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 Honorable Kristine Kerr
Judge of the St. Louis Circuit Court of St. Louis County

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

RESPONDENT'S SUBSTITUTE BRIEF

BRADLEY A. WINTERS, #29867
SHER CORWIN WINTERS LLC
190 Carondelet Plaza, Suite 1100
St. Louis, MO 63105
314-721-5200
314-721-5201 (Facsimile)
bwinters@scwstl.com

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

Respondent, Judge Kerr, through Defendants, the Rams, submits this Jurisdictional Statement to correct certain omissions in the Jurisdictional Statement provided by Relator, Todd Hewitt ("Hewitt").

On September 26, 2013, Hewitt petitioned the Missouri Court of Appeals for the Eastern District for a writ of mandamus *or* a writ of prohibition in connection with Respondent's order compelling arbitration of this case. Although the court of appeals initially issued a preliminary writ in mandamus, the court later quashed that writ, ordering instead that arbitration proceed as originally ordered by Respondent, but also ordering that Respondent select a new arbitrator different from the one selected by the parties. It was from that order that *both* Relator and Respondent applied for, and were granted, transfer to this Court pursuant to Missouri Supreme Court Rule 83.05.

Hewitt correctly states that this Court has jurisdiction over petitions for remedial writs, like Relator's, pursuant to Article V, section 4, subsection 1 of the Missouri Constitution, and that this proceeding is to be treated as an original proceeding in mandamus (or prohibition). *State ex rel. Adrian Bank v. Luten*, 488 S.W.2d 636, 637 (Mo. 1973). But the decision in *State ex rel. Castillo v. Clark*, 881 S.W.2d 627, 628, n. 1 (Mo. *banc* 1994), cited by Hewitt, does not require that this Court treat the case as though a preliminary writ has issued; that case presented a different procedural posture, in that the court of appeals had, in that case, entered a permanent writ, while in this case the preliminary writ has been quashed, and both sides seek review by this Court.

STATEMENT OF FACTS

The first three paragraphs of Hewitt's Statement of the Facts are littered with "facts" from his petition that go to the ultimate merits of his case but, in violation of Rule 84.04(c), have no bearing on the question now before this Court—the question of whether Hewitt is entitled to extraordinary writ relief to override Judge Kerr's finding that the parties agreed many times over many years to arbitrate their disputes and to have the NFL Commissioner, or his designee, serve as their chosen arbitrator. This Court should not consider Hewitt's improperly inserted "facts." Respondent offers the following substitute Statement to include only those facts that are properly before the Court and to correct pertinent omissions from Hewitt's own Statement.

In November of 2008, Hewitt entered into an employment agreement with the Rams to serve as their equipment manager for the 2009-2010 and 2010-2011 NFL seasons (the "Agreement"). (Relator's Appx., A9.) Hewitt admits that he signed the Agreement and had signed similar contracts for forty years. (Respondent's Appx., A4, ¶ 13; Relator's Appx., A12, ¶ 2.) The Agreement and prior contracts contain this arbitration provision:

> The Rams and Hewitt… 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.

(Relator's Appx., A10, ¶ 7.)

On May 29, 2012, despite this promise to arbitrate, Hewitt filed a civil action against the Rams in state court claiming age discrimination under the Missouri Human Rights Act. (Respondent's Appx., A1-A9.) The Rams then moved the court to compel arbitration and to either dismiss or stay the state court proceedings. (Relator's Appx., A1.) Judge Kerr granted the Rams' motion, and in her order of January 8, 2013, held that (i) Hewitt and the Rams had entered into a valid and enforceable agreement to arbitrate any disputes that arose between them; (ii) they had agreed that the NFL Dispute Resolution Procedural Guidelines would govern that arbitration; and (iii) they had agreed that the NFL Commissioner would designate their arbitrator. (Relator's Appx., A1-A7.) Judge Kerr accordingly stayed the litigation pending arbitration.

Hewitt then filed a motion to amend Judge Kerr's January 8 order in which he asked the court to dismiss rather than stay his lawsuit in order to allow him to pursue, *or attempt to pursue*, an immediate appeal. (Relator's Appx., A8.) Judge Kerr granted Hewitt's motion in part and denied it in part. On January 17, 2013, she amended her original January 8 order, dismissing Hewitt's lawsuit without prejudice, while again directing that the parties proceed to arbitration as they had agreed. (Relator's Appx., A8.)

The parties then proceeded with the ordered arbitration. The arbitrator has agreed to hold hearings in St. Louis, where this case is pending, and has allowed a full range of discovery. The parties have produced documents in volumes, responded to interrogatories, and subpoenaed and deposed third-party witnesses. (*See, e.g.*,

Respondent's Appx., A10-A84.) In fact, the only objections to subpoenas and depositions have been Hewitt's.[1]

While arbitration was moving forward, Hewitt appealed Judge Kerr's amended order to the court of appeals, arguing that she had erred in compelling arbitration and asking that the court reverse her ruling. On September 24, 2013, the court of appeals reversed Judge Kerr's dismissal of the case—directing that the case instead be stayed (as she had originally ordered) pending arbitration—but affirmed the order to the extent that it compelled arbitration. (Respondent's Appx., A88.)

---

[1] Because writ review is an original proceeding, an appellate court may consider additional evidence that was not presented to the trial court, particularly where that evidence relates to an issue that was not before that court. *Bruce v. Gregory*, 65 Cal.2d 666, 667-71 (1967). Here, evidence concerning the status of the arbitration proceeding obviously was not available at the time Respondent entered her order compelling arbitration and relates to Hewitt's claim that he would be prejudiced by this Court's failure to enter extraordinary relief, an issue that was never presented to Respondent. Hewitt has previously cited *State ex rel. Grimes v. Appelquist*, 706 S.W.2d 526, 529 (Mo. App. 1986) for the proposition that a party may not file documents with the appellate court that were not part of the record below. But *Grimes* is distinguishable. The new evidence at issue there had never been presented to the trial court even though it related directly to matters decided by that court.

On September 26, 2013, Hewitt filed with the court of appeals his petition for writ of mandamus or prohibition, again challenging Judge Kerr's January orders compelling arbitration. On October 22, 2013, the court denied Hewitt's petition, rejecting his arguments against arbitration but modifying the parties' agreement as to the identity of the arbitrator. (Relator's Appx., A23-A30.) The court found that term alone—the parties' selection of the NFL Commissioner as their arbitrator—to be unconscionable and ordered Judge Kerr to substitute a new arbitrator pursuant to R.S.Mo. §435.360. *Id.*

On November 6, 2013, both sides filed with the court of appeals their motions for rehearing and applications for transfer to this Court. The court of appeals denied each of those motions on December 5, 2013. Both sides then applied for transfer to this Court, and those applications were granted. The only question before this Court is whether Hewitt is entitled to the extraordinary writ relief he seeks.

ARGUMENT

STANDARD OF REVIEW

Contrary to Hewitt's assertion at page 7 of his brief, the only standard of review that applies here is the *de novo* review given by this Court to Hewitt's petition for the issuance of an extraordinary writ. *Adrian Bank*, 488 S.W.2d at 637. Hewitt bears the burden of showing that such a writ is appropriate. *Furlong Cos. v. City of Kan. City*, 189 S.W.3d 157, 165-66 (Mo. *banc* 2006)

Hewitt cites *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 510 (Mo. *banc* 2010), for the proposition that this Court must also review *de novo* the propriety of Judge

Kerr's original order compelling arbitration, and that Respondent bears the burden of proof on that question. If this were a direct appeal, like *Robinson*, that would be true. However, it's not. The matter before this Court is Hewitt's writ petition, and the review of that petition is governed by the standards applicable to the issuance of extraordinary writs.

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 to the court 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. App. W.D. 2008); *State ex rel. City of Springfield v. Brown*, 181 S.W.3d 219, 221 (Mo. App. S.D. 2005). That burden is high with respect to both types of relief—they are rightfully called "extraordinary"—and Hewitt has failed to meet it with respect to either remedy.[2]

"The extraordinary relief of mandamus has limited application." *Jones v. Carnahan*, 965 S.W.2d 209, 212 (Mo. App. W.D. 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*, 189 S.W.3d at 165-66 (emphasis added). Writs in mandamus may not be used to

[2] Although the court of appeals' original preliminary order was in mandamus, Hewitt's petition refers to "mandamus **or** prohibition[.]" (Respondent's Appx., A92, ¶ 8, emphasis added.) For that reason, the standards applicable to both remedies are discussed in this brief.

