No. SC 96672

In The
SUPREME COURT OF MISSOURI

A-1 PREMIUM ACCEPTANCE, INC. d/b/a "KING OF KASH",

Appellant,

v.

MEEKA HUNTER,

Respondent.

APPEAL FROM THE CIRCUIT COURT OF MISSOURI
SIXTEENTH JUDICIAL CIRCUIT

Honorable Joel P. Fahnestock, Judge
Case Number 1516-CV01797

Transferred from the Missouri Western District Court of Appeals, WD 79735

RESPONDENT'S SUBSTITUTE BRIEF

Dale K. Irwin
THE IRWIN LAW FIRM
P.O. Box 140277
Kansas City, Missouri 641114

and

David Angle
ANGLE WILSON LAW LLC
920A East Broadway, #205
Columbia, MO 65201

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER

STATEMENT OF FACTS

Respondent is dissatisfied with the accuracy and completeness of appellant's statement of facts and sets forth the following statement of facts.

Appellant A-1 Premium Acceptance, Inc. d/b/a King of Kash ("A-1" or "King of Kash") is a consumer installment lender. LF 8, 10, 39.

A-1 engaged in substantial litigation conduct before filing its motion to compel arbitration. A-1 filed suit against respondent Meeka R. Hunter ("Hunter") on January 21, 2015, arising out of a 12 month installment loan dated July 1, 2006. LF 7-8. A-1 seeks to recover a "principal of $275.00 plus $6957.62 in interest as of 09-16-14." LF 8.

On March 31, 2015, counsel for Hunter filed her Answer and Counterclaim and served her first interrogatories and requests for production on A-1. LF 7, 14-16. A-1 filed its Response to Defendant's Counterclaim on April 23, 2015. LF 18-20. On or about April 28, 2015, A-1 responded to Hunter's first interrogatories and requests for production. LF 6. On May 4, 2015, A-1 served its first requests for admission and first interrogatories on Hunter. LF 5-6. On May 26, 2015, the parties filed a joint motion for continuance of the status conference that had been set for May 27, 2015, basing the motion on the stated fact that "[d]iscovery is ongoing". LF 5. On June 24, 2015, A-1 noticed the case up for a pretrial conference on July 8, 2015. LF 5. Hunter thereafter served her responses to A-1's first interrogatories and requests for production on June 28, 2015. LF 5. On August 4, 2015, Hunter filed her First Amended Counterclaim (FAC), asserting a class action counterclaim against A-1 and followed it with her August 14, 2015, motion to certify the matter to circuit court. LF 4, 5, 21-31, 32-34. A-1 did not

oppose the filing of Hunter's FAC or the certification of this case to circuit court. On August 21, 2015, the court certified the matter to proceed in circuit court. LF 4, 35-36. [1]

Over a month later, on September 28, 2015, A-1 filed a motion to force Hunter's counterclaim out of court and into arbitration. LF 4, 37-50. The arbitration clause on which A-1 based its motion mandates that any arbitration "shall" be conducted by the National Arbitration Forum (NAF) under the the NAF Code of Procedure then in effect. LF 59.

The NAF was barred, by a 2009 consent judgment with the Minnesota Attorney General, from arbitrating any consumer disputes. L.F. 152-205 [2] The Minnesota Attorney General's case revealed that a very substantial undisclosed conflict of interest. As the court documents, undenied, establish, a New York-based hedge fund group had purchased both a governing interest in the NAF and had also purchased the assets of the

[1] The form Order certifying the case to circuit court contains a typo, indicating the order was issued October 14, 2015.

[2] A-1 states that this Court may take judicial notice of the government action against the NAF. (Appellant Br., p.15, FN4). Similarly, this Court may take judicial notice of reports in the Congressional record regarding NAF corruption and of publicly reported facts that align with the undisputed facts contained in the Minnesota enforcement action. *E.g., State v. Weber,* 814 S.W.2d 298, 303 (Mo.App.E.D. 1991) (judicial notice "may be taken of a fact, not commonly known, but which can be reliably determined by resort to a readily available, accurate and credible source.").

three largest consumer credit debt collectors in the country – companies that regularly submitted claims to the NAF. *State of Minnesota v. National Arbitration Forum*, No. 27-CV-09-18550, Complaint ¶¶ 2, 32 (Minn. Dist. Ct. July 14, 2009). The NAF had been deciding tens of thousands of cases in which its owners had a direct financial interest in seeing one side win – all while publicly claiming that it was "not affiliated or owned by any party who files a claim before the forum," that it was not "aligned with lenders or other business parties," and that it provided "neutral and unbiased dispute resolution." Complaint ¶¶ 32, 23. Three days after Minnesota filed suit, the NAF agreed to immediately and permanently stop handling all consumer arbitrations via the consent decree entered into with State of Minnesota on July 17, 2009. Thus, due to its financial ties to the debt collecting parties appearing before it (and their attorneys); its concealment of those financial ties; and misrepresentations that it was a neutral, independent forum, the NAF's consumer arbitration scheme was shut down. LF 130-31, 152-205.

Prior to the enforcement action that barred the NAF from consumer arbitrations, several exposes revealed the NAF was publicly claiming to be a neutral forum while privately informing companies that it would rule in their favor and against consumers in order to gain and keep their business. *See e.g.,* Caroline E. Mayer*, Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided, WASH. POST at E-1, Mar. 1, 2000;* Robert Berner & Brian Grow*, Banks vs. Consumers (Guess Who Wins), BUS. WEEK, June 4, 2008;* Chris Serres*, Arbitrary Concern: Is the National Arbitration Forum a Fair & Impartial Arbiter of Dispute Resolutions?, STAR TRIB. (MINNEAPOLIS), May 11, 2008, at 1D.* In the latter piece, one former NAF arbitrator

admitted, "I'd give the [companies] everything they wanted and more just to keep the business coming." In testimony to the U.S. Senate, former NAF arbitrator and Harvard Law School professor Elizabeth Bartholet, testified that she was blackballed by the NAF after she awarded a consumer $48,000 in damages. *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct & Laws Regulating Corporations*, S. Comm. on Judiciary, 110th Cong. (July 23, 2008) (testimony of Elizabeth Bartholet).

A few days after the consent decree in the Minnesota Attorney General action closed the NAF's consumer arbitration scheme, a U.S. House subcommittee issued a report further detailing the extent of the NAF's corruption. Staff of the Domestic Policy Subcomm. of the H. Comm. on Oversight & Government Reform, 111th Cong., *Arbitration Abuse: An Examination of Claims of the National Arbitration Forum* 1 (2009).

In the wake of the public exposure of the NAF's deception and the Minnesota enforcement action, some former NAF clients stopped requiring arbitration. *See, e.g.*, Carrick Mollenkamp, Dionne Searcey & Nathan Koppel, *Turmoil in Arbitration Empire Upends Credit-Card Disputes*, WALL ST. J., July 21, 2009. Others, including A-1, kept contracts in place that designated the NAF as the sole forum for resolving disputes.

The 2006 National Arbitration Forum Code of Procedure submitted by A-1 as an exhibit to its reply brief in the trial court provides that "only" the National Arbitration

Forum may administer the Code. LF 212, 224 (NAF Rule 1A).[3] The Code further provides that "[i]n the event of a cancellation of this Code, any Party may seek legal and other remedies regarding any matter upon which an Award or Order has not been entered." LF 265 (NAF Rule 48).

