

IN THE SUPREME COURT OF MISSOURI

CARLA BAKER,)

Plaintiff -Respondent,)

vs.)

BRISTOL CARE, INC., D/B/A BRISTOL)
MANOR, AND DAVID FURNELL,)

Defendants-Appellants.)

) Supreme Court No. SC93451

**Appeal From the Circuit Court of
DeKalb County Missouri
43rd Judicial Circuit**

SUBSTITUTE BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

The Circuit Court issued its Order denying Appellants' Motion to Stay Proceedings and Compel Arbitration on March 14, 2012. Legal File ("LF") 113; Appendix A1. Appellants timely filed their Notice of Appeal on March 23, 2012. LF114. The Missouri Court of Appeals for the Western District issued its Order upholding the Circuit Court on April 16, 2013. Appendix A2, A3. Appellants timely filed their Application to Transfer in the Court of Appeals on May 1, 2013. This application was denied on May 28, 2013. Appellants then timely filed their Application to Transfer in this Court on June 12, 2013. This Court granted the Application to Transfer on October 29, 2013. Therefore this Court has jurisdiction pursuant to Mo. Const. Art. V, § 10.

An order denying a motion to compel arbitration is immediately appealable under both the Federal Arbitration Act and the Missouri Uniform Arbitration Act. 9 U.S.C. §16(a)(1)(B) ("An appeal may be taken from an order . . . denying a petition under section 4 of this title to order arbitration to proceed."); R.S.Mo. 435.440.1 (2000) ("An appeal may be taken from: (a) an order denying an application to compel arbitration made under section 435.355. . ."). Appendix A4, A6. *Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772, 774 (Mo. 2005)(both Federal Arbitration Act and Missouri Uniform Arbitration Act provide for immediate appeal of order denying arbitration); *Dunn Industrial Group Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427 (Mo. 2003) (" . . . the Missouri Uniform Arbitration Act, expressly grants the right to appeal orders denying an application to compel arbitration . . . "); *Arrowhead Contracting, Inc. v. M.H. Washington*,

LLC, 243 S.W.3d 532, 535 n. 2 (Mo. App. W.D. 2008)(order denying motion to compel arbitration is immediately appealable).

STATEMENT OF FACTS

1. Bristol Care Inc. (“Bristol Care”) operates residential care facilities throughout Missouri. Legal File (“LF”) 100; LF 5, ¶¶8-9.
2. David Furnell (“Furnell”) is President of Bristol Care. LF 5, ¶9.
3. Carla Baker (“Baker”) was employed by Bristol Care at its facility in Maysville, Missouri. LF 4, ¶6; LF 48.
4. Baker began employment in August 2010 as an hourly, non-exempt night staff employee. LF 48, ¶1.
5. Baker was promoted to Administrator of the Maysville facility on November 3, 2010. LF 48, ¶2; LF 100-112; LF 31-35. (Baker refers to her position as “property manager.” LF 48).
6. As Administrator, Baker was entrusted with complete day-to-day responsibility for the operation of the Maysville facility. LF 103, Section 7.
7. At the time she became Administrator, Baker executed documents “necessary to become the property manager.” LF 48, ¶3. These documents included an Employment Agreement, LF 100-112, and a Mandatory Arbitration Agreement (“Arbitration Agreement”), LF 49, ¶4; LF 31-35.
8. As Administrator, Baker was paid a salary and was eligible for a monthly bonus. LF 101, Sections 4-5. She was also granted a license to occupy the facility,

which included utilities and basic cable service paid for by Bristol Care. LF 102, Section 6; LF 103, Section 8.

9. Pursuant to the Employment Agreement, Baker's employment could be terminated only if she was given 5 days advance notice, or if she was given 5 days pay. LF 100, Section 2(a). Baker's employment could be terminated without prior notice only if she committed a specified violation. LF 100, Section 2(b).

10. The Arbitration Agreement, signed at the time Baker became Administrator, states that the parties consent to the resolution, by binding arbitration, of all claims or controversies . . . whether arising out of, relating to or associated with the Employee's employment or application for employment with the Company, whether sounding in the contract, statute, tort, fraud, misrepresentation, discrimination or any other legal theory that the Employee may have against the Company or that the Company may have against the Employee.

LF 31, Section 5.

11. The Arbitration Agreement provides examples of claims which it covers, including "claims for wages or other compensation; claims for breach of contract . . . and claims for violation of any federal, state . . . statutes . . . including but not limited to . . . the Fair Labor Standards of 1938, as amended . . . and any and all claims under any similar . . . state . . . law." LF 31-32, Section 5.

12. The Arbitration Agreement further states that “For claims covered by this Agreement, arbitration is the parties’ exclusive legal remedy.” LF 34, Section 20.

13. The Arbitration Agreement sets forth the procedures to be followed, and the remedies available, in arbitration. These include the Company’s agreement to pay the entire fee of the neutral arbitrator, LF 33, Section 16, and the availability of all relief which would otherwise be available if the action were in court, including punitive damages and attorneys’ fees. LF 34, Section 18.

14. The parties acknowledge in the Arbitration Agreement that the interpretation, enforcement and proceedings are governed by the Federal Arbitration Act. LF 32, Section 8.

15. Baker was Administrator of the Maysville facility from November 3, 2010 until her employment was terminated in May 2011. LF 49, ¶10.

16. On September 28, 2011, Baker filed her Petition in the Circuit Court of DeKalb County, seeking unpaid wages under R.S.Mo. §290.500 and under three common law theories, including breach of contract. LF 3-16. The defendants named in Baker’s Petition are Bristol Care, Inc. and David Furnell. LF 3.

17. On October 31, 2011, Defendants filed their Motion to Stay Proceedings and Compel Arbitration, with supporting suggestions. LF 28-47.

18. Following briefing, the Circuit Court held oral argument on February 23, 2012. No evidentiary hearing was held. LF 113.

