

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. TODD HEWITT,)
)
 Relator,)
)
 v.) No. SC93846
)
 HONORABLE KRISTINE KERR,)
 JUDGE, CIRCUIT COURT FOR)
 ST. LOUIS COUNTY,)
)
 Respondent.)

Writ of Mandamus filed against the Honorable Kristine Kerr
Judge of the Circuit Court of St. Louis County

Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. ED100479

SUBSTITUTE REPLY BRIEF OF RELATOR HEWITT

JOHN D. LYNN, # 30064
SEDEY HARPER, P.C.
2711 Clifton Avenue
St. Louis, MO 63139
314/773-3566
314/773-3615 (fax)
jlynn@sedeyharper.com

ATTORNEYS FOR RELATOR HEWITT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION	1
ARGUMENT.....	1
CONCLUSION	23
CERTIFICATES OF COUNSEL.....	23

TABLE OF AUTHORITIES

Abrams v. Four Seasons, 925 S.W.2d 932, 938 (Mo. App. 1996) 5

Aetna Cos., & Sur. Co. v. Grabbert, 590 A.2d 88, 96 (R.I. 1991) 18

Alexander v. Minnesota Vikings Football Club, 649 N.W.2d 464 (Minn. App. 2002) 12

Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358 (6th Cir. 1989)..... 18

Aquila Foreign Qualifications Corp. v. Dir. of Revenue, 362 S.W.3d 1, 4 (Mo. banc 2012) 16

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2010) 10

Black v. NFL Players Ass’n, 87 F.Supp.2d 1 (D.D.C. 2000)..... 12

Brewer v. Missouri Title Loans, 323 S.W.3d 18 (Mo. banc 2010)..... 8

Brewer v. Missouri Title Loans, 364 S.W.3d 486, 489 n.1, 493 (Mo. banc 2012)..... 9

Choice Hotels v. BSR Tropicana, 252 F.3d 707, 709-10 (4th Cir. 2001) 4

Clemmons v. K.C. Chiefs Football Club, 397 S.W.3d 503 (Mo. App. 2013)..... 20

Cole v. Burns Int’l, 105 F.3d 1465 (D.C. Cir. 1996) 21

Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145, 147 (1968) 17

Dialysis Access Center v. RMA Lifeline, 638 F.3d 367, 372 (1st Cir. 2011)..... 4

Fedmet Corp. v. Buyalyk, 194 F.3d 674, 678 (5th Cir. 1999)..... 4

Fox v. Computer World Services, 920 F. Supp. 2d 90, 104 n.7 (D.D.C. 2013)..... 6

Goff v. G2 Secure Staff, 2013 U.S. Dist. LEXIS 59628 at *9 (C.D. Cal. April 22, 2013) 21

Grant v. Philadelphia Eagles, 2009 U.S. Dist. LEXIS 53075 (E.D. Pa. June 24, 2009) 20

Group Health Plan v. BJC Health Systems, 30 S.W.3d 198, 200, 203 n.2 (Mo. banc 2000)..... 14

High Life Sales v. Brown-Forman, 823 S.W.2d 493, 497 (Mo. banc 1992) 8

Hojnowski v. Buffalo Bills, 2014 U.S. Dist. LEXIS 13153 (W.D.N.Y. Feb. 3, 2014) 20

Int. Produce v. Rosshavet, 638 F.2d 548, 551 (2d Cir. 1981)..... 12

Kilmer v. Mun, 17 S.W.3d 545, 547-550 (Mo. banc 2000) 1

Korte Construction Co. v. Deaconess Manor, 927 S.W.2d 395, 398 (Mo. App. 1996)..... 1, 4

Mandich v. North Star Partnerships, 450 N.W.2d 173 (Minn. App. 1990)..... 12

March v. Tysinger Motor Co., 2007 U.S. Dist. LEXIS 91202 at *7 (E.D. Vir. Dec. 12, 2007)... 16

Masthead Mac Drilling v. Fleck, 549 F. Supp. 854, 856 (S.D.N.Y. 1982) 18

Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 680 (7th Cir. 1983) 12

Metropolitan Property and Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co., 780 F. Supp. 885, 894 (D. Conn. 1991) 17, 18

Morelite Constr. Co. v. N.Y. City Dist. Council, 748 F.2d 79, 84 (2d Cir. 1984) 18

Murray v. United Food, 289 F.3d 297, 302 (4th Cir. 2002) 18

Nat’l Ave. Bldg. Co. v. Stewart, 910 S.W.2d 334 (Mo. App. 1995)..... 19

New Regency Productions v. Nippon Herald Films, 501 F.3d 1101, 1105 (9th Cir. 2007) 18

Poston v. NFL Players Ass’n, 2002 U.S. Dist. LEXIS 23085 (E.D. Vir. Aug. 26, 2002)..... 12

Rosenbloom v. Mecom, 478 So.2d 1375 (La. App. 4 Cir. 1985) 12

Schwartzman v. London & Lancashire Fire Ins. Co., 2 S.W.2d 593 (Mo. banc 1928)..... 9

