No. SC94822

IN THE SUPREME COURT OF THE STATE OF MISSOURI

STATE OF MISSOURI ex rel. STEVEN PINKERTON, RELATOR

v.

HONORABLE JOEL P. FAHNESTOCK, JUDGE, CIRCUIT COURT OF JACKSON COUNTY, RESPONDENT

TECHNICAL EDUCATION SERVICES INC., ADRIAN ROTHROCK, AND W. GERALD YAGEN'S BRIEF ON BEHALF OF RESPONDENT

Respectfully submitted,

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COME NOW Defendants Technical Education Services Inc. d/b/a Aviation Institute of Maintenance ("AIM"), Adrian Rothrock ("Rothrock"), and W. Gerald Yagen ("Yagen"), (hereinafter collectively "Defendants"), by counsel, and on behalf of Respondent, the Honorable Joel P. Fahnestock, Judge, Circuit Court of Jackson County (hereinafter "Respondent"), and respectfully submit to the Court pursuant to Missouri Supreme Court Rule 84.24(i) their Brief in Opposition to Relator Steven Pinkerton's ("Relator" or "Pinkerton") Petition for Writ of Mandamus or Prohibition.

STATEMENT OF FACTS[1]

1. In August 2009, Pinkerton submitted an inquiry to AIM through its website for information about the AIM Aviation Maintenance Program. (Pinkerton Dep. 12:10-25, Exhibit A).

2. After sending the inquiry, Pinkerton spoke with Adrian Rothrock by telephone and scheduled an appointment to visit AIM's Kansas City campus. (Pinkerton Dep. 15:20-16:5, Exhibit A).

3. On or around August 20, 2009, Pinkerton visited the Kansas City campus where he received a tour of the School and a packet of information. (Pinkerton Dep. 16:6-17:4, Exhibit A).

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[1] This statement of facts is a nearly *verbatim* recitation statement of facts in Defendants' initial Suggestions in Opposition of the Relator's Petition, filed March 9, 2015 (hereinafter "Suggestions in Opposition"). The citations to the exhibits are citations to exhibits previously filed with the Suggestions in Opposition.

4. After visiting the School, Pinkerton talked with his father about the program and returned with his wife for a second visit to the School. (Pinkerton Dep. 17:9-17 & 19:12-20, Exhibit A).

5. During the second visit on September 4, 2009, Pinkerton submitted an application to enroll in AIM. (Pinkerton Dep. 19:21-20:14 & Deposition Exhibit 2, Exhibit A).

6. On September 8, 2009, Pinkerton returned to the School for a third visit. On that date, Pinkerton and an AIM Representative signed an Enrollment Agreement for the Aviation Maintenance Technical Engineer Program. (Pinkerton Dep. 22:17-23:2 & Deposition Exhibit 3, Exhibit A). Pinkerton admits that he signed and received a copy of the Agreement. (Pinkerton Dep. 33:4-6; 62:23-63:23 & Deposition Exhibit 10, Exhibit A). Pinkerton also admits that when the Enrollment Agreement was presented to him, the School representative pointed out various specific provisions of the Agreement. (Pinkerton Dep. 35:15-36:6, Exhibit A).

7. Pinkerton admits that he read much of the Enrollment Agreement prior to signing, but could not recall which portions he read. (Pinkerton Dep. 31:10-33:3, Exhibit A). In his deposition, Pinkerton readily and without difficulty read the entire text of the Enrollment Agreement into the record. (Pinkerton Dep. 25:13-31:9, Exhibit A). Pinkerton admits that he made notations on the copy of the Enrollment Agreement that he retained. (Pinkerton Dep. 38:22-39:7 & Deposition Exhibit 4, Exhibit A).

8. In the Enrollment Agreement signed by the Parties, Pinkerton agreed to pay tuition in exchange for the right to receive group instruction at AIM. (Pinkerton Dep. at

Deposition Exhibit 3, Exhibit A). In the ensuing months, Pinkerton received group instruction at AIM and paid tuition to the School. (Pinkerton Dep. 26:12-18 & 27:22-24, Exhibit A).

9. During discovery, Pinkerton produced a copy of the 2009 AIM School Catalogue which was provided to him by AIM. (Pinkerton Dep. 42:8-21 & Deposition Exhibit 6, Exhibit A).

10. On September 23, 2009, Pinkerton attended AIM's orientation session for new students. Pinkerton admitted in his deposition that during that orientation, "I have received a copy of the School Catalogue prior to signing the Student Enrollment Agreement. I have read and understand all relevant School policies and procedures as specified in the Table of Contents governing Admissions, Financial Aid, Tuition, Student Services, and Academics which are contained in the School Catalogue, Catalogue Supplement and the Student Enrollment Agreement, and which pertain to the program that I will be studying" and that "I have received a copy of my completed Student Enrollment Agreement." (Pinkerton Dep. 47:2-48:24 & Deposition Exhibit 7, Exhibit A).