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.2d 206, 208-09 (Mo. *banc* 1976); *City of Springfield*, 181 S.W.3d at 221. 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[.]" Missouri Supreme Court Rule 84.22(a).

Entitlement to prohibition is equally limited. Prohibition is a discretionary writ; there is no right to have it issued. *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*, 272 S.W.3d at 374-75; *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. Missouri Supreme Court Rule 84.22(a).

Beyond his bald assertion that he, unlike other litigants, should not be required to wait for his appeal, Hewitt has made no attempt to show that an appeal would not provide him with adequate relief. Under Missouri statute, Hewitt is entitled to appeal any court order affirming or denying confirmation of any arbitration award entered in this case. R.S.Mo. §435.440.1. By statute, any such appeal is to be taken in the same manner and to the same extent as from orders or judgment in a civil action. R.S.Mo. §435.440.2. Because that remedy is available to Hewitt, his petition for extraordinary writ is inappropriate and should be denied.

In fact, because Hewitt delayed for months in seeking this writ—choosing instead to file an ineffectual appeal that was on its face contrary to Missouri law—any argument he might otherwise have had that his appellate relief would be inadequate has been lost. The parties have now spent months conducting discovery on a scale identical to litigation (Respondent's Appx., A10-A84), with a final arbitration date proposed for after the 2013-14 college and NFL football seasons. For Hewitt to argue, as he must, that he would be prejudiced more by continuing this process than by returning to the circuit court and starting, relatively, from scratch would be absurd. If Hewitt is unhappy with the Commissioner's award in this case, he can, like all other litigants who wait to appeal an interlocutory order—like those, for example, who wait to appeal the denial of summary judgment—wait for a final award and judgment to be entered and appeal that judgment.

Moreover, for Hewitt to argue that this Court should issue an extraordinary writ in this particular case is to turn §435.440 on its head. That statute permits direct appeals only from certain specified orders and judgments. To allow Hewitt to appeal from an order that is not among those listed *without proving irreparable harm or the need for immediate relief* would be to thwart the legislative intent behind that statute.

In support of his writ petition, Hewitt argues only that, because there might be other cases, with different facts, in which writ relief is appropriate for challenges to arbitrability, that fact necessarily means that such relief is also appropriate for him. Obviously that reasoning is flawed. Each petitioner must convince the court that his own circumstances are sufficiently extraordinary to justify short-circuiting the appeal process. Hewitt presents no facts that distinguish him in any way from any ordinary litigant. His contentions that employees generally suffer unduly at the hands of arbitrators not only lack foundation, but also have nothing to do with his individual circumstances, his supposed need for immediate relief, or the inadequacy of his own appellate remedy. He has thus failed to meet that first and essential element of his burden.[3]

[3] Hewitt's reliance on *Korte v. Constr. Co. v. Deaconess Manor Ass'n*, 927 S.W.2d 395, 398 (Mo. App. E.D. 1996), is misplaced. That case says nothing about a petitioner's burden in establishing his right to an extraordinary writ, but instead involves a party's right to a direct appeal from a judgment deemed to be final. *See Deiab v. Shaw*, 138 S.W.3d 741, 743 (Mo. App. E.D. 2003). That is not the situation here.

But that's not all. As noted above, Hewitt must also show that he has a clear, unequivocal, and previously established right to the relief he seeks. That is, he must show that he has a clear, unequivocal, and previously established right to be relieved of his promise to arbitrate his disputes with the Rams. For the reasons discussed more fully below, he has also failed to make this showing.

I. Relator Is Not Entitled to an Order Requiring Respondent to Deny the Motion to Compel Arbitration Filed by Defendant St. Louis Rams Partnership, Because the Parties' Agreement to Arbitrate is Valid and Enforceable.

Because the parties' agreement in this case "involves commerce" within the meaning of §2 of the Federal Arbitration Act (the "FAA")—it relates to Hewitt's employment as the Rams' equipment manager for all home and away games and camps (Relator's Appx., A9-A11)—the FAA applies to this dispute and preempts any inconsistent state law. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Radovich v. Nat'l Football League*, 352 U.S. 445, 452 (1957). Under the FAA, state courts may invalidate arbitration agreements only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Hewitt relies on various state law grounds in his attempt to invalidate his agreement with the Rams. He fails on each point to show that he is right, much less to establish any clear, unequivocal, or well established right to the extraordinary relief he seeks.

A. Hewitt and the Rams mutually agreed to all essential terms for arbitration.

Hewitt first argues that the parties' agreement to arbitrate lacks mutual assent because the parties did not agree to the NFL Guidelines as the rules that would govern their arbitration. However, as Respondent correctly found below, both parties did, in fact, agree to these rules and were equally bound to follow them. (Relator's Appx., A5-A6.)

The arbitration provision in Hewitt's Agreement with the Rams reflects the parties' express agreement to arbitrate any dispute between them. It further expressly provides that Hewitt is bound by the same NFL rules and regulations that bind the Rams, and that the NFL Commissioner must hear and decide any dispute:

> 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 NFL Commissioner. 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 ….

(Relator's Appx., A10.)

Hewitt concedes that the parties agreed to arbitrate their disputes, but claims here only that the agreement is invalid because it did not expressly reference the NFL Guidelines. He is wrong, however, about the level of specificity required for this purpose. There is no need for an arbitration agreement to set forth in detail each policy and

procedure that will govern the arbitration. In fact, the U.S. District Court for the Western District of Missouri, construing Missouri law, recently rejected this very argument, finding that the plaintiff's commitment to arbitrate disputes with her employer was adequately expressed in the agreement she signed, and that the omission of an explanatory brochure referenced in the agreement's recitals, in which the relevant procedures were defined, did not render the agreement unenforceable. *Canterbury v. Parsons Constructors, Inc*., 2009 U.S. Dist. LEXIS 25905, **5-6 (W.D. Mo. March 27, 2009).

Many other courts have reached the same conclusion. In *Hojnowski v. Buffalo Bills, Inc.*, 2014 U.S. Dist. LEXIS 13153, **5-10 (W.D. N.Y. Feb. 3, 2014), a case almost identical to this one, the court specifically found that the NFL Guidelines need not have been included in the arbitration agreement to make it enforceable, even though the plaintiff player claimed to have had no knowledge of those Guidelines. In *Reichner v. McAffee, Inc*., 2012 U.S. Dist. LEXIS 38997, *8 (E.D. Pa. March 21, 2012), the court rejected the plaintiff's argument that the terms of his agreement to arbitrate were too indefinite, noting that all such terms are not required to be specified in the agreement to make it enforceable. In *Stephan v. Brookdale Senior Living Cmties, Inc*., 2012 U.S. Dist. LEXIS 132906, **13-16 (D. Colo. Sept. 17, 2012), the court rejected the plaintiff's argument that the defendant's employee handbooks formed part of the arbitration agreement, but still found that the handbooks' arbitration procedures governed the arbitration of disputes the parties agreed to in their underlying contract. In *Hawkins v. Aid*

Ass'n for Lutherans, 338 F.3d 801, 806 (7th Cir. 2003), the court found that the fraternal benefit society's bylaws requiring arbitration of disputes with its insureds were enforceable, even though the defendant insureds were not aware of and did not agree to those procedures. And, in *Williams v. Jo-Carroll Energy, Inc.*, 890 N.E.2d 566, 570 (Ill. App. 2d Dist. 2008), the court enforced the rural electric cooperative's bylaws requiring arbitration against the defendant co-op member who was unaware of the arbitration procedures.

In fact, Hewitt's Agreement gives more clarity about arbitration rules than most of these cases in which arbitration was enforced. As Respondent held, Hewitt agreed to comply with the NFL Guidelines when he agreed to comply with the NFL's Constitution, Bylaws, rules, and regulations. The Constitution and Bylaws expressly grant the Commissioner authority to arbitrate disputes and to establish appropriate procedures. (Relator's Appx., A16-A17.) And, contrary to Hewitt's suggestion at page 19 of his brief, the scope of the rules and regulations he also agreed to follow is not limited in any way by the contract, and the NFL Guidelines are not excluded from them. The fact that these "Rules and Regulations" also, in a separate paragraph of the Agreement, encompass prohibitions on Hewitt's conduct as an employee does not, as Hewitt suggests, limit them to that subject matter.