Sims and Co. v. Roven, 548 F. Supp. 2d 759, 766 (N.D. Cal. 2008)..... 2

Sniezek v. K.C. Chiefs Football Club, 402 S.W.3d 580 (Mo. App. 2013)..... 20

Springfield Iron & Metal v. Westfall, 349 S.W.3d 487, 490 (Mo. App. 2011) 22

Stahlhuth v. SSM, 289 S.W.3d 662, 670 (Mo. App. 2009)..... 7

State ex rel. Carter v. City of Independence, 272 S.W.3d 371, 375 (Mo. App. 2008)..... 2

State ex rel. Telecom Management v. O’Malley, 965 S.W.2d 215 (Mo. App. 1998)..... 14

State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 857 n.1 (Mo. banc 2006)..... 7, 13

Stolt-Nielsen v. AnimalFeeds, 559 U.S. 662, 683-684 (2010)..... 22

Vescent, Inc. v. Prosun Int., 2010 U.S. Dist. LEXIS 123889 (D. Colo. Nov. 9, 2010)..... 5

Walker v. Ryan’s Family Steak Houses, 400 F.3d 370, 385 (6th Cir. 2005) 18

Waverlee Homes v. McMichael, 855 So.2d 493, 505-508 (Ala. 2003) 19

Whitworth v. McBride & Sons, 344 S.W.3d 730, 738, 741 n.11 (Mo. App. 2011) 5

Williams v. NFL, 582 F.3d 863 (8th Cir. 2009) 12

Winfrey v. Simmons Food, 495 F.3d 549 (8th Cir. 2007) 19

Woods v. QC Fin. Servs., 280 S.W.3d 90, 96 (Mo. App. 2008) 8

INTRODUCTION

The answering brief of Respondent Kerr (realistically the St. Louis Rams) contains a number of assertions and arguments which call for a response from Relator Todd Hewitt by way of a reply brief.

ARGUMENT

1. The Rams contend that Mr. Hewitt is not entitled to a writ of mandamus because he has an adequate remedy by way of an appeal after the arbitration proceeding is completed.

This is a flawed perspective. Claimants have a right of access to court that is fundamental and when it is denied, or even delayed, without good cause they suffer a real harm. *Kilmer v. Mun*, 17 S.W.3d 545, 547-550 (Mo. banc 2000) (Missouri Constitution forbids arbitrary or unreasonable restrictions on access to the judicial system). Claimants are also harmed when they are forced to expend time and resources in a forum other than court without reasonable justification.

Missouri courts have recognized these realities, at least implicitly, in the context of arbitration. “Resolution of this issue [the validity of an alleged arbitration agreement] must occur before the parties are forced to submit to arbitration and, we believe, full resolution must include the right to appeal.” *Korte Construction Co. v. Deaconess Manor*, 927 S.W.2d 395, 398 (Mo. App. 1996). A belated appeal at the conclusion of the arbitration proceeding is not an adequate remedy for Mr. Hewitt when he has compelling arguments against the validity of the alleged arbitration agreement which, if accepted, would ensure his right of access to court and spare him the delay and expense of a

prolonged arbitration proceeding.

2. The Rams contend that Mr. Hewitt must wait for his appeal like other litigants.

But other litigants can pursue an immediate appeal when they are cast out of the judicial system. Mr. Hewitt and others like him cannot because their lawsuits are stayed pending arbitration rather than dismissed. As a practical matter, however, they are banished from the judicial system -- sometimes for years -- and remedial writs must be available to them to challenge the banishment when it is clearly unwarranted.

3. The Rams contend that Mr. Hewitt must prove that he will suffer irreparable harm if a writ of mandamus is not granted.

That is not the law in Missouri. There is no requirement that the seeker of a writ of mandamus establish irreparable harm in order to obtain the writ. Moreover, it is only one of several circumstances under which a writ of prohibition, as opposed to a writ of mandamus, can be issued. *State ex rel. Carter v. City of Independence*, 272 S.W.3d 371, 375 (Mo. App. 2008). Even if a showing of irreparable harm were required, however, Mr. Hewitt could make it here. Without the writ, he will be denied access to the judicial system for a substantial period of time and, in addition, will be forced to expend time and money in arbitration that, in the event that a court ultimately determines that arbitration was unwarranted, will not be compensable by any monetary award under the arbitration statutes. *Sims and Co. v. Roven*, 548 F. Supp. 2d 759, 766 (N.D. Cal. 2008).

4. The Rams contend that remedial writs challenging the validity of orders compelling arbitration contradict the Missouri Uniform Arbitration Act.

They do not. There is no reason to think that the drafters of the MUAA meant it to preempt the traditional use of remedial writs in lawsuits. Indeed, the authority of appellate courts to issue such writs is rooted in the Missouri Constitution which supersedes the MUAA. See Article V, section 4, subsection 1.

5. The Rams contend that the arbitration with Mr. Hewitt proceeded to a point where it should be completed.

Mr. Hewitt disagrees. The arbitration proceeding is currently stayed, pending the outcome of Mr. Hewitt's request that this Court issue a permanent writ of mandamus, and has been stayed since September of last year, when the Court of Appeals issued a preliminary writ. No formal date for the arbitration hearing was ever set and much discovery would have to be done before any such hearing could ever be held. For example, Mr. Hewitt anticipates that he may need to take at least ten more depositions, including those of alleged decision makers with regard to the challenged employment action, prior to any arbitration hearing.

