IN THE SUPREME COURT OF MISSOURI

STATE ex rel. TODD HEWITT,	)	
	)	
Relator,	)	
	)	
v.	)	
	)	**No. SC93846**
HONORABLE KRISTINE KERR, JUDGE, CIRCUIT COURT FOR ST. LOUIS COUNTY,	)	
	)	
Respondent.	)	

Writ of Mandamus filed against the Honorable Kristine Kerr
Judge of the Circuit Court of St. Louis County

Transferred from the Missouri Court of Appeals, Eastern District
Appeal No. ED100479

SUBSTITUTE BRIEF OF RELATOR HEWITT

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JURISDICTIONAL STATEMENT

Relator Todd Hewitt brought this lawsuit alleging that he was terminated from his job with the St. Louis Rams on account of his age, 54, in violation of the Missouri Human Rights Act. He seeks a permanent writ of mandamus directing the Respondent trial judge to set aside her order granting the motion to compel arbitration filed by the Rams and directing her to deny it instead. The Court of Appeals issued a preliminary writ but thereafter, by opinion, quashed it. This Court granted transfer of the case which means that it is to be treated as an original proceeding in mandamus in which a preliminary writ has been issued. *State ex rel. Castillo v. Clark*, 881 S.W.2d 627, 628 n.1 (Mo. banc 1994); *State ex rel. Adrian Bank v. Luten*, 488 S.W.2d 636, 637 (Mo. banc 1973). This Court has jurisdiction to issue the permanent writ sought by Relator Hewitt by virtue of Article V, section 4, subsection 1 of the Missouri Constitution.

STATEMENT OF FACTS

Plaintiff Todd Hewitt worked for forty years as an employee of the St. Louis Rams or its predecessor. He was the Equipment Manager for the football team. See Ex. 1 at Writ 3. The Rams held him in high regard because he had an outstanding work ethic and superior organizational skills. He also possessed high integrity and a professional demeanor. In 1997, he was named NFL Equipment Manager of the year. See Ex. 1 at Writ 4.

Everything was going fine for Mr. Hewitt until January 2009 when Steve Spagnuolo became the new head coach of the Rams. See Ex. 1 at Writ 5. Coach Spagnuolo made a number of age-biased statements to Mr. Hewitt. Most notably, he

bluntly told him that "you're too old for your job." He also told him that his employment was "NFL," which he said meant "Not For Long" employment. See Ex. 1 at Writ 5. During the time that he was head coach, Mr. Spagnuolo and the Rams fired or forced into retirement at least six employees, including the Head of Security and the Director of Player Relations, who were in their fifties or sixties. All these older employees were replaced with substantially younger employees. See Ex. 1 at Writ 5.

The axe fell on Mr. Hewitt on January 7, 2011, shortly before his two-year contract with the Rams was due to expire on February 15, 2011. See Ex. 5 at Writ 20. He was summoned to the office of Coach Spagnuolo who told him that the team was "going in a different direction" and that it was not going to retain him. See Ex. 1 at Writ 5. At the time he was terminated, Mr. Hewitt was 54 years old. Like the other older employees who were let go, he was replaced with a substantially younger employee. See Ex. 1 at Writ 5.

Mr. Hewitt commenced this lawsuit against the St. Louis Rams Partnership and three affiliated business entities on May 29, 2012. See Ex. 1 at Writ 1. He alleged that Defendants fired him from his job as the Equipment Manager because of his age in violation of the Missouri Human Rights Act. See Ex. 1 at Writ 1-7. Thereafter, Defendants filed a motion to compel arbitration of Mr. Hewitt's claims against them based on paragraph seven of his employment contract with the St. Louis Rams Partnership. That paragraph provides in its entirety as follows:

> Hewitt agrees to abide by and to be legally bound by the Constitution and By-Laws and Rules and Regulations of the National

> Football League and by the decisions of the Commissioner of the National Football League, which shall be final, binding, conclusive and unappealable. The Rams and Hewitt also severally and mutually promise and agree that in any dispute which may arise between them, the matter in dispute shall be referred to the Commissioner of the National Football League for decision and after due notice and hearing, at which both parties may appear, the decision of said Commissioner shall be final, binding, conclusive and unappealable, and the Rams and Hewitt severally and jointly hereby release the Commissioner and waive every claim each or both have or may have against the Commissioner and/or the National Football League, and against every director, partner, officer, and stockholder of every Club in the National Football League, for all claims and demands whatsoever arising out of or in connection with any decision of the Commissioner of the National Football League.

See Ex. 5 at Writ 21. The employment contract, and thus the alleged arbitration agreement, was between Mr. Hewitt and Defendant St. Louis Rams Partnership; it was not between Mr. Hewitt and the other three Defendants who were not parties to it. See Ex. 5 at Writ 20, 22.

Mr. Hewitt filed a memorandum with attached exhibits in opposition to Defendants' motion to compel arbitration of his claim of age discrimination. Among other things, he argued that (1) there was no mutual agreement between the parties concerning an essential term of an arbitration agreement, namely the rules that would

govern the arbitration process; (2) there was no consideration for the agreement to arbitrate, even assuming it existed; (3) the alleged agreement to arbitrate did not contain a clear and unmistakable waiver of his right to bring a statutory, as opposed to a common law, claim in court; (4) multiple features of the arbitration program rendered it unconscionable, in particular the provision naming the NFL Commissioner as the arbitrator, since he is a paid representative of the Rams and the other team owners; (5) several of these features interfered with his rights under the MHRA and thus barred arbitration under the denial of statutory rights doctrine; and (6) he never agreed to arbitrate with three of the four Defendants, who were not parties to the alleged arbitration agreement.

After hearing oral argument on October 29, 2012, the trial judge issued a written ruling on January 8, 2013 granting Defendants' motion to compel arbitration. See Ex. 2 at Writ 8-14. In her written decision, the trial judge stayed the lawsuit but invited either party to seek dismissal of it in order to allow an immediate appeal. See Ex. 2 at Writ 14. Mr. Hewitt accepted the invitation and the trial judge dismissed the case on January 17, 2013, observing that "it is the Court's intention to permit the Plaintiff to have the opportunity of pursuing appellate review." However, the trial judge denied Mr. Hewitt's motion to stay the arbitration proceedings pending the appeal. See Ex. 3 at Writ 15.

Subsequently, Mr. Hewitt pursued an appeal but the Court of Appeals, in an opinion issued on September 24, 2013, declined to address the merits of his challenge to the alleged arbitration agreement. See Ex. 4. The Court believed that the trial judge erred in dismissing, rather than staying, his lawsuit and a stay of a lawsuit, as opposed to

a dismissal of it, is not a final appealable judgment. However, the Court stated that Mr. Hewitt "may raise his issues in an extraordinary writ proceeding." See Ex. 4 at Writ 19.

Mr. Hewitt proceeded to do so by filing a petition for a writ of mandamus with the Court of Appeals. On September 30, 2013, the Court issued a preliminary order which effectively stayed the arbitration proceedings. On October 22, 2013, the Court of Appeals issued an opinion striking down the provision of the alleged arbitration agreement that designated the NFL Commissioner as the arbitrator for disputes between Mr. Hewitt and the Rams. It found it to be unconscionable and unenforceable due to the "ingrained potential for bias" by the Commissioner arising out of the fact that he "owes his employment and position to the NFL teams." See Appendix at A27. However, the Court did not allow Mr. Hewitt to proceed with his claim of age discrimination against the Rams in court. Instead, it directed the trial judge to appoint an impartial arbitrator to replace the NFL Commissioner pursuant to a provision of the Missouri Uniform Arbitration Act. See Appendix at A29.

As for the remainder of Mr. Hewitt's arguments, which if accepted would have invalidated the whole arbitration agreement and allowed him to litigate rather than arbitrate his claim, the Court of Appeals did not identify them let alone address their merits. It was conspicuously silent about them.

Thereafter, Mr. Hewitt and the St. Louis Rams filed applications for transfer of this case which were granted by this Court on February 25, 2014.

POINTS RELIED ON

I. Relator is Entitled to an Order Requiring Respondent to Deny the Motion to Compel Arbitration Filed by Defendant St. Louis Rams Partnership because the Alleged Arbitration Agreement is Invalid and Unenforceable in that it Lacks Mutual Agreement as to Essential Terms, Consideration, Waiver of a Judicial Forum for a Statutory Claim, and it is Unconscionable and Denies Statutory Rights.

State ex rel. Vincent v. Schneider, 194 S.W.3d 853 (Mo. banc 2006).

Whitworth v. McBride & Son, 344 S.W.3d 730 (Mo. App. 2011).

Warfield v. Beth Israel Deaconess Med. Ctr., 910 N.E.2d 312 (Mass. 2009).

II. Relator is Entitled to an Order Requiring Respondent to Deny the Motion to Compel Arbitration Filed by Defendants Rams Football Company, Inc., ITB Football Company, LLC and the St. Louis Rams, LLC Because they were not Parties to the Alleged Arbitration Agreement.

Jones v. Paradies, 380 S.W.3d 13 (Mo. App. 2012).

Springfield Iron and Metal v. Westfall, 349 S.W.3d 487 (Mo. App. 2011).

Dunn Indus. Group v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003).

ARGUMENT

STANDARDS OF REVIEW

There are actually two standards of appellate review in this case. One has to do with arbitration and the other with writs of mandamus.

