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STATEMENT OF FACTS

Each of the Relators purchased new single family homes from McBride & Son Homes, Inc. (“McBride”) pursuant to written contracts. (Ex. B, p. 9 - 26). The actual contracts between Relators and McBride are on 8 ½ x 14 paper; Relators attached a reduced copy as part of Exhibit B.

McBride’s contracts contain a provision that gives McBride the unilateral right to require any claim by the Relators arising out of the contract or the home to be decided by binding arbitration. (Appendix at A2). Each of the Relators initialed their respective contracts with McBride in the margin adjacent to the arbitration provision acknowledging that they had read, understood and agreed to the terms. (Appendix at A2).

All of the terms of McBride's contracts are negotiable. (Appendix at A5).

By letters dated April 19, 2005, counsel for McBride notified each of the Relators that McBride was requiring resolution of their claims by binding arbitration and provided counsel for Relators with alternative methods for appointment of the arbitrators to hear their claims. (Appendix at A6-A7).

Respondent granted McBride's Motion to Compel Arbitration on September 13, 2005, and specifically determined that the contracts were not contracts of adhesion, that there was an agreement to arbitrate, and that the arbitration provisions were not unconscionable. (Appendix at A1).

ARGUMENT

As Relators' Brief failed to include a statement of the applicable standard of review as required by Rule 84.04(e) of the Missouri Rules of Civil Procedure, Respondent will address this issue. Relators' Brief also failed to properly state its Points Relied On as required by Rule 84.04(d)(3) of the Missouri Rules of Civil Procedure, so Respondent's argument will include more sections, as permitted by Rule 84.04(f) of the Missouri Rules of Civil Procedure.

I. Respondent Correctly Granted McBride's Motion to Compel Arbitration Because McBride's Contracts Are Not Contracts of Adhesion In That The Contracts Were Not Tendered to Relators on a Take-It or Leave It Basis

Relators argue that McBride's contracts are contracts of adhesion, and that the arbitration provisions are therefore not enforceable pursuant to Mo. Rev. Stat. § 435.350 (2000). However, the deposition testimony of McBride's General Counsel, Jeff Berger, established that all of the terms of McBride's contracts are negotiable. (Appendix at A5). Relators failed to submit any evidence to the contrary. As McBride's contracts were not tendered to Relators on a take-it or leave it basis, Respondent correctly found that the contracts were not contracts of adhesion.

Applicable Standard of Review

Because mandamus is only appropriate if there is a showing that a party has a clear, unequivocal, specific and positive right to have a public official perform a ministerial duty imposed by law, the standard of review is an abuse of discretion standard pursuant to which this Court should only reverse the trial court's ruling when it is so

arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. Bergman v. Mills, 988 S.W.2d 84, 88 (Mo. Ct. App. W.D. 1999)(citations and quotations omitted). Furthermore, to determine whether the right to mandamus is clearly established and presently existing, the Court must examine the statute under which the Relator claims the right, and if the statute involves a determination of facts or a combination of facts and law, a discretionary act rather than a ministerial act is involved and a writ may not be issued. Jones v. Carnahan, 965 S.W.2d 209, 213 (Mo. Ct. App. W.D. 1998).

Argument

First, because the question of whether McBride's contracts are contracts of adhesion is a mixed question of fact and law, a writ of mandamus is not proper in this case. See Jones, supra.

Furthermore, as this Court recognized in Robin v. Blue Cross Hospital Service, Inc., 637 S.W.2d 695, 697 (Mo. banc 1982), in order to be a contract of adhesion, the contract must be presented on a take-it or leave it basis. The undisputed evidence before Respondent established that all of the terms of McBride's contracts are negotiable , and there is no evidence that the contracts were presented to Relators on a take-it or leave it basis.

In Robin, another fact cited by this Court to support its finding that the contract was not a contract of adhesion, was that the appellant had the ability to look elsewhere for a health insurance plan. Id. Certainly this Court can take judicial notice of the

significant number of home builders in the St. Louis Metropolitan Area. Relators were free to go elsewhere to buy their homes even if they limited their search to new homes.