6. The Rams contend that Mr. Hewitt pursued an ineffectual appeal to the Court of Appeals which was on its face contrary to Missouri law.

This is not a fair or accurate characterization of Mr. Hewitt's appeal. The Court of Appeals held that he could not appeal from the dismissal of his claim of age discrimination pending arbitration of it for two reasons. Both reasons, however, fall apart upon inspection.

First, the Court held that the MUAA requires trial judges to stay rather than to dismiss claims that they have concluded must be arbitrated, thereby preventing an

immediate appeal of the order compelling arbitration. See Ex. 4 at Writ 18-19. This holding contradicted the Court's prior decision in *Korte Construction Co.* which correctly ruled that the MUAA does not preempt the general final judgment statute, Section 512.020 R.S.Mo., and therefore does not bar dismissals of claims in favor of arbitration and immediate appeals of those dismissals. 927 S.W.3d at 397-399. It also contradicted a formidable mass of federal case law which had come to the same conclusion under the Federal Arbitration Act. See, e.g., *Dialysis Access Center v. RMA Lifeline*, 638 F.3d 367, 372 (1st Cir. 2011); *Choice Hotels v. BSR Tropicana*, 252 F.3d 707, 709-10 (4th Cir. 2001); *Fedmet Corp. v. Buyalyk*, 194 F.3d 674, 678 (5th Cir. 1999).

The Court's other holding was that a trial judge who orders arbitration of a claim, and dismisses it pending arbitration, is acting inconsistently and therefore improperly. "The trial court cannot simultaneously assert jurisdiction and control over a claim by ordering it to arbitration, and at the same time relinquish jurisdiction and control over that claim by dismissing it." See Ex. 4 at Writ 18. This reasoning is flawed because it is backwards. It assumes that the trial judge is first dismissing the claim, which causes her to lose jurisdiction, and is then ordering the claim to arbitration, after she has already lost jurisdiction. In reality, it is the other way around. The trial judge is first ordering the claim to arbitration, which she has jurisdiction to do, and then dismissing the claim in light of that order, which she also has jurisdiction to do.

The Court's decision on this issue was regrettable, not only because it was based on an idea not raised by the Rams and not briefed by the parties, but also because it contradicted Missouri case law and the FAA. *Korte Construction Co.* assumes that trial

judges have the authority to compel arbitration and dismiss claims at the same time. Moreover, federal courts have for many years dismissed a wide variety of claims, after compelling arbitration of them, without ever once expressing any concern that they were entering “internally inconsistent judgments.”

7. The Rams contend that the rules governing the arbitration process are not an essential term of a valid arbitration contract.

Missouri courts disagree. See *Whitworth v. McBride & Sons*, 344 S.W.3d 730, 738, 741 n.11 (Mo. App. 2011); *Abrams v. Four Seasons*, 925 S.W.2d 932, 938 (Mo. App. 1996).

The Rams’ efforts to distinguish these two cases are unavailing. It is pointless to say that (1) the arbitration rules in *Whitworth* were contained in a handbook that stated it was not a contract and (2) the parties in *Abrams* did not come to an agreement on other important matters besides the rules that would govern the arbitration. These are differences that do not make any difference. They do not in any way detract from the fact that both *Whitworth* and *Abrams* recognized that a meeting of the minds with regard to the arbitration rules is an essential element of a valid arbitration contract.

The Rams have nothing to say about any of the out-of-state cases cited by Mr. Hewitt with the exception of *Vescent, Inc. v. Prosun Int.*, 2010 U.S. Dist. LEXIS 123889 (D. Colo. Nov. 9, 2010), which they claim was decided on the ground that no agreement to arbitrate existed. In fact, however, the Court found that the parties expressed an interest in arbitration but, despite this, refused to compel arbitration because there was no meeting of the minds between them as to an essential term, namely “what rules will be

applicable.” *Vescent*, 2010 U.S. Dist. LEXIS 123889 at *8-10.

Other cases tilt the scales in the same direction. “An enforceable contract does not exist unless there has been a ‘meeting of the minds’ as to all material terms . . . The arbitration clause in the employment offer letter does not meet this standard because it did not outline the material terms that would govern arbitration between Fox and CWS such as discovery, type of relief available, payment of arbitration fees, etc.” *Fox v. Computer World Services*, 920 F. Supp. 2d 90, 104 n.7 (D.D.C. 2013).

8. The Rams contend that the term “Rules and Regulations” in paragraph seven of the employment contract means the “Dispute Resolution Procedural Guidelines.”

This is not a reasonable interpretation of paragraph seven of the employment contract. It opens with the agreement by Mr. Hewitt to abide by the NFL’s Rules and Regulations, which the Rams acknowledge encompass the standards governing an employee’s conduct and deportment, and is followed immediately with the agreement by Mr. Hewitt to arbitrate any disputes with the Rams. Read in context, which is to say reasonably, paragraph seven merely provides that if Mr. Hewitt is disciplined or discharged for allegedly violating a Rule or Regulation he must challenge the decision in arbitration. It does not reflect any agreement on his part to comply with the NFL arbitration rules which are not mentioned anywhere in the employment contract.

