No. SC99270

In the Supreme Court of Missouri

Bridgecrest Acceptance Corp.,
Appellant,

v.

Christopher Jones,
Respondent,

Appeal from the Associate Circuit Court of St. Louis County,
No. 20SL-AC05738
The Honorable Mondonna L. Ghasedi, Associate Circuit Judge

Brief of *Amici Curiae* the Missouri Association of Trial Attorneys and American Association for Justice in Support of Respondent

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INTEREST OF MISSOURI ASSOCIATION OF TRIAL ATTORNEYS

The issues presented by this case are of importance and interest to others besides the immediate parties, including the Missouri Association of Trial Attorneys ("MATA"). With the consent of the parties, MATA and the American Association for Justice have filed this brief of amici curiae with the Court.

MATA is a non-profit, professional organization consisting of approximately 1,400 trial attorneys in Missouri, most of whom represent the citizens of Missouri. For over 50 years, MATA lawyers have vigilantly protected their clients and Missouri citizens from injustice. In doing so, MATA strives to promote the administration of justice, to preserve the adversary system, and to apply its knowledge and experience in the field of law to advance the interests and protect the rights of individuals. MATA's members as well as attorneys across the state of Missouri will be directly affected by the Court's decision in this case.

Because of its substantial collective experience litigating cases, including cases involving arbitration agreements, MATA supports Respondent's position that the associate circuit court's order denying Bridgecrest Acceptance Corporation's ("Bridgecrest") motion to stay proceedings and compel arbitration must be affirmed.

INTEREST OF AMERICAN ASSOCIATION FOR JUSTICE

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Missouri. Throughout its 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

JURISDICTIONAL STATEMENT

MATA and AAJ hereby adopt and incorporate the Jurisdictional Statement of Respondent.

STATEMENT OF FACTS

MATA and AAJ hereby adopt and incorporate the Statement of Facts of Respondent.

INTRODUCTION

Amici for Bridgecrest resoundingly urge the Court to reverse the associate circuit court's order denying the trial-court motion to stay proceedings and compel arbitration. But tellingly, amici for Bridgecrest entirely rely on the policies in favor of arbitration to the exclusion of the context within which the motion was denied. *See* Amici Curiae Brief of the Chamber of Commerce et al., *Bridgecrest Acceptance Corp. v. Jones*, No. SC99270, at 6 (Mo. Dec. 3, 2021) ("Chamber Br."); Amicus Brief of Missouri Bankers Association et al., *Bridgecrest*, No. SC99270, at 3 (Mo. Dec. 3, 2021). But judicial adjudications of arbitration agreements, just like every other decision Missouri trial courts are called upon to render, are not made on policy without regard to the facts of the particular case—any policy considerations of the Federal Arbitration Act ("FAA") notwithstanding—for even strong legislative policies do not usurp the court's power to make the antecedent inquiries before sending a case to arbitration. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021) ("no amount of policy-talk can overcome a plain statutory command"); *Northport Health Servs. of Ark., LLC v. U.S. Dep't of Health & Hum. Servs.*, 14 F.4th 856, 868 (8th Cir. 2021) ("[C]ourts do not apply federal policies; they apply federal statutes.") (citation omitted).

The Supreme Court of the United States has made plain any policy favoring arbitration requires only that arbitration contracts be "place[d] . . . upon the *same* footing as other contracts." *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S.

287, 302 (2010) (citation omitted) (emphasis added). And it rejected the notion that any policy in favor of arbitration could override the text of the FAA in *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). The text of the FAA makes one thing abundantly clear: the same rules must be applied to arbitration contracts as to other contracts. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 (2009) (explaining that the FAA does not "purport[] to alter" the "background principles of state contract law," but rather ensures arbitration contracts are just as subject to that law as any other contract). The purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967).

