

IN THE SUPREME COURT OF MISSOURI

No. SC91066

STATE OF MISSOURI ex rel. UNION PACIFIC RAILROAD COMPANY,

Relator

v.

HONORABLE MICHAEL P. DAVID,

Circuit Judge, Division 6 of the Twenty-Second Judicial Circuit (St. Louis City),

Respondent

On A Petition For A Writ of Prohibition And Mandamus

RELATOR'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Union Pacific Railroad Company is the defendant in a series of cases consolidated before Respondent, the Honorable Michael P. David. Respondent granted plaintiffs' motion to compel arbitration of two cases in which Union Pacific did not sign a written arbitration agreement. The Court issued a preliminary writ of prohibition. The Court has jurisdiction of this proceeding under MO. CONST., art. V, § 4.1, which gives the Court "general superintending power over all courts and tribunals," and the power to "issue and determine original remedial writs."

STATEMENT OF FACTS

The Events Leading Up To The Arbitration Agreement — The Gordon And Champlin Cases Are Consolidated And Severed Before The Arbitration Agreement Is Discussed, Negotiated Or Signed

Plaintiff James L. Gordon filed a petition seeking damages from Union Pacific for personal injuries under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* on June 18, 2001. Ex. 1; Ex. 9 at 65. Plaintiff Nagel Champlin filed a similar petition on September 20, 2001. Ex. 9 at 65. These were two of more than 150 petitions filed in the Twenty-Second Judicial Circuit (St. Louis City) by present and former employees of the Union Pacific alleging that they suffered carpal tunnel syndrome from exposure to various conditions at work.

These cases (with one exception¹) were originally filed individually. On February 26, 2007, over Union Pacific's objection, Respondent Judge Michael David ordered that *Gordon* and *Champlin* be consolidated with 33 other cases for a jury trial to begin on October 22, 2007. Ex. 9 at 82-83. The lead case for this group was *John Barnes v. Union Pacific*. See *id.* Respondent also ordered 21 cases to be consolidated with *Jack E. Applegate v. Union Pacific* as the lead case — all to be tried together on March 24, 2008. Ex. 9 at 83. In addition, 38 cases were consolidated with *Leslie Steele v. Union Pacific* as the lead case pending before Judge Lisa Van Amburg. The *Ellison* cases were assigned to Judge Mark H. Neill.

On October 9, 2007, Respondent ordered that the *Gordon* case be severed from the *Barnes* group “per prior agreement.” Ex. 10 at 101. In the same order Respondent severed the *Champlin* case “per Plaintiffs’ request.” Ex. 10 at 101.

On October 16, 2007, counsel for the parties first discussed the possibility of arbitrating the cases. Tr. (1/4/10) at 8, Ex. 13 at 136. Plaintiffs’ counsel sent a proposed arbitration agreement on that date. Ex. 10 at 107.

On October 19, 2007, counsel for Union Pacific signed on his client’s behalf an arbitration agreement. Counsel for plaintiffs signed the arbitration agreement on October

¹ The original petition in *Oliver Ellison, et al.*, No. 052-10658, filed August 26, 2005, had 39 plaintiffs. Ex. 2 at 7. Judge Thomas C. Grady granted Union Pacific’s motion to sever the plaintiffs into individual case on March 15, 2006. Judge Riley ordered the individual cases consolidated on December 4, 2006. Ex. 9 at 66-80, with *Ellison* as the lead case.

24, 2007. Counsel for Union Pacific signed the arbitration agreement again on October 29, 2007 because plaintiffs' counsel misplaced the original. Ex. 3 at 48.

The Terms Of The Arbitration Agreement

The arbitration agreement is in three parts. The first is a general agreement signed by counsel for the parties. This part has general provisions relating to all of the arbitrations. It will be referred to as the "general arbitration agreement." The general agreement provides for arbitration for four groups of cases — *Barnes*, *Applegate*, *Steele*, and *Ellison*. The second part (referred to hereafter as "Exhibit A") is a list of the cases covered by the arbitration agreement. Ex. 3 at 49; App. at A11. The *Gordon* and *Champlin* cases are not listed on Exhibit A. The third part of the arbitration agreement is the individual arbitration agreement to be signed by each party (to be referred to as the "individual arbitration agreement"). Ex. 3 at 50; App. at A12. The general agreement provides that counsel will obtain written consent to arbitrate from their clients, as evidenced by their signature on the individual arbitration agreement, as a condition precedent to the effectiveness of the agreement to arbitrate. Ex. 3 at 47; App. at A9.

The Arbitrations And The Ensuing Disputes Leading Up To Plaintiffs' Efforts To Have The Gordon And Champlin Cases Arbitrated, And The Ellison Arbitration Panel Revoked

Respondent was the arbitrator for the *Barnes* group. Respondent issued the *Barnes* arbitration awards on February 25, 2008. Ex. 11 at 114. Two further disputes arose after the awards. The first — whether post-arbitration motions to vacate or modify the awards should be heard by a circuit judge other than Respondent (who was the arbitrator) — was

resolved by this Court's preliminary order in prohibition (issued May 27, 2008), No. SC89337, and the ultimate compliance with that order by Respondent. The second — whether plaintiff's breach of the confidentiality provisions of the arbitration agreement invalidated the agreement — was originally ruled against Union Pacific in 2008. Thereafter, the *Applegate* and *Steele* cases were arbitrated in 2008 and 2009. The judges to whom these cases were assigned entered judgments confirming the awards, and Union Pacific appealed the judgments. The cases were settled on appeal before briefing was begun.

The last arbitration to be completed involved the 38 cases in the *Ellison* group assigned to Judge Neill. The parties could not agree on the appointment of arbitrators. Using the procedure called for in the arbitration agreement and by §435.360 RSMo, the parties appointed two arbitrators, and, when they could not agree upon a third, Judge Neill appointed one. Ex. 7 at 57. Plaintiffs did not object to the appointment of the arbitrators or the method by which they were selected. So, as of October 5, 2009, a three arbitrator panel was in place to decide the *Ellison* cases.

On November 24, 2009, plaintiffs filed a motion to consolidate the *Gordon* and *Champlin* cases with the *Ellison* group. Ex. 9 at 60. Union Pacific opposed the motion because there was no agreement to arbitrate their claims. Ex. 10 at 99. *Gordon* and *Champlin* were pending before Respondent Judge David, (not Judge Neill to whom the *Ellison* group had been assigned some two years before) because they had been severed from the *Barnes* group more than two years previously.