11. Approximately seven (7) months into his enrollment at AIM, Pinkerton wrote a letter dated March 19, 2010 to AIM praising the School and requesting a change in programs. (Pinkerton Dep. 49:15-21; 52:4-9 & Deposition Exhibit 8 at p. 1, Exhibit A). In discovery, Pinkerton provided a "changed" copy of this same letter, which he testified that he modified after-the-fact, and submitted through his counsel do be

produced in discovery in this proceeding. (Pinkerton Dep. 49:22-50:3; 56:8-17 & Deposition Exhibit 8 at p. 2, Exhibit A).

12. On March 24, 2010, Pinkerton signed a second Enrollment Agreement to change his program of study from the Aviation Maintenance Technical Engineer Program to Aviation Maintenance Technician Program, resulting in a shorter program of study, and which did not include avionics instruction. (Pinkerton Dep. 57:1-11 & Deposition Exhibit 9, Exhibit A).

13. The Arbitration Agreements contained in both the 2009 and 2010 Enrollment Agreements provide that the Parties' dispute shall "be administered by the American Arbitration Association… in accordance with its Commercial Arbitration rules." (Pinkerton Dep. 29:2-20; Deposition Exhibits 3 & 9, Exhibit A).[2]

14. The AAA Commercial Arbitration Rules expressly provide that the "arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

[2] At the time both Enrollment Agreements were signed, the Consumer Rules of the AAA did not exist. At that time, this type of dispute would have been subject to the Commercial Arbitration Rules with Supplementary Procedures for Consumer-Related Disputes. (Supplementary Rules, Exhibit C). On September 1, 2014, the AAA replaced the eight Supplementary Rules with the fifty-five new Consumer Arbitration Rules.

Rule 7(a) of the Commercial Arbitration Rules of the AAA, Exhibit B, §§ R-7, R-8; and available at www.adr.org.[3]

15. On May 5, 2011, Pinkerton graduated as the valedictorian of his AIM class. (Pinkerton Dep. 64:3-8 & Deposition Exhibit 11, Exhibit A). Pinkerton received a certificate from AIM, which is necessary to take the Federal Aviation Administration exams to become certified as an airplane mechanic. (Pinkerton Dep. 64:13-66:16 & Deposition Exhibit 12, Exhibit A).

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[3] The new AAA Consumer Rules expressly provide:

> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

Rule 14 of the Consumer Arbitration Rules of the AAA, Exhibit D, §§ R-14; and available at www.adr.org.

16. Pinkerton waited a year and one-half before he took the first of two FAA examinations required to become an airplane mechanic. (Pinkerton Dep. 66:21-67:15 & Deposition Exhibit 13, Exhibit A). Pinkerton took the second exam on September 7, 2012. (Pinkerton Dep. 67:22-68:7 & Deposition Exhibit 14, Exhibit A).

17. Pinkerton received a Temporary Airman Certificate from the FAA on September 14, 2012. (Pinkerton Dep. 68:11-69:12, Exhibit A).

18. Prior to entering AIM, Pinkerton worked for his mother in the family business, which consists of owning and managing rental properties. Pinkerton continued to work in his family business while he was enrolled at AIM, and he has continued to work in that family business to the present and apparently has not sought employment in the aviation industry. (Pinkerton Dep. 8:20-9:15; 22:6-14, Exhibit A).

19. On April 30, 2014, Pinkerton filed a petition for damages alleging that Defendants made various misrepresentations or omissions concerning AIM's program of study and the career prospects for program graduates, in connection with his execution of the first Enrollment Agreement. (Petition for Damages, Exhibit E).

20. On June 19, 2014, Defendants moved to dismiss Pinkerton's petition for lack of jurisdiction, or in the alternative, to compel arbitration and to stay the proceeding. (Motion to Dismiss or Compel Arbitration and Memorandum in Support, Exhibit F). On June 19, 2014, Defendants also moved to stay discovery and all other pretrial proceedings pending a ruling on their Motion to Dismiss, or in the alternative, to compel arbitration and stay the proceeding. (Motion to Stay Discovery and Memorandum in Support, Exhibit G).

21. On June 30, 2014, Pinkerton filed a motion to stay briefing and ruling on Defendants' Motion to Dismiss or Compel, a preliminary opposition to Defendants' Motion to Dismiss or Compel Arbitration, and an opposition to Defendants' motion to stay discovery and other pretrial proceedings. (Plaintiff's Motion and Oppositions, Exhibit H).

22. On July 10, 2014, Defendants filed a reply in support of Defendants' Motion to Dismiss, or in the alternative, to compel arbitration and a reply in support of Defendants' motion to stay discovery and other pretrial proceedings pending a ruling on the motion to compel arbitration. (Replies, Exhibit I). Also on July 10, 2014, Defendants filed an opposition to Pinkerton's motion to stay briefing and ruling on Defendants' motion to dismiss or to compel arbitration.[4] (Opposition, Exhibit J).

