IN THE SUPREME COURT OF MISSOURI

ROBERT EATON, Respondent, vs. CMH HOMES, INC. Appellant, and SOUTHERN ENERGY HOMES, INC., and HENRY CONCRETE, LLC, Defendants.	)	**Appeal No.: SC94374** Appeal from the Circuit Court of Lincoln County, Missouri Forty-Fifth Judicial Circuit

SUBSTITUTE BRIEF OF APPELLANT CMH HOMES, INC.

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STATEMENT OF JURISDICTION

This is an appeal from an Order denying Appellant CMH Homes, Inc.'s Motion to Dismiss or Stay and Compel Arbitration. (L.F. 0077; A-35).

The Circuit Court's original Order was entered on August 5, 2013. (L.F. 0065). After granting CMH's Motion to Set Aside and Reissue Order filed August 15, 2013 (L.F. 0066), the Circuit Court, on August 28, 2013, entered a new Order denying CMH's Motion to Dismiss or Stay and Compel Arbitration. (L.F. 0077; A-35). On August 29, 2013, CMH timely filed its Notice of Appeal. (L.F. 0079).

By Order (A-36) and Memorandum Supplementing Order (A-38) dated June 24, 2014, the Missouri Court of Appeals, Eastern District, affirmed the Circuit Court's Order. The Court of Appeals subsequently denied CMH's Application for Transfer. (A-53).

On September 30, 2014, this Court sustained CMH's Application for Transfer. (A-67).

This Court has jurisdiction under V.A.M.S. 435.440.1(1) (2013) which expressly grants the right to appeal orders denying an application to compel arbitration. *Whitney v. Alltel Commc'ns., Inc.*, 178 S.W.3d 300, 306 (Mo. App. W.D. 2005). Further, this Court has jurisdiction under the Federal Arbitration Act, 9 U.S.C.A. § 16 (2014), which permits an appeal from an order denying a petition to order arbitration. *Estate of Athon v. Conseco Fin. Servicing Corp.*, 88 S.W.3d 26, 29 (Mo. App. W.D. 2002).

STATEMENT OF FACTS

Respondent Robert Eaton purchased a manufactured home from CMH Homes, Inc. (hereinafter "CMH") on April 16, 2009. (L.F. 0048; A-25). The Manufactured Home Promissory Note, Security Agreement and Disclosure Statement (hereinafter "the contract") included an arbitration clause governed by the Federal Arbitration Act, 9 U.S.C.A. §§ 1-14 (2014). (L.F. 0019; A-15).

This lawsuit commenced on September 27, 2012 when Mr. Eaton filed his Petition against defendants CMH, Southern Energy Homes, Inc. and Henry Concrete, LLC in the Associate Circuit Court of Lincoln County, Missouri. (L.F. 0005; A-1). In his Petition, Mr. Eaton alleged negligence, fraud in the inducement, negligence and/or intentional misrepresentation, strict liability and breach of contract against CMH and Southern Energy Homes. (L.F. 0005; A-1). The case was certified to the Circuit Court of Lincoln County, Missouri by Order on December 4, 2012. (L.F. 0031). CMH filed its Answer on December 14, 2012. (L.F. 0032).

On March 15, 2013, CMH filed a Motion to Dismiss or Stay and Compel Arbitration (hereinafter "CMH's Motion to Compel Arbitration" or "CMH's Motion") based on the arbitration agreement in the Manufactured Home Promissory Note, Security Agreement and Disclosure Statement between Mr. Eaton and CMH. (L.F. 0041; A-18). Mr. Eaton filed a Response to that Motion on March 29, 2013 (L.F. 0051; A-26) and CMH filed its Reply to Mr. Eaton's Response on April 10, 2013. (L.F. 0059; A-31).

On August 5, 2013, the Circuit Court entered an Order denying CMH's Motion to Compel Arbitration. (L.F. 0065). However, because neither CMH nor Mr. Eaton received a copy of the Circuit Court's Order and only became aware of it on August 15, 2013, CMH filed a Motion to Set Aside and Reissue Order citing Missouri Supreme Court Rule 74.03 (2013). (L.F. 0066). On August 28, 2013, the Circuit Court set aside the August 5, 2013 Order and reissued an Order denying CMH's Motion to Compel Arbitration. (L.F. 0077; A-35).

On August 29, 2013, CMH filed its Notice of Appeal with the Missouri Court of Appeals Eastern District. (L.F. 0079). CMH filed its initial brief on March 10, 2014. Mr. Eaton's brief was filed April 9, 2014. CMH filed its reply brief on April 22, 2014.

