



**In the
Missouri Court of Appeals
Western District**

A-1 PREMIUM ACCEPTANCE,	)	
	)	
Appellant,	)	WD79735
	)	
v.	)	OPINION FILED: July 18, 2017
	)	
MEEKA HUNTER,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Joel P. Fahnestock, Judge

Before Special Division: Cynthia L. Martin, Presiding Judge, Gary D. Witt, Judge and
Zel M. Fischer, Special Judge

A-1 Premium Acceptance, Inc. d/b/a "King of Kash" ("A-1") appeals from the trial court's denial of a motion to compel arbitration of all claims asserted by Meeka Hunter ("Hunter") that went beyond A-1's claim against Hunter for recovery of amounts alleged due on a loan. Because the parties' arbitration agreement required it to be interpreted pursuant to the Federal Arbitration Act ("FAA"),¹ and because the FAA requires that a substitute arbitrator be named if there is a lapse or vacancy in the naming of an arbitrator,

¹9 U.S.C. section 1, *et. seq.*

we reverse the trial court's judgment denying the motion to compel, and remand this matter for further proceedings consistent with this opinion.

Factual and Procedural Background

In June and July 2006, Hunter took out four loans from A-1 totaling \$800. Each loan was documented by several agreements including a loan application.² Each loan application form was one page in length, and was signed by Hunter. Relevant to this appeal, each loan application contained identical boiler plate language as follows:

You agree and understand that all transactions are governed by the laws of the State of Missouri.

. . . .

You agree and understand that a claim or demand for recovery of the balance due lender from your default in payment may be asserted by lender in any court of competent jurisdiction. However, you agree that any claim or dispute including class action suits, other than that resulting from your default in payment, between you and the lender or against any agent, employee, successor, or assign of the other, whether related to this agreement or otherwise, and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court of competent jurisdiction. Information may be obtained and claims may be filed at any office of the National Arbitration Forum at P.O. Box 50191, Minneapolis, MN 55405. ***This agreement shall be interpreted under the Federal Arbitration Act.***

(Emphasis added.)

²The other agreements Hunter signed for each loan included an automatic withdrawal authorization form, a credit card charge authorization form, and a promissory note. None of these agreements are relevant to this appeal.

On January 21, 2015, A-1 filed a petition against Hunter to collect the outstanding balance on one of the four loans, claimed to be \$275 in principal, plus interest in the amount of \$6,957.62 as of September 16, 2014, together with continuing interest, attorney's fees and costs. On March 31, 2015, Hunter filed an answer, and a counterclaim which alleged a violation of the Missouri Merchandising Practices Act. On August 4, 2015, Hunter filed an amended answer which asserted several additional counterclaims and a request for class action certification for those who had entered into similar loans. Hunter also asked that the matter be reassigned from the associate circuit court to the circuit court. On September 28, 2015, A-1 filed a motion to compel arbitration and for stay of proceedings ("Motion to Compel"). The Motion to Compel argued that arbitration of Hunter's counterclaims was required by the agreement set forth in the loan application. The Motion to Compel sought the appointment of a substitute arbitrator pursuant to section 5 of the FAA because the National Arbitration Forum ("NAF"), designated as the arbitrator in the arbitration agreement, was prohibited from involvement in "consumer arbitrations" as of a July 17, 2009 consent judgment.

Hunter opposed the Motion to Compel on several grounds. Hunter argued that: (i) whether an arbitration agreement had even been formed was an issue that had not been delegated to the arbitrator for determination; (ii) the arbitration agreement exclusively designated the NAF as the arbitrator, rendering the arbitration agreement unenforceable because the NAF was not available to arbitrate; (iii) a contract to arbitrate was never formed because of the doctrines of unconscionability and mutuality; and (iv) A-1 waived its right

to enforce the arbitration agreement. Hunter requested time to conduct discovery related to the merits of the Motion to Compel.

On May 20, 2016, the trial court entered its order ("Order") denying the Motion to Compel. The Order concluded that "[s]ince the NAF is no longer able to arbitrate consumer matters, the arbitration agreements are missing an integral term. Thus, the arbitration agreements are invalid and unenforceable." The Order noted that as a result of this finding, "it is not necessary for the Court to rule on the remaining issues related to delegation issues, unconscionability due to lack of mutuality, and waiver of the right to arbitration."

A-1 filed this timely appeal.