9. The Rams contend that consideration exists for Mr. Hewitt’s agreement to arbitrate his disputes with them.

This contention rests on the false premise that both Mr. Hewitt *and* the Rams

agreed in the employment contract to comply with the NFL's Constitution and Bylaws and its Rules and Regulations. In fact, only Mr. Hewitt did; the Rams did not. The employment contract states that "Hewitt agrees to abide by and to be legally bound by the Constitution and By-Laws and Rules and Regulations of the National Football League." See Ex. 5 at Writ 21. It does not state that "Hewitt and the Rams agree to abide by and to be bound by the Constitution and By-Laws and Rules and Regulations of the National Football League."

The Rams err when they say that this Court owes deference to the trial judge's finding that Mr. Hewitt and the Rams are equally bound by the NFL's arbitration rules. "The interpretation and construction of a contract are questions of law, which we review de novo and without deference to the trial court's construction." *Stahlhuth v. SSM*, 289 S.W.3d 662, 670 (Mo. App. 2009).

10. The Rams contend that an arbitrator rather than a court should decide the validity of the arbitration provision contained in the employment contract with Mr. Hewitt.

There is no merit to this argument. Mr. Hewitt is not indirectly challenging the validity of the arbitration provision by challenging the validity of the whole employment contract, which would be an issue that would have to be decided by the arbitrator. To the contrary, Mr. Hewitt is directly challenging the validity of the arbitration provision itself without regard to the validity of the whole employment contract, an issue that has to be decided by the court. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 857 n.1 (Mo. banc 2006).

11. The Rams contend that the alleged agreement to arbitrate with Mr. Hewitt was not adhesive in nature.

Clearly it was because it was presented to Mr. Hewitt on a take-it-or-leave-it basis by a party, the Rams, with superior bargaining power. See Ex. 7 at Writ 27-28. This is the very definition of an adhesion contract. *High Life Sales v. Brown-Forman*, 823 S.W.2d 493, 497 (Mo. banc 1992).

The Rams suggest that Mr. Hewitt said in his affidavit that each employment contract that he signed during his forty years of employment contained an arbitration provision. All he said, however, was that he signed numerous contracts of employment with the Rams; he did not say how many of them contained arbitration provisions. See Ex. 7 at Writ 27.

12. The Rams contend that an arbitration agreement has to be both procedurally and substantially unconscionable before it can be declared void.

This contention cannot be reconciled with *Brewer v. Missouri Title Loans*, 323 S.W.3d 18 (Mo. banc 2010), where this Court expressly held that “Missouri law does not require the party claiming unconscionability to prove both procedural and substantive unconscionability.” Id. at 22.

13. The Rams contend that this Court abrogated the test for substantive unconscionability set forth in *Woods v. QC Fin. Servs.*, 280 S.W.3d 90, 96 (Mo. App. 2008).

To the contrary, this Court cited *Woods* with approval in holding that contracts that are “unduly harsh” or “one-sided” or “oppressive” are unconscionable. *Brewer v.*

Missouri Title Loans, 364 S.W.3d 486, 489 n.1, 493 (Mo. banc 2012).

14. The Rams contend that the NFL Commissioner is not paid by any particular team such as the Rams.

This is cold comfort to Mr. Hewitt. The National Football League itself, as opposed to the 32 football teams that comprise it, is a non-profit organization. As a result, the Commissioner's compensation is a matter of public record. Notably, the Commissioner was paid \$35.1 million in 2012, exclusive of one-time payments. See Ken Belson, *Goodell's Pay of \$44.2 Million in 2012 Puts Him in the Big Leagues*, New York Times, February 14, 2014, <http://nyti.ms/1mh> WSNA. If it is assumed, realistically, that each of the 32 NFL teams paid a pro rata share of the Commissioner's compensation, the Rams paid him \$1.1 million dollars in 2012 alone. No fair or reasonable person could suppose for a moment that an arbitrator who is paid over one million dollars a year, or some comparable sum of money, by one of the parties to the arbitration is neutral and disinterested.

15. The Rams contend that the Commissioner is required by the NFL to be a person of unquestioned integrity.

Maybe he is such a person. But it does not follow that he cannot harbor a bias, which may be unconscious, in favor of the party to the arbitration who pays his salary and against the party who seeks to hold it liable for actual and punitive damages.

An instructive Missouri case is *Schwartzman v. London & Lancashire Fire Ins. Co.*, 2 S.W.2d 593 (Mo. banc 1928). There, the arbitrator was a treasurer, secretary and stockholder of an investment company that did business with, and earned income from,

the defendant insurance company. This Court had no trouble concluding that the arbitrator should be disqualified on the ground of bias. It held that “As a stockholder of [the investment company], he was entitled to receive dividends, which necessarily included earnings of the business brought in by [the insurance company] . . . Even though the evidence tends to establish that no conscious or actual bias, prejudice, influence or fraud was disclosed on the part of the umpire, yet public policy and an unconscious predilection to favor one’s interest renders an arbitrator, directly or indirectly interested in the results of the arbitration, partial, incompetent and disqualified.” *Schwartzman*, 2 S.W.2d at 594.

