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 REPLY BRIEF OF APPELLANT CMH HOMES, INC.

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VI. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS NOT UNENFORCEABLE IN THAT MISSOURI AND FEDERAL COURTS HAVE HELD THAT THE FEDERAL ARBITRATION ACT IS BINDING ON SIGNATORIES AND THERE IS NO EVIDENCE MR. EATON DID NOT NEGOTIATE THE APPLICATION OF THE FEDERAL ARBITRATON ACT.

9 U.S.C.A. § 5 (2014)

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

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE IN THAT THE PARTIES EXCHANGED MUTUAL, ADEQUATE CONSIDERATION AND THERE IS NO EVIDENCE MR. EATON DID NOT UNDERSTAND THE AGREEMENT.

Mr. Eaton asserts that the allegations of fraudulent inducement and misrepresentation made in his Petition do not fall within the arbitration agreement. That is incorrect. The arbitration agreement requires binding arbitration for "all disputes under case law, statutory law and all other laws, including