Oral arguments were heard on June 4, 2014. By Order and Memorandum entered June 24, 2014, the Missouri Court of Appeals, Eastern District, affirmed the trial court's order denying CMH's Motion to Compel Arbitration. (A-36; A-38). Pursuant to Mo. R. Civ. P. 83.02, CMH filed its Application for Transfer to the Supreme Court in the Missouri Court of Appeals Eastern District on July 7, 2014. (A-45). The application was denied on July 28, 2014. (A-53).

On August 7, 2014, CMH filed its Application for Transfer to the Supreme Court in the Missouri Supreme Court pursuant to Mo. R. Civ. P. 83.04. (A-54). On August 21, 2014, the Missouri Supreme Court requested Mr. Eaton file suggestions in opposition to CMH's Application for Transfer. (A-60). Mr. Eaton filed his Suggestions in Opposition on August 29, 2014. (A-61). CMH's Application for Transfer was sustained on September 30, 2014. (A-67).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE MISSOURI LAW FAVORS ARBITRATION IN THAT IT IS A SPEEDY, EFFICIENT AND LESS COSTLY ALTERNATIVE THAN COURT LITIGATION TO RESOLVE CONTRACT DISPUTES.

Bass v. Carmax Auto Superstores, Inc., No. 07-0883-CV-W-ODS, 2008 WL 2705506 (Mo. App. W.D. July 9, 2008)

Grossman v. Thoroughbred Ford, Inc., 297 S.W. 3d 918 (Mo. App. W.D. 2009)

Swain v. Auto Services, Inc., 128 S.W.3d 103 (Mo. App. E.D. 2003)

Village of Cairo v. Bodine Contracting Co., 685 S.W.2d 253 (Mo. App. W.D. 1985)

II. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION AGREEMENT IS NOT UNENFORCEABLE IN THAT THE CONTRACT, WHEN READ AS A WHOLE, MEETS THE REQUIREMENT OF MUTUALITY OF CONSIDERATION.

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

III. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE IN THAT IT DOES NOT EMPOWER CMH TO DIVEST ITSELF WHOLLY OF THE OBLIGATION TO ARBITRATE AND, WHEN VIEWED ON A CASE-BY-CASE BASIS, IT IS NOT AN AGREEMENT THAT NO PERSON IN HIS SENSES AND NOT UNDER DELUSION WOULD MAKE.

Brewer v. Missouri Title Loans, 364 S.W.3d 486 (Mo. banc 2012)

Greene v. Alliance Auto., Inc., 435 S.W.3d 646 (Mo. App. W.D.2014)

Swain v. Auto Services, Inc., 128 S.W.3d 103 (Mo. App. E.D. 2003)

IV. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE ANY PERCEIVED LACK OF MUTUALITY OF CONSIDERATION CAN BE RESOLVED IN THAT THE REMEDY IS TO ALLOW EATON TO LITIGATE COUNTERCLAIMS DIRECTLY RELATED TO ACTIONS BROUGHT BY CMH PURSUANT TO THE EXCEPTIONS OF THE ARBITRATION PROVISION.

Greenpoint Credit, LLC v. Reynolds, 151 S.W.3d 868

(Mo. App. S.D. 2004)

V. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE METHOD FOR SELECTING AN ARBITRATOR IS NOT UNCONSCIONABLE IN THAT IT ALLOWS EATON TO PARTICIPATE IN THE SELECTION PROCESS.

9 U.S.C.A. § 5 (2014)

Heller v. TriEnergy, Inc., 877 F. Supp. 2d 414, 431 (N.D. W.V. 2012)

VI. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE FEDERAL ARBITRATION ACT DOES NOT AFFECT EATON'S RIGHTS UNDER MISSOURI LAW IN THAT IT MERELY CREATES LAW TO ESTABLISH AND REGULATE THE DUTY TO HONOR ARBITRATION AGREEMENTS.

Dean Witter Reynolds, Inc. v. McCoy, 853 F. Supp. 1023, 1033 (D. Tenn., E.D. 1995)

Swain v. Auto Services, Inc., 128 S.W.3d 103 (Mo. App. E.D. 2003)

VII. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE, EVEN AFTER HENRY CONCRETE, LLC ANSWERS EATON'S PETITION, IT CANNOT BE FORCED TO PARTICIPATE IN THE ARBITRATION IN THAT IT WAS NOT A SIGNATORY TO THE CONTRACT.

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

STANDARD OF REVIEW

"An appellate court's review of a trial court's denial of a motion to compel arbitration is de novo." *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 527 (Mo. 2009). "An appellate court's review of the arbitrability of a dispute is de novo." *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. 2003).