This Court need not venture onto new ground in order to decide the present case; it need only follow in the footsteps of cases such as *Schwartzman*.

16. The Rams contend that a decision disqualifying the Commissioner as the arbitrator would create a per se rule in violation of *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2010).

This contention is baseless. The Commissioner would not be disqualified without regard to the facts of this case or the terms of the alleged arbitration agreement. To the contrary, he would be disqualified precisely because of them. The alleged arbitration agreement named the Commissioner as the arbitrator of disputes between Mr. Hewitt and the Rams even though the evidence shows that (1) he owes his job to the team owners and (2) he is charged with promoting their welfare. These circumstances disqualify him as an arbitrator in this case.

It might be a different story if the plaintiff bringing the lawsuit were the CEO of

an NFL team, or a highly-paid football player with a highly-paid agent, or the union representing the football players. They are sophisticated parties who possess the kind of bargaining power that enables them to engage in give-and-take negotiations with the team owners. If they choose to designate the Commissioner as the arbitrator of their disputes with the owners, perhaps in exchange for other concessions from them, they might be bound by their choice. But Mr. Hewitt is not a sophisticated plaintiff. He was merely the Equipment Manager of the Rams who had almost no bargaining power with them. To say that Mr. Hewitt voluntarily and knowingly agreed, in any meaningful sense, that the Commissioner would decide any future disputes that he might have with the Rams, including a claim of age discrimination, is to indulge in a legal fiction.

17. The Rams contend that the Commissioner's designees are fair and impartial as shown by the fact that they allowed Mr. Hewitt to conduct full discovery before the arbitration proceeding was halted.

This does not prove anything. The Rams omit to mention that the Commissioner's designees, who are lawyers representing management in labor relations matters, allowed broad and intrusive discovery against Mr. Hewitt and his wife during the arbitration proceeding including (1) their joint tax returns for the past five years; (2) their joint bank account records going back 16 years and; (3) a dozen subpoenas to third parties about their financial transactions. See Relator's Second Supplemental Appendix at A31-A41.

Even assuming that the Commissioner's designees would allow Mr. Hewitt to conduct full discovery during the remainder of the arbitration proceeding, it does not follow that they would decide the merits of his claim of age discrimination against the

Rams in a fair and impartial way. The nature of their jobs, which is to protect the best interests of the owners, makes it implausible to think that they would.

18. The Rams contend that prominent and experienced members of the relevant industry can serve as arbitrators.

This may be true but it is also beside the point. It is one thing to say that individuals with expertise in the relevant industry can serve as arbitrators; it is quite another thing to say that such individuals can serve as arbitrators when they are paid representatives of one of the parties to the arbitration. This creates a clear conflict of interest which did not exist in the two cases cited by the Rams where the relationships between the arbitrator and one of the parties were peripheral and remote. *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 680 (7th Cir. 1983); *Int. Produce v. Rosshavet*, 638 F.2d 548, 551 (2d Cir. 1981).

19. The Rams contend that several cases have upheld arbitration agreements which designate the NFL Commissioner, or a similar official, as the arbitrator.

The Rams are reading too much into the six cases they cite in their brief. See *Williams v. NFL*, 582 F.3d 863 (8th Cir. 2009); *Black v. NFL Players Ass'n*, 87 F.Supp.2d 1 (D.D.C. 2000); *Rosenbloom v. Mecom*, 478 So.2d 1375 (La. App. 4 Cir. 1985); *Poston v. NFL Players Ass'n*, 2002 U.S. Dist. LEXIS 23085 (E.D. Vir. Aug. 26, 2002); *Alexander v. Minnesota Vikings Football Club*, 649 N.W.2d 464 (Minn. App. 2002); and *Mandich v. North Star Partnerships*, 450 N.W.2d 173 (Minn. App. 1990). Given the particular facts or reasoning in these cases, they do not support the Rams' contention.

First, five of the six cases involved plaintiffs who, unlike Mr. Hewitt, were sophisticated parties with considerable bargaining power, in particular a NFL players union, a top executive of a NFL team, two agents for NFL players, and a professional hockey player (*Williams, Rosenbloom, Black, Poston* and *Mandich*). Second, in two of the cases the plaintiffs, unlike Mr. Hewitt, waived their right to challenge the impartiality of the arbitrator by neglecting to raise the issue in a timely manner (*Williams* and *Poston*). Third, two of the cases allowed the defendant to unilaterally select the arbitrator (*Black* and *Poston*) in direct contravention of this Court's decision in *State ex rel. Vincent*, 194 S.W.3d at 859. Fourth, three of the cases did not allude to, let alone include any discussion of, the financial and other biasing connections between the arbitrator and the defendant (*Williams, Rosenbloom* and *Mandich*). Indeed, one of them merely asserted in a single conclusory sentence, without any elaboration, that the NHL Commissioner is unbiased and impartial (*Mandich*). Fifth, and finally, one of the cases held that the plaintiff could not challenge the selection of the NFL Commissioner as the arbitrator because he, unlike Mr. Hewitt, did not seek to invalidate the arbitration agreement (*Alexander*).

20. The Rams contend that to hold that the Commissioner is unconscionably biased would be to disregard the parties' arbitration contract and to treat it unfavorably compared to other contracts.

