SC 96672

IN THE SUPREME COURT OF MISSOURI

A-1 PREMIUM ACCEPTANCE, INC.

Appellant

v.

MEEKA HUNTER

Respondent

Appeal from the Circuit Court of Jackson County, Missouri
At Kansas City
The Honorable Joel P. Fahnestock, Judge
Case Number 1516-CV01797

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Transferred from the Missouri Western District Court of Appeals
Case Number WD 79735

APPELLANT'S SUBSTITUTE REPLY BRIEF

Submitted by:

Mark D. Murphy, MO #33698
The Murphy Law Firm
mmurphy@mlf-llc.com
14221 Metcalf Avenue, Suite 130
Overland Park, Kansas 66223-3301
(913) 647-8090
Fax (913) 667-2435

Attorney for Appellant A-1 Premium Acceptance, Inc., d/b/a King of Kash

Table of Contents

Table of Authorities

Cases

Statutes

Argument

Points 1 and 2: The FAA and the Missouri Uniform Arbitration Act requires an alternate arbitrator to be designated when for any reason a lapse occurs in naming an arbitrator specifically including, as here, where the NAF designated by the arbitration agreement is unavailable.

Respondent spends the bulk of her opposition to A-1's brief arguing the construction of the "plain meaning" of the arbitration provision in the subject loan agreements, and the application of the "integral term" construction to avoid arbitration. Though some other courts have followed this analysis, it should not be followed by any court. Not only does it totally disregard controlling law that arbitration agreements are to be favored, it also disregards the express mandate from the U.S. Supreme Court that rules of contract construction and interpretation not be applied in any manner which has a "disproportionate impact" on arbitration or "interferes" with the congressional intent that arbitration agreements be enforced. ***AT&T Mobility LLC v. Concepcion***, 563 U.S. 333, 341-343 (2011).

Respondent's brief goes to great length to spin the decisions cited by A-1 and distinguish them from what they stand for – that the FAA (and also the Missouri Uniform Arbitration Act in a nearly mirror provision) requires the designation of a replacement arbitrator in instances where a specifically named arbitrator fails for any reason. A-1's brief, and a reading of the cases cited therein, is sufficient to rebut respondent's attempt to lead this Court away from the correct result.

A-1 did reference the Missouri Uniform Arbitration Act in its brief and in its underlying filings with the Circuit Court. See LF at 39. Granted that the reference was nominal, its purpose was to highlight to the Circuit Court that under that Act, just as under the FAA, the Circuit Court was required to appoint a substitute arbitrator. The provisions of Missouri law are consistent with the provisions of Federal law. The problem that we are arguing in this appeal is the various court's construction of the prevailing laws to either support the legislative mandate favoring arbitration, or to erode it by finding ways to avoid arbitration that the parties clearly intended to apply.

An excerpt from the holding in ***Baker v. Bristol Care, Inc.,*** 450 S.W.3ed 770 (Mo 2014) is applicable here:

> The FAA's deference to state law on questions of contract formation is not unlimited, however. Given that one of Congress's purposes in enacting the FAA was to overcome deeply entrenched judicial hostility toward arbitration contracts, see ***AT&T Mobility LLC v. Concepcion***, 131 S.Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011), the FAA defers only to principles of state law that apply generally to all contracts. See ***9 U.S.C. § 2*** (providing that all arbitration promises "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). In other words, state law principles that purport to apply special rules for the formation of contracts containing promises to arbitrate are preempted by, and must be disregarded under, the FAA. ***Perry v. Thomas***, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 96 L. Ed. 2d 426 (1987) (any "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with" § 2 of the FAA).

Id. at 778-79.

<u>Point 3:</u> The argument made by A-1 regarding the latent ambiguity in the arbitration agreement is not a newly raised issue – it merely expands on the

argument made in points 1 and 2 regarding the construction of the language of the arbitration agreement.