19. The Circuit Court issued its Order denying the Motion to Stay Proceedings and Compel Arbitration on March 14, 2012. The Order does not specify the grounds for denial. LF 113; Appendix A1.

20. After a timely appeal, the Court of Appeals for the Western District affirmed the Circuit Court's Order, pursuant to Rule 84.16(b), on April 16, 2013. Appendix A2, A3.

POINTS RELIED ON

I. The Circuit Court erred in denying Appellants' Motion to Stay Proceedings and Compel Arbitration because the Arbitration Agreement signed by Respondent is enforceable in that it is part of a valid contract, which includes offer, acceptance and consideration, and the claims raised in Respondent's Petition are within the scope of the disputes covered by the Arbitration Agreement since, among other things, they arise out of Respondent's employment and are claims for wages.

State ex rel Vincent v. Schneider, 194 S.W.3d 853 (Mo. 2006)

Amaan v. City of Eureka, 615 S.W.2d 414 (Mo. banc 1981)

AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011)

Dunn Indus. Group, Inc. v. City of Sugar Creek, 112 S.W. 3d 421,
(Mo. 2003)

Federal Arbitration Act, 9 U.S.C. §1 *et seq.*

Missouri Uniform Arbitration Act, R.S.Mo. 435.355 (2000)

II. The Circuit Court erred in denying Appellants' Motion to Stay Proceedings and Compel Arbitration because the Arbitration Agreement is not unconscionable in that it is not a contract of adhesion, in that, among other things, it was not an unexpected surprise and does not limit the liability of the Appellants, and Respondent freely entered into this contract and accepted its benefits, including the attendant promotion to a new position.

State ex rel Vincent v. Schneider, 194 S.W.3d 853 (Mo. 2006)

Swain v. Auto Services Inc., 128 S.W.3d 103 (Mo. App. 2003)

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Grossman v. Thoroughbred Ford Inc., 297 S.W.3d 918 (Mo. App.
W.D. 2009)

III. The Circuit Court erred in denying Appellant’s Motion to Stay Proceedings and Compel Arbitration because the Arbitration Agreement is not an illusory contract in that (a) Appellant is not permitted to amend the Arbitration Agreement without restriction but rather 30 days prior notice is required; (b) the applicable arbitration rules, contract language and contract interpretation principles prohibit retroactive amendment; and (c) there otherwise is consideration for the Arbitration Agreement.

Magruder Quarry & Co. v. Briscoe, 83 S.W.3d 647 (Mo.
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Martin v. Prier Brass Mfg. Co., 710 S.W.2d 466 (Mo. App.
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IV. The Circuit Court erred in denying Appellant’s Motion to Stay Proceedings and Compel Arbitration because the Arbitration Agreement is applicable to disputes between Respondent and individual Appellant David Furnell in that the language of the Arbitration Agreement defines the parties to the Agreement as Baker, on the one hand, and the Company and its officers (including Mr. Furnell) on the other hand.

Rabius v. Brandon, 257 S.W.3d 641 (Mo. App. W.D. 2008)

Magruder Quarry & Co. v. Briscoe, 83 S.W.3d 647 (Mo. App. E.D. 2002)

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Schell v. Lifemark Hosps. Of Mo., 92 S.W.3d 222 (Mo. App. W.D. 2002)

V. The Circuit Court erred in denying Appellants’ Motion to Stay Proceedings and Compel Arbitration because the arbitrator should decide any questions of enforceability in that the parties expressly agreed to commit such questions to the arbitrator.

Rent-a-Center West v. Jackson, 130 S.Ct. 2772 (2010).

ARGUMENT

Introduction

Arbitration is favored in Missouri. See *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006) (“given Missouri’s preference for the arbitrability of disputes . . .”). This view is consistent with the U.S. Supreme Court’s recent pronouncements on arbitration. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745-6 (2011) (the Federal Arbitration Act embodies the “liberal federal policy” in favor of arbitration); *KPMG LLP v. Socchi*, 132 S. Ct. 23, 25 (2011) (noting “emphatic federal policy in favor of” arbitration.)

The Arbitration Agreement at issue in this case has been enforced as written by two courts – the Circuit Court for the 8th Judicial Circuit, Carroll County, Missouri, in *McNicol v. Bristol Care*, Case No. 10 CR-CC00131 (Order, Sept. 27, 2011), LF44-47; and the United States Court of Appeals for the Eighth Circuit, in *Baker v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013). The Circuit Court in this case was presented with evidence showing that the Arbitration Agreement was part of a valid contract and the claims raised by the Plaintiff were within the scope of that agreement. The Circuit Court, nevertheless, denied enforcement of the Arbitration Agreement. Because the Circuit Court’s Order (Appendix A1) gives no explanation for the decision, *Bristol Care*¹ in this

¹ Bristol Care Inc. and David Furnell are both named as defendants in Baker’s Petition and are Appellants in this action. For ease of reference, they will be referred to collectively as “Bristol Care.”

brief will both show the enforceability of the Arbitration Agreement and then explain why the principal arguments raised by Plaintiff below are insufficient to deny enforceability.

Standard of Review for All Points

The issue of whether a motion to compel arbitration should be granted is a question of law. *Triarch Industries, Inc. v. Crabtree*, 158 S.W. 3d 772, 774 (Mo. 2005); *Arrowhead Contracting Inc. v. M.H. Washington, LLC*, 243 S.W. 3d 532, 535 (Mo. App. W.D. 2008). This Court's review of that issue is, therefore, *de novo*. *Id.*

I. The Circuit Court erred in denying Appellants’ Motion to Stay Proceedings and Compel Arbitration because the Arbitration Agreement signed by Respondent is enforceable in that it is part of a valid contract, which includes offer, acceptance and consideration, and the claims raised in Respondent’s Petition are within the scope of the disputes covered by the Arbitration Agreement since, among other things, they arise out of Respondent’s employment and are claims for wages.