Standard of Review

"Whether the trial court should have granted a motion to compel arbitration is a question of law decided *de novo*." *Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016) (quoting *Johnson ex rel. Johnson v. JF Enterprises, LLC*, 400 S.W.3d 763, 766 (Mo. banc 2013)).

Analysis

A-1 raises three points on appeal. First, A-1 argues it was error to deny the Motion to Compel because the FAA required the appointment of a substitute arbitrator upon the NAF's unavailability. Second, A-1 argues it was error to deny the Motion to Compel because the Missouri Uniform Arbitration Act mandates the appointment of a substitute arbitrator. Third, A-1 argues that it was error to deny the Motion to Compel because the arbitration agreement contains a latent ambiguity that frustrates the intent of the parties to

arbitrate. Because the first point on appeal is dispositive, we need not resolve the second and third points.

By its express terms, the arbitration agreement set forth in Hunter's loan application is subject to the FAA, as the agreement provides that it "shall be interpreted under the [FAA]."³ "[T]he FAA . . . governs what courts may consider in determining whether an agreement to arbitrate is enforceable." *Ellis*, 482 S.W.3d at 419. Section 1 of the FAA provides that:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Here, the Order refused to compel enforcement of the arbitration agreement because the written arbitration provision was "missing an integral term" given the NAF's inability to serve as the arbitrator. The trial court clearly erred in so concluding.

As the Order correctly observed, "[t]he terms of a contract are read as a whole to determine the intention of the parties and are given their plain, ordinary, and usual meaning." *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. banc 2006). Though the arbitration agreement designated the NAF as the arbitrator, the agreement also directed in plain and ordinary terms that it shall be interpreted under the FAA.

³Even without this express provision, the arbitration agreement would also have been subject to the FAA under the Supremacy Clause. *Ellis*, 482 S.W.3d at 419.

The trial court was thus required by the plain language of the arbitration agreement to interpret the effect of the NAF's inability to serve as the designated arbitrator pursuant to the terms of FAA. Section 5 of the FAA addresses the appointment of substitute arbitrators:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement, the arbitration shall be by a single arbitrator.

By its plain terms, section 5 of the FAA requires a trial court to appoint a substitute arbitrator under any number of circumstances, including when there is a lapse or vacancy because a designated arbitrator becomes unable to serve.

In concluding that the NAF's inability to serve as the arbitrator rendered the arbitration agreement unenforceable for want of "an integral term," the trial court ignored that the agreement expressly required its interpretation pursuant to the FAA, and thus ignored that section 5 of the FAA unequivocally required the appointment of a substitute arbitrator. The trial court's ruling was clearly erroneous as it interpreted the agreement in a manner that rendered the provision requiring interpretation pursuant to the FAA meaningless. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003) (holding that each term of a contract is to be construed to avoid rendering other terms meaningless).

In reaching its conclusion, the trial court relied on federal court cases which have created a framework for evaluating whether the designation of an arbitrator is "integral" or "ancillary" to the obligation to arbitrate. This judicially constructed dichotomy is not analytically developed or grounded in a generally recognized doctrine by which *any* contract can be revoked. Instead, it is a framework crafted exclusively in connection with arbitration agreements, and primarily in connection with agreements where the NAF is named as the arbitrator. The "integral/ancillary" dichotomy does not place arbitration agreements on equal footing with other contracts in contravention of section 2 of the FAA which provides that agreements to arbitrate must be enforced "save upon such grounds as exist at law or in equity for the revocation of **any** contract." (Emphasis added.) *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. banc 2005) ("The FAA places arbitration agreements on an equal footing with other contracts, and courts will examine arbitration agreements in the same light as they would examine any contractual agreement.")(citation omitted). In fact, the United States Supreme Court effectively neutralized the efficacy of the "integral/ancillary" dichotomy when, in *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S.Ct. 665 (2012), it held, without acknowledging the dichotomy, that claims alleging violations of the Credit Repair Organizations Act were subject to arbitration even though ***the arbitration agreement in that case specified use of the NAF***. See *id.* at 677 n. 2 (Ginsburg, J., dissenting).

