Case No. SC95066

IN THE SUPREME COURT OF MISSOURI

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

Plaintiff/Appellant,

vs.

LASHIYA D. ELLIS,

Respondent,

CONDOR CAPITAL CORP.,

Defendant

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

MORROW•WILLNAUER•KLOSTERMAN•CHURCH, L.L.C.

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ARGUMENT AND AUTHORITIES

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 AND THE TRIAL COURT DENIED THE MOTION BASED ON THE CONTENTION THAT THE UNDERLYING CONTRACT IS VOID PURSUANT TO R.S.MO § 301.210.

In Respondent's Substitute Brief, Respondent attempts to stretch, mold and contort the issue in this case into one of contract formation or lack of consideration with respect to the Arbitration Agreement in question. In the process of this attempted transformation, Respondent contends that Appellant Franklin has waived essentially every argument it makes in Appellant's Substitute Brief. (See Respondent's Substitute Brief at 6, 13, 22, 26, 31, 34). Respondent does not, however, squarely address the issue at hand in the present action. That issue is whether a challenge to the underlying contract can be applied to invalidate an arbitration agreement governed by the Federal Arbitration Act. According to the United States Supreme Court, it cannot. Instead, an arbitration agreement must be severed and enforced absent a successful challenge to the arbitration agreement itself.

The United States Supreme Court precedent directly addressing this issue does not construe it as an issue of "formation" or "consideration" as Respondent erroneously

posits. Instead, the United States Supreme Court has unequivocally held on at least four occasions that a defense that the underlying contract is void pursuant to a state statute cannot be used to invalidate an arbitration agreement. [1] According to this binding precedent, the challenge must be to the Arbitration Agreement itself otherwise the validity of the underlying contract is for the arbitrator. *Prima Paint Corp. v. Flood Conklin Mfg. Co.,* 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); *Nitro-Lift Techs, LLC v. Howard*, 133 S. Ct. 500; 184 L. Ed. 2d 328 (2012); *Southland Corp. v. Keating,* 465 U.S. 1, 4-5, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

In an additional attempt to circumvent the applicable United States Supreme Court rulings, Respondent argues that Appellant failed to sustain its burden to establish that a valid Arbitration Agreement exists. To the contrary, Appellant attached a signed

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[1] As previously noted, significant portion of Respondent's Substitute Brief is dedicated to the argument that Appellant Franklin has failed to preserve arguments. Essentially, the brief contends that Appellant Franklin has failed to preserve any of the arguments in its brief despite the fact these same arguments and points were argued in the Court of Appeals and in the trial court. In fact, Respondent's Substitute Brief argues no less than eight times that an argument has either been waived or is not in proper form. To the contrary, just as in the Missouri Court of Appeals for the Western District, Appellant Franklin has properly preserved its argument regarding the errors in the trial court's order and both points relied on are in substantial compliance with the rules.

Arbitration Agreement to its Motion to Stay Proceedings and Compel Arbitration. (L.F. at 58; Appellant's Substitute Appendix at 5). The Arbitration Agreement was a separate agreement executed by both parties and clearly covered the dispute in question. (L.F. at 58; Appellant's Substitute Appendix at 5) Respondent did not contest the validity of the Arbitration Agreement or set forth any contractual or formation defenses with respect to the Arbitration Agreement. (L. F. at 79-88, 99-103).

Respondent also contends that by contesting the underlying contract, she has contested the validity of the Arbitration Agreement. (Respondent's Substitute Brief at p. 5). To the contrary, pursuant to the FAA and applicable United States Supreme Court precedent, an Arbitration Agreement is severable from and should be separately construed.

Next, Respondent contends that since she alleges the contract for the purchase of the vehicle was void for failure to deliver title, there was no consideration for the underlying contract or the Arbitration Agreement. Respondent contends that this alleged "failure of consideration" is a defect in the "formation" of the contract. According to Respondent, this alleged "lack of consideration" for the underlying contract spills over to the Arbitration Agreement and prohibits the application of *Prima Paint* and its progeny. This analysis is fundamentally flawed because the *Prima Paint* rule explicitly requires that any "challenge to the validity of arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract'" be specifically to the Arbitration Agreement and NOT to the underlying contract. *Prima Paint*, 546 U. S. 440, 443, 126 S. Ct. 1204, 1207 (2005).