Appellate review of the trial judge's decision requiring Mr. Hewitt to arbitrate rather than litigate his claims of age discrimination against Defendants is plenary. "Whether the trial court should have granted a motion to compel arbitration is a question of law that this Court reviews de novo." *Robinson v. Title Lender*, 364 S.W.3d 505, 510 (Mo. banc 2010). The St. Louis Rams have the burden of proof. "As the party assuming the existence of a valid and enforceable contract to arbitrate, the defendants bear the burden of proving that proposition." *Whitworth v. McBride & Sons*, 344 S.W.3d 730, 737 (Mo. App. 2011).

The Rams have asserted that the law favors arbitration of disputes. However, Missouri courts have explained to "such a preference only applies where a valid arbitration agreement exists between the litigants." *Korte Const. Co. v. Deaconess Manor*, 927 S.W.2d 395, 398 (Mo. App. 1996). This is a truism but it expresses an important reality that, because it is a truism, can be overlooked.

A writ of mandamus is the proper method for a party to enforce a legal right that is "clearly established and presently existing." *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). For the reasons set forth in Point I and Point II of this brief, Mr. Hewitt has a clear and unequivocal right to pursue his claim of age discrimination against the Rams in a judicial rather than an arbitral forum because the alleged arbitration

agreement is invalid and unenforceable under the law.

The Rams may argue that an employee who wants to challenge the validity of an alleged arbitration agreements has an adequate remedy by way of an appeal after the arbitration proceeding is completed. But this cannot be right. If it was, Missouri appellate courts could never entertain requests for writs challenging the enforceability of alleged arbitration agreements before the arbitration proceedings are over. Yet they have often done so; indeed, the Court of Appeals did so in this case. See Appendix at A23-30; *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. App. 2006); *State ex rel. Geil v. Corcoran*, 623 S.W.2d 555 (Mo. App. 1981).

The Rams may argue, less broadly, that Mr. Hewitt has not shown that he in particular lacks an adequate remedy by way of appeal after the arbitration proceeding is completed in light of the particular challenges that he is making to the alleged arbitration agreement. Some context is necessary in order to respond to such a contention.

Pre-dispute arbitration agreements between employers and employees are inherently problematic. This is because of a mismatch of incentives. Employers devote much time to thinking about arbitration agreements. They expect to be sued by at least some employees and, because they will fare much better in arbitration than in court, they have an incentive to insist that all their employees sign arbitration agreements. Employees, on the other hand, devote little if any time to thinking about arbitration agreements. They do not expect when they are hired that their employers will someday commit serious wrongs against them that will require them to sue them. As a result, they have no incentive to resist arbitration agreements that their employers insist they sign,

even assuming they had the bargaining power to do so, and are vulnerable to one-sided provisions in them.

This is a big problem which becomes even bigger when trial judges fail, as they sometimes do, to strike down alleged arbitration agreements that are legally defective. The Court of Appeals has held that employees cannot immediately appeal such decisions because trial judges are required to stay rather than dismiss lawsuits in favor of arbitration, and such stays are not final appealable judgments. See Ex. 4 at Writ 18-19.

Yet the need for immediate appellate review remains acute. No employee who has compelling arguments against an alleged arbitration agreement should be banished to arbitration for long periods of time -- often years in complex employment discrimination cases -- without appellate review of the decisions sending them there until the arbitration proceedings are finally over. *Korte Const. Co.*, 927 S.W.2d at 398. Given that regular appeals are not available to aggrieved employees, the solution is to allow them to challenge orders compelling arbitration of their claims by way of remedial writs.

But this solution becomes a problem if appellate courts (1) identify a serious defect in an alleged arbitration agreement yet fail to invalidate it or (2) fail to consider or address the merits of the employee's arguments against the alleged arbitration agreement, in particular their strength and persuasiveness, in deciding whether to issue a writ. These were the central flaws in the decision by the Court of Appeals in this case.

The Court found merit to Mr. Hewitt's argument that the provision in the alleged arbitration agreement naming the NFL Commissioner as the arbitrator is unconscionable because of his "potential for very real bias." See Appendix at A27. It ruled that "to force

Hewitt to proceed with an arbitration given the method in which the arbitrator was selected would deprive Hewitt of an adequate remedy upon appeal [at the conclusion of the arbitration proceeding]." Id. at A28. This stands to reason, since no party should ever have to proceed before a decisionmaker, whether it is an arbitrator or a judge, who is not neutral and impartial.

At the same time, however, the Court of Appeals did not invalidate the alleged arbitration agreement and allow Mr. Hewitt to return to court. Instead, it ordered the trial judge to appoint a neutral arbitrator to replace the NFL Commissioner. See Appendix at A29. This was error because, as explained below, courts cannot rewrite an arbitration agreement to pick a new arbitrator where, as here, the one chosen by the parties was integral to their agreement. The unavailability of the arbitrator amounts to the failure of an essential term which brings the whole arbitration agreement to an end.

The Court of Appeals did not credit the remainder of Mr. Hewitt's arguments, which it did not discuss, that the alleged arbitration agreement should be declared unenforceable for a variety of reasons unrelated to the bias of the arbitrator. According to the Court, "we are not persuaded that Hewitt will be deprived of a remedy or adequate relief upon appeal [at the conclusion of the arbitration proceeding] should we decline to issue the requested writ." See Appendix at A27.

One is hard pressed to see the logic or sense in this approach. To be sure, it is a serious matter when the employee is forced to arbitrate a claim before an arbitrator who may not be fair and impartial. But it is an equally serious matter when the employee is forced to arbitrate a claim before an arbitrator that should not be arbitrated at all -- that

should be litigated in court, before a jury, because the alleged arbitration agreement is unenforceable due to a lack of mutual agreement as to essential terms, or of consideration, or of a clear and unmistakable waiver of the right to a judicial forum. Either way, the employee lacks an adequate remedy on appeal following completion of the arbitration proceeding and, either way, a writ should issue to remedy the legal wrong done to him.

This is not to say that the mere fact that an employee is claiming that an alleged arbitration agreement is unenforceable means that the appellate court should entertain his request for a writ. Writs are discretionary not compulsory. But the discretion has to be guided by sound considerations. What matters is not the *kind* of arguments the employee is making -- whether the alleged arbitration agreement calls for the appointment of a biased arbitrator as opposed to some other legal deficiency in it -- but the *quality* of his arguments, regardless of their nature. If the employee is advancing arguments against an alleged arbitration agreement that seem on their face to be meritorious, the appellate court should be receptive to a writ proceeding. If not, then not.

The Court of Appeals missed this key point. It faulted Mr. Hewitt for not recognizing that he had the burden of proving the right to issuance of a writ of mandamus. See Appendix at A26. All Mr. Hewitt could do, however, is what he did do: he articulated several reasons, thoroughly and persuasively, why the alleged arbitration agreement is unenforceable. See Relator's Suggestions in Support of his Petition for a Writ at pp. 5-37. To require something more from him was to require the impossible. The Court's analysis skimmed the surface with stock generalities about the burden of

proof in writ proceedings when it should have penetrated deeper to a careful evaluation of the merits of Mr. Hewitt's arguments against the alleged arbitration agreement.

POINTS RELIED ON

I. Relator is Entitled to an Order Requiring Respondent to Deny the Motion to Compel Arbitration Filed by Defendant St. Louis Rams Partnership because the Alleged Arbitration Agreement is Invalid and Unenforceable in that it Lacks Mutual Agreement as to Essential Terms, Consideration, Waiver of a Judicial Forum for a Statutory Claim, and it is Unconscionable and Denies Statutory Rights.

The Court must answer two basic questions with regard to this issue. First, is there a valid arbitration contract (offer, acceptance and consideration)? Second, if so, is it enforceable under governing legal principles (such as waiver and unconscionability)? *Whitworth*, 344 S.W.3d at 736. There are five main reasons why the alleged arbitration agreement between Plaintiff Hewitt and Defendant St. Louis Rams Partnership is invalid and unenforceable. Each will be discussed in turn.

1. Mutual Agreement to Essential Terms

The law does not require parties to submit to arbitration proceedings when they have not consented to do so. "Arbitration is a matter of contract and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *Katz v. Anheuser-Busch*, 347 S.W.3d 533, 543 (Mo. App. 2011). Whether Mr. Hewitt and the Rams agreed to submit to arbitration proceedings rather than court proceedings is determined by "ordinary state-law principles that govern the formation of contracts." *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1995).

Hornbook law holds that there must be mutual assent -- a meeting of the minds between the parties -- with regard to all essential terms before an enforceable contract can come into existence. *Olayhe Millwork Co. v. Cobblestone Finishes*, 189 S.W.3d 199, 203-204 (Mo. App. 2006). In seeking to compel arbitration, the Rams relied on a sentence in paragraph seven of the employment contract which provides that "the Rams and Hewitt also severally and mutually promise and agree that in any dispute which may arise between them, the matter in dispute shall be referred to the Commissioner of the National Football League for decision." See Ex. 5 at Writ 21. At best, this is merely a bare-bones agreement to arbitrate which, without more, does not rise to the level of a contract that can be enforced by courts.

Missouri courts have held that the rules governing the arbitration process are essential terms which, if left out of an agreement to arbitrate, render it invalid. A key case is *Whitworth* where the Court stated:

> The Employment Contract generally references Whitworth's agreement to arbitrate claims. However, the Employment Contract does not describe the applicable arbitration procedures. The procedures which the Defendants seek to enforce are contained in the Handbook. However, the Employment Contract makes no reference to the Handbook . . . We have already established that the Employment Contract cannot be the "arbitration agreement" the Defendants seek to enforce as it does not include or incorporate the Handbook's dispute resolution procedures.