The Motion To Compel Arbitration Of The Gordon And Champlin Cases Based On An Alleged “Oral Modification” Of The Arbitration Agreement

On December 17, 2009 — just two days after the parties agreed to begin the *Ellison* arbitration in early January 2010 — plaintiffs filed a motion to compel arbitration of the *Gordon* and *Champlin* cases. Ex. 11 at 110. The motion alleged that sometime in October or November 2007 plaintiff’s counsel “discovered” that neither *Gordon* nor *Champlin* were on the list of cases to be arbitrated and that was a “mistake.” Ex. 11 at 111. The motion did not mention that both cases had been severed from the *Barnes* group by agreement (*Gordon*) and at plaintiffs’ request (*Champlin*).

The motion further claimed that counsel for plaintiffs called this to the attention of Union Pacific’s counsel (it does not specify which one), and that “an agreement was reached” (it does not specify with whom) that the *Gordon* and *Champlin* cases would be included in either the *Applegate*, *Steele*, or *Ellison* arbitrations. Ex. 11 at 111. The motion does not explain why this mistaken “omission” was not raised earlier, when *Applegate* or *Steele* were set for arbitration.

Union Pacific opposed the motion to compel arbitration because neither *Gordon* nor *Champlin* were included on the list of plaintiffs attached as Exhibit A to the arbitration agreement, and the parties had not executed individual written arbitration agreements. Ex. 12 at 123. Union Pacific denied the existence of an alleged “oral agreement.” Ex. 12 at 123. Union Pacific further objected because the attempt to join *Gordon* and *Champlin* to the *Ellison* arbitration was brought before Respondent — who had never had anything to

do with the *Ellison* cases up to that point — and those cases were scheduled to start in a few days. Ex. 12 at 123

Upon Union Pacific's request, Respondent held an evidentiary hearing on the motion to compel arbitration on January 4, 2010. Ex. 13 at 134; Ex. 16 at 144. At the hearing plaintiffs' counsel claimed that the arbitration agreements had been "orally" amended. There was no mention of any alleged individual arbitration agreement signed by anybody, even though plaintiffs were expressly invited to produce such an agreement if it existed. Tr. at 11-12. Ex. 13 at 137.

Plaintiffs offered the affidavit of their counsel that "incorporated by reference" the allegations of the motion filed three weeks previously. Exs. 14 and 15 at 140, 142. The affidavit also alleged that the parties "orally" amended the arbitration agreement when another plaintiff named Thielmeier decided he did not want to arbitrate his claim. Thielmeier did not sign the individual arbitration agreement, and sought to pursue other claims in addition to his alleged carpal tunnel injury. Later, Thielmeier signed the individual arbitration agreement, and Respondent ordered his case joined (over Union Pacific's objection) with those currently being arbitrated. Exs. 14 and 15 at 140, 142.

Union Pacific offered the affidavit of Richard Brown, its Team Leader for Occupational Claims. Ex. 16 at 145. Brown was the principal company contact with plaintiffs' counsel and the person responsible for supervising the litigation.

Brown said that Union Pacific "did not intend for any individual not included on that list [*i.e.*, Exhibit A to the general arbitration agreement] to be included or otherwise covered" by the arbitration agreement. Ex. 16 at 146. Brown further testified that he

signed all of the individual arbitration agreements on behalf of Union Pacific and that “I have not executed any such agreement with respect to plaintiffs Gordon and Champlin.” Ex. 16 at 146. Moreover, Brown testified that “I have not authorized the arbitration of the claims of plaintiffs Gordon and Champlin. To my knowledge, no one at Union Pacific has signed any arbitration agreement or otherwise authorized the arbitration of the claims of plaintiffs James Gordon and Nagel Champlin.” Ex. 16 at 146.

Respondent took the motion to compel arbitration under submission. Tr. at 16, Ex. at 138.

In the meantime, on January 6, 2010, the presiding judge, the Honorable David Dowd, granted plaintiffs’ motion to consolidate the *Ellison* cases with *Gordon* and *Champlin* with *Gordon* as the lead case. Judge Dowd transferred all the cases to Respondent, because a local rule provided that cases are consolidated cases under the oldest case number. Ex. 17 at 154. *Gordon*, having been filed in 2001, was older than *Ellison*, which was filed in 2005. Judge Dowd also stayed the *Ellison* arbitration, which was to begin in less than a week — pending further order by Respondent. Ex. 17 at 154.

On January 13, Respondent sustained plaintiffs’ motion to compel arbitration in *Gordon* and *Champlin*. Ex. 18 at 155. Respondent held that the October 2007 arbitration agreement was a written arbitration agreement, and that the parties orally agreed to modify that agreement to arbitrate *Gordon* and *Champlin*. Ex. 18 at 156. Although Brown’s affidavit denied that anyone at Union Pacific “has signed any arbitration agreement or *otherwise authorized* the arbitration of the claims of plaintiffs James Gordon and Nagel Champlin,” Ex. 16 at 146 (emphasis added), Respondent held that

Brown “did not deny the existence of the oral agreement alleged by Plaintiff.” Ex. 18 at 156.

The Ellison Arbitration Goes Forward With A Single Arbitrator Whose Selection Was Not Agreed To By Union Pacific, Rather Than The Three-Person Arbitration Panel Agreed To By Both The Plaintiffs And Union Pacific

On January 26, 2010, plaintiffs filed a motion to enforce agreement regarding arbitration and to set aside Judge Neill’s prior orders. Ex. 19 at 158. The motion gave no grounds for removal of the three-person arbitration panel, and did not explain what in the arbitration agreement needed “enforcing” that had not already been enforced. Plaintiffs’ motion simply asked that Respondent consent to be arbitrator.

On February 10, 2010, Union Pacific filed a motion to transfer the entire *Gordon/Ellison* group back to Judge Neill. Union Pacific argued that the consolidated group of 40 plaintiffs’ cases should remain with Judge Neill, because he had presided over 38 of the cases for years, and had already ordered an arbitration that had been set to begin in January 2010.

