IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, ex rel. STEVEN PINKERTON,	)	
	)	
Relator,	)	Case No: SC94822
v.	)	
HONORABLE JOEL P. FAHNESTOCK, JUDGE,	)	
CIRCUIT COURT OF JACKSON COUNTY,	)	
	)	
Respondent.	)	

Writ of Mandamus or Prohibition filed against the Honorable Joel P. Fahnestock,

Judge of the Circuit Court of Jackson County

BRIEF OF RELATOR, STEVEN PINKERTON

Respectfully submitted,

CIVIL JUSTICE LAW FIRM LLC

By: /s/ Lee R. Anderson
Lee R. Anderson MO #57890
anderson@civiljusticelawfirm.com
601 Walnut St., Ste. 201
Kansas City, MO 64106
Telephone: (816) 825-2029
Facsimile: (816) 817-6081

THE MEYERS LAW FIRM, LC

By: /s/ Kevin A. Jones
Martin M. Meyers MO #29524
mmeyers@meyerslaw.com
Kevin A. Jones MO #62096
kjones@meyerslaw.com
503 One Main Plaza
4435 Main Street
Kansas City, MO 64111
Telephone: (816) 444-8500
Facsimile: (816) 444-8508

ATTORNEYS FOR RELATOR

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I. JURISDICTIONAL STATEMENT

Relator, Steven Pinkerton, brought this lawsuit alleging Defendants used a scheme of unfair, misleading, and deceptive recruitment and advertising practices to induce Relator to enroll at the proprietary school Aviation Institute of Maintenance. Relator seeks a permanent writ of mandamus and/or permanent writ of prohibition directing the Respondent trial court to set aside her order granting Defendants' two motions to compel arbitration, and to deny them instead. On August 18 2015, this Court issued a Preliminary Writ of Prohibition/Mandamus, and on August 19, 2015, this Court issued an Amended Preliminary Writ of Prohibition/Mandamus. This Court has jurisdiction to issue a permanent remedial writ by virtue of Article V, Section 4, subsection 1 of the Missouri Constitution.

II. STATEMENT OF FACTS[1]

Relator Steven Pinkerton enrolled in the aviation maintenance program at the Aviation Institute of Maintenance ("AIM") because of Defendants' numerous false representations about employment opportunities in the field, false claims about the school's graduate placement rate, false promises about job placement assistance Defendants would provide, and false claims about how much money Mr. Pinkerton could expect to earn as a graduate. (Petition, ¶¶15-21, Pinkerton Writ Record (hereafter

[1] This statement of facts is a nearly *verbatim* recitation of Relator's statement of facts in his initial Suggestions in Support of his Petition for a writ. The citations to the record are citations to that same record filed with his Petition.

"Rec.") pp. 4-6.) Mr. Pinkerton excelled in school, graduating as Valedictorian in May 2011, only to learn that Defendants' claims and promises had been false and the education he had worked so hard and spent so much to obtain was induced by fraud. (Petition, ¶25, Rec. 7-8.) Mr. Pinkerton filed suit. In response, Defendants moved to compel arbitration. The entire arbitration clause asserted by Defendants is contained in the "Enrollment Agreement," and reads as follows:

> **Arbitration Agreement**: I agree that any controversy, claim or dispute of any sort arising out of or relating to matters including, but not limited to: student admission, enrollment, financial obligations and status as a student, which cannot be first resolved by way of applicable internal dispute resolution practices and procedures, shall be submitted for arbitration, to be administered by the American Arbitration Association located within Virginia Beach, Virginia, in accordance with its commercial arbitration rules. All fees and expenses of arbitration shall be shared equally and any award rendered in favor of a student will be limited to the total amount paid to the School by the student. Any award or determination rendered by the arbitration(s) shall be final and entered as a judgment by a court of competent jurisdiction.

(Rec. 22, 24.)

Although discovery was only partially completed, even the limited facts available show there can be no meeting of the minds on the arbitration clause because it is facially incomprehensible. Adrian Rothrock is the Campus Director for the Kansas City campus,

serving as the highest official at the campus. (Rothrock depo. at 9:20-10:1, Rec. 222-23.) In that capacity, Mr. Rothrock oversees all other offices of the local campus: the director of education, director of compliance, director of admissions, financial aid, the registrar's office, student services, and career services. (Rothrock depo. at 14:11-22, Rec. 224.) Although Mr. Rothrock admitted that he had students sign Enrollment Agreements (Rothrock depo. at 19:2-8 (Rec. 225), 33:4-11 (Rec. 233)), and he himself signed Enrollment Agreements on behalf of the school in his capacity as admissions director and as Campus Director (Rothrock depo. at 37:25-38:9, Rec. 235-36), he has never told any student what "arbitration" means (Rothrock depo. at 5:22-24, Rec. 220). He testified that, even with the Enrollment Agreements sitting in front of him to examine and study, he could not make sense of any of its arbitration provisions:

"Q: What does the word 'arbitration' mean? A: I don't know." (Rothrock depo. at 5:10-11, Rec. 220.) "Q: If a party in an arbitration isn't happy with the outcome, can they appeal the decision? A: I don't know." (Rothrock depo. at 6:8-13, Rec. 221.) "Q: Who pays the fees that are charged by an arbitrator? A: I don't know? Q: How much are the fees that are charged by an arbitrator? A: I don't know. Q: How much are the fees that an arbitrator might charge pursuant to the arbitration provision in any enrollment agreement that AIM has used? A: I don't know." (Rothrock depo. at 6:14-24, Rec. 221.) He further admitted the arbitration clause's reference to the AAA rules, i.e. its purported delegation clause, is useless on its face to disclose what those rules are. (Rothrock depo. at 30:16-22, Rec. 232, "Q. What are the… rules? A. I do not know.")