Respondent moves her argument then to the third point raised in A-1's Appellant's Brief, that the unanticipated availability of the named arbitrator was a latent ambiguity, as the parties' clear main intent was to arbitrate any issue relating to the subject loan transaction – excepting only the black and white issue of non-payment by respondent. While respondent is disingenuously suggesting to this Court that this is a new issue not preserved, in fact, it is simply a more in-depth look at the construction of the arbitration agreement which should have been rendered by the Circuit Court. In addition, the Court should consider the full statement of Missouri law in this regard as quoted in a case relied upon by respondent – that the Court "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)(citing to cases therein)(emphasis added). ***See also Gilles v. Mo. Dep't of Corr.***, 200 S.W.3d 50, 54 (Mo.Ct.App. 2006); ***L.G.T. v. N.R.***, 442 S.W.3d 96, 108 (Mo.Ct.App. 2014). In this instance, the latent ambiguity in the arbitration agreement is no different than the construction of the wording using the Circuit Court's "integral term" analysis – it all comes down to the review and construction of the subject language and what it means. So, though the express words "latent ambiguity" were not used, a necessary part of the construction of the arbitration agreement included consideration of any such ambiguity and the "plain, ordinary, and usual meaning" of the words used.

Respondent's position is quickly dispelled by looking at the Circuit Court's Order. LF at 305, Appendix at A001. The Circuit Court's Analysis section of its Order, in

paragraphs two, four, six, seven, eight and nine all deal with the language of the subject arbitration agreement and its construction, supposedly to mine the intent of the parties. However, the Circuit Court's Order overlooks the elephant in the room – the parties agreed and desired to arbitrate their disputes first and foremost. This desire is supposed to be fostered and supported by the Courts, as mandated by the FAA, the Missouri Uniform Arbitration Act, and as the U.S. Supreme Court directly ordered in ***Concepcion***.

The straightforward and common-sense application of the law and binding common law precedent, coupled with the undeniable fact that neither party anticipated that the NAF would be unavailable, leads only to the conclusion that a substitute must be appointed. What if the named arbitrator had been an individual instead of an entity? It is more obvious, for example, if a named individual died that a substitute should be appointed. However, there is no real difference if a legal entity becomes unexpectedly unavailable as well.

This Court should follow the citation made by the Circuit Court in the appealed Order – "The terms of a contract are read as a whole to determine the intention of the parties and are given their plain, ordinary, and usual meaning." LF at 305, Appendix at A001 (citing to ***State ex rel. Vincent v. Schneider***, 194 S.W.3d 853, 859 (Mo. banc 2006)). Anyone reading the parties' contract **as a whole** to determine the intention of the parties has to first reach the conclusion that the parties intended to arbitrate their disputes. Once that conclusion is reached, the next steps have to be – as compelled by prevailing law – to promote the arbitration of disputes. The Circuit Court failed to keep that thought in mind as it picked portions of the language of the arbitration provision upon which to

hinge its decision. That decision, though, was out of context with the whole of the parties' arbitration agreement.

Respondent's First Additional Argument – A-1 Did Not Waive Any Right to Arbitration.

Respondent argues in her brief that A-1 has waived its right to compel arbitration of the disputes with respondent due to conduct in litigation in the underlying Circuit Court. A-1 briefed this issue in its initial filing with the Circuit Court seeking to compel arbitration. Based upon that same argument made by A-1 at that time, respondent's argument lacks merit and should be disregarded. Also, and importantly, the Circuit Court did not consider or rule upon this issue and, as such, is not appropriate for this appellate review[1].

A party to an arbitration agreement can waive its right to arbitrate disputes in different ways. The Eighth Circuit has held that claims of waiver based on some types of conduct must be decided by courts, while claims of waiver based on other types of conduct must be decided by arbitrators. The Eighth Circuit has explained that courts generally decide whether a party has waived its right to arbitrate by "actively participat[ing] in a lawsuit or tak[ing] other action inconsistent with the right to arbitration." ***N & D Fashions, Inc. v. DHJ Industries, Inc.***, 548 F.2d 722, 728 (8th Cir.1976) (citations omitted). By contrast, arbitrators generally decide claims of waiver

[1] See footnote 5 of the Circuit Court's Order, LF311, and Appendix at A007.

based on arguments that arbitration "would be inequitable to one party because relevant evidence has been lost due to the delay of the other." ***Id***. The Eighth Circuit described this second kind of waiver as "'waiver' . . . in the sense of 'laches' or 'estoppel.'" ***Id***.; ***Lovelace Farms, Inc. v. Marshall***, 442 S.W.3d 202, 206-07 (Mo.Ct.App. 2014).