A-1's arbitration provision does not contain a severance clause and does not provide for an alternate arbitral forum. LF 224. It provides that A-1 may bring collection claims in court but that Hunter is required to bring her claims "other than that resulting from a default in payment" in an arbitration conducted by the NAF under the NAF Code of Procedure. LF 59.

On October 8, 2015, Hunter filed her motion to enter a scheduling order for discovery and briefing regarding A-1's motion to compel arbitration and simultaneously served her second interrogatories and requests for production regarding A-1's arbitration motion. LF 3, 4, 75-80, 109-120. The following day the case was assigned to judge

[3] Note: this approach is very different from that of other major arbitration providers. With the American Arbitration Association ("AAA"), for example, it is quite common for parties to agree to arbitration clauses that incorporate the AAA's rules, but which allow arbitrators who are not affiliated with the AAA to handle the arbitration. The NAF rules at issue incorporated by reference to A-1's arbitration clause at issue in this case (unlike some earlier versions of the NAF's rules, which were applicable in some of the cases cited by A-1), by contrast, required that the NAF itself was the "only" arbitrator or arbitrators who could handle cases under A-1's arbitration clause.

Fahnestock in Division 9. LF 3. On October 27, 2015, A-1 filed its opposition to Hunter's scheduling order motion and sought a protective order to relieve it of responding to Hunter's second set of discovery requests. .LF 3, 83-86. On November 19, 2015, Hunter sought leave to file suggestions in opposition to A-1's motion for protective order. LF 3, 99-108. On January 6, 2016, the trial court entered a briefing schedule regarding A-1's motion to compel arbitration. LF 3, 121. On January 20, 2016, in compliance with the trial court's scheduling order, Hunter filed her suggestions in opposition to A-1's motion to compel arbitration. LF 2, 122-207. On February 3, 2016, A-1 filed its reply brief in support of the motion, to which Hunter responded on the same day with her motion for leave to file a surreply brief, including her surreply brief as an exhibit. LF 2, 211-295, 296-301. On February 9, 2016, A-1 filed its opposition to the latter motion. LF 2, 302-304.

On May 20, 2016, the trial court entered its order granting Hunter leave to file her surreply brief and denying A-1's motion to compel arbitration. LF 1-2, 305-312.

ARGUMENT

I. Response to A-1's claim that the trial court erred in failing to appoint a substitute arbitrator under the Federal Arbitration Act.

A. Standard of review

A-1 bore the burden of proving the existence of a valid, enforceable arbitration provision. *Whitworth v. McBride & Sons Home, Inc.,* 344 S.W.3d 730, 737 (Mo.App.W.D. 2011). Where an arbitration provision is subject to the Federal Arbitration Act (FAA), the Congressional policy favoring arbitration "is not enough,

standing alone, to extend an arbitration agreement beyond its intended scope because arbitration is a matter of contract." *Bellemere v. Cable-Dahmer Chevrolet, Inc.,* 423 S.W.3d 267, 273 (Mo.App.W.D. 2013). "The FAA places arbitration agreements on an equal footing with other contracts, and courts will examine arbitration agreements in the same light as they would examine any contractual agreement." *Triarch Industries, Inc. v. Crabtree,* 158 S.W.3d 772, 776 (Mo. banc 2005). Deference is given to factual findings by the trial court regarding the arbitration provision. *Id. at 272.* The trial court's ruling will be affirmed "if cognizable under any theory." *Business Men's Assurance Company of America v. Graham,* 984 S.W.2d 501, 506 (Mo. banc 1999) [4]; *Lopez v. H & R Block,* 491 S.W.3d 221, 228 (Mo.App.W.D. 2016).

B. The Integral Term Test is Consistent With and Required By the FAA, Which Requires Enforcement of *Agreements* to Arbitrate - Consent of the Parties and Focusing on the Terms that are "Integral" to Agreements Is Central to the Act.

The "primary purpose of the FAA" is that arbitration contracts be enforced "according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682-84 (2010) (emphasis added); *see also 9 U.S.C. § 4* (courts are only authorized to order that arbitration proceed "in accordance with the terms of the agreement"); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (the "overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration

[4] Unless otherwise noted, internal quotations and citations are omitted.

agreements according to their terms"); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 301 n.8 (2010) (same); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) ("The FAA thereby places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms."); *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (FAA "requires courts to enforce agreements to arbitrate according to their terms"). [5]

[5] The Court of Appeals decision below claims *CompuCredit* "effectively neutralized" the integral term analysis "without acknowledging" the issue. 2017 WL 3026917, *3. This finding is in error. The issue in *CompuCredit* was whether the Credit Repair Organizations Act precludes enforcement of an arbitration agreement. The case did not involve any question as to what the FAA itself meant, and did not discuss Section 5 of the FAA. But even if this Court were to guess at what the U.S. Supreme Court thought about Section 5 of the FAA while not discussing it, the facts in *CompuCredit* are completely unlike this one. The arbitration clause in *CompuCredit* provided for a substitute forum in the event the NAF was no longer available. CompuCredit's arbitration contract stated: "If for any reason the NAF cannot, will not or ceases to serve as arbitration administrator, we will substitute another nationally recognized arbitration organization utilizing a similar code of procedure." Reply Br. for Petitioners at *7, *CompuCredit*, 2011 WL 1427926 (Apr. 13, 2011). *CompuCredit* cannot be viewed to neutralize the integral term analysis.

As a corollary to this bedrock rule of law, the FAA does not compel courts to rewrite contracts and insert provisions the parties did not agree to. *Volt Info. Scis., Inc. v.Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475 (1989) (The FAA confers a right to compel arbitration only "*in the manner provided for in [the parties'] agreement.*") (emphasis original).

Where the parties have agreed to arbitration under certain conditions, courts "must give effect to these contractual limitations." *Stolt-Nielsen*, 559 U.S. at 684. That is because, "in this endeavor, as with any other contract, the parties' intentions control." *Id.* at 682. In *Stolt-Nielsen*, the lower court had held that disputes (antitrust class actions) should be handled in arbitration. But the U.S. Supreme Court held that the parties had not agreed to such an arbitration, and employed federal law to block the arbitration approved by the Second Circuit because it was not consistent with the terms of the arbitration clause.

As this brief will clearly establish, there are a large number of decisions from federal appellate courts, federal district courts, and state courts around the country addressing the issue of what courts should do with arbitration clauses that name the NAF. Two broad trends become evident from these many cases. First, every or nearly every appellate court to consider the issue has agreed that under Section 5 of the FAA, a court may not compel arbitration before an arbitrator who is not named in the arbitration clause, if the selection of the arbitrator named in the clause was an "integral term" of the contract. Put another way, there is a consensus that the "integral term" test is the appropriate test. Among many others, the "integral term" test has been embraced by the

U.S. Court of Appeals for the Second Circuit, the Third Circuit, the Fifth Circuit, the Seventh Circuit, and the Eleventh Circuit.