On February 24, 2010, Respondent granted plaintiffs’ motion to set aside all of Judge Neill’s orders, including the order appointing the three-person arbitration panel that had been in the process of arbitrating the 38 cases in the *Ellison group*. Ex. 20 at 178. Respondent’s order did not find there was any cause or justification to remove the previously selected three-person arbitration panel. As grounds for the ruling, Respondent said only that “the movement of these cases to this Division coupled with the request by

Plaintiffs for this Court to act as arbitrator is grounds enough for this Court's exercise of jurisdiction." Ex. 20 at 179.

However, the February 24 order did not appoint arbitrators or explain how arbitrators would be appointed; the order only vacated Judge Neill's orders. On March 1, Union Pacific filed a motion requesting that Respondent appoint the three-person panel that Judge Neill previously selected and that had been serving until Respondent removed them. Ex 21 at 181.

On June 15, 2010, Respondent appointed Judge Van Amburg as the arbitrator for the 38 plaintiffs in the *Ellison* group that had been transferred away from Judge Neill, and the three cases recently added — *Gordon*, *Champlin*, and *Thielemier*.² Ex. 23 at 190. Respondent denied Union Pacific's March 1 motion to appoint the three-person panel he removed as arbitrators in *Ellison*. Judge Van Amburg notified the parties that the arbitration would begin on August 3. Ex. 24 at 191.

On June 30, 2010, Union Pacific filed a petition for a writ of prohibition and mandamus in the Missouri Court of Appeals, Eastern District. The Court of Appeals denied the petition on July 28, 2010. Ex. 25.

² Judge Van Amburg previously declined to serve as the arbitrator for the *Steele* group because Union Pacific had not consented to her acting in that capacity. She retained authority over the *Steele* group as the assigned circuit judge, and later entered a judgment confirming the arbitrator's award.

The Proceedings In This Court — Plaintiffs “Discover” Documents Never Presented To Respondent In Ruling On The Existence Of An Arbitration Agreement Between Gordon And Champlin, And Union Pacific

Union Pacific filed this proceeding on July 28. The Court granted a preliminary writ of prohibition in part, limited to the issue of whether Respondent should have granted the motion to compel arbitration of the *Gordon* and *Champlin* cases. The Court directed that Respondent file an answer on August 30, 2010.

On August 24, 2010, plaintiffs filed a “memorandum supplementing the record” in the circuit court. They attached to this document copies of two individual arbitration agreements purporting to be signed by James Gordon and Nagel Champlin. They also attached an affidavit of counsel claiming that an unnamed “staff member” found these two documents on August 23, 2010 (one week before Respondent’s answer was due in this Court). The unnamed staff member also found what purported to be letters of transmittal of the documents to Gordon and Champlin dated July 3, 2008. Plaintiffs’ counsel alleged “on information and belief” that Gordon and Champlin signed the documents in July 2008.

Neither of these documents purporting to bear the signatures of Gordon or Champlin was provided to Respondent (or Union Pacific) at any time while Respondent was considering the motion to compel arbitration. Plaintiffs never previously claimed that either Gordon or Champlin actually signed the individual arbitration agreements. Rather, the claim was that there was an oral agreement to modify the agreement, and that was the

ground for Respondent's ruling. Because these documents were not before Respondent at the time of the ruling challenged in this proceeding, the January 13 order makes no mention of, nor purports to rely on, the existence of these documents. *See* Ex. 18 at ; App. at A1-A2.

The affidavit does not state that plaintiffs' counsel is familiar with either Gordon's or Champlin's signature. The affidavit does not allege that these are, in fact, the signatures of Gordon or Champlin. There is no transmittal letter from either Gordon or Champlin to suggest that they in fact signed and returned the documents. There is no affidavit from Champlin that this is his signature or that he signed the document. (Gordon died earlier this year before the alleged discovery of this document, and so his direct testimony is no longer available.) There is no affidavit from Champlin stating when he allegedly signed the document. Counsel's affidavit does not allege that plaintiffs sent these documents to Union Pacific for the signature of its representative. Brown testified in his affidavit that neither he nor anyone else at Union Pacific ever signed or authorized the entry into any arbitration agreement with either Gordon or Champlin. Ex. 16 at 146. Union Pacific noted at the January hearing that it had searched its files for any agreement with Gordon and Champlin, and found nothing. Ex. 13 at 136, Tr. at 9.

POINTS RELIED ON

I.

Relator Is Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because There Is No Written Arbitration Agreement As Required By § 435.350 RSMo In That Respondent Found There Existed Only An Oral Agreement To Modify An Existing Written Agreement Between Relator An Other Persons; The Requirement Of A Written Agreement Is A Matter Of Substantive Law, Not Evidence; And Oral Agreements To Arbitrate Are Unenforceable And Revocable At Will

Section 435.350 RSMo

Abrams v. Four Seasons Lakesites/Chase Resorts, Inc., 925 S.W.2d 932

(Mo. App., S.D. 1996)

Williams v. Kansas City Title Loan Co., Inc., 314 S.W.3d 868 (W.D. Mo. 2010)

II.

Relator Is Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because There Was Insufficient Evidence That An Oral Agreement Had Been Made Or That Relator's Attorneys Had Actual Authority To Enter Into Any Oral Agreement Or Modification Of The Written Arbitration Agreement In That The Brown Affidavit Said That Relator Did Not Sign A Written Agreement With Gordon And Champlin, Which Was A Denial Of The Existence Of An Oral Agreement, And Brown Testified That He Did Not Otherwise Authorize Anyone To Agree To Arbitrate Their Claims

Southwestern Bell Yellow Pages, Inc. v. Dye, 875 S.W.2d 557, 561

(Mo. App., E.D. 1994)

The Bar Plan v. Cooper, 290 S.W.3d 788, 792-793 (Mo. App., E.D. 2009)

Barton v. Snellson, 735 S.W.2d 160, 163 (Mo. App., E.D. 1987)

Collins v. West Plains Memorial Hospital, 735 S.W.2d 404, 407 (Mo. App., S.D. 1987)

ARGUMENT

I.

Relator Is Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because There Is No Written Arbitration Agreement As Required By § 435.350 RSMo In That Respondent Found There Existed Only An Oral Agreement To Modify An Existing Written Agreement Between Relator An Other Persons; The Requirement Of A Written Agreement Is A Matter Of Substantive Law, Not Evidence; And Oral Agreements To Arbitrate Are Unenforceable And Revocable At Will

A. Introduction

An oral agreement to arbitrate is not enforceable under the Missouri Arbitration Act.³ There was no written agreement between either James Gordon or Nagel Champlin and Union Pacific to arbitrate their personal injury suits.