Both Missouri and federal courts use the same three-factor test to establish waiver of the right to arbitrate. The party seeking to establish waiver bears the burden of demonstrating that the alleged waiving party: "(1) had knowledge of the existing right to arbitrate; (2) acted inconsistently with that existing right; and (3) prejudiced the party opposing arbitration by such inconsistent acts." ***Loveless Farms***, 422 S.W.3d at 206-07 (citing to ***Berhorst v. J.L. Mason of Missouri, Inc***., 764 S.W.2d 659, 662 (Mo. App. ED 1988); ***Stifel, Nicolaus & Co. Inc. v. Freeman***, 924 F.2d 157, 158 (8th Cir. 1991)).

Whether the party opposing arbitration has been prejudiced by acts inconsistent with arbitration is a determination to be made on a case-by-case basis. A finding of prejudice may result from lost evidence, duplication of efforts, use of discovery methods unavailable in arbitration, litigation of substantial issues, and postponing invoking arbitration, thereby causing the opposing party to incur unnecessary delay or expense. ***Loveless Farms***, (citing to ***Reis v. Peabody Coal Co***., 935 S.W.2d 625, 631 (Mo.Ct.App. 1996)). Although delay in requesting arbitration by itself does not constitute prejudice, "delay and the moving party's trial-oriented activity are material factors in assessing prejudice." ***Loveless Farms***, (citing to ***Reis*** (quoting ***Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc***., 817 F.2d 250, 252 (4th Cir.1987)).

Waiver must be evaluated in light of the federal policy which strongly favors

arbitration. ***Loveless Farms*** (citing to ***McCarney v. Nearing, Staats, Prelogar & Jones***, 866 S.W.2d 881, 890 (Mo.Ct.App. 1993)). Thus, in considering the three-factor test, any doubts as to whether waiver has occurred must be resolved in favor of arbitration. ***Loveless Farms*** (citing to ***Stifel, Nicolaus***, 924 F.2d at 158). "[I]n light of the strong federal policy in favor of arbitration, any doubts concerning waiver of arbitrability should be resolved in favor of arbitration." ***Lewallen v. Green Tree Servicing, L.L.C.***, 487 F.3d 1085, 1090 (8th Cir. 2007) (citing to ***Dumont v. Saskatchewan Gov't Ins***., 258 F.3d 880, 886 (8th Cir. 2001) (quoting ***Ritzel Communications, Inc. v. Mid-American Cellular Tel. Co.,*** 989 F.2d 966, 968-69 (8th Cir. 1993)[2]; see also ***Moses H. Cone Mem'l Hosp.***, 460 U.S. at 24-25.

In ***Loveless Farms*** the party proposing arbitration had participated in litigation for four (4) years and had substantially broadened the litigation by filing counterclaims and adding parties. The proponent also filed multiple motions to strike and to dismiss. The other party expended substantial time and expense in that litigation. As such, the Court therein determined that the 4-year delay in demanding arbitration prejudiced the other side by causing unnecessary delay and expense and deprived them of the primary benefit of arbitration. ***Loveless Farms***, 422 S.W.3d at 208.

The case at bar does not nearly approach the situation in ***Loveless Farms***. In this case, A-1 filed a simple collection action – as its agreements with respondent provide – on January 21, 2015. Respondent filed her counterclaim on March 31, 2015, to which A-

[2] The undersigned lead counsel for A-1 was also lead counsel for the prevailing party in the ***Ritzel*** case.

1 responded. Respondent also later filed an amended counterclaim. Both parties have served and responded to very limited, basic written discovery requests. Pending in this matter is respondent's motion seeking class certification. Importantly, the parties have not litigated any substantial issue, nor has any determination been made as to any substantial issue. The basic steps taken by the parties have been neither expensive nor anything that would not occur outside of an arbitration procedure.