Both contentions are misguided. The whole purpose of the doctrine of unconscionability is to override the agreement of the parties, which is ordinarily controlling, because it is the product of oppression or exploitation. When the path is bad,

the obstruction is good.

Mr. Hewitt is not asking the Court to single out an arbitration contract for special unfavorable treatment. He is invoking a general legal principle -- that adjudicators of disputes must be neutral and impartial -- that is not confined to the arbitration context. It extends to other contexts, most obviously the judicial one, where judges are disqualified when they have biasing ties to one of the parties. See, e.g., Rule 2-2.11 of the Missouri Code of Judicial Conduct.

21. The Rams contend that the FAA does not authorize pre-award challenges to arbitrators on the ground of bias.

A threshold problem with this contention is that it assumes that the FAA applies to this case. It does not because the employment contract between Mr. Hewitt and the Rams provides that it is governed by Missouri law, see Ex. 5 at Writ 22, which means that the MUAA applies to this case. *Group Health Plan v. BJC Health Systems*, 30 S.W.3d 198, 200, 203 n.2 (Mo. banc 2000).

There is no per se rule under the MUAA barring courts from disqualifying arbitrators for bias prior to the completion of the arbitration proceeding. This is clear from *State ex rel. Telecom Management v. O'Malley*, 965 S.W.2d 215 (Mo. App. 1998). There, the Court held that, while judges should not intervene in arbitration proceedings lightly, they should not refrain from doing so when there are serious allegations of arbitrator bias. The Court observed that "it does not entirely rule out a factual situation in which court intervention would be justified. It would be a closer case where, even with an agreement such as in this case, an arbitrator was discovered to be in the employ of one

party as an adjuster and being paid a per diem by that party while serving on an arbitration case and was not removed.” *Telecom Management*, 965 S.W.2d at 220.

These words might have been written for this case. The alleged arbitration agreement between Mr. Hewitt and the Rams selects the Commissioner as the arbitrator even though he is, in effect, employed by the Rams and the other teams and regularly receives substantial monetary compensation from them. The Commissioner is inherently biased in light of these circumstances and judicial intervention is necessary to disqualify him in order to preserve Mr. Hewitt’s right to a fair hearing in a fair forum.

The Court’s approach in *Telecom Management* is sound, insofar as the present case is concerned, because it is consistent with the text of the MUAA and with relevant policy considerations.

The Rams seem to believe that if a party wants to challenge the impartiality of the arbitrator his only remedy is to proceed to a decision and then seek to have a court vacate it. But this is not a reasonable interpretation of the MUAA. To be sure, Section 435.405.1(2) authorizes a court to vacate an arbitration award on the ground of evident partiality of the arbitrator after the arbitration proceeding is over. At the same time, however, Section 435.350 authorizes a court to invalidate an arbitration agreement “upon such grounds as exist at law or equity for the revocation of any contract” before the arbitration proceeding has begun. Significantly, such grounds include unconscionable terms in the alleged arbitration agreement such as those that designate an arbitrator who is predisposed to rule in favor of one of the parties. *State ex rel. Vincent*, 194 S.W.3d at 857, 859. To adopt a per se rule forbidding courts from entertaining challenges to

arbitrators on the ground of bias prior to the conclusion of the arbitration proceeding would put the MUAA in conflict with itself. One provision of the statute, which authorizes post-award challenges to the impartiality of arbitrators, would nullify another provision of the statute, which authorizes pre-award challenges to the impartiality of arbitrators. That cannot be right. The two provisions of the MUAA must be harmonized to allow claims of bias at the front end as well as the back end of the arbitration process when the circumstances warrant it. *Aquila Foreign Qualifications Corp. v. Dir. of Revenue*, 362 S.W.3d 1, 4 (Mo. banc 2012) (statutes must be read as a whole and their provisions harmonized).

There are three reasons why it would be bad policy to adopt a rigid and inflexible rule barring courts from considering challenges to the independence and impartiality of arbitrators before the arbitration proceedings have been completed.

First, it would create a jarring anomaly. Claimants would be able to assert a wide variety of pre-award challenges to alleged arbitration agreements, such as lack of mutual assent, absence of consideration, inadequate waiver of statutory rights, denial of such rights and so on, but would not be able to assert pre-award challenges to arbitration agreements that designate arbitrators who are clearly biased against them. Such a result would be paradoxical, especially in light of the fact that “a party who alleges that an arbitral forum is biased is, in effect, claiming that the forum may not be able to resolve any aspect of the dispute fairly.” *March v. Tysinger Motor Co.*, 2007 U.S. Dist. LEXIS 91202 at *7 (E.D. Vir. Dec. 12, 2007) (emphasis in the original).

Second, a blanket rule of non-intervention would be unfair to parties raising

claims of bias. They would be forced, no matter how meritorious their claims, to endure the indignity and futility of presenting their cases to arbitrators who are predisposed to rule in favor of their opponents. Only after the arbitration is over, perhaps years later, could they get a judicial hearing on the merits of their claims of bias. Court intervention prior to this time must be available to disqualify arbitrators who are unconscionably biased in order to safeguard the integrity of the arbitration process. Lawmakers wanted “to provide not merely for *any* arbitration but for an impartial one.” *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 147 (1968) (emphasis in the original).