We recognize that the provision in the arbitration agreement designating the NAF as the arbitrator, though viable when the agreement was entered into, is no longer viable. We also recognize that Missouri recognizes a defense generally applicable to the

enforcement of any contract where "performance is rendered impossible by an Act of God, the law, or the other party." *Farmers' Elec. Co-op., Inc. v. Missouri Dep't of Corr.*, 977 S.W.2d 266, 271 (Mo. banc 1998); *see also Werner v. Ashcraft v. Bloomquist, Inc.*, 10 S.W.3d 575, 577 (Mo. App. E.D. 2000) (citing *Grannemann v. Columbia Ins. Group*, 931 S.W.2d 502, 506 (Mo. App. W.D. 1996)). However, impossibility of performance is an affirmative defense to a claim of breach of contract. *Farmers' Elec. Co-op., Inc.*, 977 S.W.2d at 271 (referring to what a "party pleading impossibility as a defense" must demonstrate to be relieved from the obligation to perform a contract). Hunter has not plead impossibility of performance as a defense to the Motion to Compel. And even had she, the defense would not apply to relieve her of the obligation she undertook to arbitrate claims based solely on the fact the designated arbitrator cannot serve. "A party pleading impossibility as a defense must demonstrate that it took virtually every action within its powers to perform its duties under the contract." *Id.* Here, the "contract performance" sought to be compelled--the submission of claims to arbitration--is not impossible for Hunter to perform. Though, a contingency occurred after the agreement to arbitrate was entered into that leaves the NAF unable to serve as the designated arbitrator, "[i]f a party desires to be excused from performance in the event of contingencies arising after the formation of a contract, it is that party's duty to provide therefore in the contract."⁴ *Id.* (citing *Stein v. Bruce*, 366 S.W.2d 732, 734 (Mo. App. 1963)). That is particularly so when the claimed impossibility involves a necessary act by a third party, as in this case.

⁴We recognize that the loan application was not likely "negotiable" in its form by Hunter. That, however, is not relevant to whether a general defense of impossibility of performance applies to relieve her of the obligation to submit certain claims to arbitration.

If a party to a contract unconditionally undertakes to perform an act that is not impossible, but merely requires a third party to acquiesce or perform a preceding act, the party's performance is not deemed to be conditioned on the third party's acquiescence or performance. In the latter situation, the inability to secure the necessary permission of acts of the third party does not excuse performance of the contract.

Werner v. Ashcraft Bloomquist, Inc., 10 S.W.3d 575, 578 (Mo. App. E.D. 2000) (internal citations omitted).

No provision is made in the arbitration agreement to relieve Hunter from the obligation to submit certain claims to arbitration in the event the designated arbitrator could not serve. The inability of a third party, the NAF, to act in the manner anticipated by the arbitration agreement does not excuse Hunter from performing the obligation she undertook in the agreement to submit certain claims to arbitration. In fact, the arbitration agreement itself directs the parties to the FAA, which resolves the arbitrator vacancy by compelling the court to appoint a substitute arbitrator.

The plain, ordinary, and usual meaning of the parties' written arbitration provision required the agreement to be "interpreted under the [FAA]." The plain, ordinary, and usual meaning of section 5 of the FAA required the trial court to name a substitute arbitrator given the NAF's inability to serve as the arbitrator. And no generally available defense to the enforcement of contracts relieves Hunter of the obligation to perform the arbitration agreement merely because the NAF is unable to serve as the designated arbitrator. The trial court clearly erred in concluding that the arbitration agreement became unenforceable when the designated arbitrator, the NAF, was unable to serve.

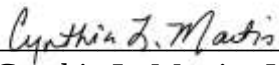
Point One is granted. As a result, we need not resolve points two⁵ and three on appeal.

Conclusion

The trial court's Order denying the Motion to Compel is reversed. The trial court's Order was expressly limited, however, to determining whether the NAF's inability to serve rendered the arbitration agreement unenforceable. The trial court did not determine whether A-1 waived its right to insist on arbitration by engaging in substantial litigation prior to the filing of its Motion to Compel. And the trial court did not determine whether the arbitration agreement is unconscionable due to a lack of mutuality. Factual issues remain relevant to determining these additional grounds raised by Hunter in opposition to the Motion to Compel. *Robinson v. Title Lenders, Inc.*, 362 S.W.3d 505, 518 (Mo. banc 2012) (reversing denial of motion to compel and remanding to consider undetermined arguments in opposition to motion to compel because "[a]s the fact-finder, the trial court should assess the evidence in this case and determine if the . . . arbitration agreement is enforceable"); *see also Lopez v. H & R Block, Inc.*, 429 S.W.3d 497, 503 (Mo. App. W.D. 2014) (reversing denial of motion to compel and remanding to consider other arguments raised in opposition to the motion but not determined by the trial court). We therefore