The 8-0 decision in *New Prime* confirmed this principle, holding that a court must first engage in "the necessarily antecedent statutory inquiry" of whether the FAA covers the agreement before deciding whether to send a case to arbitration—and is not "free to pave over" the text of the FAA itself. *New Prime*, 139 S. Ct. at 537–38, 543. This Court's subsequent decision in *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 440 (Mo. banc 2020), further clarified a court must also determine whether there was an agreement between the parties to arbitrate. When these two cases are synthesized with this Court's background in arbitration jurisprudence and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010), wherein the Court held parties may delegate to an arbitrator exclusive authority to resolve an agreement's validity and enforceability, a Missouri court must make up to four adjudications

before finding a movant has met its burden and before granting a motion to compel arbitration that invokes the FAA:[1]

(1) assuming there is a valid and enforceable agreement between the parties to arbitrate, does that agreement fall within the ambit of the FAA, *New Prime*, 139 S. Ct. at 537;

(2) if yes, whether there is in fact an agreement between the parties to arbitrate, *Theroff*, 591 S.W.3d at 440;

(3) if yes, whether the question of contractual validity or enforceability has been clearly and unmistakably delegated to the exclusive authority of an arbitrator, *see Rent-A-Center*, 561 U.S. at 68–69; and

(4) if no, whether the agreement to arbitrate is valid and enforceable under state contract law principles, *see State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 807 (Mo. banc 2015).

See also Granite Rock, 561 U.S. at 300 (Arbitration should be compelled "only after the Court was persuaded that the parties' arbitration agreement was validly formed and that it covered the dispute in question and was legally enforceable.").

[1] Despite the implication from Bridgecrest and its amici, no policy favoring arbitration creates a presumption of arbitrability. *See EM Med., LLC v. Stimwave LLC*, 626 S.W.3d 899, 907 (Mo. App. 2021) ("The party seeking to compel arbitration has the burden of proving the existence of a valid and enforceable arbitration agreement.") (citation omitted). Rather, the party seeking to compel arbitration has the burdens of production, proof, and persuasion to send the case to arbitration. *See id.*; *see also Krispy Kreme Doughnut Corp. v. Dir. of Revenue,* 488 S.W.3d 62, 67 (Mo. banc 2016) ("the burden of proof means [the movant] ha[s] both the burden of production and burden of persuasion").

Because the trial court must make these adjudications before sending a case to arbitration and may hear evidence to assist it in doing so, *see Theroff*, 591 S.W.3d at 435, the standard of review for the reviewing court in Missouri must be that of a court tried case. *See Eaton v. CMH Homes Inc.*, 461 S.W.3d 426, 431 (Mo. banc 2015) (providing standard of review of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

When construing any arbitration agreement, a Missouri court will give neutral application to state law contract defenses. *See Lopez v. H & R Block, Inc.*, 491 S.W.3d 221, 222 (Mo. App. 2016). Analyzing this case from an arbitration-neutral viewpoint leads to the conclusion that generally applicable principles of Missouri contract law demonstrate Bridgecrest failed to prove the existence of a valid and enforceable arbitration agreement, as Respondent has capably demonstrated in his own brief.

Last, though policy matters have little relevance to this case, to the extent the Court will consult statistics from Bridgecrest's amici (even though such statistics are not in the record below and should not be considered), amici for Respondent have procured data demonstrating the flaws in Bridgecrest's amici's presentation. More so, the disparity in the two sets of statistics reveals the danger of considering scientific evidence not vetted by the adversarial system and a trial court.

The associate circuit court's order must be affirmed.

ARGUMENT

As with any case involving arbitration, this case presents the Court an opportunity to apply the correct standard of review to the record below and interpret the text of the disputed arbitration agreement. Respectfully, this is the proper order of operations for this, or any case on appeal presenting an arbitration agreement, and these two steps alone provide a resolution here.