A-1 has flip flopped as to whether it agrees with the unanimous set of decisions applying the "integral term" test. Below, A-1 cited and quoted from a number of cases that applied the "integral term" doctrine, and relied particularly heavily on the Eleventh Circuit case that first enunciated the test in this memorable phrase. But more recently, A-1 has had a change of heart, and now argues that under Missouri's Arbitration Act, a court may force parties to arbitrate before a newly chosen arbitrator *even whe*re the selection of the arbitrator actually named in the arbitration agreement was an "integral term" of the agreement. In other words, A-1 takes the remarkable and drastic position that parties may be forced into arbitration even where doing so would be counter to the essential, integral terms of their agreement. The consequences of this flip-flop are enormous, because now, before this Court, by now (sometimes) rejecting the "integral term" test, A-1 effectively argues for non-consensual arbitration. According to A-1, Missouri law supposedly requires arbitration in some settings even where it would be counter to the integral terms of parties' actual agreements.

A-1 is severely mistaken. In fact, the FAA flatly bars non-consensual arbitration, and the policy in support of arbitration only applies to arbitration where parties have agreed to it. The central provision of the FAA, of course, is 9 U.S.C. § 2. Section 2 of the Act provides that courts must enforce an *agreement* to arbitrate on equal grounds as any other contract. Agreement regards the intentions of the parties – what did they consent to under the arbitration provision? A foundation of contract law is the essential

element of mutual assent to the terms. *Grant v. Sears,* 379 S.W.3d 905, 916 (Mo.App.W.D. 2012). "Silence generally cannot be translated into acceptance." *Id.*

In *Stolt-Nielsen*, 559 U.S. 662, the United States Supreme Court addressed the question of whether, under the FAA, the parties could be compelled into class arbitration where the arbitration provision was silent on the issue. The Court refused to infer that class proceedings were allowed in the absence of language indicating the parties had consented to class treatment. "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." *Id.* at 684. In so holding, the Court reaffirmed "the basic precept that arbitration is a matter of consent, not coercion." *Id*. at 681; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) ("the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties").

The trial court, in compliance with the FAA and Missouri contract law, gave effect to the plain meaning of the arbitration clause at issue in finding that the parties had designated the NAF and that under the language of this provision, the selection of the NAF was integral to the parties' agreement to arbitrate. The trial court properly refused to rewrite the contract by appointing a substitute arbitrator or imposing substitute procedures. This is entirely consistent with the FAA and long-standing Missouri contract law.

Where language is clear, a court may not ignore the parties clearly expressed intent and rewrite contract provisions. 9 U.S.C. §2, *Triarch*, 158 S.W.3d at 776 ("[I]n determining whether the parties have entered into a valid agreement to arbitrate, the usual

rules of state contract law and canons of contract interpretation apply. The guiding principle of contract interpretation under Missouri law is that a court will seek to ascertain the intent of the parties and to give effect to that intent."), *Bellemere*, 423 S.W.3d at 274, *Thiemann v. Columbia Public School District*, 338 S.W.3d 835, 839-840 (Mo.App.W.D. 2011) ("If, giving the language used its plain and ordinary meaning, the intent of the parties is clear and unambiguous, we cannot resort to rules of construction to interpret the contract.").

C. Virtually Every Appellate Case to Consider the Issue Has Agreed that Courts May Not Compel Arbitration Before an Arbitrator Not Named in an Arbitration Clause, if the Selection of the Arbitrator Named by the Clause Was an "Integral Term" of the contract

The first court to articulate the "integral term" test (which, as noted above, is simply an application of the basic rule of FAA law that arbitration may only be enforced where it is consensual) was *Brown v. ITT Consumer Financial Corp.,* 211 F.3d 1217 (11th Cir.2000). The *Brown* court stated that where the "choice of forum is an integral part of the agreement to arbitrate," the failure of the chosen forum will preclude arbitration. *Id. at 1222.* It is important to note that A-1 repeatedly cites to and relies upon *Brown*. Thus, its recent shift to an argument that this Court should apply Missouri's Arbitration Act to require arbitration where it is contrary to the "integral terms" of the parties' agreement is a blatant shift in position.

In any case, the "integral term" standard has been applied by literally dozens of courts, including all of the courts cited by A-1 finding that particular arbitration clauses

did not meet that test. *E.g., Moss v. First Premier Bank,* 835 F.3d 260 (2d. Cir. 2016); *Klima v. Evangelical Lutheran Good Samaritan Soc.,* 2011 WL 5412216 (D.Kan. 2011); *Ranzy v. Tijerina,* 393 Fed.Appx 174 (5th Cir. 2010); *Flagg v. First Premier Bank,* 644 Fed.Appx. 893 (11th Cir. 2016); *Beverly Enterprises v. Cyr,* 608 Fed.Appx. 924 (11th Cir. 2015); *Geneva-Roth, Capital, Inc. v. Edwards,* 956 N.E.2d 1195 (In. Ct. App.2011); *Rivera v. American General Financial Services, Inc.,* 259 P.3d 803 (NM 2011); *Stewart v. GGNSC-Canonsburg, LLC,* 9 A.3d 215 (Pa. Superior Ct. 2010); *Riley v. Extendicare Health Facilities, Inc.,* 826 N.W.2d 398 (Wis.App. 2012); *Miller v. GGNSC Atlanta, LLC,* 746 S.E.2d 680, 685–89 (Ga.App. 2013); *Carideo v. Dell,* 2009 WL 3485933 (W.D.Wash. 2009); *see also I.F, below.*

D. The plain language of A-1's arbitration provision Demonstrates that the Selection of the NAF Was An Integral Term of This Arbitration Clause.

A-1's arbitration agreement states, "This agreement shall be interpreted under the Federal Arbitration Act." (L.F. 59) As recognized by A-1, the FAA controls this inquiry. (Appellant Br. pp. 8, 9).[6] Referring to the "simple" language of its arbitration agreement,

[6] Under the U.S. Supreme Court's jurisprudence interpreting the FAA, a number of rules of federal law govern questions as to when parties have agreed to arbitration (and what kind of arbitration they have agreed to). So, for example, state laws may not treat arbitration agreements worse than other types of contract terms. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). And, similarly, no state law may force parties to arbitrate a claim in the absence of an agreement to arbitrate those claims. *See* cases,

A-1 correctly asserts that the word "shall" means exactly that with regard to the parties "crystal clear" intent that the provision be governed by the FAA. (Appellant Br., p.8). Under the FAA, construing the parties' clear intent through the plain language of this arbitration provision requires finding that selection of the NAF was integral to the agreement to arbitrate.

The arbitration clause at issue mandates that any arbitration "shall" be resolved by the NAF under the NAF Code of Procedure "then in effect." It neither contains a severability clause nor provides for an alternative arbitral forum. These factors led the trial court to rule that the parties' clearly expressed intent was to arbitrate only before the NAF. The trial court's ruling comports with Missouri contract law and the FAA. Given the plain meaning of A-1's arbitration provision, there is no ambiguity. *Triarch Industries,* 158 S.W.3d. at 776 ("The intent of the parties to a contract is presumed to be expressed by the ordinary meaning of the contract's terms."), *citing J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club,* 491 S.W.2d 261, 264 (Mo. banc. 1973) ("A court will not resort to construction where the intent of the parties is expressed in clear and unambiguous language for there is nothing to construe."); *see also Frye v. Levy,* 440

---

particularly, *Stolt-Nielsen*, cited in Part II-B above. In some areas (such as how to interpret contract language – do specific terms govern more general ones, should a contract be interpreted against the drafting party, etc.), courts applying the FAA will apply state law to those questions so long as the state law doesn't discriminate against arbitration agreements.