ARGUMENT

Respondent Robert Eaton purchased a manufactured home from CMH on April 16, 2009. (L.F. 0048; A-25). The contract contained the following arbitration provision:

> **ARBITRATION:** All disputes, claims or controversies arising from or relating to this contract, or the subject hereof, or the parties, including the enforceability of this arbitration agreement or provision and any acts, omissions, representations and discussions leading up to this agreement, hereto, including this agreement to arbitrate, shall be resolved by mandatory binding arbitration by one arbitrator selected by Seller with Buyer's consent. This agreement is made pursuant to a transaction in interstate commerce and shall be governed by the Federal Arbitration Act at 9 U.S.C. Section 1. Judgment upon the award rendered may be entered in any court having jurisdiction. The parties agree and understand that they choose arbitration instead of litigation to resolve disputes. The parties understand that they have a right to litigate disputes in court, but they prefer to resolve their disputes through arbitration, except as provided herein. **THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY**

RIGHT THEY HAVE TO A JURY TRIAL. The parties agree and understand that all disputes arising under case law, statutory law and all other laws, including, but not limited to, all contract, tort and property disputes will be subject to binding arbitration in accord with this contract. The parties agree that the arbitrator shall have all powers provided by law, the contract and the agreement of the parties. The powers shall include all legal and equitable remedies including, but not limited to, money damages, declaratory relief and injunctive relief. Notwithstanding anything hereunto the contrary, Seller retains an option to use judicial (filing a lawsuit) or non-judicial relief to enforce a security agreement relating to the Manufactured Home secured in a transaction underlying this arbitration agreement, to enforce the monetary obligation secured by the Manufactured Home or to foreclose on the Manufactured Home. The institution and maintenance of a lawsuit to foreclose upon any collateral, to obtain a monetary judgment or to enforce the security agreement shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing of

> a counterclaim in a suit brought by Seller pursuant to this provision.

(L.F. 0020; A-15).

On September 27, 2012, Mr. Eaton filed suit in Lincoln County, Missouri alleging damages arising from the purchase, installation and use of the manufactured home. (L.F. 0005; A-1). On March 15, 2013, CMH filed its Motion to Compel Arbitration referencing the arbitration provision set out above. (L.F. 0041; A-18).

I. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE MISSOURI LAW FAVORS ARBITRATION IN THAT IT IS A SPEEDY, EFFICIENT AND LESS COSTLY ALTERNATIVE THAN COURT LITIGATION TO RESOLVE CONTRACT DISPUTES.

Arbitration is a "speedy, efficient, and less costly alternative than court litigation to resolve contract disputes." *Village of Cairo v. Bodine Contracting Co.*, 685 S.W.2d 253, 263 (Mo. App. W.D. 1985) (citations omitted). Missouri courts are clear that they prefer the arbitration of disputes. Only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006). Doubts as to the enforceability of an arbitration clause should be resolved in favor of coverage. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 429 (Mo. 2003).

The case of *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo. App. E.D. 2003) is a good example of the application of Missouri law to arbitration agreements. The

Swain court wrote that if a court determines by ordinary rules of contract interpretation that a valid agreement to arbitrate exists, and that the dispute falls within the scope of the arbitration agreement, then arbitration must be compelled.

In the *Swain* case, the plaintiff had purchased an automobile service plan and brought an action for breach of contract and other claims against the service provider. The service provider moved to compel arbitration pursuant to the plan's arbitration clause. The trial court denied the service provider's motion because the requirement that arbitration occur in Arkansas deprived the plaintiff of meaningful redress.

In reversing the trial court's order, the *Swain* court found that the arbitration clause was a contract of adhesion, but also noted that such contracts are not automatically unenforceable. Only those provisions that fail to comport with reasonable expectations or are unexpected and are unconscionably unfair are unenforceable. The court noted further that an agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair.

In the *Swain* case, the court found the requirement that the arbitration take place in Arkansas was unfair and would not be enforced. However, the court did enforce the remainder of the arbitration agreement.

In *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W. 3d 918 (Mo. App. W.D. 2009), the plaintiffs filed suit alleging fraud and the defendant petitioned for an order of arbitration. The circuit court denied the defendant's motion without explanation and the defendant appealed.

The plaintiffs argued that the arbitration agreement was unconscionable because it limited any punitive damages award to $5,000. The appellate court held the cap on punitive damages, even if it subsequently was found to be invalid, did not impact the enforceability of the agreement to arbitrate. *Id.* at 924. In other words, the arbitration agreement was enforced and it was left to the arbitrator or a circuit court to determine the validity of the limit in the event punitive damages were awarded.