I. The Correct Standard of Review is that of *Murphy v. Carron*.

Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute it has not agreed to resolve in that way. *Theroff*, 591. S.W.3d at 437; *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 (Mo. banc 2003). The party seeking to compel arbitration bears the burden to prove a valid and enforceable arbitration agreement exists. *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 737 (Mo. App. 2011). The "overall burden of proof is made up of two separate burdens, the burden of persuasion and the burden of production." *See Annayeva v. SAB of TSD of City of St. Louis*, 597 S.W.3d 196, 200 n.8 (Mo. banc 2020) (workers' compensation case). To meet the burden of production, the party seeking to compel arbitration must introduce "competent and substantial evidence on the whole record sufficient to support a finding," *see id.*, that an arbitration agreement exists, was validly formed, and legally enforceable, *Theroff*, 591 S.W.3d at 440; *Hewitt*, 461 S.W.3d at 807. The burden of persuasion requires the party seeking to compel arbitration "to convince the fact-finder to view the facts in a way that favors [it]." *See*

Annayeva, 597 S.W.3d at 200 n.8 (citation omitted); *see also White v. Dir. of Revenue*, 321 S.W.3d 298, 304 (Mo. banc 2010) (discussing the burdens of production and persuasion); *Cooper-Dorsey v. Time Warner Cable*, 591 S.W.3d 500, 510 (Mo. App. 2019) (applying *White* to motions to compel arbitration).

Before enforcing an arbitration agreement under the FAA, a court must adjudicate whether there is in fact an agreement between the parties (*i.e.*, step (2) above). *Theroff*, 591 S.W.3d at 440. This happens in various ways, as described in *Theroff*. Sometimes the existence of the agreement will be uncontested. But other times, the existence of the agreement (for one reason or another) will be disputed as a matter of fact. *Theroff*, 591 S.W.3d at 436 & n.3. Where that is the case, the Missouri Uniform Arbitration Act empowers courts to proceed summarily to determine whether an arbitration agreement exists between the parties and may hold an evidentiary hearing. *Id.* at 436 & n.3 (citing Mo. Rev. Stat. § 435.355.1).

Then upon appellate review, the reviewing court applies the standard of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976): the judgment of the trial court will be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." This has long been the standard of review for trial court determinations regarding arbitration agreements. *See Eaton*, 461 S.W.3d at 431; *see also Kunzie v. Jack-In-The-Box, Inc.*, 330 S.W.3d 476, 480 (Mo. App. 2010) (collecting

authorities). And in a recent case, upon which the Court denied transfer, Judge Martin fully articulated the standard for the court of appeals:

> We review the trial court's denial of a motion to compel arbitration *de novo.* However, issues relating to the existence of an arbitration agreement are factual and require our deference to the trial court's findings. Where the trial court does not make factual findings, all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached.
>
> Thus, our review of the trial court's determination as to the existence of an agreement itself is analogous to that in a court-tried case. We will affirm the trial court's order unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. [T]he party asserting the existence of a valid and enforceable contract to arbitrate[] bears the burden of proving that proposition.

Trunnel v. Mo. Higher Educ. Loan Auth., 635 S.W.3d 193, 197–98 (Mo. App. 2021) (citations and internal quotation marks omitted). Of course, pure matters of law are given *de novo* review. *Soars v. Easter Seals Midwest¸* 563 S.W.3d 111, 113 (Mo. banc 2018). But it would be incorrect to characterize the standard of review as simply *de novo*. *See Theroff*, 591 S.W.3d at 436 n.5. Indeed, when a Missouri trial court issues an order, without specifically enunciating the findings of fact leading to a conclusion, it is often said that order must be upheld upon appellate review for any reason supported by the record. *See, e.g., Ferguson v. Strutton*, 302 S.W.3d 239, 243 (Mo. App. 2009); *Lopez*, 491 S.W.3d at 225 (reviewing court will affirm the trial court judgment

if it is "cognizable under any theory, regardless of whether the reasons advanced by the trial court are wrong or not sufficient.") (citation omitted).