In the present action, Respondent has never presented a separate challenge to the Arbitration Agreement itself and certainly never asserted a formation defense to the Arbitration Agreement in the court below. (L. F. at 79-88, 99-103) Instead, Respondent's position is entirely based upon the argument that the underlying contract is void pursuant to R.S.Mo. § 301.210.

Consideration is a "red herring" issue in this case. However, assuming, *arguendo,* that the underlying contract lacked consideration, the case law cited by Respondent does not require separate monetary consideration for an agreement to arbitrate. Instead, mutuality of the obligation to arbitrate is sufficient consideration. *See e.g. Baker v. Bristol Care, Inc.,* 450 S.W.3d 770, 774 (Mo. banc 2014).

A. A Valid Arbitration Agreement Was Formed And Is Severable From The Underlying Contract Documents.

Respondent attempts to transform the issue before this Court into an issue regarding the existence of a valid arbitration agreement. Essentially, Respondent argues that somehow Appellant failed to establish the existence of a valid arbitration agreement. (Respondent's Substitute Brief at p. 15). However, Respondent does not elaborate on how Appellant failed to meet its burden except to note that the burden was not met. (Respondent's Substitute Brief at p. 15 ftn. 8). There has never been any question in this case that an Arbitration Agreement was entered into by the parties. (L.F. at 58; Appellant's Substitute Appendix at 5). The sales file contains a ***separate contract document*** entitled "Arbitration Agreement." (L.F. at 58; Appellant's Substitute Appendix

at 5). It is signed by Respondent and certainly covers the dispute in question.[2] (L.F. at 58; Appellant's Substitute Appendix at 5).

In Appellant Franklin's Motion to Compel Arbitration and accompanying Suggestions, Appellant set forth the terms of the Arbitration Agreement, that the Arbitration Agreement was signed by both parties, and that the allegations in Plaintiff's Petition arose out of and related to her purchase of the vehicle. (L.F. at 35-36). Additionally, a copy of the Arbitration Agreement was attached to the Motion to Compel Arbitration and referenced throughout the pleadings. (L. F. at 33-58, 59-68, 89-88) Moreover, in the Suggestions in Support of Appellant's Motion to Stay Proceedings and Compel Arbitration, Appellant set forth the circumstances under which the Arbitration Agreement was executed, the terms of the Arbitration Agreement, that the dispute came within the scope of the Arbitration Agreement and that the Arbitration Agreement was not subject to any applicable contract defenses. (L.F. at 63-65). Respondent did not contest any of these arguments noting only that the underlying contract was void and, as

[2] Respondent argues that "deference must be given to the trial court's findings that the arbitration agreement lacked consideration and was void." However, these findings are legal determinations not factual determinations regarding things such as whether the agreement was signed and dated. Consequently, the appropriate standard of review is de novo.

the argument goes, the Arbitration Agreement was void also. (L.F. at 60-78, 99-103).[3]

Despite the fact that there are several United States Supreme Court cases that are directly on point, Respondent fails to address the holdings noting only that "*Buckeye Check Cashing,* 546 U.S. 440 and *Prima Paint*, 388 U.S. at 402-04 focus on the 'enforceability of the contract' and 'presuppose[s][sic] that a validly formed contract may be subject to a defense of enforceability.'" (Respondent's Substitute Brief at p. 21). The brief then goes on to state "[i]n *Buckeye*, the formation of the contract was not an issue as the party resisting the arbitration argued the interest provision invalided [sic] the contract as a whole and there was no evidence of consent to arbitrate. *Granite Rock*, 561 U.S. at 300-01 (citing *Buckeye,* 546 U.S. at 444-443[sic])" (Respondent's Substitute Brief at p. 21). Finally, Respondent's Substitute Brief states that:

> [i]n *Prima Paint,* the issue was fraud in the inducement of a contract, 388 U.S. at 403-404. This is distinguishable because the present arbitration

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[3] In Respondent's Substitute Brief, Respondent contends that "Appellant is arguing it established an enforceable arbitration agreement, an argument not presented to the court of appeals." (Respondent's Substitute Brief at p. 14). This contention is disingenuous since the ***Respondent*** failed to contest the validity of the Arbitration Agreement for any reason other than her allegation that the underlying agreement was void in the trial court. In fact, the notion was first raised by Respondent in her appellate brief and Appellant responded in its Reply Brief. (See L.F. 60-78, 99-103, Resp. Brief at p. 5-8, Appellant's Reply Brief at p. 5-7).