This matter is more analogous to the ***Stifel, Nicolaus*** case cited above. In that case, Stifel moved to compel arbitration approximately six months after it had filed a diversity action to recover outstanding debt balances owed by its customer. The parties responded to the pleadings and engaged in written discovery. The District Court granted the motion to compel arbitration, which was upheld by the 8th Circuit Court of Appeals. The Court found that although Stifel knew of its existing right to arbitration and acted inconsistently with it, the other parties were not prejudiced and, thus, Stifel did not waive its right to arbitrate. The Court specifically found that:

> Although Stifel invoked the judicial process and there was some pretrial litigation activity, primarily pleadings and discovery, no issues were litigated and the limited discovery conducted will be usable in arbitration. In our view, the fact that Stifel initiated litigation to recover debit balances and waited three months after Freeman and Weyhmueller filed their amended counterclaim for violations of federal securities laws before moving to compel arbitration did not prejudice Freeman and Weyhmueller.

Stifel, Nicolaus, 924 F.2d at 159.

Likewise, it is quite analogous to certain of the facts in ***Lewallen***. In that case, the arbitration agreement between Lewallen and Green Tree specifically provided that:

> Lender retains an option to use judicial or non-judicial relief to enforce a security agreement relating to the collateral secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation or to foreclose on the collateral. . . . [A lawsuit of this sort] shall not, constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this Agreement, including the filing of a counterclaim in a suit brought by Lender pursuant to this provision.

Thus, Green Tree had the right to collect Lewallen's debt by way of judicial proceedings rather than arbitration. Its filing a proof of claim in her bankruptcy case was not inconsistent with its right to arbitrate. ***Lewallen***, 487 F.3d at 1091.

The case at bar is strikingly similar to both ***Stifel, Nicolaus*** and ***Lewallen*** (however ***Lewallen*** was resolved due to a finding of prejudice based upon actions unlike this case). A-1 filed suit for collection, as the Loan Applications specifically provide. Now that respondent is seeking to broaden that action, including seeking class certification, the arbitration provision in the loan documents is absolutely applicable.

To go through the 3-factor test: (1) A-1 had knowledge of the existing right to arbitrate matters beyond simple collection of amounts due it; (2) A-1 acted consistently with the parties' agreement and not at all inconsistently with the contracted arbitration rights; and (3) respondent is not prejudiced by the Court ordering arbitration of the disputes and a stay of this litigation.

No substantial issue has been litigated and, actually, no issue at all has been litigated![3] A-1 has not substantially "invoked the litigation machinery."[4] Respondent

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[3] ***See Nichelson v. Soeder***, 2006 U.S. Dist. LEXIS 78448 (EDMo) at 10 (citing to ***Doctor's Associates, Inc. v. Distajo***, 107 F.3d 126, 133 (2nd Cir. 1997) ("only prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate.").

[4] A party acts inconsistently with its right to arbitrate if the party "[s]ubstantially invoke[s] the litigation machinery before asserting its arbitration right." ***Ritzel***, 989 F.2d

bears a heavy burden to prove any waiver of the right to arbitrate[5] – a burden she cannot meet.

Respondent's Second Additional Argument – The Arbitration Provision is Not Unconscionable.

Respondent next argues in her brief that the subject arbitration provision is unconscionable alleging that it "lacks a binding, mutual promise to arbitrate and is illusory." As with its first additional argument, respondent's argument lacks merit and should be disregarded. Respondent's arguments fail to apply the facts of this matter and the specific provisions of the subject arbitration agreement to the prevailing law. Also, and importantly, as with the issue of waiver, the Circuit Court did not consider or rule upon this issue and, as such, is not appropriate for this appellate review[6].

To reiterate, the subject arbitration provision is:

> You agree and understand that a claim or demand for recovery of the balance due lender resulting from your default in payment may be asserted by lender in any court of competent jurisdiction. However, you agree that any claim or dispute including class action suits, other than that resulting from your default in payment, between you and the lender or against any agent, employee, successor, or assign of the other, whether related to this agreement or otherwise, and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court of competent jurisdiction. Information may be obtained and claims may be filed at any office of the National Arbitration Forum or at P.O. Box 50191, Minneapolis, MN 55405. This agreement shall be interpreted under the Federal Arbitration Act.