In *Bass v. Carmax Auto Superstores, Inc.*, No. 07-0883-CV-W-ODS, 2008 WL 2705506 (Mo. App. W.D. July 9, 2008), the plaintiff filed a class action suit regarding a fee she paid in her purchase of a car and the defendant moved to compel arbitration. The arbitration agreement's definition of claims was very broad but contained a provision waiving the parties' right to participate in a class action. This, the plaintiff argued, was unconscionable and therefore unenforceable.

The district court disagreed stating, "The very existence of an arbitration clause creates a 'presumption of arbitrability' that should be controlling unless there is 'positive assurance' that the contract cannot be interpreted to include the particular dispute at issue." The court found the plaintiff's claim fell within the purview of the arbitration agreement. Further, the court found the class action waiver was not unconscionable because the arbitration provision did not place any other limits on plaintiff's remedy. Accordingly, the motion to compel arbitration was granted. *Id.* at *3.

In the present case, Mr. Eaton has alleged negligence, fraud in the inducement, negligent and/or intentional misrepresentation, strict liability and breach of contract

against CMH and Southern Energy Homes. (L.F. 0005; A-1). As set out above, the arbitration agreement provides "[a]ll disputes, claims or controversies arising from or relating to this contract, or the subject hereof, or the parties . . . shall be resolved by mandatory binding arbitration." (L.F. 0019; A-15). Under ordinary rules of contract interpretation, it is clear Mr. Eaton's claims are among those the arbitration agreement was intended to govern. Therefore, arbitration must be compelled.

II. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION AGREEMENT IS NOT UNENFORCEABLE IN THAT THE CONTRACT, WHEN READ AS A WHOLE, MEETS THE REQUIREMENT OF MUTUALITY OF CONSIDERATION.

Mr. Eaton contends the contract is one of adhesion, that is, a form contract created and imposed by the party with greater bargaining power on a "take this or nothing" basis. *Robin v. Blue Cross Hosp. Serv., Inc.*, 637 S.W.2d 695, 697 (Mo. 1982) (citations omitted). CMH denies that the retail purchase agreement was one of adhesion. Mr. Eaton was able to bargain for and choose the size, make and model of his home, as well as his desired finishes, appliances and other features. In *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006), the homebuyer plaintiffs purchased a home from the seller defendant under a preprinted contract which contained a provision giving the seller the unilateral right to require arbitration of <u>any</u> claim arising out of the contract or the home. Finding problems with their home, the homebuyers filed suit. When the seller moved to compel arbitration, the homebuyers argued the

contract was one of adhesion and the arbitration clause, because it allowed only the seller to choose whether to arbitrate or seek judicial relief, was unconscionable.

Noting that most of the contracts signed in this country are preprinted form contracts, this Court would not declare a form contract a contract of adhesion without additional proof by a party, such as the contract is non-negotiable, or that the buyer was unable to look elsewhere for more attractive contracts. In the instant case, Mr. Eaton has provided no such evidence to support his claim that the contract at issue is one of adhesion. In fact, the buyer and seller in manufactured home transactions normally negotiate price and features of the home. Further, Mr. Eaton could have chosen to purchase a home from another manufacturer.

In his Response to CMH's Motion to Compel Arbitration (L.F. 0051; A-26), Mr. Eaton contended the arbitration clause at issue is unconscionable because, while requiring him to arbitrate any and all disputes, the arbitration clause allows CMH to file a lawsuit to enforce a security agreement, enforce the monetary obligations secured by the home or to foreclose on the home.

The homebuyer plaintiffs in *Vincent* made a similar argument against an arbitration clause which allowed only the defendant seller to choose whether to arbitrate or seek judicial relief. *Id.* at 858. This Court referred to the plaintiff's argument as "the 'mutuality of obligations' defense to an attempt to force arbitration." *Id.* Addressing the issue for the first time in the context of an arbitration clause, this Court stated,

> The majority of courts adhere to the Restatement of Contract's 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. This is the clear result from Missouri law considering that the usual rules and canons of contract interpretation govern the subsistence and validity of an arbitration clause. Furthermore, the terms of a contract should be read as a whole. Finally, given Missouri's preference for the arbitrability of disputes, a rule of contract construction that would be an exception to the general rules of contract construction and that would make arbitration less likely should not be erected.
>
> This is in agreement with the cases from other jurisdictions that have labeled the 'mutuality of obligation' requirement a dead letter in contract law. The Restatement of Contracts provides that '[i]f the requirement of consideration is met, there is no additional requirement of . . . mutuality of obligation. As long as the requirement of consideration is met, mutuality of obligation is present, even if one party is more obligated than the other.

Id. at 858-59 (citations omitted).