Whitworth, 344 S.W.3d at 738, 741 n. 11. This reasoning finds an echo in an earlier

Missouri case where the Court held that a contract to arbitrate did not exist because, among other things, the parties never came to an agreement as to the rules that would govern the arbitration process. *Abrams v. Four Seasons*, 925 S.W.2d 932, 938 (Mo. App. 1996).

This is not just the law in Missouri but in other jurisdictions as well. For example, one court has explained that the "essential terms to an arbitration agreement have been held to include the intent to arbitrate (that the parties firmly desired to resolve all disputes without resort to litigation), the scope of the arbitration (what claims or controversies would be arbitrated), *binding rules for the arbitration*, and the effect of the arbitration ruling (whether it is binding on the parties)." *Vescent, Inc. v. Prosun Int.*, 2010 U.S. Dist. LEXIS 123889 at * 8-10 (D. Colo. Nov. 9, 2010) (emphasis added). Other courts have repeatedly sounded the same theme. See, e.g., *Kansas VIP, Inc. v. KDL, Inc.*, Kan. App. Unpub. LEXIS 130 at * 12-13 (Kan. App. Feb. 18, 2011) ("the record is equally barren of evidence describing a fully-formed understanding of the parties . . . What arbitration rules would apply?); *Walker v. Ryan's Family Steak Houses*, 400 F.3d 370, 383 (6th Cir. 2005) (no mutual assent when the arbitration agreement "did not adequately explain how the arbitration procedure would work"); *Dreyfuss v. Etelecare Global Solutions*, 39 Fed. Appx. 551, 554 (2d Cir. 2009) (an enforceable agreement to arbitrate did not exist when the parties "had not both signed a single agreement which contained a full complement of agreed upon arbitration procedures").

This body of case law, both inside and outside Missouri, is impressive and strongly supports Mr. Hewitt's position.

Mr. Hewitt did not enter into an enforceable contract to arbitrate his disputes with the Rams because essential terms -- the rules governing arbitration -- are missing from it. The NFL's Dispute Resolution Procedural Guidelines govern arbitration proceedings before the Commissioner. They deal with important matters such as time limits, discovery, evidence, trial procedure, and remedies. See Ex. 6. Yet the Guidelines were not attached to the employment contract nor were they incorporated by reference in it. See Ex. 5. Notably, Mr. Hewitt stated in his affidavit, without contradiction from Defendants, that he has never seen the Guidelines and did not learn of their existence until after the Rams commenced arbitration proceedings with the Commissioner in July 2012, long after he signed his employment contract in December 2008. See Ex. 5 at Writ 22; Ex. 7 at Writ 28.

Of a meeting of the minds with regard to the NFL arbitration rules in this case it is impossible to speak. Under Missouri law, a mutual agreement requires that "the minds of the contracting party meet upon and assent to the same thing in the same sense at the same time"; it requires a "definite offer and unequivocal acceptance." *Katz*, 347 S.W.3d at 544-545. That is hardly the situation here. The Rams never offered the NFL arbitration rules to Mr. Hewitt and he never accepted them. One fails in every attempt to understand how Mr. Hewitt could have agreed to the rules when he knew nothing about them. Because there was no meeting of the minds with regard to the Dispute Resolution Guidelines, and because they are essential terms, there is no valid contract to arbitrate in this case. *Katz*, 347 S.W.3d at 545-546 (employee could not accept arbitration program when she lacked knowledge of its terms and conditions).

Against this conclusion, the trial judge had little to say and what she did say was misguided and misconceived.

The trial judge emphasized that Mr. Hewitt and the Rams signed an employment agreement which mutually bound them to arbitrate any disputes between them. See Ex. 2 at Writ 11. But this is beside the point. Merely to show that two people have agreed to arbitrate disputes is not to show that they have agreed to the rules that will govern the arbitration. Just as an agreement for the sale of goods is not legally binding when there has been no meeting of the minds as to price, because this is an essential term, an agreement to arbitrate disputes is not legally binding when there has been no meeting of the minds with regard to the rules that will govern the arbitration, because this too is an essential term.

The trial judge put forward the idea that Mr. Hewitt agreed to comply with the NFL's arbitration rules when he agreed in the employment contract to comply with its Constitution and Bylaws. See Ex. 2 at Writ 12-13. But it is a bad idea. The Constitution and Bylaws do not mention, let alone set out, the arbitration rules. They are conspicuously absent from them. See Ex. 8 at Writ 29-36. A contract can incorporate by reference another document but only those provisions of the document that are "clear beyond doubt" such that it is reasonable to conclude that the parties had notice of them and agreed to them. *Bronze v. Turner Const. Co.*, 264 S.W.3d 638, 643 (Mo. App. 2008); *Dunn Indus. Group v. City of Sugar Creek*, 112 S.W.3d 421, 436 (Mo. banc 2003); Williston, 11 A Treatise on the Law of Contracts, Section 30.25 at p. 302 (4th. ed. 2012). The incorporated document in this case, the Constitution and Bylaws, does not satisfy

this strict standard because it says nothing about the Dispute Resolution Guidelines.[1]

The trial judge noted that Section 8.2 of the NFL's Constitution and Bylaws authorizes the Commissioner to arbitrate disputes between employees and owners and that Section 8.5 authorizes him to "interpret and from time to time establish policy and procedure in respect to the provisions of the Constitution and Bylaws and any enforcement thereof." According to the trial judge, Section 8.5 delegates to the Commissioner the authority to promulgate the NFL arbitration rules. See Ex. 2 at Writ 12. If this is true, it is also irrelevant. Section 8.5 does not come close to showing, with the clarity and certainty required by the law, that Mr. Hewitt had notice of, and assented to, the NFL arbitration rules. It is too vague and ambiguous; if it refers to the rules it does so in such an indirect and roundabout way as to be effectively invisible to the average reader. Moreover, it does not *incorporate* the arbitration rules but, at most, merely refers to them. *Northrop Grumman Information Technology v. U.S.*, 535 F.3d 1339, 1334, 1346-1347 (Fed. Cir. 2008).

It bears emphasis that even if the NFL's Constitution and Bylaws had specifically

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[1] Under the incorporation by reference doctrine the secondary document, or here the tertiary document, must be readily available to the parties to the host contract. *Carlsen v. Global Solutions*, 423 Fed. Appx. 697, 698 (9th Cir. 2011). Mr. Hewitt did not have access to the arbitration rules which, contrary to Defendants' assertion in the trial court, are not available on the internet. Even if they were available, it would not matter because Mr. Hewitt was not aware of their existence.

mentioned the arbitration rules it would not change the result in this case. This is clear from the recent decisions by the Western District in *Sniezek v. K.C. Chiefs Football Club*, 402 S.W.3d 580 (Mo. App. 2013) and *Clemmons v. K.C. Chiefs Football Club*, 397 S.W.3d 503 (Mo. App. 2013). In those cases, the two employees signed contracts with the Kansas City Chiefs Football Club which provided that they would "comply at all times with, and be bound by, the Constitution and By-Laws of the National Football League." *Sniezek*, 402 S.W.3d at 582; *Clemmons*, 397 S.W.3d at 505. This is virtually the same language that appears in Mr. Hewitt's contract with the Rams. See Ex. 5 at Writ 21. Significantly, the Court in *Sniezek* and *Clemmons* held that the two employees were not bound by the NFL's Constitution and Bylaws -- and of necessity anything found in them -- because "the mere mention of the NFL's constitution and bylaws in the Agreement did not incorporate the terms of those documents in the Agreement." *Sniezek*, 402 S.W.3d at 584; *Clemmons*, 397 S.W.3d at 507.

The only case that the Rams have cited that comes close to supporting their position is *Canterbury v. Parsons Constructors*, 2009 U.S. Dist. LEXIS 25905 at *1 (W.D. Mo. March 27, 2009). But the reasoning in that case, a federal district court decision, is as misguided as it is abbreviated. The Court said it does not matter that an arbitration agreement fails to say anything about the arbitration rules because, as a practical matter, an employee who has just been hired would not bother to "devote an hour, or even fifteen minutes, to studying details of the arbitration procedure." *Canterbury*, 2009 U.S. Dist. LEXIS 25905 at * 5-6. This is like saying it does not matter that an employment contract lacks an arbitration clause because, as a practical matter, an

employee who has just been hired would not bother to read it anyway. The Court's reasoning in *Canterbury* is offensive to basic principles of contract law because it would, if taken seriously, bind employees to all manner of "agreements" that they never made.

According to the Rams, Mr. Hewitt agreed to comply with the NFL's Dispute Resolution Guidelines when he agreed in the employment contract to comply with the League's "Rules and Regulations." This is not a position that they took in the trial court which is not surprising because it plainly lacks merit.

There is no evidence that Mr. Hewitt and the Rams came to an understanding -- a meeting of the minds -- that the term "Rules and Regulations" in paragraph seven of the employment contract meant the "Dispute Resolution Guidelines." Indeed, there is evidence that they did not. The Rules and Regulations are mentioned in paragraph eight of the contract as governing Mr. Hewitt's conduct and deportment as an employee. See Ex. 5 at Writ 21. This shows that the Rules and Regulations are a separate and independent document from the Dispute Resolution Guidelines. Nothing in the record suggests that this document, which the Rams have never made a part of the record, refers in any way to arbitration let alone to the arbitration rules. Under these circumstances, it cannot be said that by agreeing to the "Rules and Regulations" of the NFL Mr. Hewitt meant to agree to its "Dispute Resolution Guidelines," especially when it is undisputed that he knew nothing about the Guidelines. See Ex. 7 at Writ 27.

