S. Ct. 500; 184 L. Ed. 2d 328 (2012)

Based on Respondent's arguments, the trial court entered the following Order:

> Now on this 21st day of October 2014, the Court takes up for consideration Defendant JF Enterprises, LLC d/b/a Jeremy Franklin's Suzuki of Kansas City's Motion to Stay Proceedings and Compel Arbitration. The Court having considered the Motion of Defendant JF Enterprises, LLC d/b/a Jeremy Franklin's Suzuki of Kansas City's to Stay Proceedings and Compel Arbitration and Suggestions and supporting documents that Plaintiff Lashiya D. Ellis Response in Opposition and supporting documents and Affidavit of Plaintiff Lashiya D. Ellis, and for good cause and based on the evidence, the Court finds that no title to the 2012 Hyundai

> Sonata was provided to Plaintiff Lashiya D. Ellis at the time of the sale or since, and therefore, pursuant to Section 301.210 RSMO, the contract is fraudulent and void, and that the arbitration provision which is to be construed with the other contract documents is subject to the Plaintiff's contract defenses of fraud and lack of consideration and is void, and therefore, not enforceable.

(L. F. at 104-05).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING APPELLANT JEREMY FRANKLIN'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION BECAUSE AN ARBITRATION AGREEMENT IS SEVERABLE AND SEPARATELY ENFORCEABLE FROM THE UNDERLYING CONTRACT DOCUMENTS IN THAT THE TRIAL COURT HELD THAT THE ARBITRATION AGREEMENT SHOULD BE CONSTRUED WITH THE UNDERLYING CONTRACT DOCUMENTS AND APPLIED THE STATE LAW DEFENSE OF VOIDABILITY TO INVALIDATE THE ARBITRATION AGREEMENT.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204; 163 L. Ed. 2d 1038 (S. Ct. 2006)

Southland Corp. v Keating, 465 U.S. 1, 4-5, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)

Nitro-Lift Techs, LLC v. Howard, 133 S. Ct. 500; 184 L. Ed. 2d 328 (2012)

Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967)

II. THE TRIAL COURT ERRED IN DENYING APPELLANT JEREMY FRANKLIN'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION BECAUSE UNDER THE ARBITRATION AGREEMENT, THE ARBITRATOR SHOULD DETERMINE WHETHER RESPONDENT'S CLAIM IS ARBITRABLE AND WHETHER THE CONTRACT IN THE PRESENT ACTION IS VOID IN THAT THE TRIAL COURT ASSUMED THE

ARBITRATOR'S ROLE AND DETERMINED THE MERITS OF THE CASE IN HOLDING THAT THE UNDERLYING CONTRACT WAS VOID.

9 U.S. C. § 2

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002)

Rent-A-Center West, Inc. v. Jackson, 130 S. Ct. 2772, 2777 (2010)

Wooten v. Fisher Investments, Inc., 688 F.3d 487, 493-94 (8th Cir. 2012)

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT JEREMY FRANKLIN'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION BECAUSE AN ARBITRATION AGREEMENT IS SEVERABLE AND SEPARATELY ENFORCEABLE FROM THE UNDERLYING CONTRACT DOCUMENTS IN THAT THE TRIAL COURT HELD THAT THE ARBITRATION AGREEMENT SHOULD BE CONSTRUED WITH THE UNDERLYING CONTRACT DOCUMENTS AND APPLIED THE STATE LAW DEFENSE OF VOIDABILITY TO INVALIDATE THE ARBITRATION AGREEMENT.

A. Standard Of Review

The Trial court's order denying Appellant's Motion to Compel Arbitration and Stay Action is reviewed de novo. *Frye v. Speedway Chevrolet Cadillac,* 321 S.W.3d 429, 435 (Mo. App. W.D. 2010); *Morrow v. Hallmark Cards,* 273 S.W.3d 15, 21 (Mo. App. W.D. 2008). Because the Arbitration Agreement is covered by the Federal Arbitration Act, the U.S. Constitutions' Supremacy Clause mandates that the rules of contract construction and interpretation not be applied in any manner that has a "disproportionate impact" on arbitration or "interferes" with congressional intent that arbitration agreements be enforced. *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747-1748 (2011).

B. An Arbitration Agreement Is Severable From The Underlying Contract Documents And Should Be Enforced As Written When The Parties Do Not Contest The Validity Of The Arbitration Agreement Itself.

The Federal Arbitration Act applies to contracts for the sale of an automobile. *Bellemere v. Cable-Dahmer Chevrolet, Inc.*, 423 S.W.3d 267, 273 (Mo. App. W.D. 2013). In the present action, the Arbitration Agreement also provides that the FAA applies to the Arbitration Agreement. (L. F. at 58). Respondent does not contest the applicability of the FAA to the Arbitration Agreement. Under the FAA, 9 U.S.C. § 1, et. seq. (2000), a written agreement to submit a dispute to arbitration is valid, enforceable, and irrevocable, except upon such grounds as exist in law or equity for the revocation of any contract. *McCarney v. Nearing, Staats, Prelogar & Jones*, 866 S.W. 2d 881, 887 (Mo. App. W.D. 1993); 9 U.S.C. § 2.