> provision goes to lack of consideration which is a formation of the arbitration provision. *Nitro-Lift Technologies, LLC v. Howard*, concerned a valid agreement and the lower court ruled the non-compete agreement was void on state law public policy grounds. 133 S. Ct. 500, 502 (2012). This is distinguishable because here the provision lacks consideration. Additional, [sic] this is not a public policy matter in which federal law prevails over state laws 'that invalidate arbitration agreements on public policy grounds.' *Baker*, 450 S.W.3d at 774.

(Respondent's Substitute Brief at p. 21).[4]

These quotes from Respondent's Substitute Brief evince the type of strained approach taken in trying to avoid these plainly applicable United States Supreme Court cases. These United States Supreme Court cases stand for the proposition that a state law defense to the underlying contract cannot be applied to the Arbitration Agreement. Instead, there must be an issue with the arbitration agreement itself. Moreover, in the present action the application of a state law statute to void a contract *is not a defense to*

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[4] Respondent appears to be arguing that *Prima Paint* is distinguishable because it involved a claim of fraud in the inducement of a contract rather than consideration. This argument is fatally flawed for several reasons. First, fraud in the inducement and failure of consideration are both contract defenses. Second, *Prima Paint's* holding is that for a state law defense to be applicable, it must be a defense specific to the arbitration agreement itself, not a defense applicable to the underlying contract.

the formation of the Arbitration Agreement. As plainly stated over and over again in these cases, if the allegation is that the underlying contract is void, the Arbitration Agreement is severable and the determination regarding the validity of the underlying contract is for the arbitrator in the first instance.

At one point in Respondent's Substitute Brief, counsel states that "[h]ere the issue before the Court is the formation of the arbitration provision or whether the arbitration provision was concluded, by construing the contractual documents with the arbitration provision." (Respondent's Substitute Brief at p. 19). "Respondent's position has been that no arbitration provision was formed when construing the contractual documents with the arbitration provision as title was not passed in accordance with section 301.210." (Respondent's Substitute Brief at p. 19). In fact, this is exactly what is prohibited by the United States Supreme Court.

Respondent argues that the "Arbitration Agreement is not severable under the circumstances." (Respondent's Substitute Brief at p. 8). In support of this argument, Respondent makes a somewhat circular argument that the courts can determine "[t]he arbitration agreement is not severable because the court can determine the formation of the arbitration provision." (Respondent's Substitute Brief at p. 18). Any authority the Court has to apply formation defenses to the Arbitration Agreement does not affect the severability of the Arbitration Agreement. Instead, the United States Supreme Court has specifically "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 a challenge to the contract as a whole would be decided by the court." *Buckeye Check Cashing, Inc. v.*

Cardegna, 546 U.S. 440, 126 S. Ct. 1204; 163 L. Ed. 2d 1038 (S. Ct. 2006)(citing *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)).

Respondent relies on the United States Supreme Court's decision in *Granite Rock Co. v. Int'l Bhd. Of Teamsters*, 561 U.S. 287; 130 S. Ct. 2847; 177 L. Ed. 2d 567 (2010) in support of her position. However, *Granite Rock Co.* recognizes that the United States Supreme Court applies "the requirement in §2 of the FAA that courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself." 561 U.S. at 299. Consequently, *Granite Rock* does not support Respondent's contention that an arbitration agreement should be construed with the underlying documents.[5]

Respondent's contention that Missouri state law requires that all contract documents be construed together when determining the validity of an arbitration agreement is erroneous, but even if true, such a state law would not be applicable in the present action since severability is an issue of federal law under the Federal Arbitration Act. *Prima Paint Corp. v. Flood Conklin Mfg. Co.,* 388 U.S. 395, 87 S. Ct. 1801, 18 L.