Absent evidence of the intent of the parties, which does not exist, the term "Rules and Regulations" in the employment contract is too vague and broad to be enforceable. It is nebulous to the point of meaninglessness. No showing has been made, or is plausible,

that Mr. Hewitt and the Rams came to a meeting of the minds that the term "Rules and Regulations" in the contract meant the "Dispute Resolution Guidelines." *Sea Trade v. Fleetboston Financial*, 2007 U.S. Dist. LEXIS 32167 at *8, 12-14 (S.D.N.Y. May 1, 2007) (general reference to "rules" and "regulations" in contract with bank was too indefinite as a matter of law to incorporate by reference a document not specifically mentioned in the contract).

According to the Rams, the Court can infer or surmise from Mr. Hewitt's agreement to arbitrate disputes before the NFL Commissioner the further agreement to abide by the NFL arbitration rules. That is not how contract law works. Courts construe contracts; they do not make them. They have no authority to rewrite a contract by adding a provision that is not there just because they think the parties "might" have agreed to it or that they "should" have agreed to it. "We must be guided by the well-established rule that we cannot make contracts for the parties or insert provisions by judicial interpretation . . . [W]e cannot be concerned by what they might have said, or with what they perhaps should have said." *Brackett v. Easton Boot*, 388 S.W.2d 842, 847 (Mo. 1965).

In sum, Mr. Hewitt did not agree to an essential term of a valid arbitration agreement, namely the rules governing the arbitration process, when he signed his employment contract with the Rams. Not then, not ever. To say that he did agree with them is to indulge in an extravagant fiction; it would commit him to a deal he never made. Under the circumstances, the trial judge erred in compelling Mr. Hewitt to arbitrate his claim of age discrimination against the Rams.

2. Consideration

Even assuming that the Rams could prove that Mr. Hewitt agreed to be bound by the NFL arbitration rules they still cannot prove that there was consideration for his agreement to arbitrate with them. They have argued, and the trial judge found, that the consideration comes from the fact that the parties made mutual and reciprocal promises in the employment contract to arbitrate any disputes between them. See Ex. 2 at Writ 11; *McIntosh v. Tenet Health*, 48 S.W.3d 85, 89 (Mo. App. 2001). However, the Rams' promise to arbitrate is illusory.

It is illusory because the employment contract required Mr. Hewitt to comply with the NFL's Constitution and Bylaws and its Rules and Regulations, but it did *not* require the Rams to comply with them. See Ex. 5 at Writ 20-22. In this respect, it is identical to the employment contracts of the two employees in *Sniezek* and *Clemmons*. The Court pointed out in those cases that "while the Chiefs' relationship with the NFL may have required them to comply with the NFL's constitution and bylaws, nowhere in the agreement did the Chiefs promise [the plaintiff] that, in the context of their employment relationship with [the plaintiff], they would comply with . . . any other provision of the NFL's constitution and bylaws." *Sniezek*, 402 S.W.3d at 584; *Clemmons*, 397 S.W.3d at 507.

The fact that the Rams are not contractually bound by the NFL's Constitution and Bylaws and its Rules and Regulations is significant. It means that they are not bound by the league's arbitration rules either. And this renders their promise to arbitrate with Mr. Hewitt empty and meaningless because they are free to disregard the arbitration rules

during the course of the arbitration proceeding. "Without a definite set of [arbitration] procedures, EDSI's promise to provide an arbitral forum was illusory, thereby lacking mutuality of obligation and defeating consideration." *Walker v. Ryan's Family Steak Houses*, 289 F. Supp.2d 916, 930 (N.D. Tenn. 2003), aff'd 400 F.3d 370 (6th Cir. 2005).

It does not help the Rams to say, as they have, that Mr. Hewitt got consideration for his promise to arbitrate disputes with the Rams when they gave him a definite term employment contract that required just cause for his termination. Needless to say, Mr. Hewitt's right to challenge an unjustified discharge in an arbitration proceeding is empty and meaningless when the Rams are not bound by the arbitration rules during the proceeding.

3. Waiver of a Judicial Forum for a Statutory Claim

Employees can give up their right to a judicial forum for resolution of their claims under a statute, as opposed to the common law, and agree to have them resolved in an arbitral forum instead but the waiver must be *clear* and *unmistakable*. *Warfield v. Beth Israel Deaconess Med. Ctr.*, 910 N.E.2d 312, 397-402 (Mass. 2009). This principle is equally applicable whether the agreement to arbitrate is contained in a private contract or a collective bargaining contract. See *Warfield*, 910 N.E.2d at 401; *Barnes v. Hartshorn*, 2010 U.S. Dist. LEXIS 92078 at *8-11 (C.D. Ill. July 15, 2010).

Missouri courts have characterized the Missouri Human Rights Act as serving the "important" and "transcendent" legislative goal of eradicating discrimination in the workplace. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 565 (Mo. banc 2006); *AT&T Information Systems v. Wallemann*, 827 S.W.2d 217, 224 (Mo. App. 1992). They

have laid stress on its broadly remedial purpose, see *State ex rel. Washington University v. Richardson*, 396 S.W.3d 387, 392-93 (Mo. App. 2013), and the statute itself provides that it "shall be construed to accomplish the purposes thereof and any law inconsistent with any provision of this chapter shall not apply." See § 213.101 R.S.Mo. The law in Missouri, as elsewhere, is that any private contract that thwarts or frustrates the public policy as expressed in a statute is unenforceable. *First Nat. Ins. Co. v. Clark*, 899 S.W.2d 520, 521 (Mo. banc 1995).

Given the strong public policy embodied in the MHRA, any waiver by an employee of his right to pursue a claim in court under the MHRA must be clear and unmistakable in the sense that it either specifically refers to the MHRA or, at a minimum, anti-discrimination laws or employment discrimination claims. *Warfield*, 910 N.E.2d at 397-402; *Harris v. Bingham McCutchen LLP*, 154 Cal. Rptr. 3d 843, 847-848 (Cal. App. 2013); *Kayser v. Southwestern Bell*, 2010 U.S. Dist. LEXIS 130788 at *7-10 (E.D. Mo. Dec. 10, 2010). No such clear and unmistakable waiver can be found in the employment contract between Mr. Hewitt and the Rams. It provides for arbitration of "any dispute" between the parties, see Ex. 5 at Writ 21, but this language is too vague and general to adequately inform an employee that he is waiving his right to bring suit in court for violation of his rights under the anti-discrimination statutes. Indeed, Mr. Hewitt stated in his Affidavit that he did not understand that by signing the employment contract he was giving up this right. See Ex. 7 at Writ 28.

The Rams have emphasized the broad scope of the "any dispute" language in the alleged arbitration agreement as if it helps them. But it actually hurts them. It is the

broad sweep of the language that disables it from serving as an effective waiver of statutory rights; it fails to narrowly focus the employee's attention on the fact that he is relinquishing his right of access to the court system to redress violations of the anti-discrimination laws. The more general the wording in an arbitration agreement the less likely it is to effect a "clear and unmistakable" waiver of statutory rights. See *Crocker v. Townsend Oil Co.*, 979 N.E.2d 1077, 1087 (Mass. 2012) (specific notice requirement ensures that "employees do not unwittingly waive their rights").

Notably, Courts have recognized that the kind of language contained in the alleged arbitration agreement between Mr. Hewitt and the Rams does not satisfy the clear and unmistakable standard. For example, a federal appellate court has held, in accordance with prevailing law, that "general arbitration clauses, such as those referring to 'all disputes' or 'all disputes concerning the interpretation of the agreement,' taken alone do not meet the clear and unmistakable requirement." *Carson v. Grant Food*, 175 F.3d 325, 332 (4th Cir. 1999).

A particularly noteworthy case is *Wright v. Universal Maritime Service*, 525 U.S. 70 (1998). In that case, the U.S. Supreme Court dealt with a claim of discrimination under the Americans with Disabilities Act. It held that "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA [collective bargaining contract]. The CBA in this case does not meet that standard. Its arbitration clause is very general, providing for arbitration of 'matters under dispute' -- *which could be understood to mean matters in dispute under the contract*. *Wright*, 525 U.S. at 80 (emphasis added). There is no material difference between the

employment contract in *Wright*, which calls for arbitration of "matters under dispute," and the employment contract in the present case, which calls for arbitration of "any dispute." Both fail to satisfy the clear-and-unmistakable waiver standard because both can be construed to refer to disputes arising under the employment contract itself as opposed to disputes arising under some external source, such as the state and federal anti-discrimination statutes.

Cases such as *Warfield*, *Carson* and *Wright* are important but they went unacknowledged and undiscussed in the trial judge's decision. See Ex. 2 at Writ 15-22.

There is nothing in the employment contract between Mr. Hewitt and the Rams that expressly waived his right to bring a statutory claim of discrimination in court. "Parties seeking to provide for arbitration of statutory discrimination claims must, at a minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause." *Warfield*, 910 N.E.2d at 400. The employment contract did not mention the MHRA, did not mention other anti-discrimination statutes, and did not mention claims of discrimination. See Ex. 5 at Writ 20-22. Under these circumstances, it did not "clearly and unmistakably" waive Mr. Hewitt's right to bring his claim of age discrimination in a judicial rather than an arbitral forum.