⁵Although we need not address the merits of point two on appeal, which argued that the Missouri Uniform Arbitration Act ("MUAA"), section 435.350 *et. seq.*, would also have required the trial court to name a substitute arbitrator, we do observe that *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. banc 2015) addresses that issue. In *Hewitt*, an arbitration agreement deemed subject to the FAA designated the NFL Commissioner as the arbitrator, a designation our Supreme Court deemed unconscionable. *Id.* at 812-13. *Hewitt* concluded that the NFL Commissioner's resulting inability to serve did "not invalidate the entire agreement to arbitrate." *Id.* at 813. *Hewitt* held that "[t]he MUAA provides for substitution of a new arbitrator when the designated arbitrator is disqualified." *Id.* The result in *Hewitt* is analogous to the outcome that should have been reached by the trial court in the instant case, applying section 5 of the FAA.

remand this matter for consideration of the additional grounds raised by Hunter in opposition to the Motion to Compel, and for further proceedings consistent with this Opinion.



Cynthia L. Martin, Judge

Witt, Judge, dissents in separate opinion
Fischer, Special Judge, joins in the majority opinion



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DISSENTING OPINION

I respectfully dissent from the majority's reversal of the trial court's judgment. In reaching its conclusion, the majority places too little weight on the parties inclusion of NAF in the arbitration agreement. As the majority notes, "[t]he FAA places arbitration agreements on equal footing with other contracts, and courts will examine arbitration agreements in the same light as they would examine any contractual agreement." *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. banc 2005) (citing *Keymer v. Mgmt. Recruiters Int'l, Inc.*, 169 F.3d 501, 505 (8th Cir. 1999)). The Majority then proceeds to completely ignore the intent of the parties and general principles of contract analysis and finds that section 5 of the FAA requires the court to appoint a substitute arbitrator.

With little discussion and no analysis the majority sets aside and rejects the large body of case law that has examined the question of whether a trial court can appoint a

substitute arbitrator when the contractually designated arbitrator is unavailable or unwilling to serve and a provision for appointing a substitute arbitrator is not set forth in the contract. Courts have taken what can reasonably be divided into two approaches to determining whether section 5 of the FAA acts as a savings provision to appoint a new arbitrator under the terms of a particular agreement. The "integral term test" or the "exclusivity test" have both been adopted by courts across the country in an attempt to determine the intent of the parties to the contract regarding the designation of the selected arbitrator. I would follow the vast majority of courts and adopt the integral term test which holds:

Where the chosen forum is unavailable . . . or has failed for some reason, § 5 applies and a substitute arbitrator may be named. Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an "ancillary logistical concern" will the failure of the chosen forum preclude arbitration.

Brown v. ITT Consumer Financial Corp., 211 F.3d 1217 (11th Cir. 2000); *See Miller v. GGNCS Atlanta, LLC*, 746 S.E.2d 680, 685 (Ga. Ct. App. 2013) ("The integral term vs. ancillary logistical concern test articulated by *Brown* has been adopted by the large majority of jurisdictions . . ."); *Carr v. Gateway, Inc.*, 944 N.E.2d 327 (Ill. 2011).

To apply the integral term test in Missouri we must look to Missouri law on the general rules of contract interpretation to decide whether the choice of the NAF as the arbitrator is integral. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); 9 U.S.C. §2; *Tucker v. Vincent*, 471 S.W.3d 787, 795 (Mo. App. E.D. 2015). While there is a "liberal policy in favor of arbitration," as noted above, our guiding principle in interpreting any contractual provision is the intent of the parties. *Triarch*, 158 S.W.3d at 775-76; *see Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 684 (2010) ("It

falls to the courts and arbitrators to give effects to [the] contractual limitations [of the arbitration agreements], and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties."); *Am. Exp. Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (U.S. 2013) (noting that arbitration is a matter of contract and "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes and the rules under which that arbitration will be conducted"). "If, giving the language used its plain and ordinary meaning, the intent of the parties is clear and unambiguous, we cannot resort to rules of construction to interpret the contract." *Thiemann v. Columbia Pub. Sch. Dist.*, 338 S.W.3d 835, 839-40 (Mo. App. W.D. 2011).