At the time Baker was promoted in 2010, she and Bristol Care signed an Employment Agreement and, as referenced in the Employment Agreement, a Mandatory Arbitration Agreement (“Arbitration Agreement”). LF 31, 100. That Arbitration Agreement provides, in part, that Baker and Bristol Care agree to resolve, by binding arbitration,

“all claims or controversies for which a federal or state court or other dispute-resolving body otherwise would be authorized to grant relief, whether arising out of, relating to or associated with the Employee’s employment or application for employment with the Company . . .”

Arbitration Agreement at Section 5. LF 31. Because this Arbitration Agreement is part of a valid contract, and because the claim raised by Baker’s Petition is within the scope of the claims which are covered by the Arbitration Agreement, arbitration must be compelled according to the terms of the Arbitration Agreement.

R.S.Mo. §435.355.1 provides that, upon showing of an applicable arbitration agreement and the opposing party’s refusal to arbitrate, the Court “shall order the parties

to proceed with arbitration.” Further, R.S.Mo. §435.355.4 provides that court proceedings should be stayed pending the outcome of that arbitration. Appendix A5. The Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, similarly provides that arbitration must be compelled upon the showing of a valid arbitration agreement that encompasses the subject dispute. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-8 (Mo. 2003); *3M Co. v. Amtex Security, Inc.*, 542 F.3d 1193, 1198 (8th Cir. 2008).² Because Bristol Care has shown the existence of an applicable arbitration agreement, and because Baker has chosen to file suit rather than file a demand for arbitration, the applicable statutes require that the court “shall order the parties to proceed with arbitration.” R.S.Mo. §435.355.1. *See also Dunn Indus. Group, supra*, 112 S.W. 3d at 427-8.

² Because Defendant’s business operates in interstate commerce, including for example purchase of goods from outside Missouri, the Federal Arbitration Act governs. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo. App. E.D. 2003). Missouri state courts may enforce arbitration in claims governed by the Federal Arbitration Act. *See, e.g., Dunn Indus. Group, supra*, 112 S.W. 3d at 427-8. The parties here recognize the applicability of the FAA. See Arbitration Agreement, Section 8. LF 32. However, under either the Federal Arbitration Act or the Missouri Uniform Arbitration Act, the result here would appear to be the same.

A. There is offer, acceptance and consideration to support the contractual obligation of the Arbitration Agreement.

The Arbitration Agreement is part of a valid contract. The elements of a contract in Missouri are offer, acceptance, and consideration. *Johnson v. McDonnell Douglas Corp.*, 745 S.W. 2d 661, 662 (Mo. banc 1988). Each of these elements is present here.

a. Offer and acceptance. Offer and acceptance are clear from the face of the documents. Baker was given the Employment Agreement and Arbitration Agreement at the time of her promotion to Administrator. She individually signed the Arbitration Agreement. LF 35. Unlike a policy unilaterally included in an employee handbook, which under Missouri law may not be enough to be an offer or to show acceptance, this was a written contract that was offered to, and accepted by, Baker.

b. Consideration. Similarly the documents and surrounding circumstances show there was consideration. In fact, Baker's Petition alleges that the Employment Agreement "contained mutual obligations and valid consideration." LF 15, ¶60.

Either a detriment to the promisee or benefit to the promisor can constitute consideration sufficient to support a contract. *Perbal v. Dazor Mfg. Co.*, 436 S.W.2d 677, 697 (Mo. 1968); *Moore v. Seabaugh*, 684 S.W.2d 492, 496 (Mo. App. E.D. 1984); *W.E. Koehler Construction Co. Inc. v. Medical Center of Blue Springs*, 670 S.W.2d 558, 561 (Mo. App. W.D. 1984). Detriment to the promisee may consist of doing anything he is not legally bound to do or refraining from anything he has a right to do. *Moore, supra*, 684 S.W.2d at 496; *Heath v. Spitzmiller*, 663 S.W.2d 351, 356 (Mo. App. S.D.

1983). Valuable consideration may consist of some right, profit or benefit accruing to one party, or some forbearance or responsibility, given, suffered or undertaken by the other. *Moore, supra*, 684 S.W.2d at 496; *Atherton v. Atherton*, 480 S.W.2d 513, 518 (Mo. App. W.D. 1972). Even a small amount of consideration is sufficient – the amount or magnitude of the consideration is not of concern. The only question is whether some consideration is present. *Sanger v. Yellow Cab Co.*, 486 S.W.2d 477, 480-81 (Mo. 1972); *Doss v. EPIC Healthcare Mgt. Co.*, 901 S.W.2d 216, 220 (Mo. App. S.D. 1999) (“the law does not concern itself with the adequacy of the consideration”); *Haretuer v. Klocke*, 709 S.W.2d 138, 139 (Mo. App. E.D. 1986); *Moore, supra*, 684 S.W.2d at 496 (“Even slight consideration is sufficient to support a promise.”).

There are multiple forms of consideration present in this case.

(i) Promotion. In this case, Baker was given the Employment Agreement and Arbitration Agreement as part of her promotion to Administrator of Bristol Care’s facility in Maysville, Missouri.³ At that time she moved from an hourly

³ Because the Employment Agreement and Arbitration Agreement were part of a single transaction – Baker’s promotion – they must be considered together. *See Martin v. U.S. Fid. & Guar. Co.*, 996 S.W.2d 506, 510 (Mo. banc 1999)(“where the agreement of the parties is evidenced by several documents . . . the meaning of those documents must be gleaned from the entire transaction and not simply from isolated portions of a single document.”)

paid staff employee to the salaried position of Administrator. The new position, and salary from that position, are a benefit to Baker, thus supplying consideration.