Hewitt relies on the recent decisions in *Sniezek v. K.C. Chiefs Football Club*, 402 S.W.3d 580 (Mo. App. W.D. 2013), and *Clemmons v. K.C. Chiefs Football Club*, 397 S.W.3d 503 (Mo. App. W.D. 2013), to support his position. But the similarity between

those cases and Hewitt's ends with the fact that they involve the same sport. In those cases, the question before the court was whether there was a mutual promise to arbitrate, not whether the terms of the arbitration agreement were certain or uncertain. In each of those cases, the court found that, while the employee plaintiff had expressly promised to arbitrate, the Chiefs had not. In each case, the court rejected the Chiefs' claim that because the team was bound by the NFL rules requiring the team to arbitrate with its employees the arbitration obligation was mutual. The court found instead that, if the NFL rules changed, the Chiefs could be relieved of their arbitration obligation while the employees would retain that obligation as expressed in the one-sided "Agreements" they signed but the Chiefs did not. This uneven obligation could not be viewed as mutual. In contrast here, Hewitt and the Rams both expressly committed to arbitration in the Agreement itself. And while the NFL's rules and procedures might change, any change would affect both the Rams and Hewitt equally and would not relieve the Rams of their contractual promise to arbitrate.

Hewitt's other Missouri cases are equally unhelpful. In *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730 (Mo. App. W.D. 2011), the defendant employer sought to enforce both an arbitration agreement in an employment contract and the specific arbitration rules in an employee handbook. The arbitration provision found in those parties' contract reflected their agreement to arbitrate, but failed to identify the arbitrator or the entity conducting the arbitration; instead, the employee handbook was left to provide all information regarding the arbitration. The employer contended that this

handbook was part of the plaintiff's agreement to arbitrate, even though the handbook explicitly stated it was not a contract, was neither referenced in nor provided with the employment contract, and did not bind the employer. Based on these particular facts, the court refused to enforce the rules in the handbook *because the rules specifically said they were not enforceable* and because "[t]he Handbook advise[d] that its contents [were] 'informational' only." *Id.* at 739. Unlike *Whitworth*, the Rams' and Hewitt's contractual promise to arbitrate is a stand-alone, enforceable agreement that expressly provides not only that both parties agree to arbitrate any dispute between them, but also names the arbitrator—the NFL Commissioner—who must decide any such dispute. It then incorporates Hewitt's obligation to follow the NFL Constitution and Bylaws, rules, and regulations, as the Rams were already obligated to do.

Hewitt also cites *Abrams v. Four Seasons Lakesites/Chare Resorts, Inc*., 925 S.W.2d 932 (Mo. App. S.D. 1996). But that case is different too. That court found that the parties had never agreed to arbitrate, much less agreed to the terms regarding the procedures they would follow. Although the parties' lawyers had exchanged letters discussing their willingness to arbitrate, they never reached or memorialized a final arbitration agreement. *Id*. at 938. The lack of arbitration procedures was beside the point.

Unable to find support in Missouri law, Hewitt next offers the law of other jurisdictions. For example, he cites *Vescent, Inc. v. Prosun Int.*, 2010 U.S. Dist. LEXIS 123889, **8-10 (D. Colo. Nov. 9, 2010), in which the issue before the court was, again, whether the parties had agreed to arbitrate, not the rules that would govern the arbitration.

The only reference to arbitration was found in a letter of intent stating: "Arbitration American Arbitration Association in Denver, Colorado." The court found that this bare-bones reference did not provide the necessary "meeting of the minds." *Id.*

Likewise, in *Carlsen v. Global Solutions, LLC*, 423 Fed. Appx. 697 (9th Cir. 2011), the plaintiffs who opposed arbitration had merely signed an account application that did not itself include or refer to the arbitration provision that was contained in the account agreement they received after the fact. Those plaintiffs thus had no way of knowing when they signed their application that they were also agreeing to arbitrate their disputes. The court held nothing more than that the arbitration agreement itself could not be hidden from the parties. That holding obviously has no application here, where the contract Hewitt admits he'd signed for years contained the arbitration clause that he now disavows.

In sum, Hewitt and the Rams mutually agreed to the essential terms of the arbitration agreement—that all disputes arising between them would be arbitrated by the NFL Commissioner in accordance with the NFL Constitution, Bylaws, rules, and regulations (including the NFL Guidelines).

B. The parties' agreement to arbitrate was supported by consideration.

Hewitt next contends that the Rams' promise to arbitrate disputes is lacking in consideration because the parties' Agreement required Hewitt to comply with the NFL Constitution, Bylaws, and arbitration rules but did not require the Rams to do so. This

statement is false. It is in direct contradiction to Respondent's original order and specific findings, which are supported by the express wording of the parties' Agreement.

As Respondent found below, the arbitration provision of the Agreement requires *both* Hewitt and the Rams to arbitrate any dispute they have before the NFL Commissioner and that they do so in accordance with the NFL Constitution and Bylaws. That provision reads 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, ... ***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, . . . 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….

(Relator's Appx., A10, emphasis added.)

The Rams are obligated to comply with the NFL's rules and regulations, just as Hewitt is obligated and to the precise extent that Hewitt is obligated, and their agreement to arbitrate is therefore supported by that consideration. Respondent agreed with this conclusion:

> Plaintiff directs the Court to the first sentence of paragraph seven (7), as support [for his argument regarding consideration]. The Court notes that this sentence requires Mr. Hewitt to be bound by the Constitution, By-Laws, Rules and Regulations of the National Football League and the NFL Commissioner. ***Mr. Hewitt is not a "member club of the league" within the meaning of these by-laws, rules and regulations; the St. Louis Rams Partnership is a member. Thus, while these provisions already bind the St. Louis Rams Partnership, Mr. Hewitt must separately agree to be bound. By signing this employment contract, he does so agree.***

(Relator's Appx., A4-A5, emphasis added.)

And she elaborated:

> Essentially, the NFL has delegated rule-making decisions to its Commissioner, who is then charged with their implementation. Subject to this authority, the Commissioner has promulgated the 'National Football League Dispute Resolution Procedural Guidelines.' . . . It is those procedural guidelines that govern arbitrations such as are at issue in this case. ***Both parties are equally bound by those procedural guidelines***.

(Relator's Appx., A5, footnotes omitted, emphasis added.)

The parties are thus both bound to the NFL rules and regulations, including the Guidelines, just as they are both bound by their express promise to arbitrate. *See Leatherberry v. Vill. Green Mgmt., Co.*, 2010 U.S. Dist. LEXIS 11171, **8-9 (D. Colo.

Oct. 7, 2010)(mutual obligation where parties both agreed to arbitrate and abide by decision); *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. *banc* 2003)("A construction that attributes a reasonable meaning to all the provisions of the agreement is preferred to one that leaves some of the provisions without function or sense").

In support of his position, Hewitt again claims that his Agreement is "identical" to the employment "Agreements" at issue in *Sniezek* and *Clemmons*, where the courts declined to compel arbitration. But, again, those cases differ from this one in significant respects. First, the "Agreements" signed by Ms. Sniezek and Mr. Clemmons expressly required that they arbitrate any disputes they had with the Chiefs, but contained no corresponding obligation on the Chiefs' part; indeed, the Chiefs did not sign those "Agreements." In contrast, Hewitt's Agreement with the Rams is signed by both parties and includes both parties' express agreement to arbitrate any disputes between them. Second, Ms. Sniezek and Mr. Clemmons were at-will employees who could be terminated by the Chiefs at any time; the court held simply that continued at-will employment does not constitute contractual consideration. Hewitt, in contrast, was not an at-will employee; he signed several consecutive two-year employment contracts, including his last one on November 1, 2008 for the 2009-10 and 2010-11 NFL seasons. (Relator's Appx., A9; Respondent's Appx., A4, ¶ 13.) The Rams could not terminate Hewitt unless he violated his contract, thus providing him with valuable, contractual consideration. Missouri adheres to the majority of courts' adoption of the Restatement of

Contracts' view that mutuality is satisfied if there is consideration as to the whole agreement, regardless of whether the included arbitration clause itself was one-sided. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858-59 (Mo. 2006). That requirement is satisfied here.