[4] On July 21, 2014, Pinkerton filed a Motion for Leave to file sur-reply suggestions in opposition to Defendants' motion to dismiss or to compel arbitration, a Motion for Leave to file reply suggestions in support of Plaintiff's motion to stay briefing and ruling on Defendants' motion to dismiss or to compel arbitration, and a Motion for Leave to file sur-reply suggestions in opposition to Defendants' motion to stay discovery and other pretrial proceedings. On July 31, 2014, Defendants filed oppositions to Pinkerton's motions for leave to file two sur-replies and one reply. The trial court entered an order denying Pinkerton's Motion for Leave and thus the sur-replies and reply were never filed with the trial court.

23. After a hearing, Respondent entered an order on September 8, 2014, permitting limited discovery "as to the issue of whether an arbitration contract was formed and the scope of any such arbitration contract." (Order, Exhibit K).

24. On November 4, 2014, the Missouri Court of Appeals for the Western District entered an opinion reversing a ruling from a Circuit Court Judge in Jackson County denying a defendant's motion to compel arbitration. The Missouri Court of Appeals for the Western District held that the delegation provision must be challenged specifically in order to submit the question to the court. In other words, the Missouri Court of Appeals held that even if the plaintiff has specifically challenged the validity of the of the agreement to arbitrate, the trial court must submit the challenge to the arbitrator unless the plaintiff has lodged an objection to the delegation clause specifically. *See Johnson v. Rent-A-Center*, Case No. WD76863 (Mo. Ct. App. Nov. 4, 2014).

25. In light of that opinion, Defendants filed a Motion to Stay the Court's September 8, 2014 Order concerning discovery and renewed their original Motion to Compel Arbitration because in all of his prior briefings, Pinkerton had never challenged the delegation provision contained in the Enrollment/Arbitration Agreements. (Motion to Stay September 8, 2014 Order and Memorandum in Support, Exhibit L).

26. On November 14, 2014, Pinkerton filed an Opposition to Defendants' Motion to Stay the Court's September 8, 2014 Order concerning discovery. (Opposition, Exhibit M).

27. On December 29, 2014, Defendant filed a Reply Memorandum in Support of Defendants' Motion to Stay the September 8, 2014 Order concerning discovery. (Reply, Exhibit N).

28. On February 2, 2015, Respondent entered an order granting Defendants' Motion to Stay the September 8, 2014 Order concerning discovery. Respondent also granted in part and denied in part Defendants' Motion to Dismiss, or in the Alternative, to Compel Arbitration and to Stay this Proceeding. All other motions relating to discovery were denied as moot. (Order, Exhibit O).

29. On February 23, 2015, Pinkerton filed a Writ of Mandamus or Prohibition with the Missouri Court of Appeals for the Western District. (Writ, Exhibit P).

30. On February 24, 2015, the Missouri Court of Appeals for the Western District denied Pinkerton's Writ of Mandamus or Prohibition. (Order, Exhibit Q).

31. On February 26, 2015, Pinkerton filed a Writ of Mandamus or Prohibition with the Missouri Supreme Court.

LEGAL ANALYSIS

The Missouri Supreme Court has the authority to "issue and determine original remedial writs." Mo. Const. art. V, § 4.1. "The standard of review for writs of mandamus and prohibition ... is abuse of discretion." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007).

Mandamus will lie where a court "has acted unlawfully or wholly outside its jurisdiction or authority or has exceeded its jurisdiction, and also where it has abused whatever discretion may have been vested in it." *State ex rel. Office of Pub. Counsel v.*

Pub. Serv. Comm'n, 236 S.W.3d 632, 635 (Mo. banc 2007) (quotation omitted). "The extraordinary relief of mandamus has limited application." *Jones v. Carnahan*, 965 S.W.2d 209, 212 (Mo. Ct. App. 1998). **"A litigant asking relief by mandamus must allege and prove that he has a clear, unequivocal, specific right to the thing claimed. He must show himself possessed of a clear and legal right to the remedy."** *Furlong Cos., Inc. v. City of Kansas City*, 189 S.W.3d 157, 165-166 (Mo. banc 2006) (emphasis added).

Writs in mandamus may not be used to create new rights; rather, mandamus issues only to enforce previously-established rights that the party commanded has a clear, legal duty to perform. *State ex rel. Seigh v. McFarland*, 532 S.W.2d206, 208-09 (Mo. banc 1976); *State ex rel. City of Springfield v. Brown*, 181 S.W.3d 219, 221 (Mo. Ct. App. 2005). Moreover, the Missouri Supreme Court Rules provide that "[n]o original remedial writ shall be issued ... in any case wherein adequate relief can be afforded by an appeal[.]" MO. SUP. CT. R. 84.22(a).

Entitlement to prohibition is equally limited. Prohibition is a discretionary writ; there is no right of issuance. *State ex rel. Wyeth v. Grady*, 262 S.W.3d 216, 219 (Mo. banc 2008). It is **"an extraordinary remedy, [and] is to be used with great caution and forbearance and only in cases of extreme necessity. . . . The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their jurisdiction."** *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991)(emphasis added). "Prohibition cannot be used as a substitute for an appeal or to undo erroneous judicial proceedings that have already been

accomplished." *Id.* Rather, it should be used only rarely when the alleged error is nonjurisdictional, and in that case only when some "absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available." *Id.* (*quoting State ex rel. Richardson v. Randall*, 660 S.W.2d 699, 701 (Mo. banc 1983)(emphasis added); *State ex rel. Carter v. City of Independence*, 272 S.W.3d 371, 374-375 (Mo. Ct. App. 2008); *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. 1999). As with mandamus, a writ in prohibition cannot be granted where an appeal would provide adequate relief. MO. SUP. CT. R. 84.22(a).

