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

REPLY BRIEF OF RELATOR, STEVEN PINKERTON

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I. A Remedial Writ is the Appropriate Mechanism to Enforce Relator's Right to Have the Trial Court Determine the Existence of the Alleged Arbitration Agreements

Respondent initially argues that a writ of mandamus should not issue because Relator has no right to appeal an order granting a motion to compel arbitration. "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." *State ex rel. Kiely v. Schmidli*, 583 S.W.2d 236, 237 (Mo. App. 1979).

The "existing, clear, unconditional, legal right" that Relator seeks to enforce here is his right to have the trial court determine that an arbitration agreement actually exists before sending him to arbitration. The Federal Arbitration Act ("FAA") provides that "[i]f the making of the arbitration agreement . . . be in issue, the *court* shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, . . . the *court* shall hear and determine the issue." 9 U.S.C. § 4 (emphasis added). Similarly, the Missouri Uniform Arbitration Act ("MUAA") states, "if the opposing party denies the existence of the agreement to arbitration, the *court* shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied." MO. REV. STAT. § 435.355 (emphasis added).

Relator established in his initial brief that the trial court's statutory duty to determine the existence of an arbitration agreement is not delegable to an arbitrator. *See* Relator's Br. at 12-24. Respondent's brief does not quarrel with that proposition. Accordingly, it is undisputed that Relator has a clearly established right to have the existence of the alleged Arbitration Agreements judicially determined. Respondent defaulted in her duty to make that determination by referring it to an arbitrator. Mandamus is therefore appropriate to cure Respondent's default.

Moreover, this Court has recently held that a writ is the appropriate mechanism to review the grant of a motion to compel arbitration. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 806 (Mo. banc 2015); *see also State ex rel. Union Pac. RR v. David*, 331 S.W.3d 666 (Mo. banc 2011); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 83 (Mo. banc 2006).

II. Relator's Unconscionability Defense is a Challenge to the Formation of the Alleged Arbitration Agreements

Respondent's brief does not dispute Relator's argument that "it is not legally possible to delegate the threshold question about formation to an arbitrator." *See* Relator's Br. at 13. Rather, Respondent argues that Relator simply fails to challenge the formation of the alleged Arbitration Agreements. *See* Resp. Br. at 19-24. In particular, Respondent contends that Relator "does not challenge the formation of the contract but rather only sets forth the contract defense of unconscionability which goes to the enforcement of the contract." *See* Resp. Br. at 21. While it is true that Relator's challenges the alleged Arbitration Agreements on unconscionability grounds, *inter alia*, it

is not true that such challenge goes strictly to the e*nforceability* rather than *formation* of the agreements.

Indeed, this Court in *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc 2012), unquestionably applied the unconscionability doctrine as a contract defense to the formation of an arbitration agreement. 364 S.W.3d at 492-96. The Court explained:

> The purpose of the unconscionability doctrine is to guard against one-sided contracts, oppression and unfair surprise. Oppression and unfair surprise can occur during the bargaining process or may become evident later, when a dispute or other circumstances invoke the objectively unreasonable terms. In either case, the ***unconscionability is linked inextricably with the process of contract formation because it is at formation that a party is required to agree to the objectively unreasonably terms***.

Id. at 492-93(emphasis added) (internal citations omitted). Additionally, because the FAA preempts unconscionability arguments that are based on state public policy concerns with arbitration, this Court instructed that "[f]uture decisions by Missouri's courts addressing unconscionability [] shall limit review of the defense of unconscionability to the context of its relevance to contract formation." *Id.* at 492 n.3.

The *Brewer* court went on to analyze a number of common unconscionability factors impacting contract formation and determined that "the circumstances under which the agreement was made [were] unconscionable." *Id.* at 495-96. The factors the Court discussed include: (1) whether any customer had ever renegotiated the terms of the agreement; (2) whether the corporation sued customers in court while forcing customers

to arbitrate their disputes; (3) the customer's ability to recover in full, including attorney's fees; and (4) whether any consumer had ever in fact filed an arbitration against the company. *Id.* at 487-88, 493-95.