Ultimately, Mr. Rothrock admitted the arbitration clause is entirely one-sided, purporting to bind *only* students, not the school in any way: "Q: Does this contract, the enrollment agreement, bind AIM to anything? And take all the time you'd like to review it. A: It doesn't look like it." (Rothrock depo. at 22:16-19, Rec. 226; *accord id.* at 23:9-20, Rec. 227.) He likewise admits there is no language in the enrollment agreement that binds Mr. Rothrock individually. (Rothrock depo. at 24:1-7, Rec. 228.) And, of course, the phrase that begins the arbitration clause, "I agree," refers solely to the student. (Rothrock depo. at 26:22-27:4, Rec. 229-30.) Mr. Rothrock admitted he has no idea what students think the word "arbitration" means, or whether any student understands that arbitration means giving up their right to go to court, or that they purportedly must pay half of arbitration costs. (Rothrock depo. at 36:24-37:19, Rec. 234-35.)

Mr. Rothrock admitted that the arbitration clause *does not delegate questions of arbitrability to an arbitrator*:

> Q: Looking just at the terms of the arbitration clause in the enrollment agreement, according to that who decides whether a case should go to court or to arbitration, that is, who makes that decision if there's a battle over whether it's going to be in court or arbitration, who decides whether the dispute will be in court or arbitration?
>
> A: I wouldn't know who comes up with the – the path of arbitration or to court, I don't know.
>
> Q: How would a student know?
>
> A: I – I don't know.

(Rothrock depo. at 38:10-39:3, Rec 235-36.)

The arbitration clause is facially incomprehensible as to what claims would be covered by it, even to AIM's Campus Director Mr. Rothrock. He testified that, with the arbitration clause in front of him, he could not tell what types of claims a student might bring that are covered by the arbitration clause. (Rothrock depo. at 39:4-10, Rec. 237.) He could not tell if it would apply to a claim in which a student stole money from AIM (*id*. at 39:11-40:11, Rec. 237-38); a student attacked a teacher in class (*id*. at 40:12-21, Rec. 238); a student was sexually harassed by a teacher (*id* at 40:22-41:5, Rec. 238-39); or a defamation claim by the school against a student (*id.* at 43:24-44:7, Rec. 240-41).

Mr. Rothrock even specifically admitted that on the face of the arbitration clause he could not tell if it applies to *a claim by a student against AIM for fraud, <u>like this case</u>*. (*Id.* at 44:14-20, Rec. 241.) Mr. Rothrock unequivocally reiterated the point: "Q. As you sit here today reading that arbitration agreement, can you tell me whether a claim against AIM for fraud would be subject to the arbitration clause? A. Yeah, I can't." (*Id.* at 44:24-45:7, Rec. 241-42.)

Tellingly, AIM's own counsel objected in deposition that whether these claims would be covered by the arbitration clause called for "speculation." (*Id.* at 39:11-41:5 (Rec.237-39), 43:24-45:7 (Rec. 240-42).) If, as opposing counsel admits, it requires "speculation" for the school's Campus Director to know what claims are covered by the arbitration agreements that *he signed repeatedly*, there can be no serious argument that there was any meeting of the minds sufficient to form an agreement.

Ultimately, Campus Director Adrian Rothrock admitted that even he does not understand the arbitration clause (Rothrock depo. at 43:9-14, Rec. 240), and he "wouldn't know" if he "expect[s] students to understand that they're giving up a constitutional right to a jury trial if they sign the arbitration agreement" (*id.* at 43:15-23, Rec. 240). "Q: Do you have any reason to believe that students actually understand the meaning of the arbitration clause in the enrollment agreement? A: I – I wouldn't have – no." (*Id.* at 57:5-12, Rec. 244.) And no student has ever renegotiated the terms of an enrollment agreement, or been permitted to opt out of arbitration. (*Id.* at 93:8-17, Rec. 245.)

Although discovery was not completed, the record that was obtained reveals that in practice (as well as by its terms, *i.e.*, "I [the student] agree…") the arbitration clause is treated as entirely unilateral, binding only students. Mr. Rothrock understands the reference to "financial obligations" in the arbitration clause means the "financial obligations that the student has set up when they met with financial aid." (Rothrock depo. at 27:10-19, Re. 230.) And students have in fact defaulted on financial obligations, including students at AIM's Kansas City campus. (Rothrock depo. at 27:21-28:6, Rec. 230-31.) But in discovery, Relator sought records showing all arbitrations AIM has been a party to (Ex. 19, Defendants' Supplemental Response to document requests, ¶ 65, Rec. 176-77), yet AIM's document production included *no* arbitration of any claim involving "financial obligations." Instead, AIM produced documents showing it *always* sues *in court* to collect student debts. (Ex. 29, Warrant in Debt filings, Rec. 302-31.) And Defendants' response to Relator's request for documents reflecting assignment of rights to collect any amounts for tuition and fees (Ex. 19 at ¶ 67, Rec. 178-79) points to its

production bates labelled 447-459, which lists *hundreds* of assignments of student financial obligations to debt collectors (Ex. 30, Rec. 332-44), *but no evidence any debt collection was ever arbitrated*.

And AIM produced emails showing its deliberate intent to ensure the unilateral nature of the arbitration clause, and preserve for itself the right to pursue students in court to collect outstanding debts. (Ex. 31, emails, Rec. 346, "Can we revise the arbitration clause to not include outstanding balances due to school?") But there is *no evidence* that AIM changed the arbitration clause to omit "financial obligations" from its purported ambit. (*See* Rothrock depo. at 54:19-22, Rec. 243.) That shows AIM *falsely* includes "financial obligations" in the arbitration clause *with no intent to comply with any obligation to arbitrate "financial obligations.*" Instead, AIM sues in court despite the arbitration clause's inclusion of "financial obligations," conclusively showing that the arbitration clause is—and AIM intends it to be—a unilateral obligation of students, with no mutuality at all. And in a patent effort to dissuade students from ever asserting any claim, the arbitration clause facially limits students' remedies and requires them to arbitrate their claims in Virginia, though their entire contact with the school is solely in Kansas City.