The unavailability of the parties' chosen forum precludes arbitration if 'the choice of forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern.' *Inetianbor [v. Cash Call, Inc.]*, 768 F.3d 1346, 1349-50 (11th Cir. 2014)]. "To determine whether the forum selection clause is integral, we must consider how important the term was to one or both of the parties at the time they entered into the agreement." *Id.* at 1350.

Flagg v. First Premier Bank, 644 Fed. App. 893, 896 (11th Cir. 2016). In *Flagg*, the Eleventh Circuit noted that the arbitration provision stated that disputes "shall" be resolved by the NAF under the NAF code and did "not appear to contemplate arbitration before any other forum." *Id.* The court found that the NAF "pervaded the arbitration provision" in that it was designated the exclusive forum and the exclusive code to govern all claims. *Id.* The Eleventh Circuit distinguished its earlier case of *Brown v. ITT Consumer Fin. Corp.*, 221 F.3d 1217 (11th Cir. 2000), noting that *Brown* was decided before the consent decree

between NAF and the State of Minnesota and further noting that in *Brown*, the NAF was only named as the Code of Procedure for the arbitration and not as the exclusive forum.

A-1 argues, and the majority finds, that we should look to the rationale of *Brown* and find that a substitute arbitrator should be appointed pursuant to section 5 of the FAA, irrespective of the intent of the parties to the contract. While I certainly agree that section 5 of the FAA *may* be applied to appoint a substitute arbitrator, I would hold that such is only the case when the arbitrator is not found to be an "integral" part of the arbitration agreement. To hold otherwise would prevent Missourians from being able to freely contract to arbitrate but only under the terms the parties expressly agree. Certainly, in many instances, particularly when the arbitration agreement is entered into after a dispute has arisen between the parties, the choice of the arbitrator is the most important and most negotiated part of an arbitration agreement.¹ I believe that, if, and only if, the court finds that the parties' choice to name a sole arbitrator or arbitration forum was not integral to their agreement is the court to step in and appoint a substitute arbitrator.

First, I recognize that the Missouri Supreme Court has held that, in some instances, the appointment of a substitute arbitrator is justified. For example, in *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. banc 2015), the Court was asked to invalidate the choice of arbitrator and appoint a substitute arbitrator. In *Hewitt*, the arbitration agreement stated that the National Football League Commissioner would serve as the arbitrator of disputes between teams and team employees. *Id.* at 812. The commissioner, however, was for all

¹ The majority makes no distinction between agreements entered into prior to or after a dispute between the parties has arisen and I agree that the same rules should apply to both types of contracts. However, the negotiation of the named arbitrator in a post-dispute agreement to arbitrate can receive much greater focus by the parties.

intents and purposes an employee of the team owners and thus was not neutral and the commissioner's appointment as the arbitrator was unconscionable. *Id.* at 813. The Missouri Supreme Court found that the contract defenses raised by Hewitt fell under the savings clause of section 2 of the FAA. *Id.* at 806. The Court found that because the choice of arbitrator was removed for unconscionability, under section 2 of the FAA, the unconscionable portions were replaced by relevant portions of the Missouri Uniform Arbitration Act ("MUAA") which provide for the substitution of a new arbitrator. *Id.* The parties in this case, however, are not seeking reformation under the savings clause of section 2. A-1 seeks to apply section 5 of the FAA and have a substitute arbitrator appointed pursuant to the FAA rather than seeking application of the MUAA pursuant to section 2. As addressed in detail below, the parties specifically agreed that the FAA would govern the Loan Application. A-1 did not argue for the application of the MUAA to the court below instead expressly stating that the agreement was not governed by the MUAA. It does not appear that such an argument was made or addressed in *Hewitt*. We will not now look to the MUAA and section 435.350, as the trial court did in *Hewitt*, when the parties expressly chose not to do so in the Loan Application.

A-1 cites to a number of cases where courts have found that an arbitration agreement was enforceable even if the sole named arbitrator was unavailable because the chosen arbitrator was not integral to the agreement. For example, A-1 cites to *Reddam v. KPMG LLP*, 457 F.3d 1054, 1061 (9th Cir. 2006) (abrogated on other grounds) which held that the selection of arbitration rules did not amount to a statement exclusively choosing an arbitration forum. *Id.* at 1060. In *Reddam*, the agreement stated that the arbitration "shall

be determined pursuant to the rules then in effect of the National Association of Securities Dealers, Inc." *Id.* The court found that this did not reveal an intent by the parties that the National Association of Securities Dealers, Inc. be an integral part of the agreement, it merely designated the rules by which the arbitration would occur. The court held that "something more direct is required" before finding that the unavailability of an arbitration agreement makes the parties agreement to arbitrate unenforceable. *Id.*