Here, the associate circuit court reviewed the record and held a hearing about the arbitration agreement. *See* Order, *Bridgecrest Acceptance Corp. v. Jones*, No. 20SL-AC05738 (Nov. 19, 2020). Respondent recounted the facts that occurred before Bridgecrest moved to compel arbitration and attached materials to his opposition. *See Bridgecrest*, Response to Oppose Plaintiff/counterclaim-Defendant's Motion to Dismiss, No. 20SL-AC05738, at 2 & exs. 1–6 (Cir. Ct. St. Louis Cnty. Sept. 17, 2020). Though Respondent did not present live testimony, the standard of review is that of a court-tried case if: (1) the trial court is provided with adequate materials and evidence with which to resolve any factual disputes; and (2) there is no allegation the parties were limited in their submission of the evidence by the trial court or that the trial court failed to consider any evidence presented by the parties. *EM Med.*, 626 S.W.3d at 906. There are no such allegations in the record here. *See* Order, *Bridgecrest*, No. 20SL-AC05738 (Nov. 19, 2020). Accordingly, the trial court was not making a pure legal determination based on the four corners of the contract. Thus, the Court should apply the *Murphy v. Carron* standard of review rather than the roving de novo review Bridgecrest urges. *See* Br. of Appellant at 19. The correct standard under *Murphy v. Carron*, is highly deferential to the trial court, and this Court must affirm unless one of the four exceptions applies. *See Murphy*, 536 S.W.2d at 32.

Finally, for this or any other case, the court of appeals' opinion carries no precedential effect once this Court grants transfer. *Jackson v. Barton*, 548 S.W.3d 263, 267 n.3 (Mo. banc 2018) ("Once this Court accepts transfer, the case is treated 'the same as an original appeal,' Rule 83.09, and the court of appeals opinion is of no precedential effect." (second quotation omitted)). The court of appeal's opinion is wholly vacated upon transfer to this Court. *See Newell Rubbermaid, Inc. v. Efficient Sols., Inc.*, 252 S.W.3d 164, 173 n.4 (Mo. App. 2007). Accordingly, Bridgecrest's amici indictment of the court of appeals ruling and analysis in their briefing is simply inapposite. Chamber Br. at 4, 5, 15. When the Court transfers a case pursuant to MO. CONST. art. V, § 10, the court of appeals decision is simply not what this Court reviews. Rather, this Court review is limited to the record before the trial court and the trial court's ruling thereon. Bridgecrest's amici's arguments regarding the court of appeals' opinion are simply misplaced, inappropriate, and should not be considered under Missouri's constitutional approach to appellate proceedings.

II. The Arbitration Agreement is Unenforceable Under State Contract Principles

Because arbitration is a matter of contract, the text of the agreement itself holds primary importance for the reviewing court. Again, this contrasts with the arguments put forth by amici for Bridgecrest, which rely primarily on pro-arbitration policies. No doubt these policies are evident; however, they are not applied without determining whether an agreement between the parties exists in fact (addressed above) and evaluating whether the agreement itself either delegates the question of

contractual validity and enforceability to an arbitrator (*i.e.*, step (3) above) or is valid and legally enforceable as a matter of state contract law (*i.e.*, step (4) above). To determine otherwise would be to risk the Court relinquishing its adjudicatory power when presented with a certain set of facts. *See* Anthony J. Meyer, *The Federal Arbitration Act, Rules of Decision, and Congress' Exercise of Judicial Power*, 106 MINN. L. REV. HEADNOTES 145, 163 (2021) (explaining that when a court makes a ruling after reviewing the facts the award of a remedy, like arbitration, "is inherently an exercise of judicial power").

Here, in spite of the fact that this arbitration agreement was signed almost seven years after the decision in *Rent-A-Center,* 561 U.S. 63 (2010), the agreement leaves to a court—not an arbitrator—full authority to determine the validity and enforceability of the agreement (*i.e.*, step (4) above). The Court must effectuate that intent.