III. POINT RELIED ON

Relator is entitled to an order prohibiting Respondent from compelling arbitration and directing Respondent to deny arbitration, because state and federal arbitration law require the trial court to consider the full factual record and to determine the threshold question whether an arbitration agreement was formed under Missouri contract law, in that the trial court disallowed Relator to complete the discovery he sought on arbitration issues and the trial court considered none of the fact record showing no arbitration agreement was formed, but instead delegated to an arbitrator the threshold question whether an arbitration agreement was formed.

9 U.S.C. § 4

Mo. Rev. Stat. § 435.350

Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287 (2010)

AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643 (1986)

IV. ARGUMENT

A. Introduction

It is well-settled in this State that when parties dispute that an arbitration agreement was formed, the *court*, not the arbitrator, must decide the dispute based on the facts of each particular case. Initially, Respondent correctly followed this well-settled law by granting Relator's motion to stay briefing on the arbitration issue and authorizing discovery "as to the issue of whether an arbitration contract was formed and the scope of any such arbitration contract." (Ex. 15, Order, Rec. 139.) Relator duly pursued discovery from Defendants.

But instead of fully complying with discovery, Defendants filed their Renewed Motion to Compel Arbitration, in reality a motion for reconsideration with "no legal effect[,] as no Missouri rule provides for such a motion." *Koerber v. Alendo Building Co.*, 846 S.W.2d 729, 730 (Mo. App. 1992). Rather than deny this legally ineffective motion, Respondent reversed course and compelled arbitration (Ex. 26, Rec. 246), failing to recognize Relator's express challenges to the arbitration clause's supposed delegation provision and the clause as a whole. Even on the limited facts Relator obtained, but that Respondent never considered, arbitration should be denied, as the clause lacks mutuality on its face and in practice, and the clause is incomprehensible. At a minimum Relator should be allowed to obtain *and adduce* all evidence in opposition to the motion to compel arbitration, as Respondent's first order correctly held.

The U.S. Supreme Court has squarely held that a court, and never an arbitrator, must "always" decide "whether the [arbitration] clause was agreed to." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010). Respondent exceeded her authority because she entered her Order compelling arbitration without considering Relator's challenge to the formation of the alleged delegation provision and the arbitration clause as a whole. Respondent instead wrongly concluded that even the question of whether an arbitration agreement was formed is a question for the arbitrator.

But both the Federal Arbitration Act and Missouri's Uniform Arbitration Act provide that arbitration agreements are enforceable "save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; Mo. Rev. Stat. § 435.350. Thus "Missouri contract law applies to determine whether the parties have entered a valid

agreement to arbitrate." *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 856 (Mo. 2006). U.S. Supreme Court precedent holds that formation of, *i.e.* agreement to, the asserted arbitration provision is "always" a question for a court to decide.

B. Standard of Review

"A writ of prohibition is available: (1) to prevent a usurpation of judicial power when the trial court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted." *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 32 (Mo. 2010). "Prohibition may be appropriate to prevent unnecessary, inconvenient, and expensive litigation." *Id.* "The function of the writ of mandamus is to enforce, not to establish, a claim or right; the office of the writ is to execute, not to adjudicate." *State ex rel. Kiely v. Schmidli*, 583 S.W.2d 236, 237 (Mo. App. 1979). "In order to warrant control by mandamus, there must be an existing, clear, unconditional, legal right in relator, and a corresponding present, imperative, unconditional duty upon the fact of respondent, and a default by respondent therein." *Id.* A writ is the proper procedure for correcting a court's error in compelling arbitration. *See State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 806 (Mo. banc 2015); *State ex rel. Union Pac. RR v. David*, 331 S.W.3d 666 (Mo. 2011); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 83 (Mo. 2006).

C. Relator Expressly Disputed that Any Threshold Issues were Delegated to an Arbitrator.

Respondent's threshold error is her conclusion that "Pinkerton does not challenge the delegation provision specifically." (Rec. 252.) On the contrary, even in his *Preliminary* Opposition to Defendants' arbitration motion, Relator wrote, "In *Hopwood v. Citifinancial, Inc.*, -- S.W.3d --, 2014 WL 468231 at *2 (Mo. App. S.D. Feb. 5, 2014), the court rejected the very argument Defendants make here, that the court could not decide the threshold issue because it had been delegated to the arbitrator: 'Before a party may be compelled to arbitrate under the FAA, *a court* must determine whether a valid agreement to arbitrate exists between the parties.' And in *Bellemere v. Cable-Dahmer Chevrolet Inc.*, 423 S.W.3d 267, 273 (Mo. App. W.D. 2013), the Court of Appeals rejected the argument that the existence of an enforceable agreement could be delegated to the arbitrator." (Rec. 50.) And Relator explained why the primary federal case Defendants relied on did not support their position regarding delegation. (*Id.*)

From the start Relator disputed Defendants' request to "let an arbitrator decide whether the clause is enforceable." (Pltf's Preliminary Opp., at Rec. 49.) Relator also argued, "the threshold issue of the existence of an enforceable agreement [is] a decision for the court." (*Id.*) And "the threshold question of the existence of an enforceable agreement is a decision for the court." (*Id.*) In his Reply in Support of Plaintiff's Motion to Stay Briefing, Relator explained again that he disputed Defendants' assertions about the formation of any "delegation" provision. (Rec. 113-14.) He did so again in his Surreply in Opposition to Defendants' Motion to Stay Discovery. (Rec. 120-22.) So,

too, in his Surreply in Opposition to Defendants' Motion to Compel Arbitration, where he said "no agreement to delegate was ever formed" (Rec. 131). And in his Opposition to Defendants' Renewed Motion to Compel Arbitration, Relator wrote "PLAINTIFF DISPUTES THE FORMATION AND ENFORCEABILITY OF BOTH THE DELEGATION PROVISION AND THE ARBITRATION AGREEMENT IN WHICH IT IS FOUND." (Rec. 202.)[2]

D. It is Not Legally Possible to Delegate Questions About Formation of the Putative Arbitration Agreement to an Arbitrator.