Under the FAA, an arbitration clause will be construed in favor of arbitration unless the clause positively cannot be interpreted to cover the parties' dispute. *McCarney,* 866 S.W.2d at 887. While Missouri has also enacted statutory provisions regarding arbitration agreements, those state law provisions are preempted by the FAA when it is applicable. *See Bunge Corp. v. Perryville Feed & Produce*, 685 S.W.2d 837, 839 (Mo. 1985); *Duggan v. Zip Mail Services, Inc.*, 920 S.W.2d 200, 202 (Mo. App. E.D. 1996). In fact, regardless of whether the state court agrees with the reasoning expressed therein, the state court is bound by the Supreme Court's decisions applying the FAA and has no authority to overrule those decisions. *See State ex. rel. Simmons v. Roper*, 112

S.W.3d 397, 419 (Mo. banc 2003); *Schlerath v. Hardy*, 280 S.W.3d 47, 53 (Mo. banc 2009).

The trial court's Order denying Appellant's Motion to Stay Proceedings and Compel Arbitration must be reversed because the trial court ruling is based upon the erroneous assertion that the Arbitration Agreement should be "construed with the other contract documents" in determining its enforceability when a party claims the underlying contract is void or voidable. Specifically, the trial court concluded that:

> . . . .[t]he Court finds that no title to the 2012 Hyundai Sonata was provided to Plaintiff Lashiya D. Ellis at the time of the sale or since, and therefore, pursuant to section 301.210 RSMo., the contract is fraudulent and void, that that the arbitration which is to be construed with the other contract documents is subject to the Plaintiff's contract defenses of fraud and lack of consideration and is void and therefore, not enforceable.

(L. F. at 109, Appx. at A1-A2).

This ruling ignores the severability requirement of the FAA and the United States Supreme Court precedent requiring that an Arbitration Agreement be construed on its own and enforced separately from the underlying transaction. State courts play a critical role and have particular obligations when it comes to an arbitration agreement that, as here, is governed by the FAA. As noted by the United States Supreme Court in *Nitro-Lifts Tech, LLC*, "[S]tate courts rather than federal courts are most frequently called upon to apply the [FAA], including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation

of the legislation." *Id.* at 503. Consequently, state courts "must abide by the FAA, which is 'the supreme law of the Land,' U.S Const. Art. VI, cl. 2 and by the opinions of this Court interpreting the law." *Id.* at 503.

Under applicable United States Supreme Court precedent, the Arbitration Agreement entered into by both parties in the present vehicle purchase transaction is severable and enforceable. In the trial court, Respondent erroneously argued that the Arbitration Agreement could not be enforced because the underlying Retail Buyer's Order was allegedly void pursuant to R.S.MO. §301.210. However, in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S. Ct. 1204; 163 L. Ed. 2d 1038 (2006), the United States Supreme Court squarely addressed the issue of severability of an arbitration provision when the underlying contract is void and unequivocally held that whether or not the underlying contract was void or voidable did not affect the enforceability of an arbitration provision.

In *Buckeye*, the crux of the complaint was that the contract as a whole, including the arbitration provision, was rendered invalid by a usurious interest finance charge. The plaintiffs in *Buckeye* filed a class action in Florida state court:

> [a]lleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida lending and consumer protection laws, rendering it criminal on its face. Buckeye moved to compel arbitration. The trial court denied the motion, holding that a court rather than the arbitrator should resolve a claim that a contract is illegal and void *ab initio*. The District Court of Appeal for Florida, the Fourth District reversed,

holding that because respondents did not challenge the arbitration provision itself, but instead claimed that the entire contract was void, the agreement to arbitrate was enforceable, and the question of the contract's legality should go to the arbitrator. Respondents then appealed and the Florida Supreme Court reversed. . . .

Id. at 442.

The United States Supreme Court agreed with Florida appellate court relying on a number of applicable United States Supreme Court cases:

Challenges to the validity of arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" can be divided into two types. One type challenges the specific validity of the agreement to arbitrate. *See e.g. Southland Corp. v. Keating*, 465 U.S.1, 4-5, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)(challenging the agreement to arbitrate as void under California law insofar as it purported to cover claims brought under the state Franchise Investment Law.) The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (*e.g.* the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid. Respondent's claim is of this second type. The crux of the complaint is that the contract as a whole (including the arbitration provision) is rendered invalid by the usurious finance charge.

Id.

The *Buckeye* Court went through the following analysis of prior cases in outlining the existing body of law applicable to such a claim:

> In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967), we addressed the question of who—court or arbitrator—decides these two types of challenges. The issue in the case was "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to arbitrators." *Id.* at 402, 87 S. Ct. 1801, 18 L. Ed. 2d 1270. Guided by §4 of the FAA, we held that 'if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Id.* at 403-04, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (internal quotation marks and footnote omitted). We rejected the view that the question of "severability" was one of state law, so that if state law held the arbitration provision not to be severable challenges to the contract as a whole would be decided by the court. See *id.* at 400, 402-403, 87 S. Ct. 1801, 18 L. Ed. 2d 1270.
>
> Subsequently, in *Southland Corp.* we held that the FAA "created a body of substantive law, "which was applicable in state and federal courts." 465 U.S. at 12, 104 S. Ct. 852, 79 L. Ed. 2d 1; see also Allied –Bruce Terminix

Cos. v. Dobson, 513 U.S. 265, 270-73, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995).