(ii) Other benefits to Baker. Other benefits to Baker recited in the Employment Agreement include the ability to reside at the facility with utilities and cable service paid, and the opportunity for a bonus. LF 101, Section 5; LF 102, Section 6; LF 103, Section 8. These benefits provide additional consideration.

(iii) Restrictions on the right to terminate at will. The promotion and other benefits are not the only consideration present. The Employment Agreement and Arbitration Agreement themselves indicate additional consideration. For example, the Employment Agreement restricts Bristol Care's ability to terminate Baker's employment. The general rule in Missouri is that an employer may terminate the employment relationship at any time, for any reason or with no reason. *See Amaan v. City of Eureka*, 615 S.W. 2d 414, 415 (Mo. banc 1981) (general rule is that employer may discharge an employee "at any time, without cause or reason, or for any reason..."); *Maddock v. Lewis*, 386 S.W.2d 406, 409 (Mo. 1965). However, under the Employment Agreement, Bristol Care can only terminate Baker's employment without notice for certain specified reasons: "dishonesty, insubordination, moral turpitude or incompetence" or conduct which "jeopardizes the general operation of the facility or the care, comfort or security of its residents." LF 100. Thus, for example, Bristol Care has given up the right to terminate Baker without notice due to financial reasons, or due to performance reasons which do not rise to the level of incompetence or insubordination, or without having any reason. Alternatively Bristol Care could terminate Baker's

employment only after giving her five days notice of termination or paying her five days' pay. LF 100, Section 2. Thus Bristol Care has agreed to refrain from something it otherwise has a right to do – terminate Plaintiff's employment without cause at any time. These restrictions on the reason for discharge and the timing of discharge, not present except as part of the contractual agreement, are forbearance by Bristol Care and thus supply consideration.⁴

The fact that Bristol Care could choose, as specified in the Employment Agreement, to give five days' pay instead of five days' notice does not change the outcome. The five day pay option is not simply "severance pay" in the sense of an additional payment for which there is no enforceable right to recover. It is a specific contractual restriction on Bristol Care's otherwise unfettered right to terminate employment: five days notice, or its monetary equivalent, is required in order to terminate the relationship.⁵ Such a restriction is a limitation on the employer's right to

⁴ Since these restrictions are part of the contract, they would be enforceable by the employee in a breach of contract action. *See Snowden v. Northwest Missouri State University*, 624 S.W.2d 161, 165 (Mo. App. W.D. 1981)(employee suit to enforce notice of termination provision in employment agreement); *Weltscheff v. Medical Center of Independence*, 597 S.W.2d 871 (Mo. App. W.D. 1980)(termination ineffective because contractually-required notice not given).

⁵ "Severance pay" cases, such as *Earl v. St. Louis University*, 875 S.W.2d 234 (Mo. App. E.D. 1994) or *Karzin v. Collett*, 562 S.W.2d 397 (Mo. App. E.D. 1978) are

terminate inherent in at-will employment. This forbearance from exercising rights which otherwise could be exercised by Bristol Care constitute consideration.

(iv) Obligation to pay fees and forbearance from bringing suit in court. Moreover, the Arbitration Agreement itself commits Bristol Care to pay the cost of the arbitrator and other fees should arbitration be invoked by Baker. LF 33, Section 16. Bristol Care also agrees to forebear from bringing suit over certain type of claims, agreeing that it, too, will resort only to arbitration in those matters. LF 31-32, Section 5. Again, this promise to perform, or forebear, provides the necessary consideration for Baker's promise to arbitrate. A promise by each party to submit matters to arbitration is the type of mutual obligation that supplies consideration. See generally *Frye v. Speedway Chevrolet Cadillac*, 321 S.W. 3d 429, 438-39 (Mo. App. W.D. 2010).

inapposite. *Earl* involved the question of whether there was consideration for a separately negotiated severance-pay contract. And, in fact, the court determined that a promise of severance pay to the employee was an enforceable contractual provision when the employee had made countervailing promises. *Id.* at 238-39. In *Karzin v. Collett*, 562 S.W.2d 397 (Mo. App. E.D. 1978), the principal issue was which Missouri statute governed the discharge of a particular police officer. Although the officer was apparently given a gratuitous payment of several days' pay upon termination, there was no contractual agreement in existence which required notice or pay in lieu of notice.

Each of these items alone would suffice as consideration for this contract. The fact that there are so many different forms of consideration clearly establish that this element has been satisfied.

c. There is mutuality of consideration. Both parties to a contract must be bound in some way for consideration to be present. *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006). However, mutual promises need not be identical. In fact they seldom are. *See e.g. Earl v. St. Louis University*, 875 S.W.2d 234 (Mo. App. E.D. 1994)(promise to forego service letter is consideration for promise to pay severance pay). Any obligation undertaken or right foregone is sufficient consideration for a contract. *See Earl v. St. Louis University*, 875 S.W.2d 234, 237 (Mo. App. E.D. 1994); *Hathman v. Waters*, 586 S.W.2d 376, 385 (Mo. App. 1979). As long as each party is bound in some way, there is consideration. *Schneider*, 194 S.W.3d at 858 (Mo. 2006). As discussed above, there are multiple promises by Bristol Care which provide “mutuality of consideration” necessary to support Baker’s promise to arbitrate.

Baker may argue that she is the only party who is agreeing to arbitrate any claim, and therefore there is no “mutuality”. This argument fails for several reasons. First, on the facts, both parties have agreed to arbitrate certain claims she or it may have against the other. LF 31-32, ¶ 5. There are certain specified claims that are not subject to arbitration, but that is true of claims that may be brought by either party.⁶ LF 32, ¶ 6.