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at 969 (quoting ***E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex***., 559 F.2d 268, 269 (5th Cir. 1977)). A party substantially invokes the litigation machinery when, for example, it files a lawsuit on arbitrable claims, engages in extensive discovery, or fails to move to compel arbitration and stay litigation in a timely manner. ***Stifel, Nicolaus***, 924 F.2d at 158.

[5] ***Newsom v. Anheuser-Busch Cos***, 286 F.Supp.2d 1063, 1067 (EDMo 2003) (citing to ***Microstrategy., Inc. v. Lauricia***, 268 F.3d 244, 250 (4th Cir. 2001)).

[6] See footnote 5 of the Circuit Court's Order, LF311, and Appendix at A007.

A huge, and dispositive, difference between this provision and the provisions which were found to be unconscionable in cases cited by respondent is that the sole matter carved out from arbitration – "the recovery of the balance due lender resulting from your default in payment" -- does not preclude any of respondent's defenses to that claim in litigation directed only to that purpose. For example, in ***Eaton v. CMH Homes, Inc.***, 461 S.W.3d 426 (Mo. 2015) which was cited by respondent, the arbitration agreement at issue contained an anti-waiver provision that prohibited the consumer from bringing affirmative defenses and counterclaims related to the litigated claim was held to be unconscionable.

Here, that is not the case. The plain language of the subject arbitration agreement is that "any claim or dispute…**other than that resulting from your default in payment**…" was subject to arbitration. (emphasis added). As such, respondent is not precluded from any affirmative defense or counterclaim which is related to her default. She is, however, precluded from litigating any other claim or dispute relating to the loan transaction. So, if one were to specifically look at the Answer (which contained a counterclaim as well) (LF at 14) and the First Amended Counterclaim (LF at 21) that respondent filed with the Circuit Court, it is easy to determine what is appropriate to be litigated, and what is subject to arbitration.

Respondent's Answer, which A-1 concedes is appropriate to be litigated, denied allegations and had a single affirmative defense – that the petition failed to state a cause of action. Respondent's counterclaim attached to her Answer, though, goes far past the

issue of her default and alleges claims for violations of the Merchandising Practices Act. The plain language of the arbitration agreement only allows litigation of a claim or dispute which results from respondent's default in payment. A-1 does not, and never has, conceded that respondent's claim regarding the contractual rate of interest" was appropriate to be litigated – in this regard, respondent's brief makes a material misstatement of fact.

Respondent's First Amended Counterclaim must be arbitrated, and her attempt to litigate it is in direct violation of the parties' arbitration agreement. First, respondent is here looking to file a class action against A-1. This clearly violates the arbitration agreement of the parties. Secondly, the claims being made are far astray of the issue of respondent's default in the payment of her debt, falling within the parties' definition of claims only to be arbitrated.

The case at bar is more factually similar to ***Credit Acceptance Corp. v. Niemeier***, 2015 U.S. Dist. LEXIS 89692, 2015 WL 4207122. In that case, the court found that the arbitration agreement, which provided for the arbitration of all disputes except for ones specifically excluded, was valid and did not fail for lack of mutuality. No party had the unilateral right to divest itself of its promise to arbitrate what the arbitration agreement defined as arbitrable disputes. Exactly the same as here.

In this case, A-1 and respondent have the exact same rights as it pertains to what disputes are to be litigated and what disputes are to be arbitrated. It does not have any unilateral right to pick and choose what is litigated or what is arbitrated. There is a mutual promise to arbitrate defined claims and disputes. The mutual promise is binding

and not illusory in any way. Thus, the arbitration agreement is not invalid as unconscionable. ***See, Baker***, 450 S.W.3d at 776.

Respondent's Third Additional Argument – Respondent's Request of the Appellate Court to Allow Discovery is Misplaced and Should be Stricken.