This Court should deny the Relator's Writ of Mandamus or Prohibition for the reasons stated in Defendants' Suggestions in Opposition. First, the Relator has no right to appeal any order or judgment granting a motion to compel arbitration and stay proceedings. Second, Relator's writ of prohibition and mandamus should not be granted because the Relator has a right to appeal any court order affirming or denying confirmation of any arbitration award entered in this case. The Relator therefore has adequate relief. Third, the Relator has failed in his burden to prove that Respondent abused her discretion in staying her own September 8, 2014 Order concerning discovery. Fourth, the Relator has failed in his burden to prove that Respondent abused her discretion in compelling arbitration. Fifth, the Relator has failed in his burden to prove that the facts show that an arbitration agreement does not exist. The Defendants incorporate herein by reference all arguments and analysis made in their Suggestions in Opposition.

In the Relator's Brief filed October 19, 2015 (hereinafter "Brief"), he makes two additional arguments pertaining to Respondent's Order granting Defendants' Motion to Compel Arbitration. First, the Relator maintains that Respondent "erred in her conclusion that the parties agreed to delegate the question of arbitrability to the arbitrator, both because there is not such 'delegation' agreement here, and because it is not legally possible to delegate the threshold question of formation to the arbitrator." (Brief, pp. 12-13). Second, the Relator asserts that Respondent erred in her conclusion that "Pinkerton does not challenge the delegation provision specifically." (*Id.* at p. 11).

In addition to the reasons outlined in the Defendants' Suggestions in Opposition, this Court should deny the Relator's Writ of Mandamus or Prohibition for the following reasons. First, the Relator has failed in his burden to show that Respondent abused her discretion in finding that the Relator's contract defense of unconscionability has been delegated to an arbitrator. More specifically, the Relator does not actually challenge the formation of the contract, but rather sets forth the contract defense of unconscionability which goes to the enforcement of the contract. Respondent did not abuse her discretion in finding that by specifically incorporating the AAA Rules into the Arbitration Agreement, the Parties agreed to delegate issues pertaining to the enforcement of the contract to an arbitrator.

Second, the Relator has failed in his burden to show that Respondent abused her discretion in finding that the Relator did not challenge the delegation clause. The Relator failed to cite any case law to support that argument. Moreover, the Relator in his Brief still does not specifically challenge the delegation clause itself. The Relator does

not assert that arbitration is an unconscionable forum or that it would be unconscionable in some manner for an arbitrator to decide the issues presented by this case. Rather, the Relator makes broad assertions concerning the delegation provision, without articulating any specific contentions concerning how the delegation provision itself is unconscionable.

In addition to challenging Respondent's order compelling arbitration, the Relator also challenges Respondent's order staying her own September 8, 2014 Order concerning discovery, arguing that the "Respondent failed to consider the facts relevant to contract formation." (*Id.* at p. 24). The Court should deny Relator's Petition with regards to this Order as well because Respondent has broad discretion in administering the rules of discovery, and the Relator has failed to meet the burden of showing that she abused the discretion reserved to the trial court judge.

I. The Court should deny Relator's Writ because the Relator has failed in his burden to show that Respondent abused her discretion in finding that the Relator's contract defense of unconscionability has been delegated to an arbitrator.

On February 2, 2015, Respondent entered an order granting the Defendants' Motion to Compel Arbitration. As stated above, writs of mandamus and prohibition are "extraordinary" remedies, and the Relator has failed to demonstrate that he has a clear, unequivocal, and specific right not to be compelled to arbitrate his claims, or that the Court did not have the jurisdiction to compel the Parties to arbitrate.

In the February 2, 2015 Order, Respondent noted that the United States Supreme Court has held that "[u]nder the [Federal Arbitration Act ('FAA')],[5] the determination of whether a valid arbitration agreement exists is presumptively left to the courts, but the 'parties may eliminate that presumption by providing clear and unmistakable language to the contrary.'" (Order at p. 4, Exhibit O to Suggestions in Opposition)(*quoting AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 649 (1986); *Koch v. Compucredit Corp.*, 543 F.3d 460, 463 (8th Cir. 2008)). The Relator did not challenge this finding by the Trial Court.