⁶ In support of her position, Baker may adopt the Court of Appeals misinterpretation of Section 12 the Employment Agreement to argue that there is a

Moreover, requiring both parties to agree to arbitrate all claims against each other would be contrary to both the basic principles of contract law discussed above, and to specific guidelines concerning arbitration. Consideration requires only that there be some obligation, not that there be mutual obligations to arbitrate. *Schneider*, 194 S.W. 3d at 858-59 (Mo. 2006); *Frye v. Speedway Chevrolet Cadillac*, 321 S.W. 3d 429, 439 n. 16 (Mo. App. W.D. 2010). Any requirement of “mutuality of arbitration” would clearly be a special rule directed only to the enforcement of arbitration agreements. Yet such a rule could not stand, as both the U.S. and Missouri Supreme Courts’ have admonished that special contract enforcement rules may not be created for arbitration agreements. *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011); *State ex rel Vincent v. Schneider*, 194 S.W.3d 853, 858-9 (Mo. banc 2006).

general reservation to the employer of the right to bring all suits in court. However, Section 12 expressly applies to equitable claims only, not to all claims. (LF 105). Thus this interpretation is contrary to the basic principles holding that a contract must be interpreted to give effect to its express terms, *see, e.g., Dunn Industrial Group Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428-9 (Mo. 2003), and that contractual terms should be interpreted so as not to render terms (in this case the arbitration provision) superfluous. *Id.*; *McLean v. First Horizon Loan Corp.*, 277 S.W.3d 872, 877 (Mo. App. W.D. 2009). Even if the interpretation was correct that only Baker has agreed to arbitrate anything, the conclusion built upon that interpretation – that the agreement must fail due to lack of “mutuality of arbitration” – is incorrect, as is discussed below.

B. Baker's claim falls within the scope of the Arbitration

Agreement.

There can be no doubt, as well, that the dispute raised in Baker's lawsuit is within the scope of the Arbitration Agreement. As noted, the Arbitration Agreement covers "all claims or controversies. . . arising out of, relating to or associated with the Employee's employment . . . with the Company." LF 31, Section 5. More specifically, the Arbitration Agreement provides, by way of illustration, that claims covered by the agreement include "claims for wages or other compensation", "claims for breach of contract" and "claims for violation of any federal, state . . . statute . . . including . . . the Fair Labor Standards Act of 1938, as amended . . . and any claims under any similar . . . state . . . law." LF 31-32, Section 5.

Plaintiff's Petition is a claim for wages under the Missouri state law equivalent of the Fair Labor Standards Act and a claim for wages under three common law theories, including breach of contract.⁷ Each of these causes of action arise out of her employment and are claims for wages. Thus, all the claims raised in the Petition are covered by the Arbitration Agreement.

The parties have agreed that "arbitration is the parties' exclusive legal remedy." LF 34, section 20. The Arbitration Agreement is a valid contract and the dispute is

⁷ It is interesting to note that Baker is both suing for breach of contract and claiming there is no contract.

directly within its terms. Therefore the Motion to Stay Proceedings and Compel Arbitration should have been granted.

II. The Circuit Court erred in denying Appellants' Motion to Stay Proceedings and Compel Arbitration because the Arbitration Agreement is not unconscionable in that it is not a contract of adhesion, in that, among other things it was not an unexpected surprise and it does not limit the liability of the Appellants, and Respondent freely entered into this contract and accepted its benefits, including the attendant promotion to a new position.

Baker argued below that the Arbitration Agreement is unconscionable because it is a “contract of adhesion,” and therefore should not be enforced. Baker bases this only on a claim that “she was not given adequate time to consider the arbitration agreement.”

Baker’s argument is contrary to the language of the Arbitration Agreement. The Arbitration Agreement states:

BY SIGNING BELOW, EACH PARTY TO THIS
AGREEMENT ACKNOWLEDGES THEY HAVE
CAREFULLY READ THIS AGREEMENT, THAT THEY
UNDERSTAND ITS TERMS, AND THAT THEY HAVE
ENTERED INTO THIS AGREEMENT VOLUNTARILY
AND NOT IN RELIANCE ON ANY PROMISES OR
REPRESENTATIONS OTHER THAN THOSE
CONTAINED IN THE AGREEMENT ITSELF.

EACH PARTY FURTHER ACKNOWLEDGES HAVING
THE OPPORTUNITY TO DISCUSS THIS AGREEMENT
WITH PERSONAL LEGAL COUNSEL AND HAS USED
THAT OPPORTUNITY TO THE EXTENT DESIRED.

These statements appear immediately above Baker's signature. LF 35. In light of these statements, her argument now is nothing more than saying "I didn't read the document" or "I didn't know what I was signing." Obviously that is not sufficient to invalidate the contract, or every transaction would be subject to the after-the-fact cancellation Baker seeks here. *See Cowbell LLC v. BORC Building and Leasing Corp.*, 328 S.W.3d 399, 406 (Mo. App. W.D. 2010)(party who signs contract is presumed to know contents and accept terms; failure to read the contract is not a defense). Baker here accepted the benefits of her promotion to Administrator and worked in that position for over 6 months. It is far too late for her to say she did not mean to accept the terms and conditions that accompanied those benefits.

Even if the Arbitration Agreement had been presented to Baker on a "take it or leave it" basis, it would not be invalid. This Court has made clear that simply because a contract is presented to a party as "take it or leave it", that this does not create an unenforceable contract of adhesion. In *State ex rel Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006), this Court rejected such an argument in a case involving an arbitration clause in a real estate contract. A rule which held that the lack of an ability to negotiate would create grounds for avoiding a contract "would be completely unworkable" in modern society. *Schneider*, 194 S.W.3d at 857-58 (quoting *Swain v. Auto Services Inc.*, 128

S.W.3d 103, 107 (Mo. App. 2003)). Thus even assuming there was no ability for Baker to negotiate the terms of the Arbitration Agreement, that would not invalidate the contract.