As in *Brewer*, these same factors support a finding of unconscionability that precludes the formation of any arbitration agreement between Relator and Defendants. No student has ever renegotiated the terms of the enrollment agreement, including its arbitration clause, nor been allowed to opt out of the arbitration provision. (Rec. 245). The arbitration clause purports to bind only the student, allowing Defendants to pursue all available judicial remedies against the student. (Rec. 22, 24, 226-28). And the records Relator obtained in discovery confirms that Defendant AIM does in fact pursue its judicial remedies against students. In response to Relator's discovery requests, Defendant AIM produced documents showing it sues its students in court to collect student debts. (Ex. 29, Warrant in Debt filings, Rec. 302-31).

In addition to limiting the forum available for students to pursue their claims, the arbitration clause also limits the relief the student may obtain in arbitration to "the total amount paid to the School by the student." [Rec. 22, 24]. The student is therefore effectively barred from recovering any remedies in excess of their actual damages, including punitive damages, attorneys' fees, and court costs – all of which are ordinarily recoverable in a case brought under Missouri Merchandising Practices Act. MO. REV. STAT. § 407.025.1; MO. SUP. CT. R. 77.01. The arbitration clause contains no corresponding limitation on the damages Defendants may recover from the student. The *Brewer* court found that disparity in the remedial options of the consumer and business

"constitutes strong evidence that the agreement is unconscionable." *Brewer*, 364 S.W.3d at 495.

"Courts also consider whether the terms of an arbitration agreement are unduly harsh." *Brewer*, 364 S.W.3d at 489 n.1. In addition to severely limiting the student's remedial options and being entirely one-sided, the arbitration clause at issue also requires the student to travel to Virginia Beach, Virginia to participate in arbitration proceedings, regardless of where the student attended school. (Rec. 24). And after traveling to Virginia Beach to participate in a forced arbitration, the student must then pay half of the arbitrator's fees and expenses for the privilege of doing so. *Id.* Notably, the arbitration clause's requirement that the student bear half the costs of arbitration contravenes even the American Arbitration Association's express rules for consumer disputes requiring the business to bear substantially all of the costs in consumer arbitrations. (Ex. 27 at p.33, Rec. 288-90).

The *Brewer* court also identified a number of other factors that constitute indicia of unconscionability. "[H]igh pressure sales tactics, unreadable fine print, misrepresentation or unequal bargaining positions all indicate deficiencies in the making of a contract." 364 S.W.3d at 489 n.1. Ultimately, the unconscionability analysis 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." *Id.*

Relator was precluded from exploring the full range of unconscionability factors when Respondent reversed her September 8, 2014 discovery order and referred this

matter to arbitration. Nonetheless, this Court should have no hesitation in declaring Defendants' arbitration clause unconscionable on the record presented, given the striking factual similarities between *Brewer* and this case. As a matter of judicial efficiency, Relator urges the Court to make such a declaration in this proceeding, rather than remanding to the trial court for further factual findings. That was the approach taken by this Court in *Brewer*, which is consistent with the remedial writ's purpose of conserving judicial resources and avoiding duplicative litigation. [1] *See Hewitt*, 461 S.W.3d at 806 ("If Mr. Hewitt [relator] is not bound to arbitrate under the terms of his contract, this Court can readily avoid this duplicative and unnecessary additional litigation through a writ of mandamus.").

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.

[1] If the matter is remanded for further proceedings, the MUAA allows Defendants to take an immediate appeal from a trial court's order denying an application to compel arbitration, and Relator to appeal a trial court's order compelling arbitration after the arbitration has concluded. MO. REV. STAT. § 435.440.

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.

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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 2,154 words, as counted by Microsoft Word. The brief is being electronically filed with the Court this November 19, 2015. The electronic copy has been scanned by Managed Antivirus, and has been found to contain no virus.

/s/ Kevin A. Jones

Attorney for Relator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this brief is being filed electronically with the Court this November 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 November 19, 2015, to the Hon. Joel Fahnestock, Judge of the Circuit Court of Jackson County, 415 E. 12th St., Kansas City, MO 64106.

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