Respondent further held that "[a]n arbitration provision that incorporates the AAA Rules provides a clear and unmistakable expression of the parties' intent to reserve the question of arbitrability for the arbitrator and not the court," (Order at p. 4, Exhibit O)(*citing Fallo v. High-Tech Institute*, 559 F.3d 874, 878 (8th Cir. 2009) and that "[t]he majority of circuits agree with this interpretation." *Id.* (*citing United States ex rel. Beauchamp & Shepherd v. Academi Training Ctr.*, 2013 U.S.Dist. LEXIS 46433, at *27 (E.D.Va. March 29, 2013)). After analyzing the Enrollment Agreements, Respondent concluded that "[t]he clear and unmistakable language in the arbitration agreements here incorporate the AAA Rules." (*Id.* at p. 5). Respondent noted that the AAA Rules outline "the arbitrator's jurisdiction as 'including any objections with respect to the existence,

[5] As Respondent stated in her Order "[t]he parties do not dispute that the arbitration agreements are governed by the Federal Arbitration Act..." (February 2, 2015 Order at p. 4, Exhibit O to Suggestions in Opposition).

scope or validity of the arbitration agreement' and specifies that '[a] party must object to the jurisdiction of the arbitrator.'" (*Id.*)(*citing* AAA R-7(a),(c)). Respondent further noted that "[t]he incorporation of AAA Rule 7 is a clear and unmistakable expression of the parties' intent to reserve the gateway question of whether the parties agreed to arbitrate for the arbitrator to decide." (*Id.* at pp. 5-6).

A. The Relator's arguments center on the contract defense of unconscionability which goes to the enforcement of the contract and not the formation of the contract.

The Relator challenges Respondent's Order based on the argument that "it is not legally possible to delegate questions about formation of the putative arbitration agreement to an Arbitrator." (Brief, p. 12)(emphasis added). Specifically, the Relator maintains that "[a]s a matter of substantive law under the Federal Arbitration Act, questions of *formation* of an arbitration agreement are *always* decisions for the court, not an arbitrator." (*Id.*, p. 14)(emphasis in original). The Relator also states that the Eighth Circuit's decision in *Fallo* does not support a "conclusion that the court may defer questions of *formation* to the arbitrator." (*Id.*, p. 20)(emphasis in original).

The Relator's arguments are misplaced because he 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. (*Id.*, p. 28)("[t]his arbitration clause is, both on its face and in practice, a *model* of unconscionability..."). Under Missouri law, "[a] valid contract contains the essential elements of 'offer, acceptance, and bargained for consideration.'" *Topchian v. JPMorgan Chase Bank, N.A.*,

760 F.3d 843, 850 (8th Cir. 2014) (*quoting Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. 1988) (en banc)). The Relator does not dispute that there was an offer, acceptance, and consideration. In fact, it is undisputed that an Enrollment Agreement was signed by the Relator and a representative of AIM on September 8, 2009, and that the Relator acknowledged in that Agreement that he contracted for the right to attend classes at AIM, in exchange for payment of tuition. The Relator attended classes until he decided to change programs and signed a second Enrollment Agreement on March 24, 2010; more than six (6) months into his enrollment at AIM. The Relator then took additional classes and completed the new program which he selected in his second Enrollment Agreement. A contract was formed under Missouri law and both of the Enrollment Agreements include arbitration provisions.

Under Missouri law, unconscionability is a defense to contract enforcement. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. 2006)(en banc); *see also Lawrence v. Beverly Manor*, 273 S.W.3d 525, 531 (Mo. 2009)("generally applicable state law contract defenses, such as fraud, duress, and unconscionability")(quoting *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo.App. 2003)). "An unconscionable arbitration provision in a contract will not be enforced." *Id.*; *see Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 497 (Mo. 2012)("An unconscionable contract is unenforceable."); *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 508 n.2 (Mo.banc. 2012)("Missouri does not permit an unconscionable contract or clause of a contract to be enforced."); *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 531 (Mo. 2009)("generally applicable state law contract defenses, such as fraud, duress, and unconscionability" and

"[a]n unconscionable arbitration provision in a contract will not be enforced."); *Cicle v. Chase Bank USA*, 583 F.3d 549, 554 (8th Cir. Mo. 2009)("Before a contract will be deemed unenforceable on the grounds of unconscionability, a court applying Missouri law must find it both procedurally and substantively unconscionable." (*citing Whitney v. Alltel Commc'ns*, Inc., 173 S.W.3d 300, 308 (Mo. Ct. App. 2005)).

The Supreme Court also held that unconscionability is a contract defense that goes to the enforcement of an arbitration agreement. In *Rent-A-Center, W., Inc. v. Jackson*, the question before the Supreme Court was whether an arbitrator or a court should decide whether the doctrine of unconscionability precluded arbitration. 561 U.S. 63, 73-74 (U.S. 2010). Given the clear and unmistakable language authorizing the arbitrator to decide the "enforceability" of the arbitration agreement, the Supreme Court held that the arbitrator should decide whether the agreement was unconscionable and therefore unenforceable. *Id.* at 75-76; *see also* 9 U.S.C. § 2 (permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability").