Further, there is no evidence that this was a “take it or leave it” agreement. The Arbitration Agreement, as noted, contemplates that the party could discuss this with a personal attorney, thus at least implying the ability to negotiate. Moreover, there is no argument by Baker that she was forced to work as a manager for Bristol Care. She could have worked elsewhere, or continued at Bristol Care in her hourly position (a position for which she was not required to sign an Employment Agreement or Arbitration Agreement). This is further indication that this was not a contract of adhesion. *See Grossman v. Thoroughbred Ford Inc.*, 297 S.W.3d 918, 922 (Mo. App. W.D. 2009)(not a contract of adhesion where plaintiff not forced to do business with defendant).

Finally, there must be an “unexpected surprise advantage” which “unexpectedly or unconscionably limit[s] the obligations and liability of the [stronger party]” before an agreement can be classified as a contract of adhesion. *Schneider*, 194 S.W.3d at 857. This is clearly not present here. The Arbitration Agreement is not a surprise clause buried in fine print. It is a multi-page document in normal type size which is titled “Mandatory Arbitration Agreement” and repeatedly spells out exactly what it is, often in bold face or in all capitals. LF 31-35, Sections 5, 20, 26. Baker personally signed the Agreement, so it clearly was not a hidden provision imposed on her without her knowledge or consent. The relief available to Baker under the Arbitration Agreement is the same as is available in court, including an award of attorneys fees, so there can be no

argument that Bristol Care was attempting to limit its liability to Baker. LF 34, Section 18. Simply put, this Arbitration Agreement does not meet the definition of a contract of adhesion. *Schneider*, 194 S.W.3d at 857-858 (not a contract of adhesion because no “unexpected surprise advantage” for one party since the Plaintiff has signed the entire document and initialed the arbitration clause); *Swain v. Auto Services Inc.*, 128 S.W.3d 103, 107-08 (Mo. App. E.D. 2003)(arbitration clause not an unexpected surprise, and thus, enforceable).

III. The Circuit Court erred in denying Appellant’s Motion to Stay Proceedings and Compel Arbitration because the Arbitration Agreement is not an illusory contract in that (a) Appellant is not permitted to amend the Arbitration Agreement without restriction but rather 30 days prior notice is required; (b) the applicable arbitration rules, contract language and contract interpretation principles prohibit retroactive amendment; and (c) there otherwise is consideration for the Arbitration Agreement.

Baker argued below that the Arbitration Agreement is illusory because Defendant has the ability to amend or revoke the Agreement. She relies on ¶ 24 of the Arbitration Agreement which states, in part, “The employer reserves the right to amend, notify, or revoke this agreement upon thirty (30) days’ prior written notice to the Employee.” LF 34.

This does not make the Arbitration Agreement an illusory promise. The Arbitration Agreement does place express restrictions on the employer’s ability to amend or revoke. The Arbitration Agreement expressly provides that the employer may amend,

modify or revoke the agreement only “**upon thirty (30) days prior written notice to the Employee.**” LF 34, Section 24 (emphasis added). Thus, there is a limitation on the employer’s ability to modify or revoke the agreement. There must be written notice to the employee, and it must be given 30 days before the effective date of the amendment or revocation. In other words, Bristol Care has obligated itself to abide by the agreement as written for at least 30 days, and must give prior written notice before any change would be effective.

Many courts have recognized that this type of limitation on a party’s right to amend or revoke defeats the argument that the promise is illusory. *See Pierce v. Kellogg Brown & Root*, 245 F. Supp. 2d 1212, 1215-16 (E.D. Okla. 2003) (enforcing arbitration agreement where employer’s unilateral right to amend had a 10 day notice provision); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 604 (3d Cir. 2002)(arbitration agreement not illusory where employer required to put changes in writing and provide to employees); *Gratzer v. Yellow Corp.*, 316 F. Supp. 2d 1099, 1106 (D. Kan. 2004)(not illusory where change occurs prospectively after notice to employees); *Armstrong v. Assoc. Int’l Holdings Corp.*, 242 Fed. Appx. 955, 958 (5th Cir. 2007) (arbitration agreement enforceable where revisions or amendments cannot take effect until 30 days after notice to employee); *Seawright v. American Gen. Fin. Serv., Inc.*, 507 F.3d 967, 974-75 (6th Cir. 2007) (arbitration agreement not illusory where company remained bound for 90 days after notice of termination, and as to all known disputes arising before the date of termination); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1373-77 (11th Cir. 2005) (arbitration agreement enforceable where employer could modify only on 30-day

notice and the version in effect at the time a claim was received governed the claim). See also Restatement of Contracts 2d, §77, Illustration (b)(5) (“A promises B to act as B’s agent for three years on certain terms, starting immediately; B agrees that A may so act, but reserves the power to terminate the agreement on 30 days notice. B’s agreement is consideration, since he promises to continue the agency for at least 30 days.”) These decisions correctly conclude that, at least during the notice period (here 30 days), there can be no change and, thus, the employer has made a binding promise.

Baker will likely rely on *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429 (Mo. App. W.D. 2010) and *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15 (Mo. App. W.D. 2008) to argue that the provision allowing for amendment renders the agreement illusory. There are at least two significant differences, however, that make these cases inapposite. First, the arbitration “agreements” in both *Frye* and *Morrow* were unilaterally imposed policies, not a bilateral, individual contract as is present here. Second, and perhaps more directly to the point, in neither *Frye* nor *Morrow* was the employer obligated to give any prior notice of amendment. Thus, the employers there could have immediately amended the policies, whereas here Bristol Care is bound to follow the Arbitration Agreement as written for at least 30 days. Moreover, in *Frye* and *Morrow*, the mutual promises in the arbitration policy at issue were apparently the only possible source of consideration. Here, however, as noted above in Section IA, there are other forms of consideration in addition to the promises in the Arbitration Agreement itself which support the promises made by Baker to arbitrate these claims.

Baker also argued below that the possibility that an amendment by Bristol Care would operate retroactively to change the rules once a claim had been made would render the promise illusory. This hypothetical argument is likewise insufficient for at least three reasons.