Id. at 443.

After analyzing these two cases, the *Buckeye* court determined that:

> *Prima Paint* and *Southland* answer the questions presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration clause is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts. The parties have not requested, and we do not undertake, reconsideration of these holdings. Applying them to this Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.
>
> In declining to apply *Prima Paint's* rule of severability, the Florida Supreme Court relied on the distinction between void and voidable contracts. "Florida public policy and contract law," it concluded, permit "no severable, or salvageable, parts of a contract found illegal and void under Florida law." 894 So. 2d at 864. *Prima Paint* makes this conclusion irrelevant. That case rejected application of state severability rules to the arbitration agreement *without discussing* whether the challenge at issue

would have rendered the contract void or voidable. See 388 U.C. at 400-404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270. Indeed, the opinion expressly disclaimed any need to decide what state-law remedy was available, *id. at 400 n. 3, 87 S. Ct. 1801, 18 L. Ed. 1270 (*though Justice Black's dissent asserted that state law rendered the contract void. Id at 407, 87 S. Ct. 1801, 18 L.Ed. 2d 1270). Likewise in *Southland*, which arose in state court, we did not ask whether the several challenges made there—fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the California Franchise Investment Law—would render the contract void or voidable. We simply reject the proposition that the enforceability of the arbitration agreement turned on the state legislature's judgment concerning the forum for enforcement of the state law cause of action. See *465 U.S. at 10, 104 S. Ct. 852, 79 L. Ed. 2d 1.* So also here, we cannot accept the Florida Supreme Court's conclusion that enforceability of the arbitration agreement should turn on "Florida public policy and contract law." 894 So. 2d at 864.

Buckeye, 546 U.S. 440, 445.

The *Buckeye* court further rejected the argument that *Prima Paint's* rule of severability does not apply in state court, noting that the *Prima Paint* analysis is equally applicable to section 2 of the FAA which states, in pertinent part:

A written provision in. . .a contract. . .to settle by arbitration a controversy thereafter arising out of such contract. . .or agreement in writing to submit

> to arbitration an existing controversy arising out of such a contract. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for revocation of any contract.

Buckeye, 546 U.S. at 443-444 (citing 9 U.S.C. §2).

The *Buckeye* court determined that the rule of severability of arbitration clauses ultimately arises from this provision and that this provision creates substantive law that must be applied in state and federal courts. *Id.* at 444. In summary, the *Buckeye* court considered the exact argument asserted by Plaintiff in this case concluding that:

> It is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondent's approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

Id. at 448; *see also State ex. rel. Vincent v. Schneider,* 194 S.W.3d 853, 857 n. 1) (Mo. banc 2006)(court cited *Buckeye* for the principle that "unless the challenge is to the arbitration clause itself, the issue of a contract's validity if considered by the arbitrator in the first instance.")

The United States Supreme Court reaffirmed these holdings in *Nitro-Lift Techs, L.L.C. v. Howard*, 133 S. Ct. 500; 184 L. Ed. 2d 328 (2012). In *Nitro-Lift Techs, LLC,* former employees entered into a confidentiality and noncompetition agreement with the former employer that contained an arbitration clause. *Id.* at 500. The former employees quit and began working for a competitor. Claiming that the former employees breached their non-competition agreements, the former employer served them with a demand for arbitration. The state supreme court resolved the matter by applying Okla. State. Title 15 § 219A (2011) which limited the enforceability of noncompetition agreements. *Id.* The United States Supreme Court determined that the state supreme court failed to adhere to the correct interpretation of the FAA by declaring the noncompetition agreements null and void, rather than leaving that determination to the arbitrator in the first instance. *Id.* at 502. The arbitration provision's validity was subject to initial court determination, but the validity of the remainder of the contract was for the arbitrator to decide. *Id.* It was for the arbitrator to decide in the first instance whether the covenants not to compete were valid as a matter of applicable state law. *Id.*

In overturning the trial court's decision, the *Nitro-Lift Techs, LLC* court noted:

> [t]he Oklahoma Supreme Court's decision disregards this Court's precedents on the FAA. That Act, which "declare[s] a national policy favoring arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984), provides that a "written provision in . . .a

contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S. C. § 2. It is well settled that "the substantive law the Act created [is] applicable in state and federal courts." *Southland Corp., supra,* at 12, 104 S. Ct. 852, 79 L. Ed. 2d 1*; see also Buckeye, supra,* at 446 126 S. Ct. 1204, 163 L. Ed. 2d 1038. And when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved "by the arbitrator in the first instance, not by a federal or state court." *Preston v. Ferrer*, 552 U.S. 346, 349, 128 S. Ct. 978, 169 L. Ed. 2d 917 (2008); see also *Prima Paint Corp. v. Flood & Conklin Mfg.Co.*, 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967). For these purposes, an "arbitration provision is severable from the remainder of the contract" *Buckeye, supra*, at 445, 126 S. Ct. 1204, 163 L. Ed. 2d 1038, and its validity is subject to initial court determination; but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide.