In order to overturn Respondent's finding that McBride's contracts are not contracts of adhesion, this Court must declare that all pre-printed contracts (whether or not negotiable) between corporations and individuals are contracts of adhesion. This simply goes too far – and will undoubtedly result in significantly curtailing arbitrations under the Missouri Uniform Arbitration Act; at least for arbitrations involving individuals. For instance, the major source of arbitration in construction cases are the American Institute of Architects pre-printed form contracts which require arbitration of all disputes under the American Arbitration Rules. It can not be seriously questioned that most arbitration clauses in this country are contained in pre-printed contracts. If these contracts are now declared to be contracts of adhesion whenever they are offered by a corporate entity to an individual, then a huge number of arbitration clauses will suddenly become unenforceable in Missouri.

Relators also argue that the "test of whether a contract is one of adhesion is objective, not subjective." Relators' Brief at p. 7. Relators are confused. The "objective reasonable expectations" doctrine is a doctrine that applies when *interpreting* a contract of adhesion; it has nothing to do with the determination of whether the contract is a contract of adhesion. See Rodriguez v. General Accident Ins. Co. of America, 808 S.W.2d 379, 382 (Mo. banc 1991).

Finally, Relators appear to suggest that because McBride's arbitration provision calls for appointment of the arbitrator by the President of the Home Builders Association

of Greater St. Louis; and because McBride's President was, at the time, the President of the HBA; the contracts were contracts of adhesion. Again, Relators' argument misses the mark. Mo. Rev. Stat. § 435.360 (2000) provides that if the method of appointment called for in the agreement fails or for any reason can not be followed, the court on the application of any party shall appoint the arbitrator. (Appendix at A4). This was one of the very options provided by McBride's counsel when demanding Relators to proceed to arbitration. (Appendix at A6- A7).

As McBride's contracts were not presented to Relators on a take-it or leave it basis, and because Relators were free to purchase new homes from other home builders, Respondent correctly found that McBride's contracts are not contracts of adhesion. No writ should issue to Respondent.

II. Respondent Correctly Granted McBride's Motion to Compel Arbitration Because Mo. Rev. Stat. § 435.350 Provides That McBride's Contracts Are Not Contracts of Adhesion In That The Contracts Warrant New Homes Against Defects in Construction

Relators argue that because Relators' claims against McBride include other claims beyond their claims based upon warranties with respect to construction of the homes, Mo. Rev. Stat. § 435.350's savings provision for "contracts which warrant new homes against defects in construction" is not applicable. Section 435.350 does not in any way limit its application to claims for breach of warranty, and Respondent properly found that the arbitration provisions in McBride's contracts were enforceable.

Standard of Review

The same abuse of discretion standard of review applies.

Argument

Mo. Rev. Stat. § 435.350 (2000) provides, in pertinent part, as follows:

Contracts which warrant new homes against defects in construction and reinsurance contracts are not "contracts of insurance or contracts of adhesion" for purposes of the arbitration provisions of this section.

So, by definition, if McBride's contracts warrant new homes against defects in construction, the arbitration provisions contained in the contracts are enforceable even if the contracts were otherwise considered to be contracts of adhesion. Relators argue that since they are asserting claims against McBride that are not limited to warranty claims, this statutory exception should not apply to protect the arbitration provisions contained in McBride's contracts. There is no language in the statute to support such a restrictive reading or interpretation of the statute, and even Relators note that there are no cases interpreting this statute. Therefore, there certainly can be no finding of an abuse of discretion on the part of Respondent.

McBride's contracts clearly do provide warranties against defects in the construction of new homes. (Ex. B at p. 9 – 26). Furthermore, since Relators are asserting claims against McBride for breach of warranty in their Second Amended Petition (Ex. A, p. 3), Relators should be precluded from even suggesting that McBride's contracts are not contracts which warrant new homes against defects in construction.