C. Hewitt clearly and unmistakably waived any right he might have had to have his claims heard in a judicial forum.

Hewitt argues that, as a matter of public policy, an employee may not give up his right to resolve any statutory claims he might have against his employer in a judicial forum without clearly and unmistakably agreeing to do so. But by signing his Agreement with the Rams, that is exactly what Hewitt did here.[4]

It is well established that parties may agree to arbitrate their statutory claims. The U.S. Supreme Court stated this rule clearly in *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 23 (1991), the seminal case on the issue of the arbitrability of statutory employment claims. In that case, the Supreme Court affirmed a decision enforcing the arbitration agreement, rejecting a contention that arbitration of an age discrimination claim was inherently antagonistic to the public purposes of the Age Discrimination in Employment Act. *Id.* at 27-35; *see also Leatherberry*, 2010 U.S. Dist. LEXIS 11171, at *6.

[4] It should be noted that only one of the three matters submitted to the Commissioner for arbitration involves a statutory claim. Hewitt's argument fails even for that claim.

Missouri courts agree. In *Boogher v. Stifel Nicolaus & Co.*, 825 S.W.2d 27 (Mo. App. E.D. 1992), for example, the court rejected the plaintiff's argument that his MHRA age discrimination claim could not be arbitrated, and held further that the Missouri legislature would be prohibited by federal law, the FAA, from including any anti-arbitration provision in this or any other statute. *Id.* at 29.

Hewitt relies on *Warfield v. Beth Israel Deaconess Med. Ctr.*, 910 N.E.2d 317 (Mass. 2009), to support his contrary position. His citation to that case is inapt, if not misleading. There, the Massachusetts Supreme Court, interpreting Massachusetts law, found merely that the scope of the arbitration provision in question did not encompass the plaintiff's sex discrimination claim. The relevant arbitration provision referred to "[a]ny claim, controversy or dispute arising out of or in connection with this Agreement or its negotiations shall be settled by arbitration." *Id.* at 321. The court found that this clause limited the arbitration commitment to disputes arising out of or concerning the agreement or negotiations leading to it, rather than statutorily based gender claims. "Read as a whole, the contract language chosen by the parties suggests an intent to arbitrate disputes that might arise from or be connected to the specific terms of the agreement itself; there is no contractual term dealing with discrimination." *Id.* Thus, that defendant failed to establish that the plaintiff had waived her right to a jury trial as to non-contractual claims. In contrast, Hewitt's arbitration provision states that "any dispute" that arises between him and the Rams must be arbitrated. Hewitt thus waived any right he might otherwise have had to a judicial forum.

D. The arbitration provision contained in Hewitt's Agreement is not unconscionable.

Hewitt next argues that the Rams' arbitration agreement is unconscionable and therefore unenforceable. As Hewitt recognizes, Missouri law has traditionally distinguished between procedural and substantive unconscionability, and required a showing of both before a contract would be invalidated. *Funding Sys. Leasing Corp. v. King Louis Int'l, Inc.*, 597 S.W.2d 624, 633-34 (Mo. App. W.D. 1979). While he also notes that this distinction was "erased" by the Missouri Supreme Court decision in *Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo. 2012), he still discusses unconscionability in the pre-*Brewer* procedural/substantive terms. But however his arguments are couched, they are simply wrong. Hewitt's Agreement and his promise to arbitrate are neither procedurally nor substantively, nor in any other way, unconscionable.

Hewitt first discusses procedural unconscionability, which focuses on the process of making a contract and involves such factors as high pressure sales tactics, unreadable fine print, misrepresentation, and unequal bargaining positions. *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W.3d 918, 923 (Mo. App. W.D. 2009). To support a finding of procedural unconscionability based on the parties' unequal bargaining positions, as Hewitt attempts to do here, Missouri courts have required "an inequality so strong, gross and manifest that it must be impossible to state without producing an exclamation at the inequality of it." *Mo. Dep't of Soc. Servs. v. Brookside Nursing Ctr., Inc.*, 50 S.W.3d 273, 277 (Mo. 2001)(quoting *Peirick v. Peirick*, 641 S.W.2d 195, 197

(Mo. App. 1982), internal quotation marks omitted). An agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not for that reason alone unconscionably unfair. *Swain v. Auto. Servs., Inc*., 128 S.W.3d 103, 108 (Mo. App. E.D. 2003).

Hewitt makes several allegations about the process that led to the Agreement that, even if taken as true, do not rise to the level of *gross* and *manifest* inequalities. Even as to pre-printed form contracts offered in consumer contexts, Missouri courts have limited their enforceability only where the terms "unexpectedly or unconscionably limit the obligations of the drafting party." *Hartland Computer Leasing Corp. v. Ins. Man, Inc*., 770 S.W.2d 525, 527 (Mo. App. E.D. 1989). The arbitration clause at issue here does not limit the Rams' obligations in any way, but imposes equal obligations on both parties. And the promise to submit any disputes between the parties to arbitration is certainly not so egregious that "no man in his senses and not under delusion would make [it], on the one hand, and as no honest and fair man would accept [it] on the other. . . ." *Hume v. U.S.*, 132 U.S. 406, 415 (1889)(defining unconscionable contract).

In *Grant v. Philadelphia Eagles, LLC*, 2009 U.S. Dist. LEXIS 53075, **20-21 (E.D. Pa. June 24, 2009), the court reviewed an arbitration agreement similar to this one and specifically found the process not unconscionable. The plaintiff in that case, Grant, brought suit against her employer, the Philadelphia Eagles, alleging sex and disability discrimination and asserting retaliation claims. In denying her claims of procedural and substantive unconscionability, the court analyzed a number of claims similar to the ones

Hewitt makes, including an argument that the agreement was unconscionable because she "never had the opportunity to discuss, much less negotiate its terms." *Id*. at *7.

But the court rejected Grant's arguments, stating that "[i]nequality of bargaining power does not render a contract or contract term unenforceable." *Id*. at 20 (quoting *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 229 (3rd Cir. 1997)). The court held that there was "no evidence of an inequity of bargaining power between the Eagles and Grant, nor [could] the agreement be deemed to be adhesionary." *Id.* at 20-21. The court observed that Grant read the agreement and did not contend that she did not understand its simple terms, terms that applied equally to both parties. *Id*. Additionally, in response to Grant's argument that her agreement lacked consideration, the court found that even though one party—as Hewitt here describes, "a sophisticated and powerful NFL franchise"—did not sign the agreement at issue, the court still found that consideration existed because both parties were mutually bound to arbitrate. *Id*. at 16. The *Grant* court thus determined that the arbitration agreement in that case was enforceable even under factual circumstances tilted more in the plaintiff's favor than those at issue here.

Respondent reached the same conclusion here:

> The Court finds that Mr. Hewitt, by his own admission, signed either this employment contract, or contracts substantially similar to it, for forty years. . . . If Mr. Hewitt did not read his contract, inquire about its terms or ask for supporting documents during those decades, the Court is not able to turn back the hands of time and shield him from his own contractual promises.

(Relator's Appx., A6.)

After discussing the procedural side of unconscionability, Hewitt turns to substance. But *Brewer's* emphasis on factors affecting the contract formation process make many of Hewitt's attacks on the NFL arbitration procedures beyond the scope of his unconscionability analysis. Hewitt nonetheless contends that the test of substantive unconscionability is whether the terms of the agreement to arbitrate are unduly harsh or one-sided, citing *Woods v. QC Fin. Servs.*, 280 S.W.3d 90, 96 (Mo. App. 2008). (Relator's brief at 27.) *Woods* was abrogated by the Missouri Supreme Court's decision in *Brewer*, and, as a class certification arbitration case, is also inapposite. Nonetheless, the Rams will respond to all seven of Hewitt's reasons why his promise meets that test.

1. The parties' selection of the NFL Commissioner as their arbitrator is not unconscionable.

The court of appeals was given the opportunity in this case to strike the parties' arbitration agreement as unconscionable on any of the several grounds offered by Hewitt, but declined to do so except with respect to one—the parties' choice to use the NFL Commissioner, or his designee, as their arbitrator. The court found this provision alone to be unconscionable, essentially concluding as a matter of law that the NFL Commissioner could not be impartial. But this conclusion is inconsistent with the U.S. Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2010), this Court's decision in *Brewer v. Mo. Title Loans*, 364 S.W.3d 486 (Mo. 2012), and the FAA. And, in relying on this Court's 2006 decision in *State ex rel. Vincent v. Schneider*, 194 S.W.3d

853 (Mo. 2006), to reach this conclusion, the court of appeals ignored the dictates of the statute and of these post-*Vincent* decisions. Hewitt's reliance on *Vincent* here is equally flawed.