This principle requires that the decision below be vacated. The trial court found that the contract contained a valid arbitration clause, and the Oklahoma Supreme Court did not hold otherwise. It nonetheless assumed

> the arbitrator's role by declaring noncompetition agreements null and void. The state court insisted that its "[own] jurisprudence controls this issue" and permits review of a "contract submitted to arbitration where one party assert[s] that the underlying agreement is void and unenforceable." [citations from underlying decision omitted] But the Oklahoma Supreme Court must abide by the FAA, which is "the supreme Law of the Land," U.S. Const. Art. VI, cl.2, and by the opinions of this Court interpreting that law. "It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312, 114 S. Ct. 1510, 128 L. Ed. 2d 274 (1994). Our cases hold that the FAA forecloses exactly this type of "judicial hostility towards arbitration." *AT & T Mobility, LLC v. Concepcion*, 131 s. Ct. 1740, 179 L. Ed. 2d 742, 753 (2011).

Id. at 502.

Just as in *Buckeye* and *Nitro-Lifts Tech, LLC*, the Court in the present case must submit the issue of the validity of the underlying contract to an arbitrator for determination since there is a valid and controlling Arbitration Agreement between the parties. The argument that the underlying contract is void or voidable under state law does not render an arbitration agreement void as plainly articulated by the United States Supreme Court. Just as in *Nitro-Lifts Tech, LLC,* the trial court failed to consider United

States Supreme Court precedent and assume the role of the arbitrator in determining the enforceability of the underlying contract.

In the court below, Respondent did not contest the enforceability of the Arbitration Agreement itself. (L. F. 69-78; 79-88; 99-103). Instead, the sole basis for Respondent's objection to the Arbitration Agreement she admittedly entered into is that the underlying contract documents are void due to the lack of delivery of title. (L. F. at 69-78; 79-88; 99-103). In support of this argument, Respondent mistakenly relied on *Johnson v. JF Enterprises, LLC*, 400 S.W.3d 763 (Mo. 2013) for the proposition that all documents that are a part of single transaction are to be construed together. (L. F. at 101).

In *Johnson*, the Missouri Supreme Court *overturned* the denial of a motion to compel arbitration holding that the arbitration agreement entered into by the parties applied to the retail installment contract even the retail installment contract did not refer to the arbitration provision or incorporate it. *Id.* at 76. Specifically, in *Johnson*, the Missouri Supreme Court was faced with determining whether an arbitration provision was enforceable, it should construe all of the underlying documents to a transaction together to determine the intent of the parties regarding arbitration. *Id.* at 764. In other words, the issue before the *Johnson* court was whether the parties intended the arbitration clause to apply to the retail installment contract. In *Johnson*, the court did not determine whether or not a contention that the underlying contract was void prevented the Court from severing and enforcing the arbitration clause.

The *Johnson* decision stops far short of supporting Respondent's contention that the four United States Supreme Court decisions applicable to claims of voidability are

inapplicable in Missouri because the underlying contract documents must be construed together. Instead, in *Johnson,* this Court was construing the documents signed by the parties to determine the "total contract" between the parties:

> To accept the dissent's argument and interpret the merger clause to make the installment contract the total contract of the parties would preclude giving effect to these other contemporaneously signed papers. It is not reasonable to interpret the merger clause to negate the existence of the purchase itself, any warranties or disclosures given or made, and the other matters set out in these documents.

Id. at 766.

In the present action, this Court is not charged with determining the parties' intent with respect to arbitration. Instead, the issue is whether the argument that the underlying agreement is void renders the Arbitration Agreement entered into by the parties void. *Johnson* does not address that issue and its holding has no applicability to the facts of this case.

Respondent also stretches this Court's holding in *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505 (Mo. 2012) beyond permissible bounds in contending that when the underlying contract is void, the arbitration agreement is void due to lack of consideration. (L. F. at 100). In *Robinson,* the issue was whether a consumer arbitration clause containing a class action waiver was unconscionable. *Id.* at 506. There has been no issue of unconscionability raised in the present action. Consequently, while *Robinson* stands for the proposition that some arbitration provisions can be deemed

unconscionable, it has no application in the present action. Notably, in *Robinson*, this Court considered an arbitration provision separately from the underlying contract to determine its enforceability. As noted by the United State Supreme Court in *Buckeye* state courts can consideration formation defenses as long as they are asserted as to the arbitration agreement itself and not to the underlying contract generally. *Buckeye*, 546 U.S. at 443.

The other cases cited by Respondent in the court below simply refer to the voidability of a contract for the purchase of a motor vehicle if title is not delivered. *See e.g. Peel v. Credit Acceptance Corp.*, 408 S.W.3d 191 (Mo. App. W.D. 2013); *Burton v. SS Auto, Inc.*, 426 S.W.3d 43 (Mo. App. W.D. 2014); *Brockman v. Regency Finance Corp.*, 124 S.W.3d 43 (Mo. App. W.D. 2004); *McIntosh v. Light*, 447 S.W.2d 75 (Mo. App. 1969); *Public Finance Corp. of Kansas City v. Shemwell,* 345 S.W.2d 494 (Mo. App. 1961). These cases do not address the issue before the Court.