Facing the same arguments made by the Relator in the present case, the United States District Court for the Eastern District of Missouri held that issues of fraud and misrepresentation are included among the "gateway" questions of arbitrability that are for an arbitrator to decide, where the Parties have agreed for an arbitrator to determine threshold questions of arbitrability. *Bray v. United Ins. Co. of Am.*, 2014 U.S. Dist. LEXIS 160653, at *6 (E.D. Mo. Nov. 14, 2014); *Randazzo v. Anchen Pharms., Inc.*, 2012 U.S. Dist. LEXIS 149944 (E.D. Mo. Oct. 18, 2012); *Fox v. Career Educ. Corp.*, 2012 U.S. Dist. LEXIS 50780, at **2-3 (E.D. Mo. Apr. 11, 2012). For example, in *Fox*, the

District Court compelled arbitration despite the plaintiff's contention that the arbitration clause was procedurally unconscionable because the defendants' representatives allegedly made misrepresentations to her, pressured her into signing the agreement containing the arbitration clause without discussion or negotiation, and hid the arbitration clause in small print on the last page of the agreement. The plaintiff also argued that the agreement was a contract of adhesion because it was offered on a take-it-or-leave-it basis and because the parties possessed unequal bargaining power. The District Court concluded it was for an arbitrator to determine the enforceability of the arbitration provisions, because "[n]one of the plaintiff's arguments challenge the provision of the arbitration clause delegating authority to an arbitrator to resolve issues of arbitrability." *Fox*, 2012 U.S. Dist. LEXIS 50780, at *2-3.

In summary, the Relator relies upon the contract defense of unconscionability but does not dispute that parties may delegate issues of enforceability to an arbitrator. Thus, the Relator has failed in his burden to establish that Respondent abused her discretion in holding that contract defense of unconscionability goes to the enforcement of the contract and not its formation.

B. The incorporation of the AAA rules is a clear and unequivocable expression of the Parties' intent to reserve the question of contract defenses like unconscionability to an arbitrator.

Because the Relator challenges the two Arbitration Agreements on the grounds of unconscionability, Respondent found in her discretion that the incorporation of the AAA rules is a "clear and unequivocable expression of the parties' intent to reserve the

question of contract defenses like unconscionability to the arbitrator." (Order at p. 4, Exhibit O)(*citing Fallo*, F.3d at 878). The vast majority of courts agree with Respondent's holding. *See Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar, LLC*, 756 F.3d 1098, 1100 (8th Cir. 2014)(holding "the incorporation of the AAA Rules into a contract requiring arbitration to be a clear and unmistakable indication the parties intended for the arbitrator to decide threshold questions of arbitrability."); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2011) (noting the AAA Rules empower the arbitrator to determine his or her own jurisdiction over a controversy between the parties); *Fallo* 559 F.3d at 878 ("we conclude that the arbitration provision's incorporation of the AAA Rules ... constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator"); *see also Petrofac, Inc. v. DynMcDermott Petroleum Ops. Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006); *Contec Corp. v. Remote Solution, Co.*, 398 F.3d 205, 208 (2d Cir. 2005); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1332 (11th Cir. 2005); *Haire v. Smith, Currie & Hancock LLP*, 925 F. Supp. 2d 126, 132 (D.D.C. 2013) (collecting federal appellate and district court cases); *United States ex rel. Beauchamp & Shepherd v. Academi Training Ctr.*, 2013 U.S. Dist. LEXIS 46433 (E.D. Va. Mar. 29, 2013)(same).

In *Womack v. Career Educ. Corp.*, the plaintiff filed a lawsuit against Career Education Corporation and Sandford-Broan College alleging that they made various misrepresentations or omissions concerning the school's program and the career opportunities of its graduates. 2011 U.S. Dist. LEXIS 138699, at *2 (E.D. Mo. Dec. 2,

2011). At the time he enrolled, the plaintiff signed an enrollment agreement that incorporated the AAA rules. *Id.* The United States District Court for the Eastern District of Missouri held that the incorporation of the AAA rules "serves as a clear and unmistakable evidence that the parties intended to have the arbitrator decide threshold issues of arbitrability" including "issues concerning the enforceability of the arbitration agreement, including [plaintiff]'s unconscionability claims…" *Id.* at *4.

In his Brief, the Relator argues only the contract defense of unconscionability as a basis for holding that the enrollment agreement and arbitration agreement are unenforceable. (Brief, pp. 27-28). Respondent in her discretion concluded that by incorporating the AAA rules, the Parties agreed that any issues concerning the enforceability of the Arbitration Agreement, including the Relator's unconscionability claims, are for an arbitrator to decide. The Relator failed in his burden to show that Respondent abused her discretion in making that ruling.

II. The Court should deny Relator's Writ because the Relator has failed in his burden to show that Respondent abused her discretion in finding that the Relator did not challenge the delegation clause.

When an arbitration clause contains a clear and unmistakable agreement to arbitrate issues of arbitrability, as here, issues of the clause's enforceability will be for an arbitrator to decide, unless the provision delegating such authority to an arbitrator is specifically challenged. *See Rent-A-Center*, 561 U.S. at 72-73(holding that "unless [the plaintiff] challenged the delegation provision specifically, we must treat it as valid under § 2 [of the FAA], and must enforce it under §§ 3 and 4 [of the FAA], leaving any

challenge to the validity of the Agreement as a whole for the arbitrator."). In exercising her discretion, Respondent found that, while the Relator challenged the Enrollment Agreements as a whole, he failed to specifically challenge the delegation provision. Respondent concluded that the delegation provision was enforceable and "the issue of whether the arbitration agreement was unconscionable is left to an arbitrator per the 'clear and unmistakable' intent of the parties expressed by the incorporation of the AAA Rules into the Arbitration Agreement." (Order at p. 7, Exhibit O).