First, the Arbitration Agreement's "Rules of Procedure" provision, and the rules of American Arbitration Association which are incorporated therein, prohibit retroactive changes. Section 7 of the Arbitration Agreement specifically states:

A single neutral arbitrator engaged in the practice of law shall conduct the arbitration under the applicable rules and procedure of the American Arbitration Association ("AAA") in effect when the demand for arbitration is filed. Any dispute relating to your employment with the company or to termination of your employment shall be governed by the AAA National Rules for the Resolution of Employment Disputes⁸ in effect when the demand for arbitration is filed.

LF 32, Section 7 (emphasis added). The AAA Rules, incorporated into the Arbitration Agreement, re-iterate that the Rules "in the form in effect at the time the demand for arbitration or submission is received by the AAA" shall apply to any dispute.

⁸ The National Rules for the Resolution of Employment Disputes have been renamed "Employment Arbitration Rules and Mediation Procedures" by the AAA. These rules are available at www.adr.org. A relevant excerpt is found in the Appendix at A7.

Employment Arbitrations Rules and Mediation Procedures, AAA, Rule 1 (Applicable Rules of Arbitration). Appendix A7.

Thus, even if a retroactive change was otherwise possible, it would not affect any pending claim. Once a claim is made, the rules applicable to it are locked in. This prevents Bristol Care from changing the rules “after the fact”.

Second, the specific language of the amendment provision in the Arbitration Agreement does not permit a retroactive modification. Bristol Care is obligated to give 30 days’ “prior” notice of any modification. LF 34, Section 24. This clearly implies that any change would take place only in the future. Baker cannot explain how it would be possible for Bristol Care to give “prior” notice of an amendment to become effective 30 days in the future, that could change something that has already happened in the past. Allowing a retroactive change would render the “prior” notice provision superfluous. Thus such an interpretation should not be adopted. *Nodaway Valley Bank v. E.L. Crawford Constr., Inc.*, 126 S.W.3d 820, 827 (Mo. App. W.D. 2004)(unless it cannot be avoided, language should not be interpreted to nullify contractual provision). Moreover, such a strained and unnatural interpretation would be contrary to the mandate that a contract should be read “in favor of the construction that will make it valid if such a construction can reasonably be made.” *Magruder Quarry & Co. v. Briscoe*, 83 S.W.3d 647, 652 (Mo. App. E.D. 2002).

Third, every Missouri contract incorporates a covenant of good faith and fair dealing. *Magruder Quarry & Co. v. Briscoe*, 83 S.W.3d 647, 651 (Mo. App. E.D. 2002); *Martin v. Prier Brass Mfg. Co.*, 710 S.W.2d 466, 473 (Mo. App. W.D. 1986). This duty

prevents one party to the contract from exercising a judgment conferred by the express terms of agreement “in such a manner as to evade the spirit of the transaction or so as to deny the other party the expected benefit of the contract.” *Martin v. Prier Brass Mfg. Co.*, 710 S.W.2d 466, 473 (Mo. App. W.D. 1986); *Home Shopping Club, Inc. Roberts v. Broadcasting Co.*, 989 S.W.2d 174, 179 (Mo. App. E.D. 1998). Thus, for example, in *Martin v. Prier Brass Mfg., supra*, the Court found that the covenant of good faith and fair dealing required prior notice of the cancellation of benefits, even though the agreement did not specifically require it. An employer would violate that covenant if, as the employer in *Martin* attempted, payment was denied for events which occurred before such notice was given. *Martin*, 710 S.W.2d at 472-473. In other words, retroactive effect of a change in contractual terms (Baker’s hypothesis here) would not be permitted.

Retroactively eliminating or altering the terms of the Arbitration Agreement, the straw man argument thrown up by Baker, would certainly “evade the spirit of the transaction” and deny a party the “expected benefit of the contract.” *Martin, supra*, 710 S.W.2d at 473. Thus such an action, even assuming it were permissible under the language of the Arbitration Agreement, would be a breach of the duty of good faith and fair dealing. This is sufficient to render the Arbitration Agreement, even under Baker’s hypothetical, as non-illusory. Missouri Courts have not hesitated to invoke the duty of good faith and fair dealing in this way to enforce a contract which might otherwise be found to be illusory. *Magruder Quarry & Co. v. Briscoe*, 83 S.W.3d 647, 650-52 (Mo. App. E.D. 2002) (“An implied obligation to use good faith to enough to avoid the finding of an illusory promise.”); *Home Shopping Club Inc. v. Roberts Broadcasting Co.*, 989

S.W.2d 174, 179 (Mo. App. E.D. 1998) (good faith requirement invoked to avoid a finding that contract is illusory; “we will not interpret this provision to give the [defendant] a right to [act] arbitrarily and deprive the contract of mutuality.”). This is further consistent with the principle that a contract will be read “in favor of the construction that will make it valid, if such a construction can reasonably be made.” *Magruder Quarry, supra*, 83 S.W.3d at 652. Such a construction, upholding the validity of the contract, is more than reasonable here. Therefore, the Arbitration Agreement is not an illusory promise and must be enforced.

IV. The Circuit Court erred in denying Appellant’s Motion to Stay Proceedings and Compel Arbitration because the Arbitration Agreement is applicable to disputes between Respondent and individual Appellant David Furnell in that the language of the Arbitration Agreement defines the parties to the Agreement as Baker, on the one hand, and the Company and its officers (including Mr. Furnell) on the other hand.

Baker named David Furnell, president of Bristol Care, Inc., as an individual defendant in her Petition. LF 3. There is no independent claim against Furnell and no allegations of individual wrongdoing by Furnell. His presence as a defendant is, apparently, for no reason other than to attempt to avoid Baker’s agreement to arbitrate. But a straightforward reading of the Arbitration Agreement demonstrates that whatever claim Baker may have against him is likewise subject to arbitration.