Respondent has not contended that the Arbitration Agreement itself is invalid. In fact, in Respondent's response to Defendant's Statement of Uncontroverted Facts, Respondent admits that the parties entered into an Arbitration Agreement, contending only that "[a]s no title was provided to Plaintiff, the sale was in violation of §301.210 and is void." (L. F. at 83). Nor does Respondent deny that the Arbitration Agreement entered into covers Respondent's current claims since they "arise out of and relate to her purchase of the vehicle." (L. F. at 84)

Under well-established United States Supreme Court precedent, this Court is required to grant Appellant's Motion to Stay Proceedings and Compel Arbitration.

Pursuant to binding precedent from the United States Supreme Court, the Arbitration Agreement signed by the parties in the present action must be enforced regardless of the argument that the underlying agreement is void or voidable. Since Respondent does not contest that a valid arbitration agreement was reached between the parties, the arbitrator must determine whether or not the contract of the sale of the motor vehicle at issue in this case is enforceable or is void as Respondent contends. United States Supreme court precedent explicitly prohibits Respondent from relying on a state statute to invalidate an arbitration provision governed by the Federal Arbitration Act.

C. Appellant Franklin Has Established The Existence Of An Enforceable Arbitration Agreement Between The Parties.

Respondent has never contested the validity of the Arbitration Agreement itself and argues only that it should be construed with the underlying contract documents pursuant to *Johnson v. J.F. Enterprises,* 400 S.W.3d 763 (Mo. 2013). (L.F at 75). Respondent's contention is only that "[t]his case presents a simple resolution. As the contract between the Plaintiff and Defendant Jeremy Franklin was void, then all parts of such contract are void and not enforceable and therefore, there can be no requirement or provision to arbitrate." (L. F. at 75). This contention is in direct contradiction to the applicable binding United States Supreme Court precedent.

In Respondents briefing to the trial court, Respondent cited only cases regarding the void nature of title and argued that the Arbitration Agreement was void since the underlying contract was void. (L. F. at 69-78 and 100-103). Respondent did not dispute

the applicability of the Federal Arbitration Act to the Arbitration Agreement at issue. (L. F. at 69-78 and 100-103).

On the other hand, Appellant Franklin properly established the existence of an enforceable arbitration provision in its Motion to Compel Arbitration and Suggestions in Support of its Motion to Compel Arbitration. The pertinent facts contained in Appellant's Motion to Compel Arbitration:

> 3. Plaintiff's Petition alleges that Defendant Jeremy Franklin violated the Missouri Merchandising Practices Act and made fraudulent misrepresentations regarding delivery of title to a vehicle purchased by Plaintiff on or about November 4, 2013.
>
> 4. Specifically, Plaintiff claims that Defendant Jeremy Franklin failed to deliver title pursuant to R.S.Mo 301.210 and that she was unable to register the Hyundai Sonata purchased from Defendant Jeremy Franklin without the title. (See Plaintiff's Petition at ¶¶ 16, 26, 36, 41, attached hereto as Exhibit "A").
>
> . . . .
>
> 7. Plaintiff purchased a 2012 Hyundai Sonata VIN KMHEC4A4XCA0126203 from Defendant Jeremy Franklin. (See Retail Buyer's Order attached hereto as Exhibit "B")
>
> 8. According [to] the Retail Buyer's Order, Plaintiff agreed to purchase the vehicle from $21,104.95. (See Retail Buyer's Order attached hereto as Exhibit "B")

9. Plaintiff also executed a Retail Installment Contract, financing all $21,204.95 of the vehicle. (See Retail Installment Contract attached hereto as Exhibit "C").

10. Plaintiff traded in a 2003 Chevrolet Tahoe with over 200,000 miles on it when she purchased the Hyundai Sonata. (See Retail Buyer's Order attached hereto as Exhibit "B").

. . . .

15. As part of the purchase transaction for the 2012 Hyundai Sonata Plaintiff and Defendant Jeremy Franklin executed an Arbitration Agreement. (See Arbitration Agreement attached hereto as Exhibit "E").

. . . .

18. Since the allegations in Plaintiff's Petition arise out of and relate to her purchase of the vehicle, Defendant Jeremy Franklin is entitled to arbitration of Plaintiff's claims against Defendant Jeremy Franklin.

(L. F. at page 4).

Plaintiffs Petition for Damages, the Retail Buyer's Order, the Retail Installment Contract, and the Arbitration Agreement executed by the parties were all attached to Appellant's Motion. (L. F. 38-58).

In her response to the facts contained in Appellant's Motion to Compel Arbitration, Respondent/Plaintiff stated the following:

7. Plaintiff purchased a 2012 Hyundai Sonata VIN KMHEC4A4XCA0126203 from Defendant Jeremy Franklin. (See Retail Buyer's Order attached hereto as Exhibit "B")

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

8. According [to] the Retail Buyer's Order, Plaintiff agreed to purchase the vehicle from $21,104.95. (See Retail Buyer's Order attached hereto as Exhibit "B")

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

9. Plaintiff also executed a Retail Installment Contract, financing all $21,204.95 of the vehicle. (See Retail Installment Contract attached hereto as Exhibit "C").