Before undertaking any analysis of the agreement's validity or enforceability, however, amici for Respondent urge the Court to look to the economic realities of the transaction. Missouri courts are well-equipped to look beyond labels, language, and form to discover the "economic realities" involved in a transaction. *See, e.g.*, *Kan. City Chiefs Football Club, Inc. v. Dir. of Rev.*, 602 S.W.3d 812, 822 n.16 (Mo. banc 2020); *State v. Kramer*, 804 S.W.2d 845, 846–47 (Mo. App. 1991). Here, amici for Respondent urge the Court to look at the transaction at issue to find that the exercise of self-help remedies is integral to Bridgecrest's business model. Indeed, each transaction like

this one is intended to work in one of two ways: either (1) Bridgecrest sells a car to a buyer with a poor credit history for nearly double its value by the time the transaction is completed (here, a car with a cash price of $15,527.28 for a total sale price of $34,509.89), App. of Appellant A12–A13, or (2) before the transaction is completed, Bridgecrest repossesses the car from a buyer, sells it, then moves to collect a deficiency judgment against the buyer or engage in other debt collection practices, *see* App. of Appellant A13–A14.[2] Indeed, Bridgecrest reserves to itself the right to find a buyer in default where, "Any … event occurs that causes [it] to believe [its] prospects for payment or realization upon the Vehicle are impaired." App. of Appellant A14. Where this is the case, Appellant should not be allowed to avoid liability accruing from its business model. *Cf.* Consent Order, *In the Matter of DriveTime Auto. Grp., Inc.*, No. 2014-CFPB-0017, at 4 (Nov. 19, 2014), files.consumerfinance .gov/f/201411_cfpb_consent-order_drivetime.pdf (consent order relating to abusive debt collection and credit information furnishing practices); Nathan Vardi, *How an Ex-Con Became a Billionaire from Used Cars*, FORBES (Dec. 18, 2017), www .forbes .com/sites/nathanvardi/2017/12/18/how-an-ex-con-became-a-billionaire-from-used-cars/?sh=34b134f46d3f (reporting same).

[2] DriveTime even disclosed to the SEC that the sale and financing of vehicles in the subprime market is its "primary focus." *See* FORM S-4, SEC (May 31, 2013), available at www .sec .gov/Archives/edgar/data/1012704/000119312513243011/d529167ds4.htm.

Here, Bridgecrest could have drafted and imposed a different agreement had it wanted to. But Appellant instead drafted a boilerplate agreement that would allow it to operate fluidly in different jurisdictions while maximizing opportunities for repossession and sale of repossessed vehicles. This arbitration agreement is noteworthy for at least two reasons, both of which involve Bridgecrest's illusory promises.

A promise not binding is illusory. *See Baker v. Bristol Care Inc.*, 450 S.W.3d 770, 776 (Mo. banc 2014). Illusory promises are found where a party retains the unilateral right to amend the agreement and avoid its obligations. *See id.*; *see also* Promise, BLACK'S LAW DICTIONARY (11h ed. 2019) (an illusory promise "makes performance optional with the promisor"). Illusory promises are not enforceable. *See id.* The arbitration agreement's anti-waiver provision and its self-help exclusion are unenforceable illusory promises.

First, the anti-waiver provision of the arbitration agreement is illusory because it purportedly permits Bridgecrest to litigate (or require Respondent to pay an arbitrator's administration fee and force arbitration of) its claim for a deficiency judgment, while permitting Bridgecrest to force Respondent to arbitrate his counterclaims. Thus, the anti-waiver provision only binds Bridgecrest in reality. An integral part of Bridgecrest's business model is the repossession and sale of collateral following default in sub-prime transactions. *Cf.* App. of Appellant A12–A20. Bridgecrest wants to reserve to itself the powers to: unilaterally declare a buyer is in

default; repossess and sell the vehicle; file a lawsuit seeking a deficiency judgment; but force arbitration if the buyer has the temerity to fight back. Accordingly, the purported anti-waiver provision is unenforceable because Bridgecrest never made a promise that obligated itself to arbitrate a dispute it might have with a buyer. *See Baker*, 450 S.W.3d at 776. The Court should find Bridgecrest no longer had the contractual right to compel or waived its right to compel arbitration in a claim arising out of this transaction by suing for a deficiency judgment. *See Lobel Fin. Inc. v. Bothel*, 570 S.W.3d 87, 93 (Mo. App. 2018) (holding arbitrator did not exceed her authority in finding a car dealer creditor who did not initially elect to arbitrate its claim for deficiency judgment against a consumer had waived its contractual right to compel arbitration).