According to the U.S. Supreme Court, the primary purpose of the FAA is "to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010)(quoting *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); *Concepcion*, 131 S. Ct. at 1748. Courts construing arbitration provisions must, as with all other contracts, give effect to the contractual rights and expectations of the parties as set forth in their agreement. *Stolt-Nielsen*, 559 U.S. at 682. Indeed, when the parties to a contract have given up their constitutionally protected right to trial by jury and to a full appeal, they are entitled to the arbitration for which they bargained. Because this process is essentially consensual, the parties must be permitted to establish the rules under which their arbitration will proceed and to "*choose who will resolve [their] disputes*." *Id.* at 683. *See also Concepcion*, 131 S. Ct. at 1749.

In *Concepcion*, the U.S. Supreme Court was faced with an arbitration provision that precluded class arbitration. When the district court refused to compel arbitration in the face of this provision, and the Ninth Circuit affirmed that decision, the Supreme Court granted *certiorari* to consider whether the California case law that condemned all class waivers in arbitration provisions was preempted by the FAA. The Court held that it was. Consistent with earlier decisions, the Court held that state courts must place arbitration

agreements on an equal footing with all other contracts and enforce them according to their terms. *Concepcion,* 131 S. Ct. at 1746. As noted above, under the FAA, state courts may invalidate arbitration agreements only "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. Although "such grounds" may include state law defenses like fraud, duress, or unconscionability, they may not include any defenses that apply only to arbitration or that derive their meaning from the fact that an arbitration agreement is at issue. *Concepcion,* 131 S. Ct. at 1746. Nor may those defenses include any categorical or *per se* rules that nullify the parties' agreement on any particular point without reference to the facts of that case or the terms of the individual agreement. *See Concepcion,* 131 S. Ct. at 1750-52; *Marmet Health Care Ctr., Inc. v. Brown,* 132 S. Ct. 1201 (2012).

In this Court's recent decision in *Brewer*, the Court acknowledged the precedent established by *Concepcion* and other U.S. Supreme Court cases, and construed those cases to require case-specific analyses rather than application of categorical rules in determining unconscionability. As this Court understood, to apply blanket rules to nullify parties' agreements to arbitrate serves to discourage that process and to treat arbitration agreements differently than other contracts. *Id.* In this case, the court of appeals ignored these principles and, without any evidence, decided that the NFL Commissioner was "potentially" unfair, a decision that, if it stood, would effectively establish a *per se* rule that could arguably serve to nullify every agreement between any NFL, National Hockey League, National Basketball Association or Major League Baseball team (and other

professional sports teams) and their employees in which the parties had agreed to have their respective Commissioners serve as (or designate) their arbitrator.

The court of appeals cited only two factors to support its decision to remove the parties' chosen arbitrator: (1) the purported "take-it-or-leave-it" nature of the instant contract signing process, and (2) the presumed bias of the NFL Commissioner. Even if true, neither of these factors is sufficient to establish unconscionability consistent with controlling federal and state law and cannot be a basis for invalidating the parties' agreement.

The first is easily disposed of. Even if accepted as true, the "facts" provided by Hewitt about the contract formation process are insufficient under Missouri law to establish unconscionability. As recognized in *Davis v. Sprint Nextel Corp.*, 2012 U.S. Dist. LEXIS 167356 (W.D. Mo. Nov. 26, 2012), even pre-printed form contracts that are non-negotiable are "hallmarks of modern consumer contracts" and do not establish the unconscionability of an arbitration agreement under Missouri law; nor could they, consistent with the FAA. *Davis*, 2012 U.S. Dist. LEXIS 167356, **7-8; *see also Cicle v. Chase Bank USA*, 583 F.3d 549, 555 (8th Cir. 2009); *Swain*, 128 S.W.3d at 107. In fact, because the contract formation conditions alleged by Hewitt do not relate uniquely to the arbitration clause itself, but to the contract as a whole, they are not appropriate for evaluation by the court, but must instead be decided by the arbitrator. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444-45 (2006).

Nor are the "facts" presented by Hewitt as to his supposedly lopsided relationship with the Rams a true and complete account of that relationship. The trial court did not hold an evidentiary hearing on this question, and the record on contract formation was not developed. But based on the limited record that is available, there is at least one important and undisputed fact that the court of appeals ignored: Hewitt had for forty years signed contracts substantially similar to the Agreement, and therefore cannot be said to have been surprised by contract terms he had seen twenty times over that period. (Respondent's Appx., A4, ¶ 13; Relator's Appx., A12, ¶ 2.) As the court of appeals recognized, "unfair surprise" is a principal concern when reviewing contracts for unconscionability, and it simply does not exist here. *See Brewer*, 364 S.W.3d at 493.

The court of appeals' only other basis for finding the parties' arbitrator selection unconscionable was its own unfounded view that the Commissioner's appointee is "***potentially***" biased. (Relator's Appx., A29, emphasis added.) But this supposition of potential bias is neither supported by the facts nor supportable under controlling state and federal law.

The facts in the record show that the Commissioner is neutral. Section 8.1 of the NFL Constitution provides for the employment of a commissioner who is "a person of unquestioned integrity" and who "shall have no financial interest, direct or indirect, in any professional sport." (Relator's Appx., A16.) Among other responsibilities, the Commissioner is charged with taking "appropriate legal action or such other steps or procedures" against any team, owner, officer, player, or other personnel whenever the

Commissioner deems such action necessary "in the best interests of either the League or professional football." (Relator's Appx., A17.) The Constitution invests the Commissioner with "full, complete, and final jurisdiction and authority to arbitrate" virtually every conceivable dispute that might arise among the several teams and numerous individuals whose existence, livelihood, and general wellbeing depends upon the continued functioning and good reputation of the NFL itself. (Relator's Appx., A16.)

Hewitt incorrectly claims that the Commissioner "was chosen by the Rams" and is the Rams' "paid representative who is inclined to rule in their favor in order to protect their financial or reputational interests." (Relator's brief at 32.) That statement is patently incorrect. The Commissioner was not chosen by the Rams but was selected by a vote of not less than two-thirds of the members of the NFL. (Relator's Appx., A16-A17.) Nor is the Commissioner employed or paid by any particular owner, including the Rams; he serves the entire NFL, which includes the owners, players, coaches, and team employees. *Id.*[5]

The law on this question is no more favorable to Hewitt than are the facts. As discussed above, the parties to an arbitration agreement must be given free rein to structure the terms of their arbitration as they see fit, including the rules by which they

[5] Hewitt has no basis for his claims in footnote 2 at page 28 of his brief regarding the supposed bias of the Commissioner's appointees, who are authorized to assist the Commissioner in fulfilling his own obligations under the rules. (Relator's Appx., A19.)

will arbitrate and the arbitrator(s) who will hear their case. *Concepcion*, 131 S. Ct. at 1749; *Stolt-Nielsen*, 559 U.S. at 683. Far from discouraging industry representatives from participating in this process, courts have often recognized that the most sought-after arbitrators are prominent and experienced members of the relevant industry and are chosen for precisely that reason. *See, e.g., Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir. 1983); *Int'l Produce v. A/S Rosshavet*, 638 F.2d 548, 552 (2nd Cir. 1981); *see also Concepcion*, 131 S. Ct. at 1749. These courts understand that there can be a trade-off between expertise and impartiality. *Merit*, 714 F.2d at 679.

Although there are cases that address arbitrator bias, such cases rarely arise in the context of pre-arbitration conscionability analysis, which, pursuant to *Vincent*, appropriately focuses on the contract formation process. Such cases generally arise instead in the context of a dissatisfied party's post-arbitration attempt to vacate the arbitrator's award, with a fully developed record that either demonstrates or disproves allegations of actual prejudice. In that context, the operative statute is §10 of the FAA, which, as relevant here, provides that an arbitrator's award may be vacated only upon a showing of "evident partiality or corruption in the arbitrators[.]" 9 U.S.C. §10(a)(2). The FAA does not provide for the pre-award removal of an arbitrator for allegations of bias.