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

10. Plaintiff traded in a 2003 Chevrolet Tahoe with over 200,000 miles on it when she purchased the Hyundai Sonata. (See Retail Buyer's Order attached hereto as Exhibit "B").

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

. . . .

15. As part of the purchase transaction for the 2012 Hyundai Sonata Plaintiff and Defendant Jeremy Franklin executed an Arbitration Agreement. (See Arbitration Agreement attached hereto as Exhibit "E").

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013), and see Affidavit of Plaintiff Lashiya Ellis, Exhibit 1.

. . . .

18. Since the allegations in Plaintiff's Petition arise out of and relate to her purchase of the vehicle, Defendant Jeremy Franklin is entitled to arbitration of Plaintiff's claims against Defendant Jeremy Franklin.

PLAINTIFF'S RESPONSE: As no title was provided to Plaintiff, the sale was in violation of 301.210 RSMo. and is void. *Peel v. Credit Acceptance Corporation*, 408 S.W.3d 191 (Mo. App. W.D. 2013) and

Johnson v. JF Enterprises, LLC, 400 S.W.3d 763 (Mo. 2013), where the documents are to be construed together and as the sale was void, no title was passed to Plaintiff, the entire agreement is void.

(L. F. at 81-85).

Respondent did not cite any authority or evidence to contest the validity of the Arbitration Agreement itself or present any authority to support her contention that an arbitration agreement should not be severed when it is alleged that the underlying agreement is claimed to be void. (L. F. at. 69-78, 99-103). Moreover, Respondent did not distinguish or even discuss the applicable United States Supreme Court cases. Consequently, Appellant Franklin sustained its burden of establishing an enforceable arbitration agreement. *See e.g. AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (U.S. 2011).

While there are still some limited circumstances in which state courts can invalidate an arbitration agreement by applying generally applicable contract defenses, Missouri courts have recognized that the U.S. Supreme Court's decision in *AT & T, supra.,* significantly altered prior Missouri law which discussed circumstances under which arbitration agreements can be invalidated on state law grounds. In fact, such circumstances are limited to state law defenses in the formation of a contract such as fraud, duress or unconscionability. *See e.g. Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 491 (Mo. 2012). Such formation defenses must be separately applicable to the Arbitration Agreement, not generally applicable to the underlying contract.

D. Assuming, *arguendo*, That The Underlying Contract Lacked Consideration, Mutuality Of The Agreement To Arbitrate Is Sufficient Consideration For The Arbitration Agreement.

The trial court's order states that " the contract is fraudulent and void, and that the arbitration provision which is to be construed with the other contract documents is subject to Plaintiff's contract defenses of fraud and lack of consideration." (L. F. at 109). The voidability issue before this Court does not implicate lack of consideration. At most, any contention that title was not delivered goes to the enforcement of the contract not the formation. However, there was sufficient consideration for both the underlying contract and the Arbitration Agreement in the present action.

This Court recently addressed "consideration" in the context of enforceability of an arbitration agreement under the FAA. In *Baker v. Bristol Care, Inc.,* 450 S.W.3d 770 (Mo. banc 2014), this Court unequivocally recognized that the mutuality of an agreement to arbitrate is sufficient consideration for that severable agreement. *Baker v. Bristol Care, Inc.,* 450 S.W.2d 770, 774 (Mo. banc 2014). As recognized by this Court in *Baker,* in the context of an arbitration agreement in an employment contract:

> Appellants argue that there are two sources of consideration for the arbitration agreement: (1) Baker's promotion, continued employment and attendant benefits; and (2) Bristol's [the employer's] promise to arbitrate its claims arising out of its employment relationship between it and Baker and to assume the costs of arbitration. "If two considerations are given for a promise, one of them being legally sufficient to support a promise and the

other not sufficient, the promise is enforceable." *Earl v. St. Louis Univ.*, 875 S.W.2d 234, 236-237 (Mo. App. 1994)(citing 1 Corbin on Contracts, 126 (1963):. The arbitration contract, therefore, is enforceable if either source of consideration is valid.

Id. at 774. The *Baker* court recognized that mutual agreements to arbitrate constitute sufficient consideration for an arbitration agreement, but found in that case, the employer's promise failed because it had the unilateral right to revoke the arbitration agreement upon 30 days notice. The Arbitration Agreement in the present action contains no such unilateral right. (L. F. at 58, Appx. at A5) Consequently, the mutuality of agreement to arbitrate constitutes sufficient consideration.

E. The Underlying Contract Does Not Lack Consideration Because The Alleged Failure To Deliver Title Goes To The Enforcement Of The Contract Not The Formation.

Respondent will undoubtedly argue that because she alleges the underlying contract is void, there was no consideration for the Retail Installment Contract or the Agreement to Arbitrate. While the separate consideration of mutuality of agreement to arbitrate is sufficient, Respondent's argument that the underlying agreement lacked consideration or was fraudulent when formed is fatally flawed. Respondent's contention assumes that consideration promised at the time the contract was executed is somehow revoked if a party breaches the agreement or fails to perform the promised act. Any failure to perform pursuant to the terms of the contract would give rise to an action for breach of contract.