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[5] Although not specifically addressed in Respondent's Brief, in the Application for Transfer, Respondent contends that the decision of the Missouri Court of Appeals for the Western District is somehow in conflict with *Granite Rock*. To the contrary, the *Granite Rock* case specifically upholds the doctrine of severability applicable to arbitration agreements.

Ed. 2d 1270 (1967); *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006); Nitro-Lift Techs, LLC v. Howard, 133 S. Ct. 500; 184 L. Ed. 2d 328 (2012); *Southland Corp. v. Keating,* 465 U.S. 1, 4-5, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

In support of the contention that an arbitration agreement is not severable, Respondent cites several distinguishable cases that do not address the issue of the severability of an Arbitration Agreement. *See e.g. Johnson ex. rel. Johnson v. JF Enterprises*, 400 S.W.3d 763,764 (Mo. banc 2013) (holding that according to merger clause retail installment contract was subject to the arbitration provision contained in the retail buyer's order not addressing void contracts or the *Prima Paint* rule); *Baker v. Bristol Care, Inc.*, 440 S.W.3d 763 (Mo. banc.); *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426 (Mo. 2015) (holding that anti-waiver clause in arbitration agreement was severable and arbitration agreement could be enforced as written); *Public Finance Corp. of Kansas City, Mo. No. 1 v. Shimwell,* 345 S.W.2d 494 (Mo. App. K.C. 1961)(holding that note presented as payment for the vehicle purchase price was unenforceable when no title was delivered on vehicle).

In *Eaton v. CMH Homes, supra*, the challenge was not the validity of the underlying contract in question. Instead, the challenge was specifically to the arbitration agreement. *Id.* at 435-37. Respondent mistakenly cites this decision for the proposition that "whether there is consideration for the arbitration provision is dependent on whether there is consideration for contract as whole." (Respondent's Substitute Brief at p. 20). *Eaton* makes no such holding. In fact, since *Eaton* specifically addressed the arbitration

agreement, the *Prima Paint* rule was not addressed.

Eaton did address an issue similarly discussed in this Court's recent opinion in *Baker v. Bristol Care*. That issue is whether the underlying contract can provide consideration for the an agreement to arbitrate when it is alleged the arbitration agreement itself lacks consideration. *Id.* at 426. Both of these decisions recognize that mutuality of an agreement arbitrate is sufficient consideration for that agreement. *Eaton,* 461 S.W.3d at 432-33; *Baker,* 440 S.W.3d at 774; *See also Jimenez v. Cintas Corp. et. al,* 2015 WL 16051 at (Mo. App. E.D. 2015).[6]

B. Respondent Contests The Validity Of The Underlying Contract But Failed to Contest the Validity of The Arbitration Agreement Itself in the Courts Below.

Respondent has not argued that the Arbitration Agreement entered into by the parties was separately unenforceable. Moreover, there was no argument made to the trial court that the Arbitration Agreement lacked consideration. Instead, as throughout the briefing, Respondent's sole argument albeit restated numerous ways, is that the alleged applicability of a state statute to void a contract after it has been consummated for failure to deliver title to the vehicle, voids the entire contract including the Arbitration

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[6] Respondent concedes this issue on page 25 of Respondent's substitute brief when she states "in a bilateral contract where the only consideration is the mutual promise to arbitrate, the promises must be mutually binding. *Jimenez v. Cintas Corp.,* 2015 WL 16051, 5 (Mo. App. E.D. 2015)."

Agreement. Appellant has combed the record and found no additional allegations relating the validity of the Arbitration Agreement.[7] Consequently, the Arbitration Agreement is fully enforceable according to its terms.