The arbitration clause in *Vincent* reserved power to the seller well beyond the three types of claims exempted from arbitration by CMH. Nonetheless, because both

parties in *Vincent* had exchanged consideration in the sale of the home, this Court found "no reason to create a different mutuality rule in arbitration cases." *Id.* at 859.

Here, as in *Vincent*, Mr. Eaton's mutuality of obligation defense fails because both parties exchanged adequate consideration in the transaction. For a home of a certain size, with his selected features and appliances, Mr. Eaton agreed to pay a negotiated price. The terms of the arbitration were clear and able to be considered by both parties. Accordingly, under *Vincent*, the arbitration provision at issue is valid and enforceable and arbitration must be compelled.

III. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE IN THAT IT DOES NOT EMPOWER CMH TO DIVEST ITSELF WHOLLY OF THE OBLIGATION TO ARBITRATE AND, WHEN VIEWED ON A CASE-BY-CASE BASIS, IT IS NOT AN AGREEMENT THAT NO PERSON IN HIS SENSES AND NOT UNDER DELUSION WOULD MAKE.

In its opinion, the Court of Appeals relied heavily on *Greene v. Alliance Auto., Inc.*, 435 S.W.3d 646 (Mo. App. W.D.2014). The *Greene* case involved the sale of an automobile under a contract requiring arbitration of "'any dispute' between the parties . . . and apply[ing] to all matters arising out of or relating to the Contract or … 'in any way connected with the purchase and sale or financing of the Vehicle, or any resulting transaction or relationship.'" *Id.* at 653. The arbitration clause contained a self-help provision which provided:

> Self-Help: Notwithstanding this arbitration agreement, the Parties retain the right to exercise self-help remedies and to seek provisional remedies from a court, pending final determination of the Dispute by an arbitrator. No Party waives the right to elect arbitration of a Dispute by exercising self-help remedies, filing suit, or seeking or obtaining provisional remedies from a court.

Id. at 652.

The contract also required a buyer in default to pay court costs, attorneys' fees and reasonable expenses and provided Alliance "'all of the remedies provided by law and this Contract,' including repossession by 'legal process or self-help.'" *Id.* at 653.

It was alleged that Greene purchased an automobile and failed to make a payment. Alliance exercised self-help and repossessed the vehicle. When Greene filed suit, Alliance moved to compel arbitration. The *Greene* court found the agreement was unenforceable because it allowed Alliance to "exercise its primary remedy of self-help repossession without waiving arbitration of other disputes," while also "allow[ing] Alliance to unilaterally divest itself of the promise to arbitrate." *Id.* at 654. "A contract that purports to exchange mutual promises will be construed to lack legal consideration if one party retains the unilateral right to modify or alter the contract as to permit the party to unilaterally divest itself of an obligation to perform the promise initially made." *Id.* at 653-54 (citing *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 442 (Mo. App. W.D. 2010).

The arbitration provision at issue in the present case is wholly different from the agreement in *Greene*. In this case, CMH exempted from arbitration only actions to enforce a security agreement, and to enforce the monetary obligations secured by the home, or to foreclose on the home. Nothing more. The arbitration provision in the present case does not allow CMH to opt out of arbitration altogether or to unilaterally decide to pursue litigation as to whatever claim it chooses. Rather, the provision clearly sets out only three circumstances under which CMH could seek judicial relief and requires that CMH arbitrate all other claims just as must Mr. Eaton. CMH is bound by that language to the same degree as Mr. Eaton.

In *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. banc 2012) (Fischer, J. and Price, J., dissenting), the plaintiff borrowed $2,215 from the defendant company using the title to her vehicle as security for the loan. The annual percentage rate for the loan was 300 percent. The plaintiff made two payments totaling over $1,000 but her principal was reduced by only six cents. When the plaintiff filed a class action suit, the defendant company moved to compel arbitration pursuant to the loan agreement. This Court found the arbitration agreement was unconscionable and unenforceable because, *inter alia:* (1) the entire contract was non-negotiable; (2) the terms were extremely one-sided; (3) each party was to pay its own arbitration costs; (4) given that the agreement disallowed class action suits, an individual plaintiff effectively would have to proceed without counsel because it would not be financially viable for an attorney to pursue the complicated matter for such small damages; (5) while the plaintiff could only arbitrate, the defendant could "seek possession of the Collateral in the event of default by judicial

or other process including self-help repossession;" and (6) no consumer had ever arbitrated a claim against the defendant title company under the terms of the arbitration agreement. For these reasons, this Court found that, "the unconscionable aspects of the agreement indicate that it is a contract that no person 'in his senses and not under delusion would make.'" *Id.* at 495 (quoting *AT & T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1755 (2011) (Thomas, J. concurring)).