Plaintiffs claim there was a so-called oral “modification” of a written arbitration agreement between Union Pacific and 120 other personal injury plaintiffs. But an oral “modification” — even if proven — is nothing more than an oral agreement itself.

³ Whether a valid and enforceable arbitration agreement exists is a matter of law the Court reviews *de novo*. See *Dunn Industries Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003).

The statute plainly requires a written agreement, not an oral agreement or an oral modification of a written agreement, to be enforceable. Only a “written agreement to submit any existing controversy to arbitration . . . is valid, enforceable and irrevocable.” §435.350 RSMo. Only the “making of an agreement described in section 435.350 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement.” § 435.430. Lacking a written agreement, Respondent had no authority to compel Union Pacific to arbitrate with Gordon or Champlin.

B. Only Written Arbitration Agreements Are Valid And Enforceable

Since Missouri adopted the Uniform Arbitration Act in 1980, every Missouri court that has considered the issue holds that § 435.350 means what it says — only a written arbitration agreement is valid, enforceable, and irrevocable. An oral agreement to arbitrate is simply not enforceable. At best, an oral agreement to arbitrate would permit a common law arbitration. Under the common law, oral agreements to arbitrate are not enforceable and are revocable at will by either party until there has been an award.

The requirement of a written arbitration agreement is illustrated by *Abrams v. Four Seasons Lakesites/Chase Resorts, Inc.*, 925 S.W.2d 932, 938-939 (Mo. App., S.D. 1996). In *Abrams*, the plaintiff sought to compel arbitration of a dispute arising out of the purchase of a condominium. Plaintiff conceded that there was no single document that was a written arbitration agreement between the parties. Rather, plaintiff contended that agreement to arbitrate was found in a series of letters exchanged by the parties. *See id.* at 933, 934-936.

Plaintiff prepared and signed a written “Submission to Arbitration” that he sent to the defendant, Four Seasons. Four Seasons’ attorney objected to two provisions in the proposed arbitration agreement. *See id.* at 935. Plaintiff responded with a letter stating that “I will confirm our verbal agreement to the two nominal changes you made in the Submission to Arbitration form that I signed and sent to you on April 27.” *Id.* at 936.

Plaintiff contended that this letter was the final document that demonstrated the existence of an arbitration agreement. The court, however, rejected that claim, noting that the letter was, “at most, only a confirmation of an alleged oral agreement. . . . Plaintiff failed to prove the existence of a written agreement between him and Four Seasons to submit the controversy to arbitration. Because only written agreements are enforceable under § 435.350, the trial court properly denied Plaintiff’s motion to compel.” *Id.* at 938-939.

In a related context, a settlement reached as a result of arbitration, mediation, or other alternative dispute resolution under Rule 17 is enforceable only if the parties enter into a “written document setting out the essential terms of the agreement executed after the termination of the alternative dispute resolution process.” Rule 17.06(c). Even if such a document is drawn up and orally agreed to by the parties, it is not enforceable based only upon a party’s oral agreement to sign the document.

In *Williams v. Kansas City Title Loan Co., Inc.*, 314 S.W.3d 868 (W.D. Mo. 2010), the plaintiff and one of the defendants entered into a court-ordered mediation under Rule 17. During the mediation, the parties reached a settlement. The plaintiff and his attorney left prior to signing a final written settlement agreement, after advising the mediator that

they would return shortly to sign it. The defendant and the mediator waited for an hour, but the plaintiff did not come back. The mediator, the defendant and defendant's counsel signed the settlement agreement. Plaintiff never signed the written settlement agreement despite his promise to do so. *See id.* at 869.

Defendant filed a motion to enforce the settlement agreement, which the circuit court granted. The Western District reversed. The court noted that Rule 17 specifically requires a written settlement agreement in order to have a valid and enforceable settlement. Therefore, the "settlement" reached at the mediation was non-binding, and revocable by the plaintiff. *See id.* at 872.

The defendant argued, and the court agreed, that oral settlement agreements "have long been enforced under the common law in Missouri." *Id.* at 872. However, the arguments for enforcement of oral settlement agreements under the common law are displaced by Rule 17 — which (like § 435.350) expressly requires a written agreement. There are compelling reasons for the written agreement requirement. For example, it avoids the kind of "he said, she said" disputes about the existence of an agreement or its terms that encourage further litigation. Written agreements ensure that parties understand and accept the loss of significant litigation rights — such as a right to jury trial or an appeal from an unfavorable judgment — as a consequence of the settlement. *See id.* at 873.

Plaintiffs contend that there was a written agreement — the general agreement signed by counsel for the parties in 2007. But neither Gordon nor Champlin were included in that written agreement. *See Ex. 16 at 151; App. at A 11.* Indeed, Respondent severed

Gordon and Champlin's cases from the consolidated group on October 9, 2007 — several days before *any* arbitration agreement was even proposed, let alone signed. Ex. 10 at 101. Plaintiffs' theory is that there was an oral modification to the written agreement, and that transforms an oral agreement into a written agreement.

This legal alchemy makes no sense. An oral agreement is still an oral agreement, even if it consists of adopting the terms of a written document. The *Abrams* case makes that clear. There the plaintiff alleged that the defendant orally agreed to the arbitration, and the plaintiff (and only the plaintiff) signed the Submission to Arbitration. But even if the defendant orally agreed to the terms of the arbitration, it did not sign the agreement and thus there was no *enforceable* arbitration agreement under the statute. *See id.* at 938-939. Similarly, *Williams* also stands for the proposition that an oral agreement that refers to a written document — there a written settlement agreement — does not thereby become a written document itself. *See id.* at 873.

There are significant reasons the legislature required arbitration agreements to be in writing. *First*, by entering into an arbitration agreement parties give up their constitutional right to a jury trial. MO. CONST. art. I, § 22(a). *Second*, the parties also potentially give up other important litigation rights afforded by the civil rules. *Third*, the scope of appeals from arbitration awards is limited compared to the scope of appeals from civil judgments. And *fourth*, the existence of a written agreement ensures (as does the requirement of a written settlement agreement under Rule 17.06(c)) the avoidance of protracted disputes over whether an arbitration agreement even exists.