Such failure to perform does not support the contention that consideration (mutual promise) was missing at the time of contract formation.

In fact, in *Baker*, this Court recognized that "bilateral contracts are supported by consideration and enforceable when each party promises to undertake some legal duty or liability. These promises, however, must be binding, not illusory. A promise is illusory when one party retains the unilateral right to amend the agreement and avoid its obligations." *Baker*, 450 S.W.3d at Moreover, "consideration consists either of a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party." *Id.*; *See also Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 437 (Mo. App. W.D. 2010)(stating that "[g]enerally speaking, therefore, if a contract contains mutual promises, such that a legal duty or liability is imposed on each party as a promisor to the other party as a promise, the contract is a bilateral contract supported by sufficient consideration."); *Ragan v. Schreffler,* 306 S.W.2d 494 (Mo. 1957)(holding that a promise on the part of a purchaser to buy and pay the purchase price is sufficient consideration for the promise of a vendor to sell and convey.)

In the present action, one party promised to purchase the vehicle and the other party promised to sell the vehicle in the Retail Buyer's Order. (L. F. at 52-53, Appx. at A3). Any failure to perform under this agreement is a breach of contract.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT JEREMY FRANKLIN'S MOTION TO STAY PROCEEDINGS AND COMPEL ARBITRATION BECAUSE UNDER THE ARBITRATION AGREEMENT, THE ARBITRATOR SHOULD DETERMINE WHETHER RESPONDENT'S CLAIM

IS ARBITRABLE AND WHETHER THE CONTRACT IN THE PRESENT ACTION IS VOID IN THAT THE TRIAL COURT ASSUMED THE ARBITRATOR'S ROLE AND DETERMINED THE MERITS OF THE CASE IN HOLDING THAT THE UNDERLYING CONTRACT WAS VOID.

A. Standard Of Review

The Trial court's order denying Appellant's Motion to Compel Arbitration and Stay Action is reviewed de novo. *Frye v. Speedway Chevrolet Cadillac,* 321 S.W.3d 429, 435 (Mo. App. W.D. 2010); *Morrow v. Hallmark Cards,* 273 S.W.3d 15, 21 (Mo. App. W.D. 2008). Because the Arbitration Agreement is covered by the FAA, the U.S. Constitutions' Supremacy Clause mandates that the rules of contract construction and interpretation not be applied in any manner that has a "disproportionate impact" on arbitration or "interferes" with the congressional intent that arbitration agreements be enforced. *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747-1748 (2011).

B. The Arbitration Agreement In The Present Action Is Broad And Requires That Any Issue Of Scope Or Arbitrability Of The Claim Be Submitted To The Arbitrator.

Ordinarily, "a disagreement about whether an arbitration clause in a concedingly binding contract applies to a particular type of controversy is for the court." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). However, "parties can agree to arbitrate 'gateway' questions of 'arbitrability' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010).

The Arbitration Agreement in the present action contains the following delegation provision:

> Any claim or dispute, whether in contract, tort, statute or otherwise (including interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, your purchase or financing contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase or financing contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Agreement shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action.

(L.F. at 58, Appx. at A5). The Arbitration Agreement also explicitly provides the FAA applies to the Arbitration Agreement. (L. F. at 58, Appx. at A5). Since the Arbitration Agreement clearly and unmistakably delegates to the arbitrator the issue of the arbitrability of the claim or dispute in question, the arbitrator, not the Court must decide whether Respondent's allegations that the Retail Installment Contract is void prohibit arbitration of the claim. *Wooten v. Fisher Investments, Inc.*, 688 F.3d 487, 493-94 (8th Cir. 2012); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011). When

faced with a valid delegation clause, as here, courts "must enforce it under [the FAA's] §§3 and 4, leaving any challenge to validity of the [arbitration agreement] as a whole for the arbitrator." *Rent-A-Center*, 130 S. Ct. at 2779.

In its Order denying Appellant's Motion to Stay Proceedings and Compel Arbitration, the Circuit Court did not address Appellant's argument that the validity of the underlying contract was an issue for the arbitrator to decide. (L. F. at 104, Appx. at A1-A2). Appellant argued that "[s]ince Plaintiff does not contest that a valid arbitration agreement was reached between the parties, the arbitrator must determine whether or not the contract of the sale of the motor vehicle at issue in this case is enforceable or is void as Plaintiff contends." (L. F. at 96). Additionally, the Court's Order did not address the issue of whether the claim was arbitrable and or whether any issue regarding whether or not the claim was arbitrable should be determined by the arbitrator as indicated in the agreement. The trial court did not address any of the terms of the Arbitration Agreement because Respondent did not contest the terms or the applicability of the Arbitration Agreement and the trial court made the initial determination that the underlying contract was void so the Arbitration Agreement was void. In fact, the trial court did not discuss the separate the provisions of the Arbitration Agreement at all (L. F. at 109-110, Appx. at A1). The only challenge to the Arbitration Agreement ruled upon by the trial court was the contention that the underlying contract and the Arbitration Agreement were void for failure to deliver title. (L. F. at. 69-78, 79-88, 99-103).