Respondent erred in her conclusion that the parties agreed to delegate the question of arbitrability to the arbitrator, both because there is no such "delegation" agreement

[2] Defendants have repeatedly and wrongly contended that Plaintiff "never challenged the delegation of threshold issues to the arbitrator." (*E.g.*, Defendants' March 9, 2015 "Suggestions in Opposition to Relator's Petition for Writ of Mandamus or Prohibition" at p. 24 n.8.) Defendants' assertion is belied by the face of Relator's filings in the trial court, including Relator's unmistakable assertion in ALL CAPS in his opposition (at Rec. 202) to Defendants' "renewed" motion to compel arbitration, which was the Defendants' motion that directly prompted Respondent's error at issue here. And though Respondent indeed denied Relator's July 21, 2014 motions to file Sur-Replies and Reply Suggestions regarding the *prior* motions (in mid-2014) (Rec. 139, Sept. 9, 2014 Order), she denied Relator's Sur-Replies and Reply as "moot" *because* she was *correctly* ordering arbitration-related discovery to proceed.

here, and because it is not legally possible to delegate the threshold question of formation to an arbitrator. In the chief case on which Defendants and Respondent rely, the U.S. Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 66 (2010) assessed an arbitration clause that said, "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." The Court held this clause satisfied the test that such a delegation to the arbitrator was "clea[r] and unmistakabl[e]." *Id.* at 69 n.1. The Court reiterated the law that "[u]nless the parties *clearly and unmistakably* provide otherwise, the question of whether the parties agreed to arbitrate is to be decided *by the court, not the arbitrator*." *Id.* (emphasis added, quoting *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986)).

1. *The Clause at Issue Here Does Not Delegate Any Threshold Issues to an Arbitrator.*

As an initial matter, comparing the language in the *Rent-A-Center* arbitration clause with the school's arbitration clause here facially shows AIM's clause does *not* "clearly and unmistakably" delegate *any* threshold issues to the arbitrator. On the contrary, the fact record here—which Respondent did not allow Relator to adduce—confirms that even Defendants, who are *asserting* the arbitration clause here, do not believe it "clearly and unmistakably" delegates any threshold issues to the arbitrator. AIM's Campus Director, its highest ranking officer at the Kansas City school, testified that the arbitration clause contains no delegation provision, that "looking at the terms of

the arbitration clause" he "wouldn't know who comes up with the – the path of arbitration or to court" and that he did not know how a student would know. (Rothrock depo. at 38:10-39:3, Rec. 236-37.) No fact-finder can plausibly conclude on these facts that there is any "clear and unmistakable" evidence of intent to arbitrate threshold issues of arbitrability. This evidence shows *no meeting of the minds at all*, because the clause is incomprehensible.

2. *An Arbitration Clause **Cannot** Delegate Questions of Formation of the Agreement to an Arbitrator.*

As a matter of substantive law under the Federal Arbitration Act, questions of the *formation* of an arbitration agreement are *always* decisions for the court, not an arbitrator. The U.S. Supreme Court has repeatedly and emphatically stated that questions of formation must always be decided by a court, and the only "threshold" issues that may be delegated to an arbitrator—assuming such delegation is "clear and unmistakable"—are questions of the types of claims that are covered by the arbitration agreement. Importantly, the Supreme Court in *Rent-A-Center* was careful to specify what it was holding, *and what it was not*. The Court specified, "The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded,'… *we address only the former*." 561 U.S. at 70 n.2 (emphasis added). This distinction is important because various "enforceability" or "validity" issues may arise before, at the time of, or after the alleged contract is signed, but the Federal Arbitration Act expressly requires "the court" to decide challenges to "the making of the arbitration agreement," i.e., its formation. 9 U.S.C. § 4. The Court further held, "If a party

challenges the validity under [9 U.S.C.] § 2 of the precise agreement to arbitrate at issue, the federal court [here the state court] *must consider the challenge before ordering compliance with that agreement*." 561 U.S. at 71 (emphasis added). This is critical to understanding *Rent-A-Center* because it clarifies that the Court did *not* hold that the clause was effective to delegate *formation* to the arbitrator, as Defendants wrongly argue. *Formation* of the asserted arbitration agreement, including any delegation clause, is what Plaintiff challenges here. The *Rent-A-Center* court did *not* conclude that the arbitrator had the authority to decide whether the arbitration agreement had been *formed*. That is exactly what the *Rent-A-Center* Court's clarification specifically rejects rendering an opinion on. 561 U.S. at 70 n.2.

In its *Rent-A-Center* decision, the U.S. Supreme Court relied on and reaffirmed *AT&T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986). The *AT&T* decision addresses whether an arbitration clause in a collective bargaining agreement had delegated to the arbitrator the authority to determine whether disputes over AT&T's layoff practices were arbitrable. The Supreme Court *rejected* the lower courts' determinations that the question was one for the arbitrator to decide. Reviewing its key precedents on arbitration, the Supreme Court observed the principles for a court construing an arbitration clause, including the principle most relevant here: "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." 475 U.S. at 649. Notably, the issue in *AT&T* (like in *Rent-A-Center*) was *not* whether an agreement had been formed, but whether a particular dispute was subject to arbitration. Explaining this

principle, and expressly distinguishing questions of formation of the agreement from questions about what types of disputes the agreement covers, the Court held, "a compulsory submission to arbitration *cannot* precede *judicial determination* that the [agreement] does in fact create such a duty." *Id.* (emphasis added).