Respondent cites *Bellemere v. Cable Dahmer Chevrolet, Inc.*, 423 S.W.3d 267 (Mo. App. W.D. 2013) for the proposition that "deference is to be given to the trial court's factual finding that the arbitration provision lacks consideration is fraudulent and void and not enforceable." (Respondent's Substitute Brief at p. 11). However, in *Bellemere*, the Missouri Court of Appeals for the Western District determined that the arbitration agreement in that case was unenforceable because it was not signed by the

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[7] In Respondent's Substitute Brief, Respondent for the first time alleges that the Arbitration Agreement lacks mutuality. This argument is in response to a comment made in Appellant's Substitute Brief that the *Baker* court determined that the arbitration agreement in that case lacked mutuality. Appellant noted that there was no such argument in the present action. In response, Respondent makes the argument that the arbitration agreement lacks mutuality. This argument is without merit since the Arbitration Agreement requires either party to arbitrate if one party so chooses. (L. F. at 58, Substitute Appellant's Substitute Appendix at 5); *Jimenez v. Cintas Corp. et. al.*, 2015 Mo. App. LEXIS 11 (Mo. App. E.D. 2015); 2015 WL 160451 (Mo. App. E.D. January 13, 2015) (holding that mutuality of obligation "means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other; that is, neither party is bound unless both are bound.")

dealer as was required pursuant to the terms of the contract. *Id.* at 273. The *Bellemere* court recognized that issues of enforceability of the contract as a whole, not specifically the arbitration clause, must go to an arbitrator. *Id.* at 274. There is no discussion in *Bellemere* regarding any deference to be given to the trial court's determination that the arbitration agreement is to be construed with the contractual documents. In fact, this is a legal determination subject to de novo review. *Id.* at 271.

C. Respondent Fails To Articulate Any Defense Applicable To The Arbitration Agreement Itself, Instead, Respondent's Arguments Relate Solely To The Underlying Contract In Direct Violation Of The *Prima Paint* Rule.

Respondent's attempt to transform her allegations that the underlying contract is void into an issue with the formation of the Arbitration Agreement is fatally flawed. First, there was no allegation that the Arbitration Agreement itself lacked consideration made to the trial court or the Missouri Court of Appeals for the Western District. (L.F. at 79-88, 99-10; Respondent's Brief in the Missouri Court of Appeals for the Western District). Since consideration as specifically applicable to the Arbitration Agreement was not raised by Respondent in the trial court or in the court of appeals it was not validly preserved as a defense.

However, the Arbitration Agreement does not fail for lack of consideration since Missouri courts have unequivocally held 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 the Missouri Supreme 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. *Id.* at 775. The Arbitration Agreement in the present action contains no such promise. Consequently, the mutuality of agreement to arbitrate constitutes sufficient consideration.

Respondent also refers to the recent case of *Jimenez v. Cintas Corp.*, 2015 WL 16051 at 3 n. 1 (Mo. App. E.D. January 13, 2015); 2015 Mo. App. LEXIS 11, at 4 n. 1, for the proposition that "whether the [arbitration] contract contained valid consideration" was a question of contract formation under Missouri law. (Respondent's Substitute Brief at p. 41). This statement was made specifically regarding the arbitration agreement in

that case, not the underlying contract. *Id.* Additionally, it is important to note that the issue of "whether the contract contained valid consideration" is an issue of formation. In the present action, the issue is not whether the contract contained valid consideration. Instead, the issue is whether title was to the vehicle was delivered.

In *Jimenez*, the court determined that the arbitration agreement lacked mutual promises to arbitrate. *Id.* at 15. The Arbitration Agreement in the present case contains a mutual agreement to arbitrate. (L.F. at 58; Appellant's Substitute Appx. at p. 5). In so holding, the Eastern District noted that mutuality is sufficient consideration for an agreement to arbitrate. *Id.*

D. Respondent Fails To Articulate Any Defense Applicable To Formation Of The Underlying Contract, Instead, The Contention That Title Was Not Delivered Goes To The Enforceability Of The Underlying Contract.

Even if the Arbitration Agreement in this case was to be construed with the underlying contract documents, the underlying contract when formed, satisfied all of the required contractual elements. The mere fact that Respondent alleges that failure to deliver the title voided the contract, does not establish an issue with formation of the underlying contract.[8] Instead, that argument goes to the enforceability of the underlying

[8] Respondent repeatedly misstates Appellant Franklin's argument with respect to consideration. Respondent states that Appellant argues that consideration does not go to the formation of a contract. (Respondent's Substitute Brief at p. 26, 27, 29). Appellant's

contract itself. In Missouri, the essential elements of a contract are "(1) competency of the parties to contract; (2) subject matter; (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation." *Bellemere v. Cable Dahmer Chevrolet, Inc.*, 423 S.W.3d at 273. Consideration is "a promise or the transfer or giving up of something of value to the other party." *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. banc 2014).