On the other hand, Appellant asserted that "[s]ince Plaintiff does not contest that a valid arbitration agreement was reached between the parties, the arbitrator must

determine whether or not the contract of the sale of the motor vehicle at issue in this case is enforceable or void as Plaintiff contends." (L. F. at 96). [1] Consequently, if the trial

[1] In Respondent's Application for Transfer, Respondent asserts that the appellate court granted relief based on arguments not raised in the trial court and/or presented in a point relied on. First, Respondent argues that the trial court's ruling that Respondent failed to challenge the delegation provision was not properly preserved and somehow Appellant should have raised a defense to the trial court on behalf of Respondent in the trial court. As established by the record, Respondent never challenged the delegability provision or any other provision of the Arbitration Agreement choosing instead to rely on the argument that underlying contract was void. Moreover, Respondent's argument that the Appellant did not raise the issue of severability and enforceability of the Arbitration Agreement in the trial court is wholly without merit. (L. F. at 94, 95, 96 (stating "since Plaintiff does not contest that a valid arbitration agreement was reached by the parties, the arbitrator must determine whether or not the contract of the sale of the motor vehicle at issue in this case is enforceable or void as Plaintiff contends" and "Moreover, there is no contention in Plaintiff's response that the Arbitration Agreement itself is invalid.")). Finally, Respondent claims that Appellant did not cite any authority regarding the delegability of issues to the arbitrator. To the contrary, the Unites States Supreme Court cases of *Nitro-Lifts Tech, LLC, Prima Loft*, *Southland* and *Buckeye* exhaustively discuss the severability and delegability of issues to the arbitrator when the underlying contract is allegedly void.

court had determined that the Arbitration Agreement was severable, the claim would have been sent to the arbitrator for consideration consistent with the terms of the Arbitration Agreement.

C. The Trial Court Improperly Ruled On The Merits Of The Case In Holding That The Underlying Contract Was Void, And Therefore, The Arbitration Agreement Was Void.

In the present action, the trial court erred in denying the Motion to Compel Arbitration based solely on the contention that the underlying contract was void and, therefore, the Arbitration Agreement was void. (L. F. at 109-110). Since Respondent disputed the Arbitration Agreement based solely on the alleged voidability of the underlying contract, arbitration should be ordered in this case. *Nitro-Lifts Tech., LLC,* 133 S. Ct. at 502.

III. Conclusion

The Federal Arbitration Act and binding United States Supreme Court precedent require that the Arbitration Agreement in the present action be enforced by the trial court. Just as in *Buckeye, Nitro-Lifts Tech, LLC*, *Southland* and *Prima-Loft*, the mere fact that a contract may be void or voidable under state law does not invalidate the severable Arbitration Agreement. Instead, this Court is bound by United States Supreme Court precedent requiring the Arbitration Agreement to be enforced pursuant to its terms regarding of the validity of the underlying contract.

In the present action, the Arbitration Agreement was undeniably entered into by the parties and covers the vehicle purchase transaction in question. A valid arbitration

agreement was formed and is severable from the underlying contract documents. Respondent has not come forth with any argument or evidence to support the contention that the Arbitration Agreement itself is void. Moreover, Respondent's argument that the Arbitration Agreement is subject to a defense to the "formation" of a contract is without merit since mutuality of the agreement to arbitrate is sufficient consideration. Moreover, the issue of whether the contract is void pursuant to R.S.MO § 301.210 goes to the enforcement of the contract, not the formation of the contract. Respondent's attempt to transform the issue of whether or not the contention that the underlying contract was void nullifies the Arbitration Agreement into an argument that the underlying contract lacked consideration when consummated, is without merit.

As Respondent noted in her Response to Appellant Franklin's Motion to Compel Arbitration, "this case presents a simple resolution." The only issue before this Court is whether or not the state law defense of voidability of the underlying contract applies to an arbitration agreement. Under binding precedent in *Buckeye* and *Nitro-Lifts Tech, LLC,* the United States Supreme Court has conclusively established that the Arbitration Agreement in the present action is severable and fully enforceable. Since the Arbitration Agreement is fully enforceable, its provisions must be applied. Consequently, the issues of arbitrability of the claim and the validity of the underlying contract are matters to be considered by the arbitrator pursuant to the agreement between the parties.

WHEREFORE and based on the foregoing, Appellant Jeremy Franklin respectfully requests this Court's order reversing the trial court's denial of Appellant's Motion to Stay Proceedings and Compel Arbitration and ordering this case to arbitration

pursuant to the binding Arbitration Agreement between the parties and for such further relief as this Court deems just and proper.

CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that the Brief was prepared on a computer, using Microsoft Word.

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CERTIFICATE OF COMPLIANCE 84.06(b)

The undersigned hereby certifies that the Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06. According to the word count of the word processing system used to prepare the Brief, the Brief contains 12,321 words.

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CERTIFICATE OF SERVICE

I hereby certify that a copy Appellant's Brief was filed with the Clerk of the Court via the Case.Net Electronic filing system on this 22nd day of September, 2015, and was also sent via Case.Net Electronic filing system this 22nd day of September, 2015 to:

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