Expressly confirming that *Rent-A-Center* does *not* stand for any proposition that questions of *formation* can *ever* be delegated to an arbitrator, the U.S. Supreme Court held—just *three days after Rent-A-Center was decided on June 21, 2010*—that "the *court* must resolve *any issue* that calls into question *the formation* or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (June 24, 2010) (emphasis added, citing *Rent-A-Center*, 561 U.S. at 68, 70). The Court explained, "When there is no provision validly committing them [the disputes] to an arbitrator, these issues [for the court to decide] typically concern the scope of the arbitration clause and its enforceability. In addition, these issues [for the court to decide] ***always*** include whether the clause was agreed to." *Id.* (emphasis added.)

There is simply no room under these U.S. Supreme Court precedents to argue that questions about the formation of an arbitration agreement can ever be delegated to an arbitrator. And Missouri law is the same. The Missouri Supreme Court has recently addressed a *Rent-A-Center* type of argument. In *Baker v. Bristol Care Inc.*, 450 S.W.3d 770, 773-74 (Mo. banc 2014), the arbitration clause said "The arbitrator has the exclusive authority to resolve any dispute relating to applicability or enforceability of this Agreement." The *Baker* court observed that the clause lacked any attempt to delegate to

the arbitrator questions of "formation" of the agreement, readily rejected the defendant's argument that the arbitrator and not the court should decide whether the agreement was formed, and applied Missouri contract law to affirm the denial of arbitration. *Id.* at 774-77. Notably, the delegation provision in *Baker* was express, unlike the absence of any express delegation provision at all here.

Conforming to this Court's and the U.S. Supreme Court's precedents, the Missouri Court of Appeals, in *Jimenez v. Cintas Corp.*, Mo.App.E.D. Case Nos. ED101015 and ED101241, 2015 Mo. App. Lexis 11 at fn.1 (Mo. App. E.D. Jan. 13, 2015), correctly affirmed denial of arbitration, applying Missouri contract law to find no agreement was formed, even though the arbitration clause "delegates to the arbitrator the authority to resolve" disputes about "enforceability" of the arbitration clause. Similarly, in *Bellemere v. Cable-Dahmer Chevrolet Inc.*, 423 S.W.3d 267, 272 (Mo. App. W.D. 2014), the defendants argued that whether "there was a lack of mutuality of obligation… was reserved for the arbitrator." The appeals court correctly rejected the argument because "enforceability under the [Federal Arbitration Act] never comes into play if a contract itself was never formed," *id.* at 273, and affirmed the denial of arbitration because the asserted arbitration clause lacked mutuality of obligation, *id.* at 275. And in *Hopwood v. Citifinancial, Inc.*, 429 S.W.3d 425, 426 (Mo. App. S.D. 2014), the defendants argued that "pursuant to the arbitration agreements, the arbitrator must decide whether arbitration is appropriate." Citing *First Options of Chicago, Inc., v. Kaplan*, 514 U.S. 938, 944 (1995), the *Hopwood* court correctly held, "the question of whether the parties intended

to submit the issue of arbitrability to an arbitrator was one for determination by a court applying ordinary state law contract principles." 429 S.W.3d at 427.

It is thus firmly settled that the court, not the arbitrator, must determine the threshold question whether an agreement to arbitrate was formed, including whether the parties agreed to delegate threshold questions of arbitrability to the arbitrator. Here there is no delegation clause at all, and Defendants' contention that the clause's reference to AAA rules constitutes such "delegation" fails under all the aforementioned precedent.

3. *Numerous Courts have Rejected the Interpretation of* Rent-A-Center *that Defendants Advocate Here*.

The Kentucky Supreme Court recently addressed *Rent-A-Center* by instructing that plaintiffs made "a claim targeting the *making* of the arbitration agreement rather than simply its *validity*. In this context, a court is the proper forum for determining whether the arbitration agreement is enforceable, a delegation provision notwithstanding. There exist legitimate questions regarding the valid formation of the [purported] Agreement. So the trial court was the proper forum for these proceedings." *Dixon v. Daymar Colleges Grp., LLC*, 2015 WL 1544450, at *6 (Ky. Apr. 2, 2015).

The United States Court of Appeals for the Third Circuit recently addressed the issue and similarly states, "in order to qualify as a question of arbitrability that the court may consider, the challenge must '*relat[e] to the making* and performance of the agreement to arbitrate.'" *Quilloin v. Tenet HealthSystem Philadelphia, Inc.*, 673 F.3d 221, 229 (3d Cir. 2012) (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967)) (emphasis added).

Numerous other courts also properly follow this law by holding that issues involving the making of the purported arbitration agreement (i.e., formation) are first to be decided by the court before any delegation clause (if found to exist) is even considered. *E.g.*, *Sager v. Harborside Connecticut Ltd. P'ship*, 2011 WL 2669240, at *2 (D. Conn. July 7, 2011) (because the formation of the purported arbitration agreement is at issue "and not the validity of a contract that has entered into force, *Rent–a–Center* is inapposite[.]"); *Hall v. Healthsouth Rehab. Hosp. of Vineland*, 2013 WL 3581263, at *7 (N.J. Super. Ct. App. Div. July 16, 2013) ("Though the [Supreme] Court expressly declined in *Buckeye* to address this issue, the cases cited to in the [Supreme] Court's footnote […] have all held that a court, not an arbitrator, must decide such contract-formation issues. The same is true here, the trial court properly used its authority to determine there was no properly formed arbitration agreement."); *Gerike v. Rent-A-Ctr., Inc.*, 2014 WL 3592094, at *3 (D.P.R. June 27, 2014) ("Although the RAC arbitration agreement is broadly worded and delegates to the arbitrator authority to decide 'any dispute related to the ... creation of this Agreement,' because arbitration agreements are a matter of contract, it logically follows that the court must first 'decide whether [an arbitration agreement] exists before it decides whether to stay an action and order arbitration.'" […] "Because Augustin raises basic issues of contract formation, they must first be resolved by the court before an order to compel arbitration may be entered.") (internal citations omitted).