Second and relatedly, the arbitration agreement's allowance of self-help remedies for Bridgecrest makes the promise to arbitrate all other disputes illusory. While Bridgecrest might have theoretically possessed claims under the contract or the vehicle that might not have involved self-help, the promise to arbitrate those disputes rather than exercise the self-help remedies is the equivalent of Bridgecrest's promise not to fly to the moon. An integral part of Appellant's business model is the repossession and sale of collateral following default in sub-prime transactions. *Cf.* App. of Appellant A12–A20. Appellant's purported mutual promise to arbitrate disputes is illusory and should be given no effect. If Appellant may litigate its deficiency judgment claim, Respondent may litigate his counterclaims.

Last, whether an unenforceable provision of a contract may be severed—or whether the entire contract is unenforceable as a result—depends on the circumstances. *Eaton*, 461 S.W.3d at 436. If the clause to be severed is a necessary part of the agreement, the court will not give effect to a severability clause contained elsewhere in the agreement. *See id.* Here, Bridgecrest's illusory promises that allowed it to retain self-help remedies were necessary to the agreement. Indeed, they are integral to Bridgecrest's business model. *Cf.* App. of Appellant A12–A20. Accordingly, the Court should find the anti-waiver provision and the allowance of self-help remedies unable to be severed from the arbitration agreement and give the agreement as a whole no effect.[3]

All in all, Respondent himself has capably demonstrated the invalidity and unenforceability of the arbitration agreement under Missouri contract law. Amici for Respondent have offered these additional reasons not to enforce Bridgcrest's arbitration agreement. Importantly, the trial court did not explain her denial of the motion to compel arbitration. And, as established, the court of appeal's analysis is not under review. *Jackson*, 548 S.W.3d at 267 n.3. Where this is the case, this Court must affirm on any reason supported by the record. *See Murphy*, 536 S.W.2d at 32;

[3] Although the anti-waiver clause in *Eaton* was severed following a finding of unconscionability, *Eaton* is distinguishable because the illusory promises here are part and parcel of Bridgecrest's business model and, further, because the lender in *Eaton* had neither exercised self-help nor initiated a lawsuit. *See Eaton*, 461 S.W.3d at 436.

Ferguson, 302 S.W.3d at 243. The trial court's order must be affirmed because the court did not err in applying Missouri contract law.

III. Forced Arbitration Is Not a Fair, Fast, Inexpensive Alternative to Litigation, But Rather Has Become a Means for Corporate Wrongdoers to Evade Accountability.

Finally, amici for Respondent urge the Court to look past the statistics offered by Bridgecrest's amici because those statistics are not included in the record below, nor have they been subjected to the adversarial process. However, to the extent the Court will consider statistical evidence, amici for Respondent offer countervailing data, revealing the harms done to consumers by mandatory, pre-dispute arbitration agreements.

A. Congress Did Not Intend Enforcement of One-Sided, Take-It-Or-Leave-It Arbitration Provisions in Consumer Contracts.

Bridgecrest's amici argue this Court should reverse the decision below because arbitration is "a faster, cheaper alternative to litigation that is fair and beneficial to businesses and individuals." Chamber Br. at 6. It is not.