As McBride's contracts with Relators warrant new homes against defects in construction, Respondent correctly found that the arbitration provisions contained in said contracts are enforceable. Therefore, no writ should issue to Respondent.

III. Respondent Correctly Granted McBride's Motion to Compel Arbitration Because McBride's Contracts Are Not Unconscionable In That There Was Consideration To Support the Contract As A Whole

Relators argue that the arbitration provisions in McBride's contracts are unconscionable because the provisions give McBride the unilateral right to determine if Relators claims must be arbitrated. The only Missouri Appellate Court to have faced this precise issue, and the majority of courts in other jurisdictions that have examined the issue, have held that a unilateral right to require arbitration is not unconscionable.

Standard of Review

The same abuse of discretion standard of review applies.

Argument

The only Missouri Appellate Court to have addressed the precise question of whether a contract giving one party the unilateral right to demand arbitration is unconscionable was the Western District Court of Appeals in Triarch Industries, Inc. v. Crabtree, 204 Mo. App. Lexis 672 (Mo. Ct. App. W.D. 2004). The Western District Court of Appeals held that since there was consideration to support the contract as a whole, there was a "mutuality of obligation" and the arbitration clause was enforceable as written.

While this Court reversed the Western District's holding, it did so on other grounds and did not reach the specific question at issue in this proceeding. Triarch Industries, Inc. v. Crabtree, 158 S.W.3d 772 (Mo. banc 2005).

Given this state of the law in Missouri, Respondent certainly did not abuse her discretion in finding that McBride's contracts were not unconscionable.

The fact that the Missouri legislature has enacted the Uniform Arbitration Act (Mo. Rev. Stat. §§ 435.350 – 435.470 (2000)), demonstrates that the public policy of the State of Missouri supports resolution of disputes outside of the court system. See Malan Realty Investors v. Harris, 953 S.W.2d 624, 626 n. 4 (Mo. banc 1997).

There can be no dispute that a contract providing bilateral rights to demand arbitration is enforceable. And, Missouri courts are duty bound to enforce the contract as written if the terms are unequivocal, plain and clear. Id at 626-627. So what right is offended, or what interest is in need of being protected, when a contract clearly provides for arbitration at the election of only one party?

The obvious answer is simply a sense that each side should have the same rights. However, as the Western District Court of Appeals explained in Triarch Industries:

[M]utuality of obligation . . . only means that one party agrees to do one thing and the other some other thing. It does not mean that the respective undertakings, or obligations, shall be equal to, or commensurate with one another. If it did, then every contract where one party agreed to do less than the other would be called unilateral, merely because one obligation upon one party was not as great as upon the other. Thus, in determining

whether there is mutuality of obligation, we must look at the contract as a whole.

204 Mo. App. Lexis 672, 14-15 (citations and quotations omitted).

If this Court finds that McBride's arbitration clause is unconscionable because it lacks mutuality, then Pandora's Box may well be opened and the courts will be faced with challenges to all unilateral or one-sided contractual rights; such as termination for convenience clauses, limitations of liability clauses, waiver of claims provisions, notice of claim provisions, indemnity clauses, etc.

In its opinion in Triarch Industries, Inc. v. Crabtree, 158 S.W.3d 772, 774 (Mo. banc 2005), this Court recognized that the question of whether an agreement to arbitrate must be mutual is a question of state contract law. The Western District Court's opinion sets forth the current law in the State of Missouri with respect to the doctrine of "mutuality of obligation." For this Court to find that McBride's contracts are unconscionable because they provide only a unilateral right to require arbitration, this Court must create new law – which necessarily means that Respondent did not fail to undertake a clear, unequivocal, ministerial duty.

If this Court is inclined to consider whether or not overturn the current law in this state, the Court should take into account that a "majority of courts adhere to the Restatement of Contract's view that mutuality is satisfied if there is consideration as to the whole agreement, regardless of whether the included arbitration clause itself was one-sided." Robert Hollis et al., Is State Law Looking for Trouble? The Federal Arbitration

Act Flexes its Preemptive Muscle, 2003 J. Disp. Resol. 463, 485 (2003)(citing *Restatement (Second) of Contracts* § 79 (1979); other citations omitted).