The Rams' attempts to distinguish *Warfield* have been unpersuasive. To be sure, the employment contract in that case required arbitration of disputes arising out of or in connection with the employment contract. 910 N.E.2d at 321. But the Court never suggested that if the contract were worded differently -- if it referred to "any disputes" or "all matters in dispute" -- that it would have found a clear and unmistakable waiver of the

employee's right to bring suit in court for a violation of a civil rights statute. To the contrary, it would have followed cases such as *Carson* and *Wright* and allowed such a suit.

4. Unconscionability

Missouri courts have traditionally distinguished between procedural unconscionability, which focuses on the process by which the arbitration agreement was formed, and substantive unconscionability, which focuses on the terms and provisions of the arbitration agreement. The Missouri Supreme Court has recently erased the distinction between the two, however, because they both focus on the situation as it existed at the time the arbitration agreement was formed. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 493 n.3 (Mo. banc 2012). Although the concepts of procedural and substantive unconscionability have been merged, Mr. Hewitt will discuss them separately for the sake of convenience.

The Rams' arbitration program has all the hallmarks of procedural unconscionability. As Mr. Hewitt's affidavit shows, the alleged arbitration agreement was drafted by the Rams; it was hurriedly presented to Mr. Hewitt, without explanation, on a take-it-or-leave-it basis without any meaningful opportunity for negotiation; it required acceptance by Mr. Hewitt as a condition of employment in order to remain an employee of the Rams; and it effectively offered Mr. Hewitt the choice of giving up his right to sue in court if disputes with the Rams arose in the future, including his right to trial by jury, or giving up his job as Equipment Manager instead -- which was realistically no choice at all. See Ex. 7 at Writ 27-28. The fact that the Rams did not bother to give

Mr. Hewitt a copy of the arbitration rules at the time he signed the employment contract, or at any time thereafter, reinforces a finding of procedural unconscionability. *Sparks v. Vista Child and Family Services*, 207 Cal. App. 4th 1511, 1523 (Cal. App. 2012).

A further important consideration is the disparity in bargaining power between Mr. Hewitt and the St. Louis Rams. *Shaffer v. Royal Gate Dodge*, 300 S.W.3d 556, 559 (Mo. App. 2009). Mr. Hewitt was not a star football player or a high-ranking football executive. He was just the Equipment Manager. He was one employee in a sophisticated and powerful NFL franchise. The Rams' dominant economic power is illustrated by the fact that Mr. Hewitt never even tried, with one minor exception, to negotiate any changes in the employment contracts that the Rams presented to him over the years. See Ex. 7 at Writ 28; *Brewer*, 364 S.W.3d at 493.

In addition to being procedurally unconscionable, the Rams' arbitration program is also substantively unconscionable. Under Missouri law, the test is whether the terms of the agreement to arbitrate are unduly harsh or one-sided. *Woods v. QC Financial Services*, 280 S.W.3d 90, 96 (Mo. App. 2008). Here, the Rams' arbitration program has at least seven features which mark it as substantively unconscionable.

First, a grave defect in the arbitration agreement, sufficient by itself to invalidate it, is that it designates the NFL Commissioner as the arbitrator of any disputes between Mr. Hewitt and the Rams. He is not a neutral and unbiased decisionmaker. To the contrary, he is the chief executive officer of the National Football League, see Ex. 8 at Writ 35, and the owners, including the Rams, select and employ him and determine his period of employment and the amount of his compensation. See Ex. 8 at Writ 34. The

Commissioner's job is not to protect the best interests of the employees but those of the owners. As the head of the NFL, he is charged with the duty "to promote and foster the primary business of League members, each member being an owner of a professional football club." See Ex. 8 at Writ 31.

Given these circumstances, the Commissioner is not fit to sit in judgment on claims by employees such as Mr. Hewitt against owners such as the Rams, especially emotionally-charged claims of unlawful discrimination.[2]

Significantly, courts agree. A case on point is *Dryer v. Los Angeles Rams*, 198 Cal. Rptr. 497, 501-502 (Cal. App. 1984). There, the Court held that the NFL Commissioner was not a neutral and impartial arbitrator of a dispute between a football player and the Los Angeles Rams (now the St. Louis Rams). The Court observed:

Unquestionably, the NFL Commissioner's interests are closely allied with

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[2] The Commissioner is authorized by the NFL arbitration rules to designate a member of his staff to hear and decide cases. See Ex. 6 at Writ 23. He named Harold Henderson to be the arbitrator for Mr. Hewitt's claim against the Rams with assistance from Larry Ferazani. Who are these people? They both work for the Commissioner as attorneys in the NFL's Labor Relations Department. Notably, that Department represents management -- the owners of football teams such as the Rams -- in disputes with players and employees. Mr. Henderson and Mr. Ferazani are not neutral and disinterested decisionmakers; they are tainted with as much bias and partiality as the Commissioner himself.

> those of management. He is appointed and paid by team owners; he functions as something of a managerial overseer . . . In the dichotomy of player versus management, it is difficult to conceive of a closer alliance between the Commissioner's interests and those of management . . . If the instant dispute falls within the ambit of the Commissioner's removal power, the existence of a fair and impartial arbitration mechanism would be purely illusory; to subject plaintiff to such an illusion of neutral dispute resolution would be unconscionable.

Dryer, 198 Cal. Rptr. at 501.

The Rams have pointed out, as if it meaningful, that the *Dryer* case was reversed by the California Supreme Court. 709 P.2d 826 (Cal. 1985). But this is misleading. The case was reversed on the ground that the Commissioner would not be the arbitrator for the dispute; it was not reversed on the ground that, if he were the arbitrator, he would be a neutral and impartial one. To the contrary, the California Supreme Court made it clear that if the Commissioner were the arbitrator it would raise serious concerns about the fairness of the arbitration proceeding. 709 P.2d at 832-833.

Another case that supports the conclusion that the NFL Commissioner is unconscionably biased is *Morris v. New York Football Giants*, 575 N.Y.S.2d 1013 (N.Y. Sup. Ct. 1991). The Court examined the biasing ties between the Commissioner and the team owners, which included the fact that he is hired by them, paid by them, and can be fired by them, and concluded that "a neutral arbitrator should be substituted for the Commissioner in order to ensure a fair and impartial hearing." *Morris*, 575 N.Y.S.2d at

1016.

Legal commentators have followed in the footsteps of cases such as *Dryer* and *Morris*. Consider these two passages from two law review articles:

> The Commissioner is an employee of the league and, thus, employed and elected by the owners who determine the Commissioner's term and compensation . . . The Commissioner has to ensure the owner's goodwill regarding his concern about re-election or job termination. As a result of this conflict, it is very likely that the Commissioner will tend to avoid a dispute with the owners and make decisions in the owners' favor.
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> * * *
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> The AAA labor arbitration rules explain that an arbitrator is not neutral if that person "has any financial or personal interest in the result of the arbitration." If this language were applied to the NFL, there could be grounds for removal of the Commissioner as arbiter. The Commissioner is essentially a representative of the league management that hired him and pays his compensation, thus creating a financial conflict.

Lentz, The Legal Concept of Professional Sports Leagues, 6 Marq. Sports L.J. 65, 81-82 (1995) (first quote); Reece, Throwing the Red Flag on the Commissioner, 45 Val. U.L. 359, 392 (2010) (second quote).

Missouri case law is consistent with these legal authorities. Indeed, a key decision by this Court conclusively shows that allowing the NFL Commissioner to arbitrate Mr. Hewitt's claim of age discrimination against the Rams would be unconscionable.

The case is *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. banc 2006). There, the plaintiffs bought homes from defendant McBride & Son Homes. After discovering problems with the homes, they sued it for violations of, among other things, the Missouri Merchandising Practices Act. McBride sought to compel arbitration of the claims pursuant to an arbitration agreement with the home buyers which provided that "the arbitrator shall be selected by the President of the Homebuilders Association of Greater St. Louis." As it turned out, the President of the Association was also the President of McBride. *Vincent*, 194 S.W.3d at 856, 859.

The Court held that an arbitration provision that allows the selection of the arbitrator, who must be unbiased, to be made by someone in a position of bias is unconscionable. *Vincent*, 194 S.W.3d at 859. Not surprisingly, the Court found that the President of McBride was in a position of bias with regard to the claims of the home buyers against his company. Id.

But the Court did not stop there; it went further. It concluded that any President of the Homebuilders Association, even one who lacked any financial interest in McBride, would occupy a position of bias with regard to the claims of the home buyers against the company. "Even if the president of the Homebuilders Association of Greater St. Louis was not also the president of McBride, this portion of the arbitration provision would be unconscionable [because] it requires that an individual in a position of bias be the sole selector of an arbitrator." *Vincent*, 194 S.W.3d at 859. The Court's conclusion rested on common sense: the head of a trade association is the guardian of the welfare of its members and when they are the target of claims for substantial damages he will be

inclined to select an arbitrator who will rule in their favor.