4. *An Arbitration Clause's Reference to AAA Rules Does Not "Delegate" Threshold Issues to the Arbitrator*.

Defendants will presumably argue that the putative arbitration agreement here delegates all threshold issues to the arbitrator because it references the rules of the American Arbitration Association. For this proposition, Defendants have cited *Fallo v. High-Tech Institute*, 559 F.3d 874 (8th Cir. 2009). First, *Fallo* is not on point at all, because it addresses a wholly different type of delegation of authority to the arbitrator than Respondent wrongly embraced here. In *Fallo*, the issue the Eighth Circuit found had been delegated to the arbitrator was *what causes of action* fell within the scope of the arbitration clause. The trial court in *Fallo* had held that "the arbitration provision did not cover the students' tort claims," and denied the motion to compel arbitration for that reason. 559 F.3d at 876. Reconfirming that *what claims* were arbitrable was the issue delegated to the arbitrator, the Eighth Circuit said "We first address High-Tech's argument that the district court erred by determining that it had the authority to decide the threshold question of arbitrability *of the students' tort claims*." *Id.* at 877 (emphasis added). Nothing in the *Fallo* decision supports a conclusion that the court may defer the question of *formation* to the arbitrator. Indeed, the trial court in *Fallo* had examined the evidence and concluded the agreement had been duly *formed*, which the Eighth Circuit affirmed. *Id.* at 878-79 (testing formation under the standard for "procedural unconscionability").

That is so important it bears repeating: the *Fallo* court, like the trial court before it, undertook the analysis of whether an agreement to arbitrate had been *formed*. It did not

even consider the prospect of delegating to the arbitrator the decision on formation. *Rent-A-Center*, likewise, expressly proclaimed it was *not* addressing whether any agreement "was ever concluded." 561 U.S. at 70 n.2. On the contrary, *Rent-A-Center* expressly reiterates the distinction between formation, which is always a question for the court, and "validity," meaning "whether it is legally binding." *Id.* at 69 n.1 (distinguishing "The *validity* of a written agreement to arbitrate (whether it is legally binding, *as opposed to whether it was in fact agreed to*)"; emphasis added.) And just three days after it decided *Rent-A-Center*, the U.S. Supreme Court made its unequivocal declaration that "whether the [arbitration] clause was agreed to" is "always" a question for the court to decide. *Granite Rock*, 561 U.S. at 297.

But even if *Fallo* had involved a question of delegating the question of formation to the arbitrator (which it did not), it would be void under the subsequent holdings in *Rent-A-Center* and *Granite Rock*. Moreover, as to the limited question of whether *Fallo* correctly determined that reference to AAA rules amounts to a delegation of *any* threshold issues such as what types of disputes must be arbitrated, *Fallo* has no binding effect on Missouri courts, because questions of formation are peculiarly a matter of *state contract law*. As this Court has stated, "This Court is not bound to follow Circuit decisions but may consider them in undertaking its independent assessment of a case." *State v. Storey*, 901 S.W.2d 886, 900 (Mo. banc 1995).

This Court should squarely reject, as a matter of substantive Missouri contract law, any suggestion that incorporating AAA rules by reference in an arbitration clause satisfies the "clear and unmistakable" test for delegating any threshold issues to the

arbitrator. The better conclusion is that such a reference fails the "clear and unmistakable" test to constitute a delegation of any threshold questions of arbitrability. *E.g.*, *Quilloin v. Tenet Health System Philadelphia*, 673 F.3d 221, 226, 229 (3d Cir. 2012) (finding the asserted clause lacked "an agreement to arbitrate arbitrability," despite incorporation of AAA rules).

The limited facts that Relator was able to obtain with limited discovery confirm that a reference to AAA rules does not "clearly and unmistakably" delegate questions to an arbitrator. Defendant Mr. Rothrock, the head of the school Relator attended, in deposition with the putative arbitration agreement in front of him, admitted that the arbitration clause does not delegate questions of arbitrability to an arbitrator:

> Q: Looking just at the terms of the arbitration clause in the enrollment agreement, according to that who decides whether a case should go to court or to arbitration, that is, who makes that decision if there's a battle over whether it's going to be in court or arbitration, who decides whether the dispute will be in court or arbitration?
>
> A: I wouldn't know who comes up with the – the path of arbitration or to court, I don't know.
>
> Q: How would a student know?
>
> A: I – I don't know.

(Rothrock depo. at 38:10-39:3, Rec 235-36.) No reasonable fact finder can conclude on these facts that the putative agreement "clearly and unmistakably" delegates any threshold issues of formation or arbitrability to an arbitrator.

5. *Recent Missouri Decisions are Simply Erroneous and Should be Overruled*.

In misapplying the law and declining to consider the facts, Respondent's decision puts the cart before the horse, concluding that an agreement was formed to delegate the question of whether an agreement was formed. But this tautology is not supported by *Fallo* or *Rent-A-Center*. It would lead to the absurd result that anyone could, at any time, unilaterally *fabricate* an arbitration "agreement" out of whole cloth that contains a "delegation" provision, and force arbitration to which the opponent never consented. That is why the court is the *only* tribunal that can decide the threshold question of whether an agreement—including any delegation agreement—was formed.