Respondent noted a recent decision of the Missouri Court of Appeals, *Johnson v. Rent-A-Center*, 2014 Mo.App. LEXIS 1227, at *9-13 (Mo.Ct.App. Nov. 4, 2014)[6] to be persuasive. In *Johnson*, the Appellate Court held that the delegation provision must be challenged specifically in order to submit the question to the court, stating "[i]n other words, [e]ven when a litigant has specifically challenged the validity of an agreement to arbitrate, he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator – the so-called 'delegation clause.'" (Order at p. 7, Exhibit O)(*quoting Johnson*, 2014 Mo. App. LEXIS 1227, at *10 (Mo. Ct. App. Nov. 4, 2014)).

[6] In her Order, the Respondent correctly notes that the Court of Appeals withdrew the *Johnson* decision because the respondent had passed away prior to the issuance of the Court of Appeals' order, but Respondent found that "the opinion is predictive of future delegation provision enforcement issues." (Order at p. 7, Exhibit O).

The Relator asserts that Respondent erred in "her conclusion that 'Pinkerton does not challenge the delegation provision specifically.'" (Brief, p. 11). As stated above, "[t]he standard of review for writs of mandamus and prohibition ... is abuse of discretion." *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo. banc 2007). In her discretion, Respondent read all of the pleadings that had been filed by the Relator in this case[7] and concluded that the Relator never specifically challenged the delegation provision. While the Relator disagrees with Respondent's decision, the Relator does not cite any case law to support the contention that Respondent abused her discretion.[8]

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[7] As noted in footnote 1 above, the Relator's Reply and Sur-Replies were never filed with the Court.

[8] In fact, Respondent correctly ruled that the Relator did not specifically challenge the delegation clause. In his Preliminary Opposition to Defendants' Motion to Compel Arbitration, Pinkerton's sole basis for opposition was as to general enforceability which he argued was for the court – not an arbitrator – to decide: *"Thus, not only is the threshold issue of the existence of an enforceable agreement a decision for the court, but the FAA gives Plaintiff a right to a jury trial." See* Pinkerton's Preliminary Opposition, Section 1 at p. 2, included in Exhibit H to Suggestions in Opposition (emphasis added). To underscore his position, Pinkerton repeatedly noted his opposition was based solely on an enforceability argument: "*The question of enforceability of the arbitration clause is for this Court to decide*." *Id.*, Section 1 at p. 4 (emphasis added).

Like the plaintiff in *Womack*, [9] the Relator does not specifically challenge the delegation clause itself. (*See* Brief, pp. 12-13). The Relator does not assert that arbitration is an unconscionable forum, or that it would be unconscionable for the reason that an arbitrator decide the issues presented in this case, including arbitrability issues. Rather, the Relator makes broad assertions concerning the delegation provision without setting forth any specific contentions concerning how the delegation provision is allegedly unconscionable.

The only contentions made by the Relator focus exclusively on the arbitration agreement as a whole as being allegedly unconscionable. (Brief, pp. 27-28). For example, the Relator cites the following enforceability challenges: (1) "there was no meeting of the minds as to the arbitration clause;" (2) the arbitration provision "unilaterally imposes arbitration on only one party – the student;" (3) the print is unreadable; (4) it requires the parties to split arbitration costs; and (5) the arbitration clause limits damages. None of these potential arguments reference the delegation

[9] The plaintiff in *Womack* failed to specifically challenge the provision of the agreement which allows the arbitrator to decide enforceability of the arbitration clause. The plaintiff in *Womack* claimed that four provisions of the agreement were unconscionable. Those provisions are: 1) a provision requiring the arbitrator to have experience in the administration and operation of post-secondary educational institutions; 2) a provision requiring the parties to split the arbitration costs; 3) a provision limiting damages; and 4) a provision prohibiting recovery of attorney's fees.

clause as being unconscionable in some way. None of these contentions affect the Relator's ability to present to an arbitrator the questions of whether the arbitration agreement is enforceable. *See Womack*, 2011 U.S.Dist. 2011 U.S.Dist. LEXIS 138699, at *4-5; *Chisholm v. Career Education Corp.*, 2011 U.S. Dist. LEXIS 130955 (E.D. Mo. November 14, 2011); *Kenner v. Career Education Corp.*, 2011 U.S. Dist. LEXIS 136484 (E.D. Mo. November 29, 2011); *Parks v. Career Education Corp.*, 2011 U.S. Dist. LEXIS 137225 (E.D. Mo. November 30, 2011); *Hubbard v. Career Education Corp.*, 2011 U.S. Dist. LEXIS 137232 (E.D. Mo. November 30, 2011).