The value of the latter reason is highlighted here. These cases have now been pending for more than nine years. They were originally consolidated with 33 other cases for trial, but severed from that group back to an individual case status before arbitration was proposed or agreed upon in October 2007. Ex. 10 at 101. Although plaintiffs claim that an oral agreement was reached to include the cases in one of the arbitration groups in late 2007, plaintiffs' counsel did not even remember that supposed "fact" until December 2009 — more than two years later. Ex. 11.

As a consequence of plaintiffs' dilatoriness, their counsel's poor memory, and a quirk of local procedure, the long-delayed arbitration of 38 other cases (pending at that time for nearly five years) — the *Ellison* group (that was ready to begin) was indefinitely delayed from its previously agreed upon January setting. Ex. 17 at 154. Yet further litigation ensued over whether Respondent could and should remove the three-person arbitration panel the parties agreed upon six months previously, and which Judge Neill, to whom the *Ellison* cases had been assigned for the last four years, had ordered.

Arbitration is a matter of contract. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 (Mo. banc 2003). To be enforceable, an arbitration agreement must be in writing. An oral agreement to arbitrate — whether styled as a stand-alone agreement or as an oral "modification" of an existing written agreement — is still an oral agreement, and is still unenforceable under §435.350.

C. Exceptions To The Parole Evidence Rule Are Irrelevant Because The Requirement Of A Writing Is A Rule Of Substantive Law Embodying Missouri's Public Policy That Only Written Arbitration Agreements Are Enforceable

Plaintiffs claim that a written arbitration agreement can be orally modified to come within the requirement of § 435.350 that there be a written arbitration agreement. As noted above, an oral modification is still an oral agreement. There is no written document signed by the parties that includes Gordon or Champlin as part of any of the four arbitration groups.

Respondent cited several cases in his January 13 order that allowed evidence of an oral modification of a written agreement to be introduced. But these cases are irrelevant. They all deal with the question of whether, as a general principle of law, an alleged oral modification to a written contract is admissible under the parole evidence rule.⁴ *See Chandler v. Rosewin Coats, Inc.*, 515 S.W.2d 184, 188 (Mo. App., KCD 1974) (contract for salesperson's commissions); *Willis v. Community Developers, Inc.*, 563 S.W.2d 104, 107 (Mo. App., KCD 1978) (promissory notes); *Warrenton Campus Shopping Center, Inc. v. Adolphus*, 787 S.W.2d 852, 855 (Mo. App., E.D. 1990)(contract for purchase of shopping center); *Nooney Krombach Co. v. Blue Cross and Blue Shield*, 929 S.W.2d 888, 895-896 (Mo. App., E.D. 1996) (real estate broker's contract); and *AAA Uniform and Linen Supply, Inc. v. Barefoot, Inc.*, 81 S.W.3d 133, 137 (Mo. App., W.D. 2002) (sale contract).

⁴ Some also involve the question of the application of the statute of frauds, § 432.010 RSMo. Given that an arbitration could take place in less than a year, that statute is not an issue in this proceeding.

None of these cases deal with arbitration agreements or the meaning of § 435.350. The parole evidence rule is a rule of *evidence*, not of substantive law. The issue here is not whether plaintiff's counsel's affidavit, attesting to an alleged oral modification, is admissible. The issue is whether such an alleged oral agreement (assuming there was sufficient evidence that it was made) is enforceable when the statute requires a written agreement.

The distinction between an evidentiary prohibition against parole evidence and substantive provision requiring a writing was recognized in *Longmeier v. Kaufman*, 663 S.W.2d 385 (Mo. App., E.D. 1983). In *Longmeier*, the plaintiffs sought a declaratory judgment that they had not entered into a five-year lease with defendants. Defendants conceded that there was no written lease agreement, but claimed that there was an oral agreement to lease the premises for five years on the same terms as a previous written lease. Section 441.060(2) RSMo provided that, in the absence of a written lease agreement, all leases were to be held to be month-to-month tenancies, terminable on one month's notice.

The court noted that the admission or exclusion of evidence under the parole evidence rule or the statute of frauds is a question of evidence, not substantive law. The lease statute expressed the public policy of Missouri that, as matter of law, unwritten lease agreements are to be construed as creating no more than a month-to-month obligation. *See id.* at 389. *See also State Highway Commission v. St. Charles County Associates*, 698 S.W.2d 34, 36 (Mo. App., E.D. 1985) (statute requires both parties to sign lease; lease signed by only one party is month-to-month lease, not long-term lease).

Similarly, the legislature expressed the public policy of Missouri in § 435.350 that only written agreements to arbitrate are enforceable. An oral agreement to arbitrate, even one called a “modification,” does not fall within the terms of the statute.

D. Oral Agreements To Arbitrate Are Unenforceable And Revocable By Either Party Prior To The Entry Of An Award

The history of arbitration in Missouri confirms that oral agreements to arbitrate are not enforceable. Missouri adopted the Uniform Arbitration Act in 1980. Prior to 1980, arbitration agreements, whether written or oral, were not a bar to the filing of a lawsuit in Missouri. *See Medicine Shoppe International, Inc. v. J-Pral Corporation*, 662 S.W.2d 263, 274 (Mo. App., E.D. 1984) (citing cases). That was the rule at common law, and in Missouri since its inception as a state. *See King v. Howard*, 27 Mo. 21, 1858 WL 5727 at *3 (1858) (“An agreement for arbitration is, in its nature, revocable, and though an award when made will be enforced, parties will not be compelled to submit a controversy to arbitrators, nor will they be compelled to perform an agreement for that purpose after they have made it”).

When the legislature passed the Uniform Arbitration Act it did not immediately repeal the prior arbitration statute (which, in effect codified the common law).⁵ *See Medicine Shoppe International, Inc. v. J-Pral Corporation*, 662 S.W.2d at 274; *Forest Hills Country Club v. Fred Weber, Inc.*, 691 S.W.2d 361, 362 (Mo. App., E.D. 1985).

⁵ The legislature repealed § 435.010-280 RSMo 1978 in 1984.