Respondent perhaps drew the wrong conclusion in part because she depended not on the majority opinion in *Rent-A-Center* (which clarified it did *not* address formation), but instead on the *dissent*. (Feb. 2, 2015 Order at p. 7, Rec. 252). The Missouri Court of Appeals in *Johnson v. Rent-A-Center*, Case No. WD76863, 2014 Mo.App. Lexis 1227 (Mo. App. W.D. Nov. 4, 2014) (*withdrawn*), which Respondent also cited, appears to have stumbled on the same error. And the Court of Appeals has repeated the error in *Dotson v. Dillard's, Inc.*, Case No. WD78229, 2015 Mo. App. Lexis 787 (Mo. App. W.D. Aug. 4, 2015).[3] In addition to misconstruing the U.S. Supreme Court's *Rent-A-Center* decision, the *Dotson* court also misconstrues this Court's *Baker* decision, incorrectly citing *Baker*, 450 S.W.3d at 774, for the proposition that formation questions

[3] Two of the three judges who were on the panel in *Johnson* were also on the panel in *Dotson*.

can be delegated to the arbitrator. But this Court in *Baker* said no such thing. Rather, the *Baker* decision notes that the arbitration clause in that case lacked *any* delegation of "formation" questions, but does *not* say that formation questions *may be* delegated. The *Baker* court's observation that the clause did not even reference "formation" only means that there was no reason to even *consider* whether an arbitrator should decide formation questions; it thus distinguishes *Rent-A-Center* as irrelevant to the facts before it. It does not mean its inverse, that had the clause *attempted* to delegate formation issues to the arbitrator, such delegation would have been legitimate. Instead, the *Baker* decision squarely states, "Baker's claim raises a *contract formation* issue that is *subject to resolution by Missouri state courts.*" 450 S.W.3d at 774 (emphasis added).

This undoubtedly correct statement in *Baker*, like the express terms of the FAA and the unequivocal proclamation in *Granite Rock* that whether an arbitration provision was agreed to is "always" a question for the court, precludes any effort to delegate questions of formation to an arbitrator.

E. Whether an Arbitration Agreement was Formed is a Question of Fact that Requires a Fact Record and a Fact Determination.

As noted above, "Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate." *State ex rel. Vincent*, 194 S.W.3d at 856. Both this Court and the Court of Appeals have squarely held that the trial court's determination of whether arbitration must be compelled is an intensely *factual* question. But by reversing her prior Order and compelling arbitration without allowing Relator to adduce any facts, Respondent failed to consider the facts relevant to contract formation.

In *Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo. banc 2012), this Court extensively analyzed the facts of the case to determine whether the arbitration clause was unconscionable and therefore unenforceable. The Court analyzed recent U.S. Supreme Court case law and noted that "traditional state law defenses to contract formation such as unconscionability, duress or fraud" may preclude enforcement of arbitration clauses. *Id.* at 488-89. Relevant facts discussed by the *Brewer* Court were (1) whether any customer had ever renegotiated the terms of the contract (*id.* at 487); (2) whether the corporation sued customers in court while forcing customers to arbitrate their disputes (*id.*); (3) the customer's ability to recover in full, including attorney fees (*id.*); and (4) whether any consumer had ever in fact filed an arbitration against the company (*id.* at 487-88). The Court also noted other facts that Missouri Courts look to when evaluating enforceability of an arbitration clause: "high pressure sales tactics, unreadable fine print, misrepresentation or unequal bargaining positions." *Id.* at 489 n.1.

Ultimately, the *Brewer* court held, "This is a ***fact-specific*** inquiry focusing on whether the contract terms are so one-sided as to oppress or unfairly surprise an innocent party or which reflect an overall imbalance in the rights and obligations imposed by the contract at issue." 364 S.W.3d at 489 n.1 (emphasis added). "[A]nalysis of whether a particular state contract defense is preempted [by the Federal Arbitration Act] depends on the ***factual*** posture of individual cases." *Id.* at 491 (emphasis added). "The question of whether a state law unconscionability defense stands as 'an obstacle to the accomplishment of the [FAA's] objectives' requires analysis of the ***particular facts*** of the case." *Id.* at 492. In finding the arbitration clause unconscionable and therefore unenforceable, the *Brewer*

court "analyze[d] the issues… to determine if, under the *factual record* presented, [the consumer] established a defense to the formation of the agreement's arbitration clause." *Id.* (emphasis added).

In *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 518 (Mo. banc 2012), again emphasizing the fact-intensive inquiry required for the court to evaluate the enforceability of an arbitration clause, our Supreme Court *remanded* the case to the trial court because the fact record was insufficiently evaluated:

> Because the trial court's judgment adjudicated only [the consumer's] claim of unconscionability based on the class waiver, it did not adjudicate [the consumer's] other claims of unconscionability. As such, there remain *factual issues* relevant to determining whether Title Lenders' arbitration agreement was properly declared unenforceable…. As the *fact-finder*, the trial court should *assess the evidence* in this case and determine if the underlying arbitration agreement is enforceable.

(Emphasis added.)

Since *Brewer* and *Robinson* were decided in 2012, the Missouri Court of Appeals has routinely affirmed trial court decisions denying enforcement of arbitration clauses on a variety of factual issues particular to each case. *E.g. TXR, LLC v. Stricker*, 440 S.W.3d 541 (Mo. App. S.D. 2014); *Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646 (Mo. App. W.D. 2014); *Baier v. Darden Restaurants*, 420 S.W.3d 733 (Mo. App. W.D. 2014); *Jay Wolfe Used Cars of Blue Springs v. Jackson*, 428 S.W.3d 683 (Mo. App. W.D. 2014); *Hopwood v. Citifinancial, Inc.*, 429 S.W.3d 425 (Mo. App. S.D. 2014); *Bellemere v. Cable-*

Dahmer Chevrolet Inc., 423 S.W.3d 267 (Mo. App. W.D. 2013); *Gemini Capital Group, LLC v. Tripp*, 445 S.W.3d 583 (Mo. App. S.D. 2013); *Riley v. Lucas Lofts Investors, LLC*, 412 S.W.3d 285 (Mo. App. E.D. 2013); *Johnson v. Vatterott Educational Centers, Inc.*, 410 S.W.3d 735 (Mo. App. W.D. 2013); *Sniezek v. Kansas City Chiefs Football Club*, 402 S.W.3d 580 (Mo. App. W.D. 2013); *Clemmons v. Kansas City Chiefs Football Club*, 397 S.W.3d 503 (Mo. App. W.D. 2013); *Jones v. Paradies*, 380 S.W.3d 13 (Mo. App. E.D. 2012); *Marzette v. Anheuser-Busch, Inc.*, 371 S.W.3d 49 (Mo. App. E.D. 2012).

