IN THE SUPREME COURT OF MISSOURI

BRIDGECREST ACCEPTANCE CORPORATION,	)	
	)	SC99269
Appellant/Plaintiff	)	
v.	)	
KELLY DONALDSON and ROBERT HAULCY,	)	
Respondents/Defendants.	)	

MOTION FOR LEAVE TO FILE SUGGESTIONS IN SUPPORT OF PLAINTIFF/APPELLANT'S APPLICATION FOR TRANSFER

Pursuant to Rule 84.05(f), the American Financial Services Association ("AFSA") seeks leave to rile suggestions as *amicus curiae* in support of Plaintiff/Appellant's application for transfer. In support of this motion, AFSA offers the following:

1. This case presents an issue of general interest and importance concerning creditors' and consumers' rights as they relate to arbitrating disputes relating to commercial loan agreements.

2. The Court of Appeals for the Eastern District issued an opinion that contradicts well-established federal and state precedent and adds to the existing split among the lower courts as to the enforceability of arbitration provisions in commercial loan agreements.

3. The AFSA and its approximately 400 member institutions have a strong interest in rectifying the Eastern District's opinion and the split within the appeals courts because the incongruity with binding precedent puts the AFSA members' million-plus outstanding Missouri loan agreements on uncertain footing.

4. Counsel for the AFSA has contacted counsel of Defendants/Respondents but was unable to obtain consent to filing suggestions in support of transfer; therefore, the AFSA seeks this Court's leave to file its suggestions supporting the transfer of this case.

Respectfully submitted,

MICKES O'TOOLE, LLC

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The undersigned hereby certifies that on the 24th day of September, 2021, a true and correct copy of the foregoing was served through the Missouri Supreme Court electronic filing system to:

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AMICUS CURIAE AMERICAN FINANCIAL SERVICES ASSOCIATION'S SUGGESTIONS IN SUPPORT OF PLAINTIFF/APPELLANT'S APPLICATION FOR TRANSFER

In the instant case, the Missouri Court of Appeals, Eastern District, has issued an opinion regarding the enforceability of an arbitration provision in a commercial loan agreement that is irreconcilable with odds with this Court's binding legal precedent as stated in *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 429 (Mo. Banc 2015); as well as at odds with decisions of the Western District in *Holm v. Menard, Inc.*, 618 S.W.3d 669, 674 (Mo. App. W.D. 2021), the Southern District in *Keeling v. Preferred Poultry Supply, LLC*, 621 S.W.3d 672, 679-680 (Mo. App. S.D. 2021), a different panel of the Eastern District in *TD Auto Fin., LLC v. Bedrosian*, 609 S.W.3d 763, 769 (Mo. App. E.D. 2020), and numerous other decisions. In doing so, the Court of Appeals added to the unpredictable and inconsistent application of Missouri law surrounding arbitration agreements that has been prevalent in the lower courts for decades. Because the Eastern District's opinion exemplifies the divide among districts in the Court of Appeals and adds to the uncertainty that plagues entities attempting to do business or considering doing business in Missouri,

it is crucial that this Court recognize the existence of its clear-cut rule concerning what constitutes a valid arbitration provision contained within an otherwise valid contract.

INTEREST OF AMICUS CURIAE AMERICAN FINANCIAL SERVICES ASSOCIATION

The American Financial Services Association ("AFSA") is the primary trade association for the consumer credit industry. Its approximately 400 member companies provide customers with various types of credit, including traditional installment loans, direct and indirect vehicle financing, mortgages, payment cards, and retail sales finance. Over the past year alone, AFSA members and other creditors in the state have issued more than 929,000 loans in the state of Missouri and have 1.5 million outstanding loans within the state at any given time. At least 80% of these loans include arbitration provisions; as such, more than a million AFSA-member loans currently outstanding in Missouri involve customers and creditors that are on uncertain grounds when it comes to their rights concerning dispute resolution.

Additionally, through the AFSA Education Foundation ("AFSAEF"), AFSA takes a leading role in educating consumers about personal finance, teaching them responsible money management and helping them understand the credit process. To that end, it is crucial that applicable federal law is applied consistently for AFSA to provide consumers with accurate information about their rights and responsibilities associated with credit agreements.

I. THE EASTERN DISTRICT'S ORDER IGNORES THE MANDATE OF THE FEDERAL ARBITRATION ACT AND U.S. AND MISSOURI RECOGNITION OF ARBITRATION AS A PREFERRED MEANS OF DISPUTE RESOLUTION.

The benefits and preferability of arbitration as a means to settle disputes have repeatedly been recognized by this Court and the U.S. Supreme Court. *See, e.g., Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280 ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more

flexible in regard to scheduling of times and places of hearings and discovery devices ..."); *Vincent v. Schneider*, 194 S.W. 3d 853, 858 (Mo. Banc 2006) (recognizing "Missouri's preference for the arbitrability of disputes"). In other words, the U.S. Supreme Court and the Missouri Supreme Court are guided by the principle that arbitration should be favored over litigation via the courts.