Congress enacted the FAA nearly 100 years ago to enforce truly voluntary commercial agreements between merchants of roughly equal bargaining power—companies and individuals—negotiating at arm's length regarding matters within their special knowledge. Congress did not contemplate or intend enforcement of form contracts drafted by one party to its own lop-sided advantage and presented to consumers or employees on a take-it-or-leave-it basis. Jean R. Sternlight, *Panacea or*

Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L.Q. 637, 647 (1996); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 111-12 (2006).

On paper and in theory, consumers with modest claims could also benefit from streamlined dispute resolution. In practice, however, arbitration has become a weapon to deter consumers from pursuing such claims entirely. *See* Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371, 392 (2016) (despite the "widely held perception that arbitration—done right—could provide cost effective, speedy dispute resolution to consumers and employees with small value claims," the goal of many who advocated extension of arbitration in the 1980s, was the suppression of such claims).

B. Forced Arbitration Does Not Benefit Consumers.

Bridgecrest's business amici attempt to portray anti-consumer forced arbitration as actually beneficial because "consumers are more likely to win and to receive higher awards in arbitration than in court, as well as resolve disputes faster." Chamber Br. at 8. It seems unlikely that the business community, including some of the largest corporations with the most expensive legal talent in America, insist on arbitration so that they will lose more often and lose more money than in court. The fact that such provisions are generally buried in the fine print of consumer contracts of adhesion suggests they are not consumer-friendly. *See, e.g.*, *Kauders v. Uber*

Technologies., Inc., 159 N.E.3d 1033, 1051 (Mass. 2021) (unreasonably hidden arbitration provision in online rideshare agreement).

And in fact, they are not.

1. Consumers are not more likely to win in arbitration than in court.

The Chamber relies primarily on a study of data made public by AAA and JAMS, the two largest consumer arbitration providers. *See* Nam. D. Pham & Mary Donovan, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration*, ndp analytics (Nov. 2020) ("ndp Assessment"). *See* Chamber Br. at 8. The study appears to have been commissioned and paid for by the U.S. Chamber's own Institute for Legal Reform. ndp Assessment at 3 n.1.

Amicus AAJ has closely examined the same AAA and JAMS data sets and has found significant reliability concerns. *See* American Association for Justice, *The Truth About Forced Arbitration* (Sept. 2019) [hereinafter "*The Truth About Forced Arbitration*"], available at www .justice .org/resources/research/the-truth-about-forced-arbitration.

For example, the Chamber states that consumers prevailed "in 44% of all consumer arbitrations that were terminated with awards." Chamber Br. at 8. However, the study itself indicates that during January 2014 to June 2020, 24,629 consumer arbitrations were terminated. Consumers prevailed in 1,821 of them—under 8%. Notably, arbitrations involving financial services were among the least likely to

succeed. *The Truth About Forced Arbitration* at 15 (finding 2.1% success rate in AAA financial services arbitrations and 2.8% in JAMS "credit" arbitrations).

By comparison, the most recent available statistics from state courts, which handle most consumer litigation, show that "[p]laintiffs won in more than half (56%) of all general civil trials." Bureau of Justice Statistics Special Report, *Civil Bench and Jury Trials in State Courts, 2005*, U.S. Dep't of Justice 4 (Oct. 2008), available at www .bjs. gov/content/pub/pdf/cbjtsc05.pdf.

2. Consumers do not generally win larger awards in arbitration.

Bridgecrest's business amici also suggest that consumers on average win larger awards in arbitration than in court. Chamber Br. at 9.

Such comparison is almost meaningless without context. An award of $1,000 on a claim of $10,000 would not qualify as a successful arbitration. The study also did not subtract from the award the consumer's share of the arbitrator's fee and the costs levied by AAA and JAMS. In addition, the study also includes awards to consumers where the defendant corporation was awarded an even larger amount for its counterclaims. In some of those arbitrations, the consumers were also required to pay the defendant's attorney fees far in excess of the amounts the consumers were awarded. *See The Truth About Forced Arbitration* at 17 (describing examples).