S.W.3d 405, 408 (Mo.banc 2014) ("'Shall' means shall. It unambiguously indicates a command or mandate. To suggest any other meaning is to ignore the plain language"). A-1's clause clearly requires that the NAF "shall" act as the exclusive arbitrator and the NAF Code "shall" be the rules for arbitration. This selection is integral to any agreement to arbitrate.

E. In the Majority of Cases Interpreting Arbitration Clauses Naming the NAF As the Arbitrator, Courts Have Agreed that this Was An Integral Term of the Agreement and Refused to Send the Cases to Arbitration After the Collapse of the NAF.

A-1 chastises the trial court for relying on case law outside of Missouri and, by implication, for ignoring a "mountain of other case law and the national trend." (Appellant Br., p.10). Simply put, A-1 is badly mistaken. First, as noted above, the broad consensus of many courts is that where the selection of an arbitrator is an "integral term" of an arbitration clause, a court may not compel arbitration before another arbitrator. Moreover, as this section will set forth, when one looks at cases where an arbitration clause names the NAF, the clear majority of those cases have struck down the entire arbitration clause. (In all but a few of the cases that did substitute another arbitrator, the language of the contracts was readily distinguishable from the language at issue in this case.) A-1 asks this Court to place itself well outside the national consensus of courts facing this issue.

Among the cases rejecting A-1's argument are *Moss,* 835 F.3d 260 (2d. Cir. 2016) (provision mandating arbitration "shall" be conducted by the NAF "by and under the

Code of Procedure of the National Arbitration Forum" was integral to agreement; subsequent unavailability of the NAF is not a "lapse" within meaning of FAA Section 5); *Klima,* 2011 WL 5412216, *3 (where the agreement selects the NAF and the NAF code and "makes no provision for selecting any other arbitrator besides the NAF," this is integral under the FAA);.*Ranzy,* 393 Fed.Appx 174 (5th Cir. 2010) (provision stating that arbitration "shall" be conducted "under the Code of Procedure of the National Arbitration Forum" precludes enforcement; subsequent NAF closure not a "lapse" under Section 5 because of parties clearly expressed intent); *Geneva-Roth, Capital, Inc.,* 956 N.E.2d 1195 (In.Ct.App.2011) (provision stating arbitration "shall be resolved by binding arbitration by and under the Code of Procedures of the National Arbitration Forum" was integral, arbitration provision unenforceable); *Rivera,* 259 P.3d 803 (NM 2011) (provision stating arbitration "will be conducted under the rules and procedures of the [NAF] or successor organization" required finding that NAF selection was integral and Section 5 does not allow substitution); *Stewart,* 9 A.3d 215 (Pa. Superior Ct. 2010) (provision stating arbitration will occur "in accordance with the National Arbitration Forum Code of Procedure" rendered clause unenforceable); *Riley,* 826 N.W.2d 398 (Wis.App. 2012) (use of the term "shall" in designating the NAF Rules of Procedure demonstrates intent that the NAF is integral to the arbitration agreement and renders clause unenforceable); *Carideo,* 2009 WL 3485933 (W.D.Wash. 2009).[7]

[7] As pointed out by the dissent in the appellate opinion below, there are numerous additional cases from across the country finding the parties' clearly expressed intent of

F. In Some Cases, Courts Have Held that Selection of the NAF As the Arbitrator Was Not an Integral Term to the Contract for Reasons that Are Unique to Those Contracts and Distinguishable From This Case.

A-1 relies heavily on *Brown v. ITT Consumer Financial Corp.,* 211 F.3d 1217 (11th Cir.2000). As noted above, in *Brown*, the Eleventh Circuit articulated the core "integral term" test that nearly every other court has accepted as the rule of law that governs the issue before this Court in this case. (In light of A-1's extensive embrace of *Brown* in the lower court, and even in parts of its briefing here, this Court should not allow A-1 to tactically shift, in an effort to avoid the overwhelming law unfavorable to it under the FAA, and instead now seek to erroneously rely upon the Missouri Arbitration Act.)

A-1 relies upon *Brown* because of its factual holding. In *Brown*, the Eleventh Circuit held that the plaintiff failed to meet its burden of proof of identifying any contractual language in the arbitration clause to establish that selection of the NAF in that case was an integral term of that agreement. A-1 ignores several subsequent decisions from that same court (the Eleventh Circuit) where the plaintiffs *did* point to language very similar to A-1's own clause in this case. In the cases with language like the contract here, the Eleventh Circuit held that the selection of the NAF in the arbitration clauses was an integral term of those clauses, and refused to enforce arbitration after the NAF had

---

selecting the NAF and the NAF Code is integral to any agreement to arbitrate. *A-1 Premium Acceptance v. Hunter,* 2017 WL 3026917, *7-8 (Witt, J. dissent).

collapsed. Thus, looked at in terms of its context and progeny, *Brown* and subsequent Eleventh Circuit case law strongly supports Hunter's position here.

Unlike the provision at issue here, the arbitration agreement in *Brown* did not name the NAF as the sole arbitrator. *Id. at 1220.* [8] Had that been the case, or had more evidence been presented regarding the integral aspect of the NAF code, the outcome would have been different, as is emphasized by *Inetianbor v. CashCall, Inc.,* 768 F.3d 1346, 1349-50 (11th Cir. 2014) and *Beverly Enterprises v. Cyr,* 608 Fed.Appx. 924 (11th Cir. 2015).

[8] It appears no argument was made in *Brown* concerning NAF Rules 1A or 48; that the NAF Code had been cancelled; or that the NAF Code was integral to the arbitration provision. *See* Br. of Plaintiff/Appellant at 26, *Brown v. ITT Consumer Fin. Corp.*, 1999 WL 33617330 at *26 (11th Cir. June 11, 1999). The plaintiff/appellant there also failed to respond to the defendant's argument that a substitute arbitrator should be named. *See* Reply Brief of Plaintiff/Appellant, *Brown*, 1999 WL 33616901 (11th Cir. Aug. 23, 1999). Against this backdrop, it is not surprising that the *Brown* court found "no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate." *Brown,* 211 F.3d at 1222.

> Citing *Brown,* the *Inetianbor* court describes the "majority rule" as follows:
>
> "§ 5 notwithstanding, the failure of the chosen forum preclude[s] arbitration whenever the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern."
>
> *Inetianbor,* 768 F.3d at 1350, *citing Brown,* 211 F.3d at 1222.

Inetianbor distinguishes *Brown* and the other cases on which A-1 relies and finds language requiring that a specific forum and specific code "shall" be used is integral to any agreement to arbitrate.

In *Beverly Enterprises,* the court found an arbitration provision designating the NAF Code of Procedure as the exclusive method for arbitration unenforceable. The court described *Brown* as "factually distinguishable" because it was decided before the Minnesota AG enforcement action shut the NAF consumer arbitration scheme down and cancelled the NAF Code and because "the [Beverly Enterprises] agreement explicitly incorporates the NAF code, making the code an essential part of the agreement." *Beverly Enterprises, 608 Fed.Appx. at 925-26, citing Sunbridge Retirement Care Associates LLC v. Smith,* 757 S.E.2d 157, 160 (Ga.App. 2014) (arbitration provision mandating use of the NAF code unenforceable); *Miller,* 746 S.E.2d at 685–89 (designation of the NAF as sole arbitrator and requiring use of the NAF code rendered arbitration provision unenforceable); *see also Flagg v. First Premier Bank,* 644 Fed.Appx. 893 (11th Cir. 2016) (affirming the reasoning in *Beverly Enterprises* and finding "the choice of the NAF as the arbitral forum was an integral part of the agreement to arbitrate").