The Uniform Arbitration Act applies only to written agreements. The prior statute applied to oral agreements to arbitrate, and arbitration agreements between noncommercial persons. *See Forest Hills Country Club v. Fred Weber, Inc.*, 691 S.W.2d at 363.⁶

Other states that have faced the issue have also concluded that the Uniform Arbitration Act applies only to written contracts.⁷ For example, in *Heider v. Knautz*, 396 Ill.App.3d 553, 919 N.E.2d 1058 (2009), the court declined to enforce an agreement to arbitrate entered by the attorneys for the parties because there was no written agreement. *See id.*, 396 Ill.App.3d at 560, 919 N.E.2d at 139. The court noted that the states that adopted or patterned their arbitration statutes after the Uniform Arbitration Act all interpreted them as applying only to written agreements to arbitrate. *See id.* (citing cases).

In the absence of a written agreement, an oral agreement to arbitrate is subject to the common law rules governing arbitration — the most notable difference being that an oral agreement to arbitrate is revocable at will by either party before an award is made. *See id.*, 396 Ill.App.3d at 561-562, 919 N.E.2d at 1065-1066. The statute does not abrogate the common law rule regarding revocability of oral arbitration agreements. *See id.*

⁶ Section 435.465 was later amended to define commercial persons as “all persons and legal entities, excluding any government or governmental subdivision or agency.”

⁷ Because this is a uniform act, the decisions of other states that have enacted it are given greater weight than usual. *See* § 435.450; *Western Waterproofing Co., Inc. v. Lindenwood Colleges*, 662 S.W.2d 288, 290-291 (Mo. App., E.D. 1983).

Here, even if one accepts Respondent's finding that there was an oral agreement, it was revocable at will. And Union Pacific's actions in opposing arbitration of Gordon and Champlin's claims were, if nothing else, a revocation of any prior oral agreement.

E. Another Plaintiff's Refusal To Sign The Individual Arbitration Agreement Is Not A "Modification" Of The General Arbitration Agreement

Finally, plaintiffs claim that Union Pacific orally "modified" the arbitration agreement when the *Thielmeier* case which *had* been listed on Exhibit A to the agreement was not arbitrated with the other cases in his group. This supposedly proved that Union Pacific agreed to other oral modifications. Ex. 14 at 140. But it proves just the opposite.

Thielmeier did not sign the individual arbitration agreement because he wanted to litigate other injuries besides his alleged carpal tunnel syndrome. The general arbitration agreement specifically provided that "To the extent any plaintiffs in the three remaining groups do not consent, their cases should be consolidated for trials." Ex. 16 at 149; App. at A9. The failure to include Thielmeier in the group to which he was originally assigned for arbitration was not a "modification," but conformity to the written provisions of the agreement. When a party does not sign the agreement as specifically required by its terms, then there is no agreement to arbitrate.

There was no modification of the arbitration agreement regarding Thielmeier. Rather, the failure to arbitrate his case was an application of § 435.350, and consistent with Union Pacific's position that only cases with signed, written arbitration agreements can be arbitrated. Ex. 3 at 47. Once Thielmeier signed the agreement, the only issue was

whether his two-year delay in doing so waived his right to arbitrate under the agreement.⁸ It proves nothing about the alleged existence of a so-called “oral” agreement to arbitrate Gordon and Champlin’s claims.

II.

Relator Is Entitled To An Order Prohibiting Respondent From Compelling Arbitration Of The *Gordon And Champlin* Cases Because There Was Insufficient Evidence That An Oral Agreement Had Been Made Or That Relator’s Attorneys Had Actual Authority To Enter Into Any Oral Agreement Or Modification Of The Written Arbitration Agreement In That The Brown Affidavit Said That Relator Did Not Sign A Written Agreement With Gordon And Champlin, Which Was A Denial Of The Existence Of An Oral Agreement, And Brown Testified That He Did Not Otherwise Authorize Anyone To Agree To Arbitrate Their Claims

A. Introduction

Point I assumes there was some sort of oral agreement to arbitrate the Gordon and Champlin claims, and argues that such an agreement (even if it exists) is unenforceable.

But there was, in fact, insufficient evidence for Respondent to conclude that an oral agreement of any kind was reached, or that the Union Pacific’s attorneys (whoever they were that supposedly reached the agreement) were authorized to agree to arbitrate these two claims on behalf of the railroad.

⁸ Union Pacific disputed whether Theilmeier’s case should be added to the *Ellison* group. Respondent’s ruling in that respect is not at issue in this writ proceeding.

There was no substantial evidence that there an oral agreement to arbitrate, and that finding was against the weight of the evidence. *See Abrams v. Four Seasons Lakesites/Chase Resorts, Inc.*, 925 S.W.2d 932, 936 (Mo. App., S.D. 1996). Moreover, the undisputed evidence established that neither Union Pacific's attorneys nor anyone else acting on behalf of the company had the authority to sign an arbitration agreement or were otherwise authorized to arbitrate the Gordon and Champlin claims.

Given the lack of evidentiary support for the existence of an oral agreement to arbitrate or to modify the written agreement with an oral agreement, the entire premise of plaintiffs' argument — and Respondent's order compelling arbitration — collapses.

B. Respondent's Finding Of The Existence Of An Oral Agreement To Arbitrate Was Not Supported By The Evidence And Was Against The Weight Of The Evidence Because Respondent Failed To Take Into Account The Brown Affidavit's Testimony That No One Was Authorized To Enter Into Any Agreement To Arbitrate With Gordon Or Champlin, Which Was Broad Enough To Deny The Existence Of An Oral Agreement To Arbitrate

The sum total of the evidence supporting Respondent's finding of the existence of an oral agreement is an affidavit from plaintiff's counsel that incorporates by reference allegations in the motion to compel arbitration. The allegations are that, sometime in October or November 2007 (counsel could not remember when), he discovered that the Gordon and Champlin cases were not on any of the lists of cases to be arbitrated on Exhibit B to the general arbitration agreement. Ex. 11 at 111. (The Court will recall that on October 9, 2007, Respondent severed a number of cases from the consolidated group,

including these two. Ex. 10 at 101.) “Thereafter, Mr. Wendt brought this matter to the attention of defense counsel and an agreement was reached between the parties that Plaintiff herein would be included in one of the subsequent arbitrations in *Applegate*, *Steele*, or *Ellison*.” Ex. 11 at 111.

Plaintiffs’ counsel did not and could not say which of defendant’s counsel he reached this agreement with, and Union Pacific’s counsel denied reaching any such agreement. Ex. 13 at 137, Tr. at 12. Plaintiffs’ counsel apparently forgot about this alleged agreement until December 2009, when he filed the motion to compel arbitration. Ex. 11.