It is much the same here. The NFL Commissioner is the head of a trade association known as the National Football League. See Ex. 8 at Writ 30-31, 35. He is charged with protecting the best interests of the team owners and owes his job, which is prestigious and lucrative, to them. Where you stand, as the adage states, depends on where you sit. The Commissioner sits in a position that gives him a bias in favor of management and against employees that will be difficult if not impossible for him to shake off. Consciously or unconsciously, he will look with disfavor upon claims brought by employees against team owners which threaten to tarnish their reputations or to diminish their assets. As a result, the Commissioner is not a fit judge of Mr. Hewitt's claim of age discrimination against the Rams.

Reinforcing this conclusion are cases from other jurisdictions which have held, echoing the reasoning in *Vincent*, that an arbitration agreement that designates an arbitrator who is predisposed to rule in favor of one of the parties is unconscionable. See, e.g., *McMullen v. Meijer*, 355 F.3d 485, 494 n.7 (6th Cir. 2004); *Murray v. United Food*, 289 F.3d 297, 302-303 (4th Cir. 2002). While a judge is chosen to preside over a case for a reason that has nothing to do with how he is likely to decide it, the NFL Commissioner was chosen by the Rams in the employment contract for a reason that has everything to do with how he is likely to decide it -- he is their paid representative who is inclined to rule in their favor in order to protect their financial or reputational interests. To say that an arbitration process is "fair" and "reasonable" when one of the parties employs the arbitrator, pays him, and determines the length of his employment is to deny reality.

"This is the classic rabbits and foxes situation, with the foxes stacking the arbitration panel in its favor." *Bd. of Educ. v. Miller*, 236 S.E.2d 439, 443-44 (W.Va. 1977).

All the Rams had to do to ensure the validity of the arbitrator-selection provision in its employment contract with Mr. Hewitt was to provide for an arbitrator to be chosen through some reputable arbitration service, such as the American Arbitration Association (AAA), from a pool of neutral and impartial individuals. *McMullen*, 355 F.3d at 494. But they did not do this, preferring instead to select an owner-friendly decisionmaker congenial to their self-interest.

There is a further consideration. The limited and restrictive nature of arbitration makes the selection of the Commissioner as arbitrator especially harmful to Mr. Hewitt. "We should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Commonwealth Coatings Corp. v. Con't Cas. Co.*, 393 U.S. 145, 149 (1968).

It remains to consider the proper remedy if the Court concludes that the provision of the alleged arbitration agreement that designated the NFL Commissioner as the arbitrator for disputes between Mr. Hewitt and the Rams is unconscionable.

The Federal Arbitration Act (FAA) and the Missouri Arbitration Act (MUAA) contain parallel provisions that authorize a court to appoint a substitute arbitrator when the chosen arbitrator becomes unavailable. See 9 U.S.C. § 5 (FAA); § 435.360 R.S.Mo. (MUAA). However, replacement is not automatic. Courts have no authority to appoint a substitute arbitrator when the choice of the arbitrator by the parties was, as the cases say,

an "integral" as opposed to a merely "ancillary" part of their agreement to arbitrate. If it was central to the arbitration agreement, and the chosen arbitrator becomes unavailable, it is impossible to perform the arbitration agreement and it must be declared null and void in its entirety. See, e.g., *Jackson County v. McClain Enterprises*, 190 S.W.3d 633, 639-640 (Mo. App. 2006); *Klima v. Evangelical Lutheran Society*, 2011 U.S. Dist. LEXIS 129486 at * 7-15 (D. Kan. Nov. 8, 2011); *Riley v. Extendicare Health Facilities*, 826 N.W.2d 398, 403-411 (Wis. App. 2012); *Geneva-Roth Capital v. Edwards*, 956 N.E.2d 1195, 1199-1203 (Ind. App. 2011).

That is the situation here. The NFL Commissioner is unavailable to serve as the arbitrator in this case due to his lack of neutrality and impartiality. Moreover, the provision of the alleged arbitration agreement that named him as the arbitrator was an integral part of it. This is clear from the fact that (1) the alleged agreement used mandatory rather than permissive language in providing that disputes "shall" be referred to the Commissioner for final decision (Ex. 5 at Writ 21); (2) it expressly named a specific person, the Commissioner, to be the arbitrator (Id.); (3) it made no provision for selecting an alternate arbitrator (Id.); (4) it was drafted by the Rams and presented to Mr. Hewitt as mandatory in order to ensure that, among other things, the Commissioner would be the arbitrator (Ex. 7 at Writ 27-28); (5) it did not contain a severance provision which, had it been included, might have suggested that the parties did not want the entire alleged agreement to fall if one of its parts was invalidated (Ex. 5 at Writ 21); (6) it was part of an employment contract which contained multiple references to the Commissioner, including the requirement that it be approved by him (Ex. 5 at Writ 21-

22); and (7) the Rams have opposed the appointment of a substitute arbitrator, insisting that the Commissioner was chosen because of his industry-specific knowledge and experience (Defendants' Application for Transfer at pp. 1, 8 and 12). See *Jackson County*, 190 S.W.3d at 640; *Klima,* 2011 U.S. Dist. LEXIS 129486 at *17, 19; *Riley*, 826 N.W.2d at 405-408; *Geneva-Roth Capital,* 956 N.E.2d at 1201-1203.

Because the provision designating the NFL Commissioner as the arbitrator was an integral as opposed to an ancillary part of alleged arbitration agreement, and because it is impossible to enforce it given the Commissioner's disqualification for bias, the alleged arbitration agreement fails in its entirety and Mr. Hewitt is free to pursue his claim of age discrimination against the Rams in court.

No significance can be attached to the fact that this Court ordered the appointment of a substitute arbitrator in *Vincent*. 194 S.W.3d at 859. So far as appears, the plaintiffs in that case never argued that the designation of the President of the Homebuilders Association as the arbitrator was an integral term of the arbitration agreement which, because it could not be fulfilled, rendered the whole agreement unenforceable. Here, by contrast, Mr. Hewitt does make such an argument.[3]

Second, Section 6.1 of the NFL's Dispute Resolution Guidelines grants the

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[3] It should be noted that Mr. Hewitt would not oppose the appointment of a substitute arbitrator if the Court concludes, contrary to his arguments, that the designation of the Commissioner was not an integral term of the alleged arbitration agreement.

Commissioner virtually unlimited discretion with regard to discovery and expresses a hostile or dismissive attitude toward it. It provides that the Commissioner "is not required to apply the rules of discovery" and emphasizes his "discretion" to "permit, limit or disallow discovery" as he wishes. See Ex. 6 at Writ 24.

Employment discrimination cases are won or lost in discovery. Missouri courts have recognized that it is difficult for employees to prove discriminatory intent by their employers -- it is a state of mind that is carefully hidden from view -- and therefore they must be allowed to cast their discovery nets widely in order to gather circumstantial evidence of it. *State ex rel. Swyers v. Romines*, 858 S.W.2d 862, 864 (Mo. App. 1993); *Daugherty v. Maryland Heights*, 231 S.W.3d 814, 818 n.4 (Mo. banc 2007). Moreover, Mr. Hewitt is not merely alleging discrimination against himself; he is alleging a pattern of discrimination against other older employees. See Ex. 1 at Writ 5. He is entitled to conduct meaningful discovery concerning the Rams' treatment of other older employees in the workforce in order to prove his own case, see *State ex rel. Swyers*, 858 S.W.2d at 864; *Williams v. Trans States Airlines*, 281 S.W.3d 854, 871 (Mo. App. 2009), which is virtually impossible if the Commissioner takes a narrow rather than a broad view of discovery.

Although discovery in arbitration does not have to be as broad as it is in court, it must still be broad enough to effectively vindicate employment discrimination claims. *Fitz v. NCR Corp.*, 13 Cal. Rptr. 3d 8801, 96-97 (App. 2004). Case law confirms that arbitration agreements or rules that grant excessive discretion to arbitrators with regard to discovery are improper. *Fitz*, 13 Cal. Rptr. at 98; *Sparks*, 207 Cal. App. 4th at 1523 (App.

2012). It is not a valid response for the Rams to say that they are subject to the same restrictions on discovery as Mr. Hewitt. He has a much greater need for discovery than the Rams, not only because he has the burden of proof, but also because the Rams already have in their possession most of the relevant documents and already have in their employ most of the relevant witnesses. *Fitz*, 13 Cal. Rptr. 3d at 97.

Third, Section 9.5 of the NFL arbitration rules requires that "the hearing shall be maintained as confidential." See Ex. 6 at Writ 25. Courts have held that such secrecy provisions are unconscionable because, among other things, they shield from public view the unlawful employment practices of employers, which is a special concern here because, as noted, Mr. Hewitt is alleging a pattern of age discrimination by the Rams. See, e.g., *McKee v. AT&T*, 191 P.3d 845, 858 (Wash. 2008); *Acorn v. AT&T*, 211 F. Supp. 2d 1160, 1171-72 (N.D. Cal. 2002). Sunshine is the best disinfectant, Justice Brandeis wrote, and allowing employers to suppress information about their discriminatory employment practices, which other employees could use to build meritorious cases against them, would serve only to encourage and perpetuate those practices, contrary to the deterrent purposes of the MHRA and other civil rights laws. *Id.*

Fourth, Section 4 of the arbitration rules provides that "the Commissioner may conduct hearings and other proceedings at the NFL office in New York." See Ex. 6 at Writ 24. This provision carried the potential of imposing a substantial hardship on Mr. Hewitt unless waived by the Commissioner. He would have to travel to a distant and remote forum to arbitrate his claim, incurring not only expenses for himself but also for his attorney and St. Louis-based witnesses. *Twilleager v. RDO Vermeer, LLC*, 2011 U.S.