Third, a per se rule of judicial non-intervention would be impractical and inefficient. Allowing a clearly biased arbitrator to proceed with a case until he renders a decision would inevitably lead to a challenge of it in court and a likely vacating of it, thereby rendering the whole arbitration proceeding meaningless and wasteful of everybody’s time and resources. “It simply does not follow that the policy objective of an expeditious and just arbitration with minimal judicial interference is furthered by categorically prohibiting a court from disqualifying an arbitrator prior to arbitration . . . It seems senseless to require both parties to submit to a prolonged, costly proceeding when this unfair burden can readily be avoided upon proof, in this action, of bias.” *Metropolitan Property and Casualty Ins. Co. v. J.C. Penney Casualty Ins. Co.*, 780 F. Supp. 885, 894 (D. Conn. 1991).

The validity of these points can be brought into sharp focus with an example. Suppose the alleged arbitration agreement in this case had named the owner of the Rams,

or its President and General Manager, as the arbitrator. Such a provision would be transparently unconscionable but, on the view taken by the Rams, Mr. Hewitt would have to go through the entire arbitration process, even though it would be a farce, before he could challenge the provision as unconscionable in court. Such a result cannot be thought reasonable and nothing in the law requires it.

Mr. Hewitt has said that MUAA applies to this case but even if it does not, and the FAA does instead, the result would be the same. Many federal courts have approved the pre-award disqualification of arbitrators for lack of neutrality and impartiality, often relying on the doctrine of unconscionability. See, e.g., *Murray v. United Food*, 289 F.3d 297, 302 (4th Cir. 2002); *Walker v. Ryan's Family Steak Houses*, 400 F.3d 370, 385 (6th Cir. 2005); *Metropolitan Property and Casualty Ins. Co.*, 780 F. Supp. at 894; *Masthead Mac Drilling v. Fleck*, 549 F. Supp. 854, 856 (S.D.N.Y. 1982).

22. The Rams contend that evident partiality requires proof of actual bias.

It is a truth universally acknowledged, however, that arbitrators can be disqualified without evidence of actual bias. See, e.g., *Morelite Constr. Co. v. N.Y. City Dist. Council*, 748 F.2d 79, 84 (2d Cir. 1984) (“we cannot countenance the promulgation of a standard for partiality as insurmountable as proof of actual bias”); *New Regency Productions v. Nippon Herald Films*, 501 F.3d 1101, 1105 (9th Cir. 2007) (“evident partiality is distinct from actual bias”); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989) (rejecting the exacting standard of “proof of actual bias”); *Aetna Cos. & Sur. Co. v. Grabbert*, 590 A.2d 88, 96 (R.I. 1991) (evident partiality requires a showing of “less than actual bias”).

The three cases cited by the Rams do not depart from this body of case law but, on the contrary, conform to it. Each will be discussed in turn.

The first case is *Merit Ins. Co., supra*. There, the Court recognized that “actual bias might be present yet impossible to prove” with regard to an arbitrator. 714 F.2d at 681. As a result, it did not require evidence of it in order to vacate an arbitration award. All it required is evidence that is “powerfully suggestive of bias,” even if it does not prove actual bias. 714 F.2d at 681.

The second case is *Nat’l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334 (Mo. App. 1995). In that case, the Court said that the bias of an arbitrator must be “direct, definite and capable of demonstration.” 910 S.W.2d at 343. But this is just another way of saying that the bias must create a “reasonable impression of partiality” in the average person which is a less stringent standard than actual bias. *Waverlee Homes v. McMichael*, 855 So.2d 493, 505-508 (Ala. 2003).

The third case is *Winfrey v. Simmons Food*, 495 F.3d 549 (8th Cir. 2007). There, the Court said that “where an agreement entitles the parties to select interested arbitrators, evident partiality cannot serve as a basis for vacating an award . . . absent a showing of prejudice.” 495 F.3d at 551. However, the Court was referring to the special case of tripartite arbitration panels which consist of two party-nominated arbitrators, who are not expected to be neutral, and a third arbitrator chosen jointly by the party-nominated arbitrators, who is expected to be neutral. All the Court was saying is that evident-partiality challenges cannot be made against the party-nominated arbitrators, absent evidence that they have behaved improperly, for the obvious reason that they are meant

to be partisans. 495 F.3d at 552. This is a long way from saying that evident-partiality challenges cannot be raised against supposedly neutral arbitrators, like the Commissioner, who are in fact biased and partial. The Court expressly recognized that such challenges can be made. 495 F.3d at 551-552.

23. The Rams contend that *Grant v. Philadelphia Eagles*, 2009 U.S. Dist. LEXIS 53075 (E.D. Pa. June 24, 2009), and *Hojnowski v. Buffalo Bills*, 2014 U.S. Dist. LEXIS 13153 (W.D.N.Y. Feb. 3, 2014), support their position.

They do not because they are poorly reasoned cases that are at odds with the weight of judicial authority.