There was no letter, e-mail, memorandum, or other document signed or sent in 2007 that corroborated plaintiffs’ counsel belated recollection.⁹ There was no such document in Union Pacific’s files either.

Union Pacific filed an affidavit of Richard Brown, its Team Leader, Occupational Claims. Brown was responsible for supervising all of these cases for the company. Ex. 16 at 145. Brown said that Union Pacific “did not intend for any individual not included on that list [*i.e.*, Exhibit A to the general arbitration agreement] to be included or otherwise

⁹ On August 24, 2010 — eight months after the evidentiary hearing, and six days before Respondent’s answer — plaintiffs’ counsel claimed to have discovered two documents signed by Gordon and Champlin, but not by Union Pacific, that no one had ever seen or heard of before. Plaintiffs never previously claimed to have signed any document, let alone the ones that surfaced in August. Union Pacific addresses these documents further in Point II. D., *infra*.

covered” by the arbitration agreement. Ex. 16 at 146. Brown further testified that he signed all of the individual arbitration agreements on behalf of Union Pacific and that “I have not executed any such agreement with respect to plaintiffs Gordon and Champlin.” Ex. 16 at 146. Brown said that “I have not authorized the arbitration of the claims of plaintiffs Gordon and Champlin. To my knowledge, no one at Union Pacific has signed any arbitration agreement or *otherwise authorized* the arbitration of the claims of plaintiffs James Gordon and Nagel Champlin.” Ex. 16 at 146 (emphasis added).

Respondent characterized Brown’s affidavit as “Nowhere . . . deny[ing] the existence of the oral agreement alleged by Plaintiff.” Ex. 18 at 156; App. at A2. “Thus, based on the only evidence before this Court, the Court hereby finds that that there was an oral agreement to include Plaintiffs Gordon and Champlin in one of the later arbitrations.” *Id.*

This is simply a misreading of Brown’s affidavit. He denied both the existence of a written agreement *and* that anyone on behalf of Union Pacific “*otherwise authorized*” the arbitration of Gordon and Champlin’s claims. The italicized language is sufficiently broad to cover an allegation that the railroad’s attorneys entered into an oral agreement to arbitrate these two claims. And Brown denied that anyone authorized the arbitration.

Thus, Respondent’s basis for finding that an oral agreement existed — that Brown did not deny its existence — cannot withstand an examination of the evidence. Faced with a vague claim that somebody sometime agreed to an oral modification that even plaintiffs’ counsel forgot about for two years, the overwhelming weight of the evidence — based on Brown’s specific testimony in his affidavit — leads to only one conclusion:

there no was no agreement of any kind, written or oral, to arbitrate Gordon and Champlin's claims.

C. Union Pacific's Attorneys Did Not Claim The Authority To Enter Into Oral Modifications Or Oral Agreements To Arbitrate, And They Lacked The Actual Authority To Enter Into Any Such Agreements On Behalf Of Union Pacific

There is an additional reason why Respondent's finding of a binding oral agreement cannot stand: the unnamed defense counsel was not authorized by Union Pacific to make such an agreement.

Union Pacific's attorneys never claimed they had the authority to agree to an oral modification of the written arbitration agreement that would have the effect of waiving the railroad's right to a jury trial, let alone that they exercised it. Brown's affidavit establishes that the attorneys in fact had no express authority to agree to arbitrate claims with Gordon and Champlin. And while an attorney may have apparent or implied authority to take certain steps in litigation on behalf of his or her client, there is no apparent or implied authority to agree to a change of the tribunal adjudicating the client's rights, particularly when such a change would involve the waiver of the client's right to a jury trial and other important litigation rights that are not available in an arbitration.

The authority of an attorney to act for his client is governed by the general principles of agency. The attorney has implied authority to commit the client in procedural matters, but the attorney may not, without the client's consent, surrender its substantive rights. *See, e.g., Robinson v. Dewese*, 379 S.W.2d 831, 836 (Mo. App. 1964). An attorney, for example, has no implied authority to compromise a client's claim. *See, e.g., Southwestern*

Bell Yellow Pages, Inc. v. Dye, 875 S.W.2d 557, 561 (Mo. App., E.D. 1994). Similarly, an attorney has no authority to hire another attorney to appeal a judgment, or to waive the client's right to select appellate counsel, in the face of an express contract requiring the client's written consent to such an action. See *The Bar Plan v. Cooper*, 290 S.W.3d 788, 792-793 (Mo. App., E.D. 2009).

While there appear to be no Missouri cases specifically addressing an attorney's apparent or implied authority to enter into an arbitration agreement without the clients' express consent, the cases from other jurisdictions considering the issue — analogizing the entry into an arbitration agreement to the entry into a settlement agreement — have held that no such implied authority exists. See, e.g., *Blanton v. Womancare, Inc.*, 38 Cal.3d, 396, 407, 696 P.2d 645, 652-653 (In Bank 1985); *D & D Carpentry v. U.S. Bancorp.*, ___ N.W. 2d ___, No. 2009AP1264 (Wis. App., August 18, 2010).

Although some Missouri cases have held that an attorney has apparent authority to settle a case if the attorney says he does, *Leffler v. Bi-State Development Agency*, 612 S.W.2d 835, 837 (Mo. App., E.D. 1981), that view has been criticized by the same court. See *Barton v. Snellson*, 735 S.W.2d 160, 163 (Mo. App., E.D. 1987). In any event, even under *Leffler*, a representation of authority by the attorney only creates a presumption that can be rebutted by the client with evidence showing that the attorney lacked actual authority to bind the client to an agreement to settle a case or forego other substantive rights. See *Leffler v. Bi-State Development Agency*, 612 S.W.2d at 837.

Here, even if one accepts Respondent's finding that unnamed defense counsel entered into an oral agreement to arbitrate the Gordon and Champlin cases, the

undisputed evidence establishes that the attorneys had no such authority. First, the affidavit Respondent relied upon does not say that the unnamed defense represented that they had the authority agree to arbitrate the Gordon and Champlin cases. Thus, no presumption as to the attorneys' authority exists. Second, Brown's affidavit expressly says that that "I have not authorized the arbitration of the claims of plaintiffs Gordon and Champlin. To my knowledge, no one at Union Pacific has signed any arbitration agreement or *otherwise authorized* the arbitration of the claims of plaintiffs James Gordon and Nagel Champlin." Ex. 16 at 146 (emphasis added).