R.S.Mo. § 301.210.4 states:

> 4. It shall be unlawful for any person to buy or sell in this state any motor vehicle of trailer registered under the laws of this state, unless, at the time of the sale or delivery thereof, there shall pass between the parties such certificates of ownership with an assignment thereof, as provided in this section, and the sale of the motor vehicle or trailer registered under the laws of this state without the assignment of such certificate of ownership, shall be fraudulent and void.

According to the plain language of this statute, the contract itself is not void at

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argument is that the **failure to deliver title** pursuant to the Retail Buyer's Order is not an issue related to the "formation" of a contract. Instead, failure to deliver title in accordance with contractual terms is a breach of contract, not an issue of consideration. Moreover, such an argument is inapplicable to the Arbitration Agreement since the Arbitration Agreement is severable from the underlying contract documents.

formation. Instead, the underlying sale contract becomes void upon failure to deliver the title. Such an issue is wholly separate from the formation of a contract. If a contract were never formed in the first instance, it would not be necessary to declare it void.

In the present action, the retail installment contract was executed by the parties and contained mutual consideration. (L.F. at 52-53). Respondent would pay for the vehicle and Appellant would deliver the vehicle she purchased. (L.F. at 52-53). As such, any allegation that the contract became void upon failure to deliver title would be a potential defense to the enforceability of the contract as a whole, not specifically the arbitration clause. *Bellemere*, 423 S.W.3d at 274 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006).

II. THE ARBITRATION AGREEMENT AND UNITED STATES SUPREME COURT PRECEDENT REQUIRE THAT AN ARBITRATOR DECIDE WHETHER THE UNDERLYING CONTRACT IS VOID.

Respondent never contested the validity of the Arbitration Agreement in the court below. Instead, the entire argument was based on Respondent's contention that the underlying contract was void so the Arbitration Agreement was void under state law. In response to this contention, Appellant consistently argued that the decision of whether the underlying contract was void was for the arbitrator. (L.F. at 90, 91, 92, 93, 94, 95, 96).

In Appellant's Brief, Appellant points to the delegation clause in support of its

contention that according to the Arbitration Agreement, the arbitrator, not the Court must decide whether Respondent's allegation that Retail Installment Contract is void prohibits arbitration of the claim. (Appellant's Brief at p. 26). This is wholly consistent with Appellant's position in the trial court.

The trial court's order does not address Appellant's argument that the arbitrator should determine whether the allegations that the underlying contract is void prohibits arbitration. (L.F. at 104, Appellant's Substitute Appendix at A1-A2). Instead, the trial court held that the underlying contract was void without discussing the arbitrator's role in that determination. (L.F. at 104, Appellant's Substitute Appendix at A1-A2). The trial court did not make a factual finding regarding the existence of an arbitration agreement. Instead, the trial court misapplied the law in construing all of the contract documents together rather than separately considering the Arbitration Agreement.

III. Conclusion

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 is not valid. Moreover, Respondent's argument that the Arbitration Agreement is subject to a defense to the formation of the contract is without merit since 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. Finally, the issue of whether the

underlying contract documents are void is for the arbitrator to decide pursuant to binding United States Supreme Court precedent and the Federal Arbitration Act. Consequently, Respondent's claims are subject to arbitration and the Arbitration Agreement must be enforced by this Court.

WHEREFORE and based on the foregoing, Appellant Jeremy Franklin respectfully requests this Court's order reversing the Circuit 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.

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CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that the Substitute Reply 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 Substitute Reply 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 5,923 words.

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I hereby certify that a copy Appellant's Substitute Reply Brief was filed with the Clerk of the Court via the Case.Net Electronic filing system on this 6th day of November, 2015, and was also sent via Case.Net Electronic filing system this 6th day of November, 2015 to:

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