More similar to this case, is *Khan v. Dell Inc.*, 669 F.3d 350, 354-55 (3rd Cir. 2012), which found that the phrase "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM" was ambiguous as to the parties' intent because "EXCLUSIVELY" could be read to modify "BINDING ARBITRATION," "THE NATIONAL ARBITRATION FORUM," or both. *Id.* at 355. Further, the Third Circuit found that the application of FAA sections 1-16 suggested an intent to have a substitute arbitrator appointed under section 5. *Id.* 356. Although the court went on to acknowledge that jurisdictions are divided on the question of what makes an arbitrator "integral" to the agreement, the court held that the "liberal federal policy in favor of arbitration" resolves ambiguities in favor of arbitration. *Id.* 356; *See also Courtyard Gardens Health and Rehab., LLC v. Arnold*, 485 S.W.3d 669, 677 (Ark. 2016) (mandatory language of the arbitration agreement applied to arbitration rather than arbitrator); *Jones v. GGNSC Pierre LLC*, 684 F.Supp.2d 1161, 1168 (D.S.D. 2010); *Adler v. Dell*, No.08-CV-13170, 2009 WL 4580739 (E.D. Mich. Dec. 3, 2009) (agreement stated that disputes "shall be resolved exclusively by binding arbitration" and naming of the NAF was merely ancillary);

Robinson v. EOR-ARK, LLC, No. 1:14-CV-01051, 2015 WL 5682647, *4-*5 (W.D. Ark. June 19, 2015) (severance clause, permissive language of "may be filed at any office of the National Arbitration Forum, and minimal reference to the NAF made the use of the NAF ancillary).

As many of these cases recognize, while the majority of circuits and jurisdictions apply the "integral test" to determine if the appointment of a substitute arbitrator is appropriate, there is far from agreement on how to specifically apply this test. A number of cases have found that where only one entity is named as an arbitrator, without reference to substitution, the parties expressed a clear intent that the arbitrator was integral to the agreement. *See Inetianbor v. Cash Call, Inc.*, 768 F.3d 1346, 1351 (11th Cir. 2014); *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680 (Ga. App. Ct. 2013) (the NAF bring named as arbitrator was integral to the agreement); *McMullen v. Meijer, Inc.*, 166 Fed. Appx. 164, 169 (6th Cir. 2006); *Carideo v. Dell, Inc.*, C06-1772JLR, 2009 WL 3485933 (W.D. Wash. Oct. 26, 2009) (same)²; *Geneva-Roth, Capital, Inc. v. Edwards*, 956 N.E.2d 1195, 1201-02 (Ind. Ct. App. 2011); *Wert v. Manorcare of Carlisle PA, LLC*, 124 A.3d 1248, 1263 (Pa. 2015) (recognizing that the majority of jurisdictions hold that post-consent decree, "Section five of the FAA cannot preserve NAF-incorporated arbitration agreements unless the parties made the NAF's availability non-essentially by specifically varying the terms of its procedure.") *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215 (Pa. Super. Ct. 2010) (collecting cases in which arbitration agreement is not enforceable in the absence of the

² While distinguished by other jurisdictions, I see no support for A-1's statement that in light of the Ninth's Circuit's holding in *Reddam*, the holding in *Carideo* is "likely no longer good case law."

NAF). Given our mandate to give effect to the intent of the parties where possible, I find the reasoning of these cases more persuasive. The parties have agreed to waive their constitutional right to a jury trial, but limited that waiver to the use of NAF as the chosen and designated arbitration forum.

For example, as cited by Hunter, *Kilma v. Evangelical Lutheran Good Samaritan Soc.*, No.10-CV-1390, 2011 WL 5412216 (D. Kan. Nov. 8, 2011) recognizes that in both *Reddam* and *Brown*, the "selection of an arbitrator [was] an ancillary concern because the parties merely selected the rules of the specific forum." *Id.* at *4.³ In *Kilma*, the parties had an express statement that the NAF Code of Procedures for Arbitration would apply and that the party requesting arbitration would be required to pay a filing fee to the NAF-- manifesting an intent that the NAF was to be the arbitrator. The language in the Loan Agreements in the case at bar are even clearer that disputes "shall be resolved by binding arbitration by the National Arbitration Forum." *See Ranzy v. Tijerina*, 333 Fed. Appx. 174 (5th Cir. 2010) (use of the phrase "shall be resolved . . . by and under the Code of Procedure of the National Arbitration Forum" was mandatory language that showed an intent of the parties for the arbitrator to be integral to the contract); *Carr v. Gateway, Inc.*, 944 N.E.2d 327, 330 (Ill. 2011) (use of the word "exclusively" coupled with penalty provision for failing to use the NAF evidenced that arbitrator was integral to the agreement); *Beverly Enterprises Inc. v. Cyr*, 608 Fed. Appx. 924, 925-26 (11th Cir. 2015) ("NAF code is 'integral' to the agreement in this case because the agreement explicitly incorporates the