A-1's arbitration provision is even more emphatic on the NAF than the one in *Beverly Enterprises.* Here, the provision explicitly incorporates the NAF code and names the NAF as the sole arbitrator. In *Beverly Enterprises,* the court addressed only the former. *Id. at 925.*

A-1's reliance on *Reddam v. KPMG LLP,* 457 F.3d 1054 (9th Cir. 2010) suffers the same flaw. The arbitration agreement in that case did not name a sole arbitrator. *Id. at 1059* ("The provision…does select the rules of the NASD, but does *not* state that the arbitration is to take place before the NASD itself. Had the latter been intended, the parties could easily have said so.")

Klima, 2011 WL 5412216 (D.Kan. 2011) is also instructive in this regard. *Klima* distinguished cases which had refused to enforce arbitration clauses naming the NAF as sole arbitrator from those that incorporated a set of rules but did not name the arbitrator. *Klima - Id. at *4* ("[T]his case is distinguishable from *Reddam* and *Brown* in that the parties did more than merely select the rules of the NAF; the agreement, read as a whole, shows that the parties selected the NAF as the exclusive arbitrator."). In this case, as in *Klima,* the NAF is named as the sole arbitrator and use of the NAF Code, which, the evidence shows, prohibited its use by anyone other than the NAF and explicitly provided that the parties could file their claims in court in the event the Code was cancelled, is mandatory.

A-1 is therefore also mistaken in claiming that *Reddam* rendered *Carideo v. Dell,* 2009 WL 3485933 (W.D.Wash. 2009) "no longer good case law." (Appellant Br., pp.9-10). The provision at issue in *Carideo* mandated the NAF as arbitrator and the NAF code

as the exclusive rules. As the *Carideo* court correctly identified, these factors distinguish the clause at issue from that in *Reddam* and compel the conclusion that selection of the NAF was integral to any agreement to arbitrate. *Carideo - Id. at *4.*

A-1's claim that the trial court's order somehow runs afoul of *Ellis v. JF Enterprises, LLC,* 482 S.W.3d 417 (Mo. banc 2016) is equally wrong. (Appellant Br., p.9). *Ellis* stands for the proposition that challenges to arbitration provisions must be "directed specifically at the arbitration agreement itself." *Id. at 423.* This is exactly the circumstance of Hunter's challenge and the trial court's ruling.

Additionally, *Robinson v. Eor-Ark, LLC,* 2015 WL 5684140 (W.D.Ark. 2015) [9] provides no solace for A-1. There, the court found that because the arbitration clause at issue invoked "only the Code and not the NAF itself" and because the clause contained a severance provision, the NAF was not integral to the arbitration clause. *Id. at *1.* The arbitration language in this case invokes the NAF itself and contains no severance clause.

[9] As in its brief in the Court of Appeals, A-1 cites to the U.S. Magistrate's recommendation, not the U.S. District Court opinion. (Appellant Br., p.11). Notably, the District Court does not rely on *Khan v. Dell Inc.*, 669 F.3d 350 (3d Cir. 2012) or *Brown* – *Id.*

G. In a Handful of Cases, Courts Have Held that the Selection of the NAF As the Arbitrator Was Not an Integral Term to the Contract for Reasons that are Simply Unpersuasive, and those Decisions Should Be Rejected by this Court.

A-1's cite to *Khan v. Dell,* 669 F.3d 350 (3d Cir. 2012) (Appellant Br., pp.11-12) is unpersuasive. *Khan* construed *Brown* as "demonstrating an intent to arbitrate that trumped the designation of a particular arbitrator who was no longer available." *Id. at 354.* But this is not a correct reading of *Brown*. The *Khan* court relied on its misinterpretation of *Brown* to hold that an arbitration clause stating disputes "shall be resolved exclusively and finally by binding arbitration administered by the National Arbitration Forum" was ambiguous as to whether "exclusively" applied only to the word "arbitration" or also to the NAF, implying that the NAF selection would be integral under the latter interpretation. *Id.* at 354-55. While finding that Texas contract law would apply to interpret the arbitration clause, the court made no reference to Texas law in concluding this clause was ambiguous. *Id. at 352-57.* The court then held that, because of this ambiguity, selection of the NAF was not integral and thus Section 5 did not prevent appointment of a substitute arbitrator. *Id. at 356-57.*

As the *Khan* dissent also points out, "[i]t cannot be insignificant" that entities such as A-1 selected the NAF in their form contracts, given the facts exposed by the government enforcement action, including that the NAF "represented to corporations that it would appoint anti-consumer arbitrators and discontinue referrals to arbitrators who decided cases in favor of consumers." *Id. at 358-59.* A-1 wants to "have its cake and eat

it, too" by demanding the NAF as the sole arbitrator while it was in existence, so as to eliminate the possibility of consumers gaining relief from predatory practices, but now claiming that another arbitral body will suffice.

The same flawed reliance on *Brown* was the basis for the ruling in *Adler v. Dell, Inc.,* 2009 WL 4580739 (E.D.Mich. 2009) ("In short, this court finds more persuasive the reasoning of the 11th Circuit in *Brown* in refusing to void the arbitration clause because the specified forum (also the NAF in that case) was unavailable."). As shown, the *Adler* court claimed to rely on *Brown* but did not actually follow the *Brown* ruling. *Adler* is thus no help to A-1. (Appellant Br., p.12).

A-1's citation to *Green v. U.S. Cash Advance Ill., LLC,* 724 F.3d 787 (7th Cir. 2013) is likewise unavailing. (Appellant Br., pp.12-13) The court in *Green* emphasized its construction of the specific clause at issue. "The agreement calls for use of the Forum's Code of Procedure, not for the Forum itself to conduct the proceedings." *Id. at 789.* This distinction was recognized in *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 781 (7th Cir. 2014), where the payday lender defendant argued that regardless of the unavailability of the chosen arbitral forum, Section 5 of the FAA required court appointment of a substitute arbitrator. *Id. at 780.* The Seventh Circuit disagreed, noting that the provision at issue in *Green* did not require arbitration under the "direct auspices" of the NAF and "[t]he district court, therefore, could invoke section 5 of the FAA to appoint an arbitrator." *Id. at 781.* In contrast, the provision at issue in *Jackson* required arbitration under circumstances "for which a substitute cannot be constructed." *Id.* As *Jackson* confirms, Section 5 of the FAA is not to be applied in defiance of the parties'

intent. Further, the *Green* ruling relies on the same misinterpretation of *Brown* as did the *Khan* court. *Green – Id. at 790.*

A-1's erroneous reliance on *Brown* and *Reddam* is apparent throughout its brief, culminating in its citation to *Courtyard Gardens Health & Rehab., LLC v. Arnold*, 485 S.W.3d 669, 677 (Ark. 2016) (Appellant Br., p.13). *Courtyard Gardens* not only employs the same mistaken interpretation of *Brown,* but is distinguishable because the arbitration provision there (1) did not name the NAF as the sole arbitrator and (2) contained a severance clause; both factors that were relied upon by the court in reaching its decision. *Id. at 674-78.*

Thus, the trial court's finding that the arbitration clause in this case is unenforceable because the NAF was integral to it is entirely consistent with *Brown* and *Reddam*. *Flagg v. First Premier Bank,* 644 Fed.Appx. at 896 ("The arbitration provision in *Brown* provided only that claims were to be 'resolved by binding arbitration under the Code of Procedure of the National Arbitration Forum,' but did not explicitly designate an arbitral forum."), *Inetianbor,* 768 F.3d at 1349-50 (11th Cir. 2014) (recognizing the "majority rule" that "§ 5 notwithstanding, 'the failure of the chosen forum preclude[s] arbitration' whenever 'the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern.'), *citing Brown,* 211 F.3d at 1222. A-1's contrary argument is in error and should be rejected.