In adopting the Federal Arbitration Act ("FAA"), Congress codified this very principle by ensuring that arbitration agreements did not face stricter scrutiny than contracts of a different nature. 9 U.S.C. § 2 ("A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."); *Kindred Nursing Ctrs. Ltd. v. Clark*, 137 S. Ct. 1421, 1426 (2017) (affirming that courts cannot invalidate an arbitration agreement based on legal rules that apply only to arbitration agreements).[1]

While acknowledging that, under the FAA, the validity of an arbitration agreement is tested through "*ordinary state-law contract principals*," the Eastern District's decision fails to provide any explanation as to how or why it applies extraordinary consideration requirements to arbitration provisions in apparent contravention to the FAA's clear and unambiguous mandate to the contrary. Moreover, the Eastern District's decision fails to mention—much less, recognize and respect—the national and state preference for arbitration and consistent application of law concerning arbitration agreements. The fact that the Eastern District failed to discuss these principles renders its analysis wholly deficient.

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[1] Notably, Missouri—along with a majority of other states—has adopted the Uniform Arbitration Act to essentially mirror the mandates of the FAA and ensure that arbitration remains a preferred format for dispute resolution in the commercial context. R.S.Mo. §435. These statutes not only evince a national and state policy favoring arbitration; they also—perhaps more importantly—ensure consistent enforcement of such agreements so entities (such as members of AFSA) may efficiently operate nationally based on one set of uniform laws and their customers have equal rights no matter where they enter the contract.

II. The Eastern District's Order and Other Similar Decisions Rely Upon Distinctions Without a Difference in Attempting to Distinguish Precedent Established by This Court and the U.S. Supreme Court.

The Eastern District recognized in its order that this Court *en banc* has twice held that courts "will look to a contract . . . as a whole to determine whether consideration is adequate rather than looking solely at the consideration given for the agreement to arbitrate." *See* Order; *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 429 (Mo. Banc 2015); *Vincent*, 194 S.W.3d at 858. However, instead of following this Court's clear precedent, the Eastern District attempts to distinguish *Eaton* and *Vincent* by pointing out that those cases also considered whether the arbitration provisions at issue were unconscionable and, as such, were not binding as to the issue of whether a valid contract was formed. The Court of Appeals' analysis in this regard is flawed in that, while *Eaton* and *Vincent* did consider the issue of unconscionability, they both also considered the lack of mutuality argument when determining whether an arbitration provision is enforceable.

In the instant case, the Eastern District was faced with essentially the exact same lack of mutuality argument, but instead of considering that issue in terms of unconscionability, it claimed that a lack of mutuality prevented a valid arbitration agreement from being formed to begin with. The Eastern District's Order is based on a distinction without a difference. This Court has held that an arbitration provision that may lack mutuality standing alone is nevertheless enforceable, provided there is consideration in the contract as a whole, and that holding should be binding on all lower courts throughout the state of Missouri regardless of the legal theory a court applies.

III. The Eastern District's Order Exemplifies Issues of General Interest and Importance that are Prevalent in Other Appeals Court Decisions.

As Appellant sets forth in its Application for Transfer, the Court of Appeals has issued contradictory rulings concerning the very issues at bar and, as such, the rule of law across the state is unsettled so long as the Court of Appeals does not apply a uniform analysis as to the enforceability of arbitration provisions that are contained within valid

commercial loan agreements. The uncertainty created by these conflicting rulings defeats the purpose of arbitration agreements, which is to provide a faster and generally less expensive avenue for dispute resolution than litigation through the courts provides.

For Missouri businesses to operate efficiently, and for Missouri to be an attractive jurisdiction in which to do business, companies must have consistency and predictability in the laws that govern their operations. Laws governing how thousands of companies like AFSA's members resolve disputes go to the very heart of whether and how they do business in the state. The current lack of certainty surrounding whether an arbitration provision will be enforced threatens countless arbitration agreements—especially in the financial sector, where lenders are left in a state of flux as to whether they may mitigate their losses through self-help, without waiving their other contractual rights arbitrate.

That being said, businesses certainly are not the sole losers in the current inconsistent legal landscape. Consumers—for whom arbitration is meant to spare undue time and expense—are left paying for protracted litigation over whether they are bound by the terms of their credit agreement in the first place. Also, as businesses incur exorbitant costs associated with enforcing rights clearly stated in a mutual loan agreement, consumers share the economic burden as those costs will ultimately be passed down to them.

For the reasons stated in these Suggestions and in Appellant's Application for Transfer, this Court's acceptance of the transfer of this case is critical to efficient and economical operation of Missouri companies, and to the protection of Missouri consumers.

Respectfully submitted,

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