³ See *Meskill v. GGNCS Stillwater Greeley LLC*, 862 F.Supp.2d 966, 973-74 (D. Minn. 2012) (collecting cases in which arbitration agreement only specified rules and procedures to be followed, not a specific designation of an arbitrator).

NAF code, making the code an essential part of the agreement); *compare Miskill*, 862 F.Supp. 2d at 972 ("when an arbitration clause selects an arbitral forum's rules but does not expressly designate that forum to hear the matter, arbitration may be compelled notwithstanding the forum's unavailability); *accord Davis v. Sprint Nextel Corp.*, No. 12-01023-CV, 2012 WL 5904327 (W.D. Mo. Nov. 26, 2012).

When reviewing the breadth of cases from other jurisdictions applying the "integral term" test, I appreciate that each case requires an individualized interpretation of arbitration language and courts have varied widely on how best to decide whether a term is integral. *See Rivera v. Am. General Financial Servs., Inc.*, 289 P.3d 803, 811-12 (N.M. 2011) (collecting cases both finding and not finding arbitration forum to be integral--ultimately holding designation of the NAF or "successor organization" to not allow substitution under subsection 5). Many of these cases do, however, have common factors which are examined to determine whether a forum is integral. For example, whether the appointment language was absolute or permissive and the degree to which the forum was referenced in the agreement. I find that under these factors, the contractual statement that the NAF shall act as the arbitrator and that its rules shall apply, with no specific reference to section 5 of the FAA or any alternative arbitrator or method for selecting an alternate arbitrator, suggest that the NAF was, in fact, an integral part of this agreement between these parties.

I am unpersuaded that by failing to acknowledge or address the "integral/ancillary" dichotomy in *CompuCredit Corporation v. Greenwood*, ___ U.S. ___, 132 S.Ct. 665 (2012), the Court was rejecting *sub silentio* its application. Certainly, the majority is correct that the arbitration agreement at issue in *CompuCredit* called for the use of NAF as

an arbitrator and, as acknowledge by Justice Ginsburg's dissent, "an arbitrator" would be used because NAF was prohibited from acting as such. There is no indication, however, that the Court was asked to address the appropriateness of appointing a substitute arbitrator given NAF's unavailability. I find it overreaching to say that the Court "effectively neutralized the efficacy of the 'integral/ancillary' dichotomy" in a case where there is no indication the issue was even before or considered by the Court. Although Missouri has yet to address this issue, I find the large body of law from other jurisdictions persuasive.

By rejecting the "integral/ancillary" dichotomy, the majority ignores the intent of the parties and seems to reject the idea that parties may have a desire to arbitrate but only to the extent the arbitration is overseen by the contractually agreed upon arbitrator. It is of great import that the people of the State of Missouri, through their constitution have protected the right to a trial by jury as inviolate in both criminal and civil cases. Mo. Const. Art. 1 Sec. 22(a). By agreeing to arbitrate a dispute the parties are giving up the right to bring their dispute before a civil court, which includes the constitutional right to a jury trial, and agreeing to a different forum to resolve their civil disputes. In criminal cases, the courts require a specific knowing and voluntary waiver of the right to a jury trial. *State v. Cooper*, 356 S.W.3d 148, 153 (Mo. banc 2011). In a civil case, a court may not deny a party its right to a jury trial unless that party has affirmatively waived such right. *Estate of Talley v. Am. Legion Post 122*, 431 S.W.3d 544, 550 (Mo. App. E.D. 2014). The party does not have to demand a jury trial but is entitled to a jury absent an effective waiver of that right. *Id.* The right to a jury trial in a civil action can be waived by contract. *Midland Prop. Partners, LLC v. Watkins*, 416 S.W.3d 805, 811 (Mo. App. W.D. 2013). However,

that waiver will never be implied and must be clearly and explicitly stated and "requires the use of clear, unambiguous, unmistakable, and conspicuous language." *Id.* "In determining whether a party knowingly and voluntarily relinquished its right to a jury trial, courts have examined the negotiability of the contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision." *Id.* at n. 5. (internal quotation marks and citations omitted.)