H. Application of the FAA does not evidence a judicial hostility to arbitration

A-1 erroneously claims that following the integral term analysis evidences judicial hostility toward arbitration. (Appellant Br., pp. 14-17) This section of A-1's brief was

not presented to the trial court or the Court of Appeals. A-1 may not raise a new argument in its substitute brief. *Rule 83.08(b); Linzenni v. Hoffman,* 937 S.W.2d 723, 727 (Mo. banc 1997); *J.A.R. v. D.G.R.,* 426 S.W.3d 624, 629 (Mo. banc 2014). Hunter will further address this claim but maintains that it was not preserved for review.

A-1s new argument cites to *State ex rel. Hewitt v. Kerr,* 461 S.W.3d 798 (Mo. banc 2015), a case not cited by A-1 to the Court of Appeals or the trial court. In *Hewitt*, the plaintiff argued there was no agreement as to the rules of arbitration and the NFL Commissioner was biased and these, along with other factors, rendered the agreement to arbitrate unconscionable. *Id. at 807.* The Court was not presented with and did not analyze the question of whether, under the FAA, a singularly chosen arbitrator and code of procedure were integral to the parties' intent in forming the contract. The relevant paragraph in *Hewitt* – the entirety of the Court's discussion of the issue of substituting arbitrators – is only four short sentences. At no point did the Court identify the "integral to the contract" test, much less discuss it. Moreover, the issue was not presented to the Court by the facts, the agreement at issue in *Hewitt* did not name the rules to be followed. *Id. at 811.* The majority emphasized that an arbitration contract is "like any other contract and is enforced according to its terms…giving the terms their plain, ordinary, and usual meaning." *Id. at 808.* However, "the lack of any terms in the employment contract" regarding the rules and procedures for the Commissioner to follow, gave an arbitrator in a position of bias "unfettered discretion" and the Court found this to be unconscionable. *Id.* at 813.

A-1 suggests that if this Court were to follow the multiple cases applying the FAA from courts such as the U.S. Court of Appeals for the Second, Fifth, Seventh and Eleventh Circuits, that this Act would be evincing "hostility to the FAA," and would run afoul of *Hewitt*. Nothing could be further from the truth – in light of the facts and law presented to it, the *Hewitt* court had no occasion to address, much less reject, the great weight of federal authority applicable to *this* appeal.

Hunter is not arguing that "the failure of the parties to agree to the specific terms of arbitration invalidates the arbitration clause," as was the case in *Hewitt. Id. at 811.* Ms. Hunter's argument regards application of the FAA to this clear language and whether selection of the NAF and the NAF code was an integral term to the contract. This analytical framework has been accepted by virtually every court presented with the issue. *See I.C, above.* Further, the majority of courts have found that where the parties clearly expressed the intent to arbitrate certain issues only with the NAF and only under the NAF code, a court cannot rewrite the terms. *See I.E, above, e.g., Moss,* 835 F.3d at 265-66; *Jackson,* 764 F.3d at 781; *Inetianbor,* 768 F.3d at 1349-50 (11th Cir. 2014).

A-1 repeatedly emphasizes that the FAA governs this inquiry. (Appellant Br., pp.8, 9) Under 9 U.S.C. § 2, arbitration contracts are to be interpreted just as any other. Adhering to the fundamental principle of honoring the clear intent as expressed in the unambiguous contract terms does not evidence judicial hostility toward arbitration. Quite the opposite. This mandate applies to all contracts. *Stolt-Nielson,* 559 U.S. at 682. ("Whether enforcing an agreement to arbitrate or construing an arbitration clause, courts

and arbitrators must 'give effect to the contractual rights and expectations of the parties.' In this endeavor, 'as with any other contract, the parties' intentions control.'").

The arbitration clause at issue here specified the NAF as the sole arbitrator and required use of the NAF Code of Procedure. It has no severability clause and makes no provision for an alternate arbitral forum or code. The trial court was correct in ruling that because selection of the NAF was integral, the arbitration clause is unenforceable.

II. Response to A-1's claim that the Missouri Uniform Arbitration Act required appointment of a substitute arbitrator.

A. Standard of review

Missouri courts "will generally not convict a lower court of error on an issue that was not put before it to decide." *Smith v. Shaw,* 159 S.W.3d 830, 835 (Mo.banc 2005), *Lincoln Credit Co. v. George Peach,* 636 S.W.2d 31, 36 (Mo.banc. 1982). "Appellate courts are merely courts of review for trial errors, and there can be no review of a matter which has not been presented to or expressly decided by the trial court." *Barkley v. McKeever Enterprises, Inc.,* 456 S.W.3d 829, 839-840 (Mo.banc 2015). A-1 bears the burden of proving, under Missouri law, the existence of a valid, enforceable arbitration provision. *Whitworth,* 344 S.W.3d at 737.

B. A-1's Position Contradicts the FAA.

As explained above, the core of the FAA is that courts will not require arbitration of cases without the consent of the parties. This means that where the selection of an arbitrator is an "integral term" to an agreement, such that compelling arbitration to another arbitrator not selected by the parties would violate the "integral terms" of the

agreement, compelling arbitration would not be consented to by the parties. Accordingly, the "integral term" test is not only consistent with, but is REQUIRED by the FAA's requirement of consent.

A-1 audaciously suggests that Missouri law requires forcing parties into arbitration where doing so would be counter to the "integral terms" of the agreement agreed upon by the parties. In other words, A-1 calls for non-consensual forced arbitration. This is flatly forbidden by the string of U.S. Supreme Court decisions cited above, and particularly the *Stolt-Nielsen* case.

C. A-1 did not preserve this point

A-1's suggestions to the trial court in support of its motion to compel arbitration contain one footnote with a cursory reference to the Missouri Uniform Arbitration Act (MUAA) (LF 41). A-1's brief acknowledges that it "sought the Circuit Court's order appointing a substitute arbitrator as provided by the FAA." (Appellant Br., p.4) A-1's current argument was not presented to the trial court and, therefore, is not preserved for review. *Lincoln Credit,* 636 S.W.2d at 36 ("[I]t has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide."), *Spicer v. Farrell,* 650 S.W.2d 695, 696-97 (Mo.App.S.D. 1983). Ms. Hunter will further address A-1's argument but maintains her position that it was not preserved for review.

D. The MUAA does not apply to invalidate the trial court's finding that the NAF was integral to the arbitration provision.