Moreover, the general arbitration agreement provided that only the plaintiffs listed on Exhibit A to the agreement were to have their cases arbitrated, and, even among those listed, only the ones who entered into a written agreement would be included. *See* Ex. 16 at 149. Brown's affidavit confirms that Union Pacific did not intend to arbitrate with anyone not on the list, and that the arbitration would proceed only with those cases where both the plaintiff and the Union Pacific signed the individual arbitration agreement. *See* Ex. 16 at 146, ¶¶ 4, 6 and 7. Where the written agreement expressly requires the client's written consent, the attorney lacks the authority to change or waive it. *See The Bar Plan v. Cooper*, 290 S.W.3d at 792.

D. The Documents Filed More Than Eight Months After The January 4 Evidentiary Hearing Should Not Be Considered By The Court Because They Were Not Before Respondent When He Entered The Challenged Order, And Because They Are Both Inadmissible And Irrelevant

Respondent attached a Memorandum Supplementing the Record to his answer to the petition for a writ of prohibition filed in this Court. Attached to the Memorandum were copies of letters purporting to be addressed to plaintiffs James Gordon and Nagel Champlin, two incomplete and undated individual arbitration Agreements purporting to be signed by Gordon and Champlin, and an affidavit from plaintiffs' counsel. Plaintiffs allege that these documents were "discovered" on August 23, 2010. They were served upon Union Pacific and filed in the Circuit Court on August 24, 2010.

None of these documents are properly before the Court. The documents would not have been admissible at the evidentiary hearing. Moreover, even if the documents were admissible, they prove nothing relevant to the disposition of the issues in this proceeding.

These documents were not offered into evidence at or before the hearing on January 4. That alone is grounds enough for the Court to refuse to consider them.¹⁰

In *Anglim v. Missouri Pacific R. Co.*, 832 S.W.2d 298, 303 (Mo. banc 1992), the Court held that only the facts that were before the trial court at the time of the challenged

¹⁰ Union Pacific has filed concurrently with this Opening Brief a motion to strike the documents.

ruling can be considered by the appellate court. In *Chandler v. Multidata Systems International Corp.*, 163 S.W.3d 537, 548 (Mo. App., E.D. 2005), the court refused to consider documents attached to a reply brief that were not part of the record presented to the trial court at the time of the ruling.

None of the documents attached to the “Memorandum Supplementing the Record” were presented to the court either before or at the hearing on the motion to compel arbitration in January 2010, or before the entry of the order compelling arbitration. Even though the question of whether Gordon or Champlin ever signed the arbitration agreements was raised initially in December 2009, Ex. 10 at 99, plaintiffs never argued that they *had* signed the agreements — their claim was that there was an oral agreement to modify the existing arbitration agreement with the other plaintiffs. Ex. 13 at 136. Respondent did not consider or rely upon these documents in compelling arbitration of the Gordon and Champlin cases in the January 13 order that is the subject of this proceeding.

Although these documents are supposed to have been in plaintiffs’ counsel’s possession since July 2008, they only surfaced a week before this Court required an answer to the petition to be filed. Plaintiffs cannot attempt to bolster their position with documents that were never before Respondent, and that played no role in the challenged decision.

Moreover, the two individual arbitration agreements allegedly were signed by Gordon and Champlin would not have been admissible at the January 4 evidentiary

hearing. Although proceedings under § 435.355.1 are to be “summary,” the statute does not dispense with the rules of evidence.

The affidavit does not authenticate the documents or the alleged signatures that appear on them. “The authenticity of a document cannot be assumed, what it purports to be must be established by proof.” *Collins v. West Plains Memorial Hospital*, 735 S.W.2d 404, 407 (Mo. App., S.D. 1987). The affidavit accompanying the purported individual arbitration agreements does not identify the signatures on the documents, or even attempt to establish any basis for the affiant being able to do so. The affiant did not himself find the documents. Therefore, his testimony as to the circumstances of the discovery is hearsay. The claim that the documents were supposedly signed in July 2008 is only on “information and belief” — not personal knowledge. On this record, the documents are inadmissible.

Apart from the suspicious circumstances under which these documents suddenly came to light, the purported existence of individual arbitration agreements does not alter the analysis. To the extent these documents are supposed to “prove” there was a written agreement to arbitrate, they are completely inconsistent with the affiant’s prior affidavit claiming that the agreements were oral, with plaintiffs’ theory of an oral agreement to arbitrate, and Respondent’s own finding of an alleged oral agreement.

There is no claim that the documents were ever submitted to the Union Pacific to sign — another requirement of the general arbitration agreement. Indeed, even plaintiffs’ counsel supposedly did not know of their existence until August 23, 2010. Union Pacific did not sign these documents — thus confirming the testimony in Brown’s affidavit.

These documents are neither properly before the Court or relevant to the outcome of the case.

CONCLUSION

Section 435.350 provides that only written arbitration agreements are valid, enforceable, and irrevocable. There is no written arbitration agreement that applies to Gordon and Champlin. Even assuming Gordon and Champlin had an oral agreement to arbitrate, they do not have a written arbitration agreement. Nothing in the statute allows them to compel arbitration based on someone else's written agreement. Because Respondent lacked the authority to compel arbitration, this Court should enter a writ of prohibition on this issue.

Respondent's order directing that Union Pacific arbitrate the claims of two plaintiffs with whom it never signed a written arbitration agreement is directly contrary to the statute, which limits a court's authority to compelling arbitration of written agreements – and only written agreements. A writ of prohibition is necessary to halt the claims of Gordon and Champlin from proceeding in arbitration.

For these reasons, Relator Union Pacific Railroad requests that the Court make its preliminary writ of prohibition permanent, direct that Respondent take no further action to require arbitration of the claims of plaintiffs Champlin and Gordon because those two plaintiffs do not have any written arbitration agreement, and grant such other and further relief as the Court deems proper in the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, that it complies with the limitations in Rule 84.06(b), and it contains 10,022 words, excluding the parts of the brief exempted by Rule 84.06, that it has been prepared in proportionally spaced typeface using Microsoft Word 2007 in 13 point Times New Roman font; and that it includes a virus free CD-ROM in Microsoft Word 2007 format.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Relator's Opening Brief was mailed, first class mail postage prepaid, this 28th day of September, 2010 to:

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