Grant upheld an arbitration agreement between an employee and a NFL football team that was virtually identical to the one struck down in *Sniezek v. K.C. Chiefs Football Club*, 402 S.W.3d 580 (Mo. App. 2013) and *Clemmons v. K.C. Chiefs Football Club*, 397 S.W.3d 503 (Mo. App. 2013). In invalidating the agreement for lack of consideration, the Missouri Court of Appeals was critical of the reasoning in *Grant*. *Sniezek*, 402 S.W.3d at 586 n.2; *Clemmons*, 397 S.W.3d at 508 n.2.

Equally unreliable is *Hojnowski*. In that case, the court upheld an arbitration agreement between an employee and a NFL football team but, in doing so, committed three errors. First, the Court said that the NFL's arbitration rules, like all arbitration rules, are not essential terms of an arbitration contract. This flatly contradicts the law in Missouri and in other jurisdictions. Second, the court said that it did not matter if the employee lacked any knowledge of the NFL's arbitration rules because such knowledge, and an agreement to abide them, could be "imputed" to him. This clashes starkly with

basic contract law which requires a real, as opposed to a mythical, meeting of the minds between the parties. Third, the Court said that the Commissioner was a proper arbitrator of the dispute between the parties without, however, paying any attention to the fact that he is hired by the team owners, paid by them, and can be fired by them. *Hojnowski*, 2014 U.S. Dist. LEXIS 13153 at *6-11, 14-16.

24. The Rams contend that Section 13.1 of the NFL Arbitration Rules requires the Commissioner to follow applicable law in allocating attorneys' fees and costs between the parties.

To the contrary, it gives the Commissioner broad discretion to "take into account" fee-shifting statutes such as the MHRA which is not the same thing as requiring him to be bound by them.

25. The Rams contend that the decision in *Cole v. Burns Int'l*, 105 F.3d 1465 (D.C. Cir. 1996), has been largely abrogated by subsequent case law.

It has not. Courts continue to cite it with approval. See, e.g., *Fox*, 920 F.Supp.2d at 104 n.7; *Goff v. G2 Secure Staff*, 2013 U.S. Dist. LEXIS 59628 at *9 (C.D. Cal. April 22, 2013).

26. The Rams contend that employees are better off in arbitration than they are in court.

No. Employers are not the best judge of the welfare of employees -- employees are. And they strongly resist arbitration because they know, as employers do too, that they will fare poorly there compared to court.

This is demonstrated empirically by the studies mentioned in the law review

article cited by Mr. Hewitt in his opening brief. According to the Rams, the article finds that employees actually prevail more often in arbitration than in court. This is incorrect. Only one of the studies mentioned in the law review article came to this conclusion and it is an anomaly that is out of line with the other studies mentioned in it. They all show what we all know -- that employees prevail less often, and recover less damages, in arbitration than in court.

27. The Rams contend that Mr. Hewitt must arbitrate his claim of age discrimination against three of the defendants even though they were not parties to the alleged arbitration agreement.

Such a contention runs counter to U.S. Supreme Court precedent. “Nothing in the [FAA] authorizes a court to compel arbitration of any issues, *or by any parties*, that are not already covered in the agreement.” *Stolt-Nielsen v. AnimalFeeds*, 559 U.S. 662, 683-684 (2010) (emphasis in the original).

28. The Rams contend that it would be wasteful to require Mr. Hewitt to arbitrate against the defendant who was a party to the alleged arbitration agreement but not against the three defendants who were not parties to it.

Missouri courts have rejected this argument. “Our supreme court deems arbitration a matter of agreement, even if arbitrated and non-arbitrated issues are inextricably intertwined . . . The result [in two Missouri Supreme Court cases] was that some, but not all, parties had to arbitrate some, but not all, claims. We are not free to erode arbitration’s voluntary nature for the sake of judicial convenience.” *Springfield Iron & Metal v. Westfall*, 349 S.W.3d 487, 490 (Mo. App. 2011).

CONCLUSION

For the reasons discussed here and in his opening brief, Relator Todd Hewitt asks the Court to grant his request for a permanent writ of mandamus.

SEDEY HARPER, P.C.
Attorneys for Relator Hewitt

/s/ John D. Lynn

John D. Lynn, #30064
2711 Clifton Avenue
St. Louis, MO 63139
314/773-3566
314/773-3615
jlynn@sedeyharper.com

Certificate of Compliance

The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b) and that the entire brief contains 7,238 words. The brief is being electronically filed with the Court on this 9th day of May 2014.

/s/ John D. Lynn

John D. Lynn
Attorney for Relator Hewitt

Certificate of Service

The undersigned hereby certifies that a true and correct copy of this reply brief with the second supplemental appendix were filed electronically with the Court on this 9th day of May 2014 and served by operation of the Missouri E-filing System upon

Bradley Winters and Michael Hart, Sher Corwin Winters LLC, 190 Carondelet Ave., Suite 1100, St. Louis, MO 63105. The undersigned further certifies that a true and correct copy of this reply brief with the second supplemental appendix were sent by U.S. Mail, postage prepaid, this 9th day of May 2014 to the Honorable Kristine Kerr, Judge of the Circuit Court for St. Louis County, Courts Building, 3rd Floor, 7900 Carondelet, Clayton, Mo., 63105.

/s/ John D. Lynn

John D. Lynn
Attorney for Relator Hewitt