F. <u>The Facts Show No Arbitration Agreement was Formed</u>.

By delegating to the arbitrator the court's duty to decide the threshold question of formation, Respondent failed to evaluate formation at all. Even on the limited record Relator was able to discover, the facts here show there was no meeting of the minds as to the arbitration clause, as even the Campus Director admitted its terms are incomprehensible in every material respect. And even if the arbitration clause were not unintelligible, it necessarily fails because it facially and in practice unilaterally imposes arbitration on only one party—the student. No student has ever renegotiated the terms of an enrollment agreement, nor been allowed to opt out of the arbitration provision. The print of the arbitration clause is so small as to be virtually unreadable. The clause purports to require the parties to share arbitration expenses equally, in contravention of even the AAA's own express rules requiring the business in any consumer dispute (expressly defined to include "Private school enrollment agreements," Ex. 27 at p. 10, Rec. 265) to bear substantially all arbitration costs. Thus the clause, *ab initio*, is unconscionable *even under the AAA rules it purports to invoke*. And the clause purports

to limit students' remedies (but *not* AIM's) to only the "amount paid to the school"—denying students their legal rights to all actual damages, punitive damages, attorney fees, costs, and expenses. Defendants may (belatedly) argue that any provisions of the arbitration clause in conflict with the AAA rules will not be enforced, but Defendants are not allowed to *reform* the arbitration clause after the fact to prove that one was formed at the start. *See State ex rel. Vincent*, 194 S.W.3d at 861 (letter from defendant attempting to soften the unconscionable portions of the arbitration clause was ineffective because arbitration clause is to be viewed as it existed at the time it was adopted).

This arbitration clause is, both on its face and in practice, a *model* of unconscionability under *Brewer*, 364 S.W.3d 486. The facts preclude a finding that any agreement to arbitrate was formed. This Court should order Respondent to proceed with the litigation and deny Defendants' motions to compel arbitration.

G. If This Court Finds the Record Insufficient to Reject Arbitration, It Should Order Respondent to Enforce Discovery and Allow Relator to Present His Evidence and Argument.

Respondent exceeded her authority not only by granting the motions to compel arbitration, but also by denying Relator the opportunity to obtain and adduce evidence and argument. This Court's holdings unmistakably hold that the decision on whether to compel arbitration depends on the facts. Defendants objected to virtually all discovery and obfuscated their discovery responses (Exs. 16-19, Rec. 141-81). Relator duly filed his motion to enforce discovery (Ex. 20, Rec. 182), but Respondent denied that motion as "moot" (Rec. 255). If this Court finds the record is not yet sufficient to deny the motions

to compel arbitration, Relator should be afforded the remainder of the arbitration-related discovery he seeks, and an opportunity to adduce all the relevant evidence and his arguments.

CONCLUSION

Relator respectfully requests that this Court, on the fact record presently available, hold that no arbitration agreement was formed, and order Respondent to proceed with litigation. Alternatively, Relator requests that this Court order Respondent to permit Relator to complete discovery of arbitration-formation related facts, and then present his full argument and fact record in opposition to Defendants' motion to compel arbitration.

In either event, Relator respectfully requests that this Court clarify, consistent with the FAA and the U.S. Supreme Court's and this Court's precedent, that disputes about the formation of an arbitration agreement are always to be decided by a court, and cannot be delegated to an arbitrator. Relator further requests this Court's determination that the arbitration clause asserted by Defendants here contains no "clear and unmistakable" delegation of any "threshold" issues of arbitrability to an arbitrator, and that mere incorporation of the AAA rules does not constitute such delegation.

Respectfully submitted,

CIVIL JUSTICE LAW FIRM LLC

By: /s/ Lee R. Anderson
Lee R. Anderson MO #57890
anderson@civiljusticelawfirm.com
601 Walnut St., Ste. 201
Kansas City, MO 64106
Telephone: (816) 825-2029
Facsimile: (816) 817-6081

THE MEYERS LAW FIRM, LC

By: /s/ Kevin A. Jones
Martin M. Meyers MO #29524
mmeyers@meyerslaw.com
Kevin A. Jones MO #62096
kjones@meyerslaw.com
503 One Main Plaza
4435 Main Street
Kansas City, MO 64111

Telephone: (816) 444-8500
Facsimile: (816) 444-8508

ATTORNEYS FOR RELATOR

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the limitations contained in Rule 84.06(b) and that the entire brief contains 8,854 words, as counted by Microsoft Word. The brief is being electronically filed with the Court this October 19, 2015. The electronic copy has been scanned by Eset NOD32 Antivirus 8, and has been found to contain no virus.

/s/ Lee R. Anderson

Attorney for Relator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this brief is being filed electronically with the Court this October 19, 2015, and being served by operation of the Missouri E-filing System upon counsel of record for Defendants. The undersigned further certifies that a true and correct copy of this brief is being deposited in the U. S. Mail, First Class postage prepaid, this October 19, 2015, to the Hon. Joel Fahnestock, Judge of the Circuit Court of Jackson County, 415 E. 12th St., Kansas City, MO 64106.

/s/ Lee R. Anderson

Attorney for Relator