Like the plaintiff in *Brewer*, Mr. Eaton has asserted the defense of unconscionability to the arbitration provision at issue. When viewed on a case-by-case basis as instructed in *Brewer*, with the exception of the agreement exempting from arbitration three categories of actions, there is no similarity between the arbitration clause at issue and the arbitration clause in *Brewer*. Even with the exempted actions, the arbitration provision at issue is not one-sided at all. As pointed out above, CMH exchanged a substantial home completed to Mr. Eaton's specifications for an agreed upon price. There is no evidence that CMH had undue power or control over Mr. Eaton. There is no evidence Mr. Eaton was pressured to buy, did not understand or did not properly consider the arbitration clause. Clearly, this is not an agreement "such as no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept on the other." *Swain* at 107.

IV. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE ANY PERCEIVED LACK OF MUTUALITY OF CONSIDERATION CAN BE RESOLVED IN THAT THE REMEDY IS TO ALLOW EATON TO LITIGATE COUNTERCLAIMS DIRECTLY RELATED TO ACTIONS BROUGHT BY CMH PURSUANT TO THE EXCEPTIONS OF THE ARBITRATION PROVISION.

In *Greenpoint Credit, LLC v. Reynolds*, 151 S.W.3d 868 (Mo. App. S.D. 2004), the lender filed a petition for replevin of a manufactured home after Vernon Reynolds defaulted on his loan. Reynolds[1] filed a counterclaim for wrongful replevin and conversion, fraud and fraudulent misrepresentations, abuse of process and defamation. Greenpoint moved to compel arbitration based on an arbitration provision which provided, in relevant part:

> Arbitration. You and I agree to arbitrate any and all (1) disputes, torts, counterclaims, or any other matter in question between you and I arising out of, in connection

[1] The replevin action was directed to Reynolds and to Mary Nations who was alleged to have possession of the home at the time the action was filed. However, because Nations was not a party to the contract between Greenpoint and Reynolds, her counterclaims were not covered by the arbitration agreement and therefore are not discussed herein.

> with, or in any way relating to this Agreement ("Claims") (including whether a Claim must be arbitrated) and (2) any Claims arising out of, in connection with, or relating to a transaction involving you and I . . . . However, neither you or I can require the other to arbitrate (1) any proceeding in which a lien holder may acquire or convey title to or possession of any property which is security under this Agreement, ... Enforcement of this exception to arbitration at any time will not waive the right to arbitrate any other Claim . . . including those asserted as a counterclaim in a lawsuit under this exception to arbitration.

Id. at 871-72.

The *Greenpoint* court addressed the trial court's finding that the contract lacked mutuality. "Mutuality of obligation exists when both parties to a contract agree to certain obligations to the other, notwithstanding that the respective obligations need not be equal or commensurate with one another." *Id.* (citing *Warren v. Ray County Coal Co.*, 207 S.W.883, 885 (Mo. App. 1919)). However, as to the contract at issue, the court stated,

> A person accepting a contract that excepts a lien holder's action to acquire possession of the manufactured home from arbitration would not reasonably expect to be denied

> access to the state court in which the lien holder brings such an action in order to challenge the lien holder's claim and seek appropriate relief for wrongs by the lien holder that arise out of the facts that are at issue.

Id.

As a remedy, the court found unconscionable and unenforceable only that part of the contract that limited Reynolds' access to state courts when defending against a proceeding by Greenpoint to acquire or convey title to or possession of the property secured under the contract. This done, the court declared the contract no longer lacked mutuality of obligation. *Id.*

The court then addressed Reynolds' counterclaim and found that the counts for wrongful replevin and conversion, fraud and fraudulent misrepresentations and abuse of process were excepted from arbitration because they were related to Greenpoint's properly excepted claim for replevin. Reynolds' claim for defamation, however, fell within the parameters of the arbitration provision rather than the exception and therefore, had to be arbitrated.

Here, much like in *Greenpoint*, the contract has limited the exceptions from arbitration to the enforcement of a security agreement, enforcement of the monetary obligations secured by the home or foreclosure. The last sentence of the arbitration clause provides that a lawsuit filed by CMH as to any of these three causes of action "shall not constitute a waiver of the right of any party to compel arbitration regarding any other dispute or remedy subject to arbitration in this contract, including the filing

of a counterclaim in a suit brought by Seller pursuant to this provision." (A-24). (emphasis added.) To the extent this sentence could be construed to prevent Mr. Eaton from filing any counterclaim in response to a suit by CMH based on one or more of the exceptions, the Court of Appeals, consistent with *Greenpoint*, could have declared only that last sentence unenforceable.