Throughout its briefing to this Court and to the courts below, A-1 repeatedly emphasizes that the FAA governs and the inquiry is what constitutes a "lapse" under 9 U.S.C. § 5. (Appellant Br., pp.4, 8, 9) Under the FAA and generally applicable Missouri contract law, words are given their plain meaning and courts do not rewrite contracts unless the parties' clearly expressed intent allows it. *Triarch Industries,* 158 S.W.3d. at 776, *Bellemere,* 423 S.W.3d at 273-74. Where the selection of an arbitrator is integral and the selected forum fails, the arbitration provision fails. A-1's arbitration clause is not silent or equivocal regarding the arbitral forum. The arbitration clause selects the NAF and the NAF code. As the trial court correctly found, this selection was integral and thus the arbitration provision is unenforceable. This is the proper ruling under Sections 2 and 5 of the FAA. If A-1 wished to provide for an alternate forum in the event that the NAF consumer scheme came to an end (the corruption was on full display as of the time of Hunter's loan), it could have easily done so. There was no mistake in naming the NAF and its code as the required forum and rules. The plain language of A-1's contract makes this clear. There is no room for strained construction of the parties' clearly expressed intent. *Bellemere,* 423 S.W.3d at 274, *Thiemann,* 338 S.W.3d 839-40. A-1 argues that the Court should treat this arbitration provision differently than other contracts and insert terms the parties never intended. The point fails.

III. Response to A-1's claim that selection of the NAF created a latent ambiguity

A. Standard of review

Points not raised to the trial court are not preserved for appellate review. *Smith v. Shaw,* 159 S.W.3d at 835, *Lincoln Credit,* 636 S.W.2d at 36, *Barkley*, 456 S.W.3d 839-40. A-1 bears the burden of proving an enforceable arbitration agreement. *Whitworth,* 344 S.W.3d at 737.

B. A-1 did not preserve this point

A-1 raised no argument in the trial court regarding a supposed latent ambiguity in the arbitration clause. Ms. Hunter will further address A-1's new claim but maintains her position that it was not preserved for review. *Lincoln Credit,* 636 S.W.2d at 36.

C. There is no latent ambiguity

As shown, Missouri law looks no further than the plain language of the contract to ascertain the parties' intent. *Thiemann,* 338 S.W.3d 839-40. A-1 attempts to create an ambiguity where none exists. A-1 primarily cites *Royal Banks of Missouri v. Fridkin*, 819 S.W.2d 359 (Mo. banc 1991). (Appellant Br., p.18) This case, however, does not support A-1's argument. *Royal Banks* involved a guaranty that mistakenly described a nonexistent $10,000 promissory note. A promissory note in the amount of $50,000 that fit "the description in the guaranty in all respects except for principal amount" did exist. *Id. at 362.* The guarantor "candidly stated at trial, he expected to be obligated to pay $10,000.00." *Id.* The court found that, under these unique circumstances, "only one conclusion as to the true intent of the parties" could be ascertained, the guarantor's admitted $10,000 liability. *Id.* The circumstances here bear no resemblance to *Royal*

Banks. The inclusion of the NAF was no mistake. Indeed, this selection was quite intentional given that the NAF was designed to enrich companies and their lawyers at the expense of consumer rights. There was no error in A-1's drafting of this clause and there is no extrinsic evidence that defies the plain meaning of the words A-1 chose.

This point is emphasized by *Alack v. Vic Tanny Int'l*, 923 S.W.2d 330 (Mo. banc 1996), another case cited by A-1. (Appellant Br., p.18) The *Alack* decision dealt with an exculpatory clause in a gym membership contract. The gym asserted that the clause released it from future negligence claims; however, the language did not explicitly state that future negligence claims were exempted. *Id. at 334-36.* The court held the release to be ambiguous because the clause did not specifically insulate the gym for future negligence claims and would include claims for "intentional torts or for gross negligence, or for activities involving the public interest," which "cannot be waived." *Id.* Here, A-1's clause contains the explicit detail missing in *Alack.* The language quite clearly identifies the NAF and the NAF Code. Missouri law and the FAA provide that arbitration provisions are placed on an "equal footing" as other contracts. *Triarch,* 158 S.W.3d at 776. The Congressional policy favoring arbitration is not the same as the legal prohibitions at issue in *Alack.* Arbitration contracts are to be interpreted as they are written, giving words their plain meaning. *Stolt-Nielson,* 559 U.S. at 682-84, *Volt Info.,* 489 U.S. at 475, *Thiemann,* 338 S.W.3d at 839-840. The policy favoring arbitration is not enough to justify rewriting clearly expressed contract terms. *Bellemere,* 423 S.W.3d at 273.

A-1's cursory citation to *Boswell v. Steel Haulers, Inc.*, 670 S.W.2d 906 (Mo.App.W.D. 1984) is also unavailing. (Appellant Br., p.18) *Boswell* regarded driver compensation in equipment leases. In practice, the parties operated under a "variant from the literal language" of the leases by the lessee providing the drivers, instead of the equipment owners. *Id. at 909.* The equipment owners admitted that this variant caused the labor union contract to be incorporated into the equipment lease. *Id.* The court identified that the compensation rates "originating in the labor agreement with the union" caused an ambiguity in the equipment lease regarding who was to absorb increased labor costs. *Id.* There is no such complexity here. The express language of the arbitration provision mandates the NAF as sole arbitrator. This is an integral selection and the arbitration provision fails. [10]

IV. A-1 Waived Any Right to Arbitration

A. Standard of review

The trial court's ruling will be affirmed "if cognizable under any theory." *Business Men's Assurance,* 984 S.W.2d at 506 (Mo. banc 1999). Waiver of a claimed

[10] Notwithstanding that A-1's arbitration clause plainly identifies the NAF and the NAF code as integral, and is not in any manner ambiguous, if there were an ambiguity, it is to be construed against A-1 as the drafter; the intent of the parties is a question of fact; and the trial court's findings in this regard are entitled to deference. *Triarch*, 158 S.W.3d at 776, *Bellemere*, 423 S.W.3d at 273, *LeKander v. Estate of LeKander*, 345 S.W.3d 282, 288 (Mo.App.S.D. 2011).

right to arbitration through litigation conduct is a matter for the court to decide. *Lovelace Farms, Inc. v. Marshall,* 442 S.W.3d 202, 207 (Mo.App.E.D. 2014).

B. A-1's waiver

A-1 engaged in substantial litigation activity for nine months before filing its motion to compel arbitration. A-1 has waived any right to arbitrate this case. A party waives its right to arbitrate if it: (1) had knowledge of the existing right to arbitrate; (2) acted inconsistently with that right, and (3) prejudiced the party opposing arbitration. *Major Cadillac, Inc. v. General Motors Corporation,* 280 S.W.3d 717, 722 (Mo.App.W.D. 2009), citing *Getz Recycling, Inc. v. Watts,* 71 S.W.3d 224, 229 (Mo.App.W.D. 2002).