As stated above, for a litigant to obtain the extraordinary relief provided by writs of mandamus and prohibition, he must meet the high burden of proving to this Court that such relief is appropriate. The Relator has failed to carry that burden.

III. The Court should deny Relator's Writ because the Relator has failed in his burden to show that Respondent abused her discretion in staying her own discovery order.

The Relator also asks the Court to force Respondent to reverse her own discovery order and to compel Respondent to allow the Relator further discovery on the arbitration agreement. (Brief, pp. 24-27; 29). In summary, on September 8, 2014, Respondent entered an order permitting limited discovery. On November 4, 2014, the Missouri Court of Appeals for the Western District entered an opinion reversing a ruling from a circuit judge in Jackson County denying the defendant's motion to compel arbitration, because the underlying contract delegated the issue of arbitrability to the arbitrator and because the plaintiff did not challenge that delegation provision, but only challenged the contract

as a whole. On that same day, Defendants filed a Motion to Stay requesting that Respondent stay her own September 8, 2014 Order concerning discovery. On February 2, 2015, Respondent entered an order granting Defendants' Motion to Stay the Court's September 8, 2014 Order concerning discovery.

Respondent has broad discretion in administering rules of discovery, and the Missouri Supreme Court has ruled that it "will not disturb [this broad discretion] absent an abuse of discretion." *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner,* 239 S.W.3d 608, 610 (Mo. 2007) (*citing State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992)). Missouri law permits a trial court to stay underlying proceedings. First, Missouri Revised Statute Section 435.355, which governs proceedings to compel arbitration, provides that "[a]ny action or proceeding involving an issue subject to arbitration shall be stayed if... an application therefor has been made" to compel arbitration. MO. REV. STAT. § 435.355.4; *see also State ex rel. PaineWebber v. Voorhees*, 891 S.W.2d 126, 130 (Mo.banc 1995)(granting writ of prohibition where trial court refused to stay litigation pending arbitration). Second, the trial court has the power to stay proceedings to avoid an undue burden or expense. Rule 56.01 of the Missouri Supreme Court Rules permits any party for good cause to file a motion for a protective order. MO. SUP. CT. R. 56.01(c). "A request for a stay order falls within that rule." *Smulls v. State*, 71 S.W.3d 138, 150 (Mo. 2002).

Relator does not assert that Respondent abused her discretion by staying her own September 8, 2014 Order concerning discovery. Rather, Relator asserts that the trial court erred by filing "to consider facts relevant to contract formation." (Brief, p. 24).

Respondent did not deny Relator's opportunity to obtain and adduce evidence and produce that evidence at argument, but ordered that the discovery and argument occur in arbitration pursuant to the Parties' arbitration agreement. Relator has the right of discovery under the AAA Arbitration Rules on enforceability and equitable defenses to the enforcement of the arbitration agreement. *See* Rules 22 and 23 of the Commercial Arbitration Rules of the AAA, Exhibit B, §§ R-22 & 23; Rules 22 and 23 of the Consumer Arbitration Rules of the AAA, Exhibit D, §§ R-22 & 23, both available at www.adr.org. Moreover, Relator will have the right to argue in arbitration that the Enrollment Agreement is unconscionable. *See* Rule 7 of the Commercial Arbitration Rules of the AAA, Exhibit B, §§ R-7; Rule 14 of the Consumer Arbitration Rules of the AAA, Exhibit D, §§ R-14, both available at www.adr.org.

Under Missouri law, in order for a litigant to obtain the extraordinary relief provided by writs of mandamus and prohibition, he bears the burden of proving that such relief is appropriate. *Furlong*, 189 S.W.3d at 165-66; *State ex rel. Carter v. City of Independence*, 272 S.W.3d 371, 375 (Mo. Ct. App. 2008); *State ex rel. City of Springfield v. Brown*, 181 S.W.3d 219, 221 (Mo. Ct. App. 2005). The burden is high with respect to both types of relief, and the Relator has failed to meet that burden with respect to either suggested remedy.

CONCLUSION

For all the foregoing reasons, and for the reasons stated in Defendants' Suggestions in Opposition, this Court should deny the Relator's Writ of Mandamus or Prohibition. The Relator argues only the contract defense of unconscionability, which

goes to the enforcement of the arbitration agreement. By incorporating the AAA rules into the Arbitration Agreement, the Parties agreed to delegate issues of enforcement to an arbitrator for determination. In her discretion, Respondent found that the Relator failed to challenge that delegation provision, and based upon Missouri appellate precedent, held that the case should be compelled to arbitration. The Relator has failed in his heavy burden to show that Respondent abused her discretion, thus the Writs of Mandamus and Prohibition should be denied and Respondent's Order upheld.

Respectfully submitted,

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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 7,663 words, as counted by Microsoft Word. The undersigned further certifies this brief has been filed in compliance with Rule 55.03.

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of November, 2015, I caused a copy of the above and foregoing to be electronically filed with the Court, which shall also serve by operation of the Missouri E-filing System a copy to the following counsel of record:

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