Under the cases decided under §10, an arbitrator's "potential" bias is not sufficient for disqualification. As the Eighth Circuit and other federal courts have specifically held, "evident partiality" under this section is not "'made out by the mere appearance of bias.'" *Williams v. NFL*, 582 F.3d 863, 885 (8th Cir. 2009)(quoting 3 Fed. Proc. §4:119

(Lawyers ed. 2009)); *Int'l Produce*, 638 F.2d at 551; *Poston v. NFL Players Ass'n*, 2002 U.S. Dist. LEXIS 23085, *10 (E.D. Va. Aug. 26, 2002). Indeed, "***[w]here an agreement entitles the parties to select interested arbitrators***, 'evident partiality' cannot serve as a basis for vacating an award . . . ***absent a showing of prejudice***." *Winfrey v. Simmons Food, Inc.*, 495 F.3d 549, 551 (8th Cir. 2007)(emphasis added). "The standards for judicial intervention are therefore narrowly drawn to assure the basic integrity of the arbitration process without meddling in it." *Merit*, 714 F.2d at 681 (refusing to invalidate AAA arbitration award based on arbitrator's past relationship with one of the parties without substantial indicia of actual bias).

Missouri courts hold similarly, under Missouri's counterpart statute, that, in order to show "evident partiality" by an arbitrator sufficient to vacate his or her award, "the interest or bias of the arbitrator must be direct, definite and capable of demonstration, rather than remote, uncertain or speculative." *Nat'l Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 343 (Mo. App. S.D. 1995)(citing *Sheffield Assembly of God Church, Inc. v. Am. Ins. Co.*, 870 S.W.2d 926, 929-30 (Mo. App. W.D. 1993)); R.S.Mo. §435.405.1(2).

In fact, courts deciding this issue, including the Eighth Circuit, have upheld the very provision that Hewitt claims is unconscionable: the authorization of the NFL Commissioner to designate the arbitrator, or to arbitrate himself, disputes between an NFL club and its employees. *See, e.g., Williams*, 582 F.3d at 886 ("[T]he Union has failed to carry the 'heavy burden' . . . of demonstrating that [the arbitrator's] actions show evident partiality as the Union has not even alleged that [his] actions were motivated by

'improper motives.'"); *Buffalo Bills*, 2014 U.S. Dist. LEXIS 13153, at ** 14-15 (refusing, pre-arbitration, to nullify arbitration agreement based on parties' choice of NFL Commissioner as their arbitrator); *Poston*, 2002 U.S. Dist. LEXIS 23085, at **9-10 (regarding the NFL-selected arbitrator, court found that "the extent of the arbitrator's interest in this case is no different from that of any other arbitrator who works often with a given professional association"); *Alexander v. Minn. Vikings Football Club LLC*, 649 N.W.2d 464, 467 (Minn. App. 2002)(court rejected pre-arbitration challenge to NFL Commissioner arbitrating employment dispute between assistant coaches and club); *Rosenbloom v. Mecom*, 478 So.2d 1375, 1378 (La. App. 1985)(court refused to vacate arbitration award based on alleged bias of the NFL Commissioner).

Other arbitrators in similar positions have been deemed equally impartial. In *Black v. NFL Players Ass'n*, 87 F. Supp. 2d 1 (D. D.C. 2000), the court refused, prior to the arbitration, to remove an arbitrator selected by the NFLPA, despite its recognition that "[a]n NFL-selected arbitrator may have an incentive to appease his or her employer[.]" *Id.* at 6. That court was determined to honor the parties' contract, and noted that the plaintiff remained free to challenge any penalty ultimately approved through arbitration, just as Hewitt here has resort to the vacation provision cited above should actual bias and prejudice later be revealed. *Black*, 87 F. Supp. 2d at 6.

In *Mandich v. N. Star P'ship*, 450 N.W.2d 173, 178 (Minn. App. 1990), the Minnesota Court of Appeals likewise affirmed a trial court finding that the NHL Commissioner was "free from bias and partiality."

In short, courts agree that "the parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Winfrey*, 495 F.3d at 551; *Williams*, 582 F.3d at 885; *Black*, 87 F. Supp. 2d at 6. The naming of the NFL Commissioner or his designee as the chosen arbitrator cannot, therefore, be deemed as a matter of law so "strongly, grossly, and manifestly unequal that someone with common sense would exclaim at the inequality of it," as would be required to find the provision unconscionable. *See Cowbell, LLC v. BORC Bldg. & Leasing Corp.*, 328 S.W.3d 399, 405-06 (Mo. App. W.D. 2010).

Because there is no evidence of actual bias in this case (and no other legitimate grounds for disqualifying the parties' chosen arbitrator), an order disqualifying the Commissioner could be read as creating a *per se* rule that prevents any party to a contract with an NFL club from agreeing to allow the Commissioner to appoint or serve as their arbitrator. Such a rule would directly contradict *Concepcion*'s mandate: it would disregard the parties' agreement and, in doing so, treat arbitration differently than other contracts. Such a rule would potentially also affect other Missouri contracts, including those between Missouri sports teams and their employees that authorize a league official to resolve, or to appoint an arbitrator to resolve, their disputes.

In the face of these precedents and this logic against his argument, Hewitt cites two law review articles and two cases, *Morris v. New York Football Giants, Inc.*, 575 N.Y.S.2d 1013 (N.Y. Sup. Ct. 1991), and *Dryer v. Los Angeles Rams Football,* 198 Cal. Rptr. 497 (Cal. App. 1984), *rev'd on other grounds,* 709 P.2d 826 (Cal. 1985). The

Morris case is a twenty-three-year-old case based on New York state law that is inconsistent with the vast majority of decisions on this question. The *Dryer* case was reversed (on other grounds or not), and the California Supreme Court found that it should proceed to arbitration and that all nonsignatory (individual) defendants should be a part of that arbitration.

As for the court of appeals' reliance on this Court's ruling in *Vincent* and R.S.Mo. §435.360 to justify replacing the parties' chosen arbitrator, Respondent agrees with Hewitt that it was inappropriate. This case is governed by *Concepcion*, as explained in *Brewer*, and, to the extent inconsistent with these decisions, *Vincent's* holdings do not apply. Section 435.360 cannot serve to void an arbitration clause that is otherwise enforceable under these decisions and the FAA. By its own terms, moreover, this section only comes into play when the parties have failed to specify a method of appointing arbitrators, or that method for some reason cannot be followed, and then only "on application of a party . . . ." Here, neither party asked the court to appoint a new/different arbitrator. To the contrary, the parties chose their arbitrator and, for all of the reasons stated above, that choice can and should be honored.

2. No other aspect of the parties' arbitration agreement is unconscionable.

In Hewitt's second argument for unconscionability, he contends that the arbitration clause of the Agreement is substantively unconscionable because the NFL Guidelines express a "hostile or dismissive attitude" toward discovery in arbitration.

(Relator's brief at 36.) The plaintiff in *Grant* made this same argument, but the court disagreed, citing Section 6.1 of these same Guidelines. Hewitt also cites Section 6.1, noting that it gives the Commissioner discretion to "permit, limit, or disallow discovery," but conveniently omitting the end of that sentence, which reads, "…or compel a party to provide such discovery as he considers necessary to an appropriate exploration of the issues in dispute." (Relator's Appx., A20.) The court in *Grant* read all of Section 6.1 and held that even in a case involving an employee with discrimination claims, such as this one, the NFL arbitration procedures were not unconscionable. *Grant*, 2009 U.S. Dist. LEXIS 53075, *23.

As Respondent noted in her original order, the NFL Guidelines provide for equal exchange of information between the parties. (Relator's Appx., A5, fn. 3; Relator's Appx., A20.) That is exactly what has happened here. As noted above, the parties have engaged in a full range of discovery, with the arbitrator's approval. It has, in fact, been only Hewitt who has attempted to rein in that process. (*See, e.g.*, Respondent's Appx., A43-A78.) There is simply no basis for any prediction that the Commissioner will curtail discovery in the future or refuse to allow either party ample opportunity to explore the issues in dispute.

In his third argument, Hewitt claims that because the arbitration rules require the hearing to be maintained as confidential, the arbitration agreement is substantively unconscionable. Hewitt cites no Missouri cases to support this proposition, but instead relies solely on the decisions in *McKee v. AT&T Corp.*, 191 P.3d 845 (Wash. 2008), and

Acorn v. AT&T, 211 F. Supp. 2d 1160, 1171-72 (N.D. Cal. 2002). Those cases are distinguishable.