By the express terms of Section 1, the Arbitration Agreement is between Baker and “the Company”:

“Parties to the Agreement: This is a binding agreement between you (the “Employee”) and Bristol Care, Inc. (the “Company”). All references to “Company” in this Agreement shall include all of Bristol Care, Inc.’s subsidiary and affiliate entities, including all former, current and future officers, directors, and employees of all such entities, in their capacity as such or otherwise; all benefits plans and their sponsors, fiduciaries, administrators, affiliates, and agents, in their capacity as such and otherwise; and all successors and assigns of any of them.” LF 31.

This language defines “Company” to mean Bristol Care Inc., and all of Bristol Care Inc.’s subsidiary and affiliate entities. “Company” also includes “all former, current and future officers, directors and employees of all such entities.” Furnell is an officer of one of these entities – he is President of Bristol Care Inc.

Baker advanced a strained reading of the Arbitration Agreement to argue that only the officers of a subsidiary or affiliate are within the definition of “Company.” Yet Bristol Care Inc. is one of the entities included in the definition of “Company”, and thus its officers are officers of one of “all such entities” which comprise the “Company”.

Baker’s contorted reading of the Arbitration Agreement does not render it ambiguous. “A contract is not ambiguous merely because the parties disagree as to its construction.” *Ethridge v. Tierone Bank*, 226 S.W.3d 127, 131 (Mo. banc 2007) (quoting *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 860 (Mo. banc 2006)). Instead,

“[t]he test for ambiguity is whether the disputed language is reasonably susceptible of more than one meaning when the words are given *their plain meaning as understood by an average person.*” *Lacey v. State Bd. of Registration for the Healing Arts*, 131 S.W.3d 831, 839 (Mo. App. W.D. 2004)(emphasis added)(quoting *Daniels Express & Transfer Co. v. GMI Corp.*, 897 S.W.2d 90, 92 (Mo. App. E.D. 1995)). “[C]ourts are prohibited from creating ambiguities by distorting contractual language that may otherwise be reasonably interpreted.” *Care Ctr. of Kansas City v. Horton*, 173 S.W.3d 353, 355 (Mo. App. W.D. 2005). Thus, “overly technical reading” of contractual language must be avoided, because it will produce an “unlikely construction” of the agreement. *Schell v. Lifemark Hosps. of Mo.*, 92 S.W.3d 222, 229 (Mo. App. W.D. 2002).

The language clearly includes officers of all corporate entities, not just subsidiaries, in the definition of “Company.” Any other reading is simply a strained and overly-technical twisting of words—it would make no sense to read the language as including officers of subsidiaries but not of the parent.

Moreover, Baker’s contention would nullify the parties’ expressed intent to establish arbitration as the comprehensive method for resolution of “all claims and controversies”, which are “arising out of, relating to, and /or associated with the Employee’s employment with the Company.” LF 31, ¶¶4, 5. Adopting an interpretation that easily allows a claimant to circumvent or nullify these contractual provisions is inconsistent with the intent expressed in the agreement. *See, e.g. Livingston v. Metropolitan Pediatrics LLC*, 227 P.3d 796 (Ore. App. 2010)(where claims against individuals are based on same facts as claim against employer, arbitration agreement that

governs all claims “arising out of or relating to his employment” shows intent to cover claims against individual employees, and thus non-signatory employee-defendants may invoke arbitration. *Id.* at 804-05.).

Missouri courts prefer constructions which give effect to a contract’s terms; unless it cannot be avoided, language should not be interpreted to nullify or invalidate contractual provisions. *Rabius v. Brandon*, 257 S.W.3d 641, 645-46 (Mo. App. W.D. 2008); *Nodaway Valley Bank v. E.L. Crawford Constr., Inc.*, 126 S.W.3d 820, 827 (Mo. App. W.D. 2004) (citing *SD Invs., Inc. v. Michael-Paul, L.L.C.*, 90 S.W.3d 75, 81-82 (Mo. App. W.D. 2002)); *Magruder Quarry & Co. v. Briscoe*, 83 S.W.3d 647, 652 (Mo. App. E.D. 2002). This Court should favor the interpretation that is both logical and natural and gives effect to the entire agreement—all corporate officers are included within the definition of “Company”—and should therefore compel arbitration as to Baker’s claim against David Furnell.

V. The Circuit Court erred in denying Appellants’ Motion to Stay Proceedings and Compel Arbitration because the arbitrator should decide any questions of enforceability in that the parties expressly agreed to commit such questions to the arbitrator.

The parties agreed, in the Arbitration Agreement, that “the Arbitrator has exclusive authority to resolve any dispute relating to the applicability or enforceability of this Agreement.” LF 34, Section 20. The U.S. Supreme Court has held that such clauses, delegating the authority to rule on these threshold issues, are valid and enforceable. *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010). This is another reason that the

Court should grant the Motion to Stay and allow an arbitrator to deal with any challenges by Plaintiff to the enforceability of the Agreement.

CONCLUSION

For the reasons set forth above, this Court should reverse the Order of the Circuit Court, grant the Motion to Stay Proceedings and Compel Arbitration, and award Appellants their costs herein.

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2013, I electronically filed the foregoing with the clerk of the court by using the Missouri eFiling System which will send a notice of electronic filing to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Sup. Ct. Rule 84.06(b)(1):

1. I hereby certify that the information required by Sup. Ct. Rule 55.03 has been included, and the original copy of this Brief has been signed by the undersigned.
2. I hereby certify that this brief complies with the type-volume limitation of Sup. Ct. Rule 84.06(b)(1) because this brief contains 8,919 words, excluding the parts of the brief exempted by Sup. Ct. Rule 84.06(b)(1).
3. I certify that the file containing the digital version of Brief of Appellants has been scanned for viruses using Symantec Endpoint Protection and is virus-free.

/s/Brian N. Woolley

An Attorney for Appellant