Further, the contract itself provides for a *Greenpoint*-type result. The contract states, in relevant part:

> Wherever possible each provision of this contract shall be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this contract shall be prohibited by or be invalid under applicable law, such provision shall be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this contract.

(A-24).

Had the Court of Appeals followed *Greenpoint*, it would have resolved any perceived disparity between the parties as to the arbitration agreement while at the same time preserving the intent of the parties to the contract.

In any event, Mr. Eaton's claims against CMH are based on negligence, fraud in the inducement, negligent and/or intentional misrepresentation, strict liability and breach of contract. Mr. Eaton's claims clearly fall within the purview of the arbitration

clause and there is no question but that both Mr. Eaton and CMH are required to arbitrate those disputes raised by Mr. Eaton.

For these reasons, the approach taken by the *Greenpoint* court is the better solution in that it would resolve any perceived lack of mutuality as well as respect the intent of the contracting parties.

V. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE METHOD FOR SELECTING AN ARBITRATOR IS NOT UNCONSCIONABLE IN THAT IT ALLOWS EATON TO PARTICIPATE IN THE SELECTION PROCESS.

In his Response to CMH's Motion (L.F. 0051; A-26), Mr. Eaton also contended that the method for selecting the arbitrator is vague and unconscionably unfair to him. The arbitration agreement states the issue between the parties will be resolved "by one arbitrator selected by Seller with Buyer's consent." (A-23). The clause is quite clear and it gives Mr. Eaton veto power over CMH's selection. Mr. Eaton certainly, then, cannot complain he has no control over the process of selecting the arbitrator.

Nonetheless, even if this part of the arbitration provision was found to be vague or unconscionable, this Court can decide not to enforce this particular section and chose another method for selecting the arbitrator. In fact, by its own terms, the arbitration clause is governed by the Federal Arbitration Act, 9 U.S.C.A. §§ 1-14 (2014) (hereinafter "FAA") which, at section 5, provides that the court shall appoint an arbitrator in the event the selection method in the arbitration clause is inadequate or

nonexistent. It does not require that an otherwise valid arbitration clause be stricken. *See Heller v. TriEnergy, Inc.*, 877 F. Supp. 2d 414, 431 (N.D. W.V. 2012) (explaining that failure of method to select arbitrator does not render an arbitration clause unenforceable in that Section 5 of the FAA may provide appropriate relief).

VI. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE FEDERAL ARBITRATION ACT DOES NOT AFFECT EATON'S RIGHTS UNDER MISSOURI LAW IN THAT IT MERELY CREATES LAW TO ESTABLISH AND REGULATE THE DUTY TO HONOR ARBITRATION AGREEMENTS.

Mr. Eaton argued in his Response to CMH's Motion (L.F. 0051; A-26) that, because the arbitration clause states the contract "shall be governed by the Federal Arbitration Act . . .," CMH has chosen to avail itself of federal law thereby forcing him into that same choice. This, Mr. Eaton continues, deprives him the right to seek relief under Missouri law where he resides and where the transaction occurred.

The FAA does not require federal substantive or procedural law be applied to a specific issue or claim about which the parties are in dispute. Rather, it merely "creates a body of federal substantive law establishing and regulating the duty to honor arbitration agreements." *Dean Witter Reynolds, Inc. v. McCoy*, 853 F. Supp. 1023, 1033 (D. Tenn., E.D. 1995) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)). "The substantive law created by the FAA is applicable in both federal and state courts." *Id.* (citing *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984)).

Section 2 of the FAA provides, in pertinent part, the following:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . **shall be valid, irrevocable, and enforceable**, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2 (2014) (emphasis added).

"Commerce" is defined as "commerce among the several States." 9 U.S.C.A. § 1 (2014).

CMH Homes, Inc. is a citizen of the State of Tennessee while Mr. Eaton is a citizen of Missouri. Therefore, because the contract at issue involves interstate commerce, the arbitration agreement is covered by the FAA.

Mr. Eaton has based his claim on alleged negligence, fraud in the inducement, negligent and/or intentional misrepresentation, strict liability and breach of contract against CMH and Southern Energy Homes. The arbitration clause applies to "[a]ll disputes, claims or controversies arising from or relating to [the] contract, or the subject [thereof], or the parties, including the enforceability of [the] arbitration agreement or provision and any acts, omissions, representations and discussions leading up to [the] agreement . . . ." Mr. Eaton's claims clearly fall within the purview of the arbitration clause.