In *McKee*, the confidentiality clause was contained in "a contract of adhesion for a basic consumer service such as long distance telephone service." *McKee*, 191 P.3d at 858-59. The basis for the court's decision was the established public policy of the state of Washington favoring the open resolution of such public matters as consumer fraud by a large provider of a basic consumer service. The case is not controlling and, in any event, has no applicability to Hewitt's purely private employment dispute.[6]

Hewitt's reliance on *Acorn* is similarly misplaced. *Acorn* was decided under California law, and the confidentiality of the arbitration agreement was but one of several

[6] Under Missouri law, a contract of adhesion is generally a pre-printed form contract that is imposed by a stronger party on a weaker one and unexpectedly or unconscionably limits the obligations of the stronger party. *Swain v. Auto Servs.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003). Even if the Agreement between Hewitt and the Rams were pre-printed, it would not be a contract of adhesion because it does nothing to limit the Rams' obligations compared to those undertaken by Hewitt, and there is nothing unexpected in this contract that Hewitt signed many times. And in Missouri even pre-printed form contracts between large corporations and individuals are not viewed as "inherently sinister and automatically unenforceable." *Id.* (citing *Hartland Computer Leasing Corp., Inc. v. Ins. Man, Inc.*, 770 S.W.2d 525, 527 (Mo. App. E.D. 1989)).

factors considered by the court in determining unconscionability. *Acorn*, like *McKee*, involved a contract of adhesion and an expressed public interest, under California law, in protecting consumers. Like *McKee*, *Acorn* is not controlling here and is irrelevant to a case like this one, involving a long-term, private employment relationship. These cases, interpreting other states' laws, surely cannot support an argument by Hewitt that he has a clearly established right to the relief he seeks from this Court.

For his fourth argument, Hewitt claims that the mere possibility that the Commissioner will conduct hearings at the NFL's New York office, as he is permitted to do under the NFL Guidelines, renders the arbitration agreement unconscionable. But, as Hewitt recognizes, the Commissioner has already ordered the arbitration to occur in St. Louis. (Relator's brief at 38, fn. 4.) Because Respondent lives in California and filed his lawsuit in St. Louis (Relator's Appx., A14; Respondent's Appx., A94-A98), he would be traveling "halfway across the country" in any event.

Even if that were not the case, Section 3.1 of the Guidelines requires the Commissioner to "conduct the arbitration in such manner as he deems appropriate, and *in a manner designed to reach a fair and prompt outcome, consistent with the circumstances of the particular dispute*." (Relator's Appx., A19, emphasis added.) And, although Hewitt correctly states that the Guidelines permit the Commissioner to hold the arbitration in New York, he conveniently omits the language that allows the Commissioner to conduct hearings "*at any other location he deems appropriate after*

consultation with the parties." (Relator's Appx., A20, emphasis added.) There is thus no reason to believe that the arbitration will be conducted in an unfair manner or location.

Hewitt cites two cases in support of his argument that the mere possibility of conducting a hearing in New York City is so outrageous that it renders his arbitration promise unconscionable. Both are distinguishable, and neither is controlling. First, in *Twilleager v. RDO Vermeer, LLC*, 2011 U.S. Dist. LEXIS 46217, *23 (D. Ore. April 1, 2011), the forum selection and choice of law clauses were included in a contract of adhesion. Unlike this case, the employee in *Twilleager* was required to sign an agreement to arbitrate as a condition of employment, yet the employer was free to litigate its claims against the employee. *Id*. at 17.

In *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 497-500 (Mo. *banc* 1992), the court noted that Missouri courts will enforce freely-negotiated forum selection clauses, "so long as doing so is neither unfair nor unreasonable." *Id*. at 497. In holding that the forum selection clause at issue there was unenforceable, the court turned its decision on public policy, not hardship to the plaintiff. The court noted that the Missouri statute relating to merchandising and trade practices was important to the state of Missouri and the court "should not abrogate the responsibility of interpreting this important statute to the Kentucky courts." *Id.* at 499-500. *High Life*, like *Twilleager*, has no bearing on the unconscionability analysis here and does not give rise to a well-established right.

For Hewitt's fifth argument, he claims that the arbitration provision is unconscionable because it allows the Commissioner to "apportion the costs of arbitration, including presumably his own fees . . . in any way he feels is 'reasonable'." (Relator's brief at 38.) But this is an unfair and incomplete statement of those rules. In fact, the Commissioner's ability to apportion costs or attorneys' fees is not only limited by his sense of reasonableness, but also expressly limited by "any agreement between the parties to the contrary, League rules and ***applicable law***." (Relator's Appx., A22, ¶ 13.3.) Hewitt misleadingly omits this important limitation from his discussion. (Relator's brief at 38-39.)

And, in fact, Hewitt has failed to demonstrate, as he must, that, even if the Commissioner retained full discretion, the cost of arbitration would be prohibitive or, indeed, any greater than that of litigating this case in court. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 (2000); *see also Williams*, 890 N.E.2d at 571 (court rejected plaintiff's contention that arbitration was unconscionable as imposing costs without specifying what costs might be); *see also Nabors Wells Servs., Ltd. v. Herrera*, 2009 Tex. App. LEXIS 549, *16 (Tex. App. Jan. 27, 2009)(party opposing arbitration must prove the likelihood of incurring such costs and produce some specific information substantiating the alleged costs, citing *Green Tree*).

Hewitt cites two cases in support of his position, both of which are inapposite. The contract at issue in one of those cases, *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 784 (9th Cir. 2002), was completely different from Hewitt's contract with the Rams,

and the court's decision on this question was based on California law. That contract was a contract of adhesion that required the employee to bear unfair arbitration costs and gave the employer advantages in discovery. That is not the situation here. The other case, *Gibson v. Nye Frontier Ford,* 205 P.3d 1091, 1099-1101 (Alaska 2009), related narrowly to public policy considerations underlying Alaska's wage and hour law. That court noted that, unlike the parties' contract here, the contract at issue there was a contract of adhesion, and found, with respect to the Alaska Wage and Hour Act, the fact that employees would be required as a condition of employment to arbitrate claims based on remedial statutes would violate the public policy of Alaska. *Id.* at 1099. In any event, neither of these cases can be said in any way to create a clear, unequivocal, or pre-existing right, *under Missouri law*, justifying the extraordinary relief that Hewitt seeks.

In his sixth argument, Hewitt claims that the agreement to arbitrate is unconscionable because the Guidelines do not *compel* the Commissioner to award every remedy that might be available. But it is specious to argue that an arbitrator will be unlikely—or even less likely than a judge—to award a statutory remedy when justified by the facts of a case. The U.S. Supreme Court has made it clear that an agreement to arbitrate disputes that includes statutory claims has no limiting effect on those rights: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). In fact, relevant case law holds that, once a court has determined the that

the parties agreed to arbitrate their dispute, the range of remedies available is then up to the arbitrator. *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 538-39 (8th Cir. 2002).

Each of the cases cited by Hewitt either follows this line of authority or relates to a situation in which the arbitration expressly limited the available remedies; none of them stands for the proposition stated at page 39 of Hewitt's brief that the arbitration agreement must affirmatively provide for all available relief. Moreover, the decision in *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1996), has been largely abrogated by subsequent case law, including the U.S. Supreme Court decision in *Green Tree* cited above. And of course the 1998 law review article Hewitt cites cannot override established law on this point.

Finally, for his seventh argument for unconscionability, Hewitt contends that, because the MHRA mandates an award of attorneys' fees and costs to the prevailing plaintiff, the fact that the Commissioner has discretion to award fees and costs renders the arbitration agreement unconscionable. As discussed above, the Commissioner is authorized to award every remedy available under the MHRA, including fees and costs. Rule 13.3 of the Guidelines gives the Commissioner the ability to do this, just as Hewitt has requested. (Relator's Appx., A22.) There is no basis to suggest that he will choose not to do so if Hewitt prevails, and Hewitt's concern that an arbitrator might disregard law, fact, or reason is not a justification for invalidating the arbitration provision.