Dist. LEXIS 46217 at *23 (D. Ore. April 1, 2011). This despite the fact that his claim of age discrimination has numerous ties to Missouri and none at all to New York. Mr. Hewitt's claim arose in Missouri under a Missouri civil rights statute and Missouri law governs his employment contract. See Ex. 5 at Writ 22. Nevertheless, Rule 4 could have required him to litigate his claim halfway across the country in New York. *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 497-500 (Mo. banc 1992) (invalidating a similar forum-selection clause).[4]

Fifth, Section 13.3 of the NFL arbitration rules vests the Commissioner with the authority to apportion the costs of arbitration, including presumably his own fees (arbitrators commonly charge fees, which can be steep, for their time) in any way he feels is "reasonable." See Ex. 6 at Writ 26. As a matter of law, however, Mr. Hewitt cannot be required to pay any part of the costs of arbitrating his MHRA claim that he would not have to pay were he litigating that claim in court. *Brewer*, 364 S.W.3d at 493, 495; *Ferguson v. Countrywide Credit Industries*, 298 F.3d 778, 785 (9th Cir. 2002); *Gibson v. Nye Frontier Ford*, 205 P.3d 1091, 1099-1101 (Alaska 2009). Since he would not have to pay a judge to decide his claim, Mr. Hewitt cannot be required to pay an arbitrator to

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[4] It does not matter that the Commissioner has agreed to hold any arbitration hearing in Mr. Hewitt's case in St. Louis. Under Missouri law the validity of an arbitration agreement is determined ex ante -- at the time it was formed -- not ex post in light of subsequent developments. *State ex rel. Vincent*, 194 S.W.3d at 861; see also *Brewer*, 364 S.W.3d at 493 n.3.

decide it either. Yet Section 13.3 appears to authorize such a result.

The Rams have suggested that Mr. Hewitt can be required to pay the costs of arbitrating his MHRA claim as long as they are not prohibitive. This may be true for federal statutory claims but it is not true for state statutory claims. For the latter, as opposed to the former, there is a bright-line rule that rejects a case-by-case analysis of whether the costs of arbitration are prohibitive. *Gibson*, 205 P.3d at 1099-1101.

Sixth, the arbitration process cannot serve as a screen behind which employees are stripped of their remedies under the anti-discrimination laws. See, e.g., *EEOC v. Waffle House*, 534 U.S. 279, 296 n.10 (2002); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1062 (11th Cir. 1998). To prevent this from happening, courts have required that the arbitration program itself, by its terms, expressly provide that employees are entitled to recover the full range of remedies available under the law. See, e.g., *Circuit City Stores v. Adams*, 279 F.3d 889, 895 (9th Cir. 2001); *Cole v. Burns Int. Security Services*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

Here, the Rams' arbitration program fails to satisfy this requirement. It does not mandate all the relief authorized by law. To the contrary, Section 13.1 of the NFL arbitration rules confers broad discretion on the Commissioner to "grant any remedy or relief that he deems just and equitable." See Ex. 6 at Writ 26. This stands contrary to most arbitration programs which specifically require the arbitrator to award the same relief to employees that would be available to them in court. See, e.g., Rule 39(d) of the Employment Rules of the American Arbitration Association, available at www.adr.org;

arbitration program of Plaza Motor Company. See Ex. 9 at Writ 38.[5]

According to the Rams, the Court should trust the Commissioner to award Mr. Hewitt all the relief to which he is entitled under the MHRA. This is asking too much when, quite apart from the serious concerns about his impartiality, the Commissioner has complete discretion with regard to remedies under the arbitration rules. The only reliable way to cabin the discretion of an arbitrator is with a clear rule, spelled out in the arbitration program itself, which requires him to award the victim of discrimination all the remedies authorized by the law. No such clear rule exists in the Rams' arbitration program, however, which leaves Mr. Hewitt at the mercy of the Commissioner. "Claimants should not be subject to an arbitrator whose 'wide discretion' may curtail their statutory rights." Davis, The Arbitration Claws, 78 B.U.L. Rev. 255, 394 (1998).

Seventh, and finally, Rule 13.3 authorizes the Commissioner to award attorneys' fees and costs "as he deems reasonable" and further provides that, absent special circumstances, "each party will be expected to bear their own costs and counsel fees." See Ex. 6 at Writ 26. Again, such a provision clashes with the MHRA which mandates

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[5] The Rams' arbitration program does not mention any of the remedies available under the MHRA which include back pay, emotional distress damages, reinstatement or front pay, and punitive damages. See § 213.111 R.S.Mo.; *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 563 (Mo. banc 2006); *Brady v. Curators of the Univ. of Mo.*, 213 S.W.3d 101, 113 (Mo. App. 2006).

an award of attorneys' fees and costs as a matter of course to the prevailing plaintiff, see *Brady*, 213 S.W.3d at 115, and which forbids an award of attorneys' fees and costs to the prevailing defendant, unless the plaintiff's claim was frivolous. *Willard v. Raga*, 290 S.W.3d 768, 772 (Mo. App. 2009). Nothing in Rule 13.3 prevents the Commissioner from doing in arbitration what no judge would be allowed to do in court -- deny Mr. Hewitt all or part of his attorneys' fees and costs if he wins his claim of age discrimination or require him to pay all or part of the Rams' attorneys' fees and costs if he loses it, even if it was brought in good faith.

Mr. Hewitt cannot be subjected to the risk that the Commissioner will follow Rule 13.3, as he chooses to interpret it, rather than the MHRA. "[Plaintiff] asserts the arbitration provision grants the arbitrator discretion to deny the prevailing consumer his or her attorney fees. If true, [Plaintiff] is correct this would be a significant infringement of her rights under the Consumer Act." *Cottonwood v. Estes*, 810 N.W.2d 852, 860 (Wis. App. 2012). Section 13.3 frustrates the remedial and deterrent purposes of the fee and cost shifting provisions of the MHRA and, as a result, is unconscionable. See *State ex rel. Vincent*, 194 S.W.3d at 860, discussing *Whitney v. Alltell Communications*, 173 S.W.3d 300, 309 (Mo. App. 2005) (invalidating an arbitration program which required the parties to a claim under the Missouri Merchandising Practices Act to bear their own attorneys' fees because the Act provides for an award of fees to the prevailing plaintiff); *Pokoray v. Quixtar*, 601 F.3d 987, 1004 (9th Cir. 2010) (invalidating loser-pays provision in an arbitration program).

Viewed cumulatively, these seven deficiencies in the Rams' arbitration program

show that it is unduly harsh to Mr. Hewitt and unduly favorable to the Rams. They reflect "a systematic effort to impose arbitration on an employee not as an alternative to litigation but as an inferior forum that works to the employer's advantage." *Fitz*, 13 Cal. Rptr. at 106. Given that its terms are unfair and unjust to Mr. Hewitt, and were imposed on him without any real choice, the Rams' arbitration program should be held to be unconscionable and unenforceable.

The trial judge gave short shrift to Mr. Hewitt's unconscionability argument in her written decision. She said that he agreed to the arbitration program when he signed his employment contract with the Rams and that she could not "shield him from his own contractual promises." See Ex. 2 at Writ 13. This assertion is, as they say in the medical profession, contraindicated. The whole purpose of the unconscionability doctrine is to relieve the plaintiff of a one-sided or oppressive contract to which he has, at least nominally, agreed. *Brewer*, 364 S.W.3d at 493. If he did not agree to it, he would not need the doctrine of unconscionability; he could invalidate it on the simple ground of lack of mutual assent. There is no merit to the trial judge's assertion.

5. Denial of Statutory Rights

There is an important distinction between common law claims and statutory claims in the arbitration context. An arbitration agreement can modify substantive common law rights or remedies but it cannot modify substantive statutory rights or remedies. They must remain the same in arbitration as they are in court. Any arbitration agreement that subverts or dilutes an employee's substantive rights or remedies under a statute is invalid and unenforceable as against public policy. See, e.g., *Mitsubishi Motors*

v. Soler Chrysler-Plymouth, 473 U.S. 614, 628, 637 n.19 (1985); *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082 (9th Cir. 2007); *Thomas and King v. Jaramillo*, 2009 U.S. Dist. LEXIS 18432 at *33 (E.D. Ky. March 10, 2009); *State ex rel. Vincent*, 194 S.W.3d at 860. This is true regardless of whether the arbitration agreement is, or is not, unconscionable. The denial of statutory rights doctrine is analytically separate and distinct from the unconscionability doctrine and is not subject to any of its requirements. *Blankfeld v. Richmond Health Care*, 902 So.2d 296, 297 (Fla. App. 2005); *Whitney*, 173 S.W.3d at 313; *In re American Express Merchants' Litigation*, 554 F.3d 300, 320 (2d Cir. 2009).

The Rams' arbitration program violates Mr. Hewitt's statutory rights under the MHRA in several ways. First, it designates a biased individual, the NFL Commissioner, as the decisionmaker while the MHRA designates an unbiased judge or jury. See § 213.111 R.S.Mo. Second, it designates a far-away location, New York, as the forum while the MHRA lays venue in St. Louis, where the unlawful employment practice occurred. *Id*. Third, it confers discretion on the Commissioner to deny Mr. Hewitt the remedies authorized by the MHRA simply because they strike him as "unjust" or "inequitable" or "unreasonable." See Ex. 6 at Writ 25. Such an arbitration program offends public policy because it deprives victims of discrimination of the rights that the Missouri state legislature wanted them to have.