Interestingly, the only Missouri court to have cited Section 79 of the *Restatement (Second) of Contracts*, did so with approval. See Historic Hermann, Inc. v. Thuli, 790 S.W.2d 931, 935 (Mo. Ct. App. E.D. 1990).

While, as recognized by this Court in Triarch Industries, there are certainly some courts that have found unilateral arbitration clauses to be unconscionable due to a lack of mutuality, these courts are in the minority, have applied different state laws, and have generally relied upon out-dated theories. As the Second Circuit Court of Appeals explained in Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 451-453 (2d Cir. 1995), the doctrines of "mutuality of obligation" and "mutuality of remedy" are "dead letters" that have been rejected by many commentators and the majority of courts across the land.

Certainly, given the current state of the law on this issue, this is not a situation where Respondent had a clear, unequivocal, ministerial duty imposed by law to declare McBride's arbitration provision unconscionable. Therefore, mandamus is not appropriate in this case.

IV. Respondent Correctly Granted McBride's Motion to Compel Arbitration Because McBride's Contracts Are Not Unconscionable In That The Contracts Do Not Place All Of The Costs Of Arbitration Upon Relators

Relators' final argument is that McBride's contracts are unconscionable because the contracts place the burden of paying all of the costs of arbitration upon Relators. The

contracts clearly do not place the burden of these costs upon Relators, and Respondent properly found that McBride's contracts are not unconscionable.

Standard of Review

The same abuse of discretion standard of review applies.

Argument

Relators simply misread McBride's contracts. The contracts do not require Relators to pay the costs of the arbitration. The clause at issue states: "Purchaser shall be liable to Seller [McBride] for all court, arbitration and attorney's fees and costs incurred by Seller **in enforcing this provision.**" (Appendix at A2)(emphasis added).

This provision does not require Relators to pay the arbitration costs or expenses for the actual arbitration of their claims. Rather, it requires Relators to pay the costs incurred to compel the Relators to honor their obligation to resolve their claims by arbitration if requested to do so by McBride - i.e., the types of costs that McBride incurred in filing and prosecuting the Motion to Compel Arbitration and in these writ proceedings. Note that McBride's counsel specifically warned Relators' counsel that the contracts allowed McBride the right to recover these types of costs, and gave Relators the opportunity to voluntarily comply with McBride's demand. (Appendix at A6-A7).

Respondent's finding that McBride's contracts are not unconscionable is fully supported by a plain reading of the contractual language. There was no abuse of discretion, and there is no basis to issue a writ.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to deny Relators' request for issuance of a Writ of Mandamus directing Respondent to set aside the order of September 13, 2005, sustaining Defendant McBride & Son Homes, Inc.'s Motion to Compel Arbitration of the claims asserted by Relators in St. Charles County Circuit Court Case No. 04CV-130775, entitled Gayle Vincent, et al., Plaintiffs, v. McBride & Son Homes, Inc., Defendant.

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CERTIFICATION

The undersigned counsel hereby certifies, under Rule 84.06(c), that this brief: (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Missouri Supreme Court Rule 84.06(b); (3) contains 4,425 words, and that the computer disks containing an electronic copy (in Microsoft Word format) of the foregoing Brief, filed herewith and served on opposing counsel, have been scanned for viruses and determined to be virus-free.

Steven M. Cockriel

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served by U.S. mail, postage prepaid, upon David C. Knieriem, Esq., Law Offices of David C. Knieriem, 7711 Bonhomme, Suite 850, Clayton, MO 63105, Attorneys for Relators, and Honorable Nancy Schneider, St. Charles County Circuit Court, Division 2, 300 North Second Street, St. Charles, Missouri 63301, on this ____ day of February, 2006.

Steven M. Cockriel

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