E. The arbitration provision in Hewitt's Agreement does not deny his statutory rights.

Hewitt argues that the arbitration agreement is invalid because it imposes an undue burden on the vindication of his statutory rights under the MHRA, and thereby violates public policy, in the following ways: (1) it designates a biased arbitrator; (2) it designates a "far-away location" for the arbitration; and (3) it allows the arbitrator to disregard statutory remedies. Each of these issues has been addressed and disposed of above. None of them is a valid reason for declining to enforce Hewitt's agreement to arbitrate, and certainly none of them creates the clearly established right that Hewitt needs to show in order to justify the writ relief he seeks.[7]

[7] Hewitt also cites another law review article to the effect that "[e]mpirical studies show that employees fare poorly in arbitration." (Relator's brief at 44-45, citing Reilly, Achieving Knowing and Voluntary Consent in Pre-dispute Mandatory Arbitration Agreements, 90 Calif. L. Rev. 1203, 1211-1212 (2002)). Hewitt neglects to mention the equally interesting finding in that article that employees actually prevail more often in arbitration than they do in court. *Id.* at 1211, fn. 35, citing Lewis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Col. Hum. Rts L. Rev. 29, 45-46 (1998). But these statistics have no evidentiary foundation and no bearing on the issues before this Court, which are to be decided under by well-established case law favoring arbitration in exactly these circumstances.

II. Relator Is Not 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 the Allegations in His Petition Bring These Parties Within the Scope of the Arbitration Agreement.

Hewitt argues finally that he is not required to arbitrate with the three Defendants that are not signatories to the Agreement. However, this argument is nothing more than Hewitt's attempt to circumvent his obligation to arbitrate by hauling into court entities with which he had absolutely no independent relationship. This attempt cannot succeed.

As a legal matter, nonsignatories to a contract are often entitled to enforce an arbitration clause against a signatory to that contract. *PRM Energy Sys., Inc. v. Primenergy, L.L.C.*, 592 F.3d 830, 834 (8th Cir. 2010); *CD Partners v. Grizzle*, 424 F.3d 795, 798 (8th Cir. 2005).

For example, a nonsignatory can enforce an arbitration agreement when the relationship between the signatory and nonsignatory defendants "'is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided.'" *CD Partners*, 424 F.3d at 798, quoting *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999); *see also Cahill v. Alternative Wines, Inc.*, 2013 U.S. Dist. LEXIS 14588, **16-17 (N.D. Iowa Feb. 4, 2013)(where claims against company's president and CEO stemmed from his actions as in his capacity as an officer, those claims were closely enough related

to those against signatory as to be arbitrable); *Barton Enters., Inc. v. Cardinal Health, Inc*., 2010 U.S. Dist. LEXIS 52435, **8-9 (E.D. Mo. May 27, 2010)(nonsignatory corporate parent could enforce arbitration where subsidiary entered agreement to arbitrate with plaintiff).

A nonsignatory can also enforce an arbitration provision when the plaintiff has treated the signatories and nonsignatories "as a single unit." *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc*., 198 F.3d 88, 98 (2nd Cir. 1999); *see also MS Dealer*, 177 F.3d at 947 (enforcement by nonsignatory appropriate where claims "are based on the same facts and are inherently inseparable.")(quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993).

As the court recognized in *FCMA, LLC v. Fujifilm Recording Media U.S.A., Inc.*, "[a] contrary result would permit a plaintiff to avoid its arbitration agreement simply by naming individual defendants in addition to or in lieu of the signatory entity." 2010 U.S. Dist. LEXIS 79129, *20 (D. N.J. Aug. 5, 2010). "Plaintiffs cannot be permitted to argue Defendants are joint employers while, at the same time, argue their relationship is not so close that all Defendants cannot compel arbitration." *Carter v. Affiliated Computer Servs.*, 2010 U.S. Dist. LEXIS 139926, *12 (W.D. Ark. Dec. 15, 2010).

So it is here. Hewitt did not differentiate among the Defendants in his petition, but instead lumped them all together as "the Rams." He made no separate allegations as to the various corporate entities beyond identifying them in the first paragraphs of the petition. He alleged that all four Defendants engaged in age discrimination, even though

his only employment relationship was with the St. Louis Rams Partnership. (Respondent's Appx., A1-A9; Relator's Appx., A11.) These facts are sufficient to justify enforcement of Hewitt's arbitration agreement by these nonsignatory parties.

Hewitt's cases are distinguishable. *Jones v. Paradies*, 380 S.W.3d 13 (Mo. App. E.D. 2012), stands only for the proposition that when individuals sign an arbitration agreement as agents for a company, solely in their representative capacity, they may not, when they are sued as individuals, in separate claims based on their independent conduct, rely on that agreement to compel arbitration. That situation is different from this one. These Defendants did not (1) contract with Hewitt, in any capacity, or (2) employ Hewitt, or (3) engage in any conduct whatsoever that is independent of what his actual employer did. In these circumstances, allowing these Defendants to benefit from an arbitration agreement to which they are not parties is perfectly appropriate.

Similarly, in *Springfield Iron &Metal v. Westfall*, 349 S.W.3d 487 (Mo. App. S.D. 2011), the defendants were each being sued for their individual conduct, and the court merely held that neither their "close relationship" with each other nor the fact that the claims against them were "inextricably intertwined" was sufficient to allow them to take advantage of an arbitration agreement to which they were not parties. 349 S.W.3d at 490. But Defendants here do not rely merely on their "close relationship," and the claims against them are not merely similar or interconnected. Rather, there is a complete identity of the claims against them, all of which are based on a single employment relationship.

Hewitt offers the decisions in *Dunn*, 112 S.W.3d 421, cited above, and *Estate of Sample v. Travelers Indem.*, 603 S.W.2d 942 (Mo. App. 1980), as fair examples of his point. They are not.

Dunn holds only that a guarantor cannot be compelled to arbitrate claims for the principal debt, even where the principal debtor has signed an arbitration agreement. 112 S.W.3d at 434-35. But that's because the guarantor's obligation, while arising from the original debt, is independent of it; a claim against a guarantor is based on a separate agreement and has different elements and defenses than a claim against the debtor, and the two of them often have divergent and conflicting interests. But here Hewitt alleges the exact same cause of action against all Defendants, all arising from Hewitt's employment with the St. Louis Rams Partnership.

The *Travelers* case has nothing to do with arbitration, and stands only for the proposition that the liability of a surety is the same as that of his principal. The proper resolution of that issue has no bearing on this case.

Failing on these points, Hewitt cites *McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994), for the proposition that an integration clause "expresses the intent of the parties to limit arbitral rights to signatories." (Relator's brief at 48.) But *McCarthy* is, again, distinguishable because the party seeking arbitration did not sign that agreement in his individual capacity, but only in his representative capacity for the signatory company. *Id.* at 356. Because the *McCarthy* plaintiff asserted separate claims against that defendant in

his personal rather than his corporate capacity, these claims were not part of the "integrated" contract and were not arbitrable. *Id.* at 359.

Hewitt does not allege here that the nonsignatory Defendants did anything to him that the signatory did not do. Indeed, he had no relationship with them independent of his relationship with the signing entity, the St. Louis Rams Partnership. He cannot now tag these parties onto his case and thereby hope to avoid his promise to arbitrate. He should not be permitted to escape the consequences of his agreements or his pleadings. He should be compelled to arbitrate all disputes with his "employer" as he has promised to do for decades. It would be wasteful, and would potentially give rise to inconsistent outcomes, for Hewitt to attempt litigate his claims against these Defendants separately, when those claims arise solely from his employment relationship with the St. Louis Rams Partnership. Hewitt's agreement to arbitrate should be enforced.

Moreover, for purposes of *this* proceeding, Hewitt has certainly failed to show that he has a clearly established, pre-existing right with regard to this issue that is worthy of writ review. He does not, and his writ petition should be denied.

CONCLUSION

Because Hewitt has failed to meet his burden of establishing that his appellate remedy is inadequate and that he has any right, much less a clearly established and pre-existing right, to the remedy he seeks, his writ petition must be denied.

Respectfully submitted,

SHER CORWIN WINTERS LLC

/s/ Bradley A. Winters
Bradley A. Winters, #29867
190 Carondelet Plaza, Suite 1100
St. Louis, Missouri 63105
(314) 721-5200
(314) 721-5201 (Fax)
bwinters@scwstl.com

Attorneys for Respondent

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 _14,846_ words. The brief is being electronically filed with the Court on this _14th__ day of April, 2014.

/s/ Bradley A. Winters

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Respondent's Substitute Brief, with the appendix, was filed electronically with the Court on this 14th day of April, 2014, and served by operation of the Missouri E-filing System upon John D. Lynn, Sedey Harper PC, 2711 Clifton Ave., St. Louis, MO 63139. The undersigned further certifies that a true and correct copy of the Substitute Brief of Respondent, with the appendix, was sent by U.S. Mail, postage prepaid, this 14th day of April, 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/ Bradley A. Winters