3. Arbitration is not faster than the judicial forum.

The business amici point to the study's conclusion that the mean and median number of days required to complete a dispute by arbitration is less than for litigation.

Chamber Br. at 9. However, AAA "deletes data every quarter in a way that significantly distorts arbitration results." *The Truth About Forced Arbitration* at 7. That is, it "deletes cases by filed date instead of closed date," with the result that "claims that take a long time are automatically scrubbed from its database." *Id*. at 9.

Researchers at Yale Law School were able to supply more than 1,000 case records that had been deleted from AAA's database. At least 389 of those cases took more than a year to close, 90 took more than two years, and 20 took more than three years. *The Truth About Forced Arbitration* at 20 (summarizing results found at Yale Law School Consumer Arbitration Data Archive, Yale Law School (May 23, 2018), available at library.law.yale .edu/news/yale-law-school-consumer-arbitration-data-archive). Similarly, the JAMS 2014 database included 18 cases that took between and five and six years to close. *The Truth About Forced Arbitration* at 21.

The most revealing aspect of the AAA/JAMS is how few consumers are actually able to even attempt arbitration of their claims, much less prevail. Forced arbitration provisions are almost ubiquitous in consumer contracts. It is conservatively estimated that more than 800 million arbitration provisions permeate our everyday lives. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234 (2019). Nearly every consumer who has a credit card or cell phone has "agreed" to forego judicial redress and submit to arbitration. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of*

Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale L. J. 2804, 2813 (2015).

Yet, the two dominant consumer arbitration providers recorded only 24,629 consumer arbitrations from January 2014 to June 2020, less than 3,800 per year. ndp Assessment at 5 & 6. The databases reveal that large companies that impose forced arbitration provisions experience very few consumer arbitrations. For example, Amazon, with 101 million Prime subscribers, faced only 15 forced arbitrations over five years; General Motors sold approximately 40 million vehicles over five years and faced only 5 arbitrations during that time; and Walmart, which serves 275 million customers per week, faced just 2 consumer arbitrations. *The Truth About Forced Arbitration* at 12.

Businesses prefer arbitration because the consumer must pay a share of the costs of private arbitration, the consumer's chances of obtaining an award are exceedingly low, and failure to win may subject the consumer to a crippling financial penalty. Consequently, an arbitration "agreement" effectively shields a business from having to face any consumer claims at all. As one scholar has opined, "Binding, pre-dispute arbitration imposed on the weaker party in an adhesion contract . . . should be recognized for what it truly is: claim-suppressing arbitration." David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239 (2012).

CONCLUSION

The proper standard of review in this case is that of a court-tried case because the trial court held a hearing and was provided with adequate materials and evidence from which to resolve factual disputes. When applying the standard of review provided in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), the Court must affirm the order in this case because the order is supported by substantial evidence, not against the weight of the evidence, and does not erroneously declare or apply the law. Here, in addition to the compelling reasons supplied by Respondent as to why the arbitration agreement is invalid and unenforceable under Missouri contract law, amici for Respondent urge the Court to find Bridgecrest's promises, which allowed it to retain self-help remedies, were illusory. Because those promises were necessary to the arbitration agreement Bridgecrest presented to its customers, the Court should not enforce the arbitration agreement itself.

Finally, though the statistics offered by Bridgecrest's business amici are not a matter of the record, to the extent the Court will consider such statistics, amici for Respondent have offered countervailing data demonstrating the harm done to consumers by mandatory, pre-dispute arbitration agreements.

For all these reasons, the associate circuit court's order must be affirmed.

Dated: January 26, 2022

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that I signed the original version of this brief and that this brief contains all other information required by Rule 55.03. I further certify that this brief complies with the limitations contained in Rule 84.06(b) and contains a total of 5,812 words, excluding those sections specified in Rule 84.06(b).

The undersigned further certifies that a true and correct copy of the foregoing was filed with the Court's EM/ECF system on January 26, 2022. That system will serve copies on all those requesting notice.

By: /s/Anthony J. Meyer