The Rams cannot at this late date offer to remove the offending features of the challenged arbitration program or agree to an interpretation of them that renders them lawful. Missouri contract law does not permit a party to revive a legally defective

arbitration program by the simple expedient of offering to change it. *State ex rel. Vincent*, 194 S.W.3d at 861; see also *Nino v. Jewelry Exchange*, 609 F.3d 191, 205 (3d Cir. 2010) ("the employer is saddled with the consequences of the provisions *as drafted*") (emphasis in the original).

Nor can the Rams ask the Court to sever the objectionable features of the arbitration program and enforce the remainder. There is no severance provision in the employment contract or in the NFL's Dispute Resolution Guidelines. See Ex. 5 at Writ 20-22; Ex. 6 at Writ 23-26. "The absence of a severability clause tends to indicate that a contract is entire and not severable." *Shaffer*, 300 S.W.3d at 561. Even if a severance provision had existed, severance would be unwarranted in a case such as this one where there is a pattern of arbitration provisions that "stack the deck" against the employee. *Ingle v. Circuit City Stores*, 328 F.3d 1165, 1180 (9th Cir. 2003); see generally *Kisling v. MFA Mut. Ins.*, 399 S.W.2d 245, 250 (Mo. App. 1966). This is a reasonable rule, for otherwise employers would be encouraged to include improper provisions in their arbitration programs knowing that many employees will not challenge the programs and, if some do, they can always jettison the improper provisions and still compel arbitration of the claims against them. Denying severance is necessary to discourage this kind of bad faith conduct by employers.

There is a final consideration that warrants discussion. The Rams have suggested, as have many other employers, that arbitration is a fair alternative to litigation for the resolution of employment discrimination claims. This is a myth. Empirical studies show that employees fare poorly in arbitration. While their win rate is almost 60% in court, it

can be as low as 30% in arbitration. Even when they prevail, employees recover reduced damages in arbitration. While they receive 70% of what they request in court, they receive only 25% of what they request in arbitration. Reilly, Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements, 90 Calif. L. Rev. 1203, 1211-1212 (2002). Although the Rams might be encouraged by these statistics, the drafters of the MHRA would be alarmed by them. They knew that they could not accomplish their goal of stamping out discrimination in the workplace without effective enforcement mechanisms in an impartial tribunal. Only in court, not in arbitration, will Mr. Hewitt get a fair hearing on his claim that he was deprived of his livelihood because of his age and full relief for the wrong done to him.

II. Relator is Entitled to an Order Requiring Respondent to Deny the Motion to Compel Arbitration Filed by Defendants Rams Football Company, Inc., ITB Football Company, LLC and the St. Louis Rams, LLC Because they were not Parties to the Alleged Arbitration Agreement.

Mr. Hewitt named four Defendants in this lawsuit. They are the St. Louis Rams Partnership, the Rams Football Company, Inc., ITB Football Company, LLC and the St. Louis Rams, LLC. See Ex. 1 at Writ 1-3. As discussed, the arbitration agreement between Mr. Hewitt and the St. Louis Rams Partnership is not valid and enforceable under the law. Even if it was, however, the other three Defendants could not enforce it against Mr. Hewitt because they were not parties to it. By its terms the employment contract, which contains the alleged arbitration agreement, was between Mr. Hewitt and the St. Louis Rams Partnership. It was not between Mr. Hewitt and the other three

Defendants, who did not sign the contract and are not mentioned in it. See Ex. 5 at Writ 20-22.

Unlike some federal courts, Missouri courts have taken a hard line against allowing nonparties to an arbitration agreement to enforce it. They have held that a plaintiff who has signed an arbitration agreement may have to arbitrate against the defendant who signed it, assuming it is a valid and enforceable agreement, but not against other defendants who did not sign it. This holds true even when the claims against the signatory and non-signatory defendants are closely related, see *Jones v. Paradies*, 380 S.W.3d 13, 18 (Mo. App. 2012), and even when the signatory and non-signatory defendants are closely related, such as when the non-signatory defendants are agents or owners of the signatory defendant. *Nitro Distributing v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006); *Springfield Iron and Metal v. Westfall,* 349 S.W.3d 487, 490 n.7 (Mo. App. 2011); *Prickett v. Lucy Lee Hospital*, 986 S.W.2d 947, 948 (Mo. App. 1999). Given this case law, Mr. Hewitt cannot be forced to arbitrate his claims of age discrimination against the three Defendants who were not parties to the alleged arbitration agreement.

Defendants have emphasized that the signatory Defendant, the St. Louis Rams Partnership, is a general partnership (identified as such in the employment contract) and that Mr. Hewitt has alleged in his petition that two of the three other Defendants, the Rams Football Company, Inc. and ITB Football Company, LLC, are owners of (i.e. partners in) the partnership. According to Defendants, Mr. Hewitt's arbitration agreement with the general partnership should be treated as an arbitration agreement with the two corporate partners because "the general partners in a partnership *are* the

partnership." (emphasis in the original).

This is a flawed perspective. A partner is not the equivalent of the partnership itself. A partnership consists of the aggregate of all the partners; a partner in a law firm is not the whole law firm. What is true is that the conduct of a partner, such as breaching a contract or committing a tort, is imputed to all the other partners -- to the partnership itself. *8182 Maryland Associates v. Sheehan*, 14 S.W.3d 576, 581 (Mo. App. 2000). But this is just another way of saying that the partner and the partnership are jointly liable and, under Missouri law, a non-signatory defendant cannot enforce an arbitration agreement just because it is alleged to be jointly liable with the signatory defendant.

A good way to see this is with an example. Suppose a creditor has signed an arbitration agreement with the debtor but not with the guarantor of the debt. He brings a claim against both of them for non-payment of the debt. The debtor can be compelled to arbitrate the claim but not the guarantor even though they are jointly liable for the debt. *Dunn Industrial Group*, 112 S.W.3d at 435; *Estate of Sample v. Travelers Indemnity*, 603 S.W.2d 942, 946 (Mo. App. 1980).

Equally unavailing is Defendants' assertion that "Mr. Hewitt does not allege that the non-signatories did anything to him that the signatory didn't do." All they are saying is that Mr. Hewitt's claims of age discrimination against the signatory and non-signatory defendants are closely related. But this does not justify requiring him to arbitrate with business entities that he never agreed to arbitrate with. "To compel arbitration of claims against a non-signatory -- even if those claims are 'inextricably intertwined' with signatory claims -- is inconsistent with the overarching principle that arbitration is

ultimately a matter of agreement between the parties." *Jones*, 380 S.W.3d at 18.

Two additional considerations undermine the position advanced by the nonsignatory Defendants in this case.

One is that they are sophisticated businesses with sophisticated legal counsel. It would have been a simple matter for them to join as parties to the employment contract with Mr. Hewitt. Yet they failed to do so; it is not this Court's role to rescue them from their own conduct.

The second consideration is that the employment contract between Mr. Hewitt and the St. Louis Rams Partnership contains an integration clause which provides that "this Agreement contains the entire agreement of the parties hereto." See Ex. 5 at Writ 21. Courts have held that such a provision expresses the intent of the parties to limit arbitral rights to signatories, observing that "it would be wrong to widen the arbitration clause to include the signatories' agents." *McCarthy v. Azure*, 22 F.3d 351, 358-359 (1st Cir. 1994). Partners are, of course, agents of the partnership. *Anchor Centre Partners v. Mercantile Bank*, 803 S.W.3d 23, 31 (Mo. App. 1991).

There is one last point to be made. Mr. Hewitt alleged in his petition that two of the three non-signatory Defendants are owners of the St. Louis Rams Partnership but he did not allege that the other one, the St. Louis Rams LLC, is an owner of the partnership. See Ex. 1 at Writ 1-3. Defendants have never offered any evidence concerning the status of the St. Louis Rams LLC and, as a result, they have failed to carry their burden of proving that Mr. Hewitt should be compelled to arbitrate his claim against this party.

CONCLUSION

Relator Todd Hewitt is entitled to his day in court, not in arbitration, on his claim of age discrimination against the St. Louis Rams under the Missouri Human Rights Act. For the reasons discussed, he asks the Court to issue a permanent writ of mandamus directing the Respondent trial judge to vacate her order granting the motion to compel arbitration filed by the Rams and directing her to deny it instead.

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Certificate of Compliance

The undersigned certifies that this brief complies with the limitations contained in Rule 84.06(b) and that the entire brief contains 15,433 words. The brief is being electronically filed with the Court on this 17th day of March 2014.

/s/ John D. Lynn
_____
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Certificate of Service

The undersigned hereby certifies that a true and correct copy of this brief with the appendix was filed electronically with the Court on this 17th day of March 2014 and served by operation of the Missouri E-filing System upon Bradley Winters and Michael Hart, Sher Corwin Winters LLC, 190 Carondelet Ave., Suite 1100, St. Louis, MO 63105. The undersigned further certifies that a true and correct copy of this brief with the appendix was sent by U.S. Mail, postage prepaid, this 17th day of March 2014 to the Honorable Kristine Kerr, Judge of the Circuit Court for St. Louis County, Courts Building, 3rd Floor, 7900 Carondelet, Clayton, Mo., 63105.

/s/ John D. Lynn

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