Along with the power to waive a party's right to a jury trial comes with it the attendant right to limit the circumstances under which the party is willing to waive that right. "We have held that parties are generally free to structure their arbitration agreements as they see fit" including that they "may choose who will resolve specific disputes." *Stolt-Nielsen S.A.*, 559 U.S. at 683 (internal quotations and citations omitted); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). In many cases the choice of the designated arbitrator or arbitration forum is a subject of extensive negotiation between the parties and a party may well be willing to waive its constitutional right to a jury trial if the cause will be determined by a particular arbitrator or arbitration forum but would not be so willing to waive their jury trial rights absent a specific arbitrator or arbitration forum being contractually designated to resolve their disputes.

It is this basic principal of freedom to choose contract terms that I also believe addresses the majority's concern that we are mandated to treat an arbitration agreement as we would any other contract. *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. banc 2005). The majority argues that the integral/ancillary dichotomy should not be

applied because this analysis would not be applied to other types of contractual disputes. However, the Majority then goes on to ignore general principles of contract analysis, which starts with an attempt to determine the intent of the parties, and skips to the application of the savings provisions of the FAA. While arbitration agreements may be on equal footing with other contracts, they will always be a distinct and unique subset because they are governed by the FAA or other state arbitration statutes. Arbitration agreements are governed by statutes that courts often impose to alter the agreements. In this case, the application of the substitution provisions of section 5 of the FAA is equivalent to a modification or reformation of other contracts. Such modification or reformation requires the same elements as required for the formation of the original contract. *Lunceford v. Houghtiln*, 170 S.W.3d 453, 464 (Mo. App. W.D. 2005). This includes showing that the requested change reflects the actual intent of the parties. *Id.* The integral/ancillary dichotomy merely applies the same rules in the arbitration context. Before unquestioningly applying section 5, which allows for the appointment of a substitute arbitrator, the court first asks if a substitution reflects the actual intent of the parties. Under the majority's analysis, if the parties in a complex business relationship negotiated for months and finally agreed that they would contractually designate a particular patent lawyer with an engineering degree and thirty years of experience to arbitrate any disputes between the parties, if that designated arbitrator was unwilling or unable to serve, the court could appoint an eighteen year old high school dropout whose only experience was selling sunglasses at the kiosk in the mall as a substitute arbitrator. Such an appointment would not reflect the agreement of the parties but would comply with the majority's blind

adherence to section 5 of the FAA and completely ignore substantial caselaw which tries to determine the intent of the parties consistently with other contractual analysis. In this case, as fully discussed above, I would find that the contract does not support a finding that the intent of the parties at the time they entered into the agreement to substitute an arbitrator should NAF be unavailable and, thus, as I believe the law would not modify or reform a contract under these circumstances I would not apply section 5 to reform the arbitration agreement.

I agree with the majority that the arbitration agreement signed by Hunter states that it will be governed by the FAA generally and that section 5 of the FAA can act as a savings provision but, I do not agree that when read as a whole, the intention of the parties was to arbitrate even if NAF was unable or unwilling to act as arbitrator. The agreement specifically named NAF but made no specific mention of the savings provision. Under its plain language, the agreement places the emphasis on the importance of NAF over the savings provision. As such, I would follow the other jurisdictions that have addressed this issue and deferred to the terms agreed to by the parties.

My greatest concern is not the majorities finding that under this agreement a substitute arbitrator may be appointed by the trial court, but the majority's blind application of section 5 of the FAA with no analysis or even attempt to first determine the intent of the parties to this agreement.

Because I would find the naming of NAF was an integral part of the arbitration agreement in this case, I would affirm the ruling of the trial court. I do concur in the majority's decision that when this case is remanded pursuant to the majority's opinion that

the trial court may still consider the issues of waiver and unconscionability and the parties may make a proper factual record regarding those issues so the trial court can determine their applicability to this matter.

A handwritten signature in black ink, appearing to read 'Gary D. Witt', is positioned above a horizontal line.

Gary D. Witt, Judge