Respondent finally argues in her brief that she should be allowed to conduct discovery to try to create a basis for arguing unconscionability of the subject arbitration clause. This request is not appropriate for this Court to consider – it has no direct relationship to the issues on appeal, rather it is a tangential matter for a Circuit Court to deal with solely in the event that this Court reverses the Circuit Court and sends this case back for further proceedings. As such, it should be stricken and given no time or consideration by this Court.

Respondent had brought this request up to the Circuit Court by way of her motion for the Circuit Court to enter a scheduling order not only providing for discovery, but also to designate experts – all prior to hearing A-1's then-pending motion to compel arbitration. In support of this proposition, respondent cited the Court to ***Brewer v. Missouri Title Loans***, 364 S.W.3d 486 (Mo.2012). Respondent purports that the ***Brewer*** decision mandates discovery which an opponent to a motion to compel arbitration is "entitled to receive." Many readings of that decision fail to illuminate any such proposition of law or procedure. However, no matter many times one reads that decision, it does not impart any right or entitlement to discovery on this issue. Further, the

gravamen of this case was in dealing with a way for the Missouri Supreme Court to find a way around the United States Supreme Court's holding in ***Concepcion*** regarding the validity of class action waivers.

The Court should also briefly consider the discovery which respondent intends to propound. Being mindful that the agreements between A-1 and respondent were entered into in 2006, the Court will see that practically none of the requests relate to that agreement or any actions involving that time frame at all. Instead, it focuses on actions and agreements which may have been entered into during 2009-2015 – which would have no temporal relevance to any determination as to the validity of the arbitration agreement in question whatsoever!

Conclusion

The Circuit Court erred in denying A-1's Motion to Compel Arbitration and for Stay of Litigation. The Court of Appeals righted that wrong in its holding. The unavailability of the NAF did nothing more than trigger the application of § 5 of the FAA (and § 435.360, RSMo). The Circuit Court should have thereupon appointed a substitute arbitrator for the parties, and the parties should have thereupon been compelled to participate in arbitration of their disputes.

A-1 respectfully prays that this Honorable Court follow the holding made by the Court of Appeals and reverse the Order of the Circuit Court and remand this case with directions to the Circuit Court to grant A-1's Motion to Compel Arbitration and for Stay of Litigation and appoint a substitute arbitrator pursuant to the provisions of 9 USCS §5,

and order the parties to participate in binding arbitration as agreed by the parties. In doing so, this Court should contemporaneously find against respondent on each of the additional points and her extraneous request made in her brief filed herein.

THE MURPHY LAW FIRM

By_____

MARK D. MURPHY, MO #33698
mmurphy@mlf-llc.com
14221 Metcalf Avenue, Suite 130
Overland Park, Kansas 66223-3301
(913) 647-8090
Fax (913) 667-2435

Attorney for Appellant A-1 Premium Acceptance, Inc., d/b/a King of Kash

Certificate of Compliance with Rule 84.06

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule 84.06, that the brief contains 4,482 words.

THE MURPHY LAW FIRM

By_____

MARK D. MURPHY, MO #33698
mmurphy@mlf-llc.com
14221 Metcalf Avenue, Suite 130
Overland Park, Kansas 66223-3301
(913) 647-8090
Fax (913) 667-2435

Attorney for Appellant A-1 Premium Acceptance, Inc., d/b/a King of Kash

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March 2018, a copy of the foregoing was electronically filed with the Clerk of the Court through the eFiling system, and that a copy was also emailed through the eFiling system to Dale K. Irwin, Esq., The Irwin Law Firm, P.O. Box 140277, Kansas City, Missouri 64114; and David Angle, Esq., Angle Wilson Law LLC, 920 East Broadway, 2nd Floor, Columbia, Missouri 65, 205, attorneys for respondent.

THE MURPHY LAW FIRM

By_____

MARK D. MURPHY, MO #33698
mmurphy@mlf-llc.com
14221 Metcalf Avenue, Suite 130
Overland Park, Kansas 66223-3301
(913) 647-8090
Fax (913) 667-2435

Attorney for Appellant A-1 Premium Acceptance, Inc., d/b/a King of Kash