A-1 has known of the arbitration clause since July 1, 2006, the date of the loan on which it sued Hunter. (LF 40)

A-1 has acted inconsistent with any right to arbitrate. A-1 filed this case on January 21, 2015; answered Hunter's counterclaim on April 23, 2015; answered and served discovery; jointly represented to the court that the matter should be continued because of ongoing discovery; set the matter for a pretrial conference; consented to Hunter's filing of her first amended counterclaim; and consented to the matter being certified to circuit court. *Major Cadillac,* 280 S.W.3d at 722 (seeking removal, requesting change of judge, filing motion to dismiss established actions inconsistent with arbitration right), *Watts,* 71 S.W.3d at 229 (commencing litigation is inconsistent with claimed arbitration right).

Ms. Hunter has been prejudiced by A-1's nine month delay. *Watts – Id.* Duplication of efforts that would result from a party's initiating litigation and then seeking arbitration is a factor establishing prejudice. *Major Cadillac,* 280 S.W.3d at 723. Other factors establishing prejudice include use of discovery methods unavailable in arbitration and postponing invoking arbitration. *Marshall,* 442 S.W.3d at 207. A-1 filed this case; engaged in discovery; and for nine months acted entirely consistent with pursuit of the matter in court.

The 8th Circuit recently emphasized this point in *Messina v. North Central Distributing, Inc.,* 821 F.3d 1047 (8th Cir. 2016). To preserve a right to arbitrate, A-1 was required "to make the earliest feasible determination of whether to proceed judicially or by arbitration." *Id. at 1050.* The *Messina* court found prejudice due to the failure to mention arbitration over 8 months of litigation activity. *Id. at 1051.* As in *Messina,* the facts here demonstrate A-1 waived any right to arbitration.

V. A-1 Concedes That The Issue Of Charging Consumers Interest Is Outside The Scope Of Its Arbitration Provision.

A-1 "concedes" that the issue of whether it is contractually allowed to charge consumers interest is "appropriate to be litigated." (Appellant Reply Brief, Western District Court of Appeals ("Appellant Reply Br."), p.11. In its reply brief, A-1 asserts "respondent is not precluded from any affirmative defense or counterclaim which is related to her default." (emphasis in original) (Appellant Reply Br., p.10) A-1 then states that Ms. Hunter's "…defense that A-1 was not contractually allowed to collect interest at the rate it sought was proper, but taking that defense to an affirmative claim

was out of the scope of the dispute subject to litigation." (Appellant Reply Brief, p.11). A-1's right to interest is either related to a consumer's default or it isn't. A-1's claim that this issue is appropriate for a defense but not a counterclaim is without merit. The question is whether the parties' intent was to include or exclude the **issue** from arbitration. *E.E.O.C. v. Waffle House,* 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement."); *Mitchell Eng'g Co. v. Summit Realty Co.*, 647 S.W.2d 130, 140-42 (Mo.App.W.D. 1982) (judicial admission contained in appellate brief). A-1 admits that the subject of its unlawful interest collection is not within the scope of the arbitration clause and properly before the trial court.

VI. A-1's Arbitration Provision is Unconscionable

A. Standard of review

The trial court's ruling will be affirmed "if cognizable under any theory." *Business Men's Assurance*, 984 S.W.2d at 506 (Mo. banc 1999). Unconscionability is a generally applicable contract defense that courts consider in determining if a valid arbitration agreement was formed. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 490 (Mo. banc 2012).

B. A-1's arbitration clause fails as unconscionable

A-1's arbitration clause allows it to file collection lawsuits in court but requires Hunter to arbitrate counterclaims and certain defenses. The clause lacks a binding, mutual promise to arbitrate and is illusory. *Greene v. Alliance Automotive, Inc.,* 435 S.W.3d 646, 654 (Mo.App.W.D. 2014) (arbitration clause allowing car dealership self-

help repossession but requiring consumer to arbitrate lacks mutuality), *Motormax v. Knight,* 474 S.W.3d 164, 169-71 (Mo.App.E.D. 2015) [11] (arbitration agreement illusory where one party is allowed to proceed in court while the other party is required arbitrate), *citing Baker v. Bristol Care, Inc.,* 450 S.W.3d 770, 776-77 (Mo. banc 2014).

Under this arbitration clause, consumers are subjected to A-1's collection lawsuits but, in order to challenge the collection actions and seek relief to which they are entitled, consumers must raise their counterclaims and affirmative defenses in an arbitral forum while also defending against A-1 in Court. The burden and uncertainty to which consumers are subjected under this regime is unconscionable. *Eaton v. CMH Homes,* 461 S.W.3d 426, 434 (Mo. banc 2015); *GreenPoint Credit, LLC v. Reynolds*, 151 S.W.3d 868, 875 (Mo.App.S.D. 2004).

VII. Ms. Hunter is Entitled to Discovery Regarding A-1's Arbitration Clause

A. Standard of review

Hunter asserts the trial court's ruling is correct but should this Court deem otherwise, Hunter is entitled to develop a factual record as to the unconscionability of A-1's arbitration clause. *Brewer,* 364 S.W.3d at 489, n.1, 492.

B. Discovery to which Ms. Hunter is entitled

Should this Court disagree with the trial court's ruling, Hunter is entitled to discovery regarding the unconscionability determination, similar to the factual record

[11] *Abrogated on other grounds in Sanford v. CenturyTel of Missouri, LLC,* 490 S.W.3d 717 (Mo. banc 2016).

developed in *Brewer.* Discovery will include matters such as the number of consumer arbitrations conducted; whether any consumers have negotiated, altered or refused the arbitration clause; the cost of arbitration; what sales tactics are employed in obtaining consumer signatures; and other issues, all of which bear on contract formation and whether A-1's arbitration clause stands as an obstacle to prompt consumer relief. *Brewer,* 364 S.W.3d at 495. The unconscionability analysis is a "fact-specific inquiry" regarding the formation of this arbitration clause and Hunter is entitled to develop a factual record in this regard. *Brewer,* 364 S.W.3d at 489 n.1.

This Court should uphold the trial court's ruling because it is sound and supported under numerous theories. However, should this Court be hesitant to do so, Hunter is entitled to discovery regarding formation of this arbitration provision.

VIII. CONCLUSION

WHEREFORE, Respondent, Meeka Hunter, respectfully requests this Court affirm the Circuit Court's Order denying A-1's Motion to Compel Arbitration.

Respectfully submitted,

THE IRWIN LAW FIRM

By */s/ Dale K. Irwin*
Dale K. Irwin #24928
P.O. Box 140277
Kansas City, MO 64114
(816) 359-8433
(816) 986-3046 fax
dale@daleirwin.com

ANGLE WILSON LAW LLC

By */s/ David Angle*
David Angle #38937
920 East Broadway, 205
Columbia, Missouri 65201
(573) 355-4065
(888) 716-1999 (fax)
dave@anglewilsonlaw.com

Certificate of Compliance with Rule 84.06

I certify, pursuant to Supreme Court Rule 84.06(c), that this Substitute Brief for Respondent complies with Rule 55.03; complies with the limitations contained in Rule 84.06(b); and further certify that this brief contains 9,856 words, excluding the Tables of Contents and Authorities, this Certificate, the Certificate of Service, and the signature block

/s/ David Angle
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that on the 20th day of February, 2018, I electronically filed the foregoing Brief for Respondent with the Missouri e-Filing System which will automatically send email notification of such filing to the attorneys of record for Appellant A-1 PREMIUM ACCEPTANCE, INC. d/b/a "KING OF KASH".

/s/ *David Angle*
Attorney for Respondent