Congress' purpose in enacting the FAA was "to require courts to enforce privately negotiated arbitration agreements, like other contracts, in accordance with their terms." *Id.* (citing *Volt Info. Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). Therefore, "if a court determines by ordinary rules of contract interpretation that a valid agreement to arbitrate exists and that the dispute falls within the scope of that agreement, then arbitration must be compelled." *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo. App. E.D. 2003).

Enforcing the arbitration agreement will not deny Mr. Eaton his right to seek relief under Missouri law and Mr. Eaton's argument against use of the FAA must fail.

VII. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE, EVEN AFTER HENRY CONCRETE, LLC ANSWERS EATON'S PETITION, IT CANNOT BE FORCED TO PARTICIPATE IN THE ARBITRATION IN THAT IT WAS NOT A SIGNATORY TO THE CONTRACT.

In his last argument in his Response to CMH's Motion (L.F. 0051; A-26), Mr. Eaton called CMH's Motion to Compel Arbitration "premature" because defendant Henry Concrete, LLC has not answered his Petition. Mr. Eaton reasons arbitration would be inefficient because Henry Concrete's answer may affect the contract and its arbitration clause.

Mr. Eaton's concern is misplaced, however. Henry Concrete was not a party to the arbitration agreement between Mr. Eaton and CMH. Therefore, while Henry Concrete may participate in the arbitration should it so choose, it, as a general rule,

cannot be forced into arbitration. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 436 (Mo. 2003). *See also United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("Arbitration is contractual by nature – 'a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."); *Greenwood v. Sherfield*, 895 S.W.2d 169, 174 (Mo. App. S.D. 1995) (explaining that while federal policy favoring arbitration is strong, it alone cannot authorize a non-party to invoke arbitration or require a non-signatory to arbitrate).

Further, Henry Concrete was served with process on November 14, 2012 (L.F. 0027) but has not yet entered an appearance or filed an answer. Mr. Eaton, however, has not taken any steps to obtain a default judgment against it. Mr. Eaton should not be allowed to use his decision to not pursue Henry Concrete as a way to avoid the arbitration to which he contractually agreed.

Finally, the arbitrability of Mr. Eaton's claims against CMH is not affected even if Mr. Eaton is not contractually required to arbitrate his claims against Henry Concrete. The FAA "requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238, 1242 (1985). (emphasis in original.)

CONCLUSION

There is no question that Missouri courts favor enforcement of arbitration clauses. Under the ordinary rules of contract interpretation, Mr. Eaton's claims fall within the scope of the arbitration agreement.

Further, because Mr. Eaton had the opportunity to negotiate some of the terms of the contract, the contract is not one of adhesion. The arbitration agreement is not unconscionable because the parties exchanged consideration in the sale of the manufactured home and because Mr. Eaton is allowed to participate in the selection of an arbitrator. Further, CMH is not allowed under the arbitration agreement to unilaterally divest itself wholly of the obligation to arbitrate and because the terms of the agreement are not such that no person in his senses would agree to make. The Federal Arbitration Act is consistent with Missouri's preference for arbitration and the application of the Act does not affect Mr. Eaton's rights under Missouri law. Finally, because Henry Concrete, LLC was not a signatory to the arbitration agreement and therefore cannot be required to arbitrate, its failure to answer Mr. Eaton's Petition has no bearing on the arbitration agreement. For these reasons, the arbitration of this matter must be compelled.

WHEREFORE, for the foregoing reasons, Appellant CMH Homes, Inc. prays this Honorable Court reverse the decision of the trial court and remand this matter to the Circuit Court of Lincoln County, Missouri with instructions to grant CMH's Motion to Dismiss or Stay and Compel Arbitration, for costs and for such other and further relief as this Court deems just and appropriate.

Dated: October 27, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Mo. R. Civ. P. 84.06(c) that:

1. This substitute brief includes the information required by Rule 55.03; and
2. This substitute brief complies with the limitations contained in Rule 84.06(b) in that the word count for this substitute brief, excluding the cover, the certificate of service, the Rule 84.06(c) certificate, the signature block and the appendix is 7,200 words.

Dated: October 27, 2014.

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

ROBERT EATON, Respondent, vs. CMH HOMES, INC. Appellant, and SOUTHERN ENERGY HOMES, INC., and HENRY CONCRETE, LLC, Defendants.	)	**Appeal No.: SC94374** Appeal from the Circuit Court of Lincoln County, Missouri Forty-Fifth Judicial Circuit

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Substitute Brief of Appellant CMH Homes, Inc. was filed through the e-filing system with the Supreme Court of Missouri this 27th day of October, 2014, to be served by operation of the Court's electronic filing system on: Michael Sudekum, Mandel & Mandel, LLP, 1108 Olive Street, Fifth Floor, St. Louis, Missouri 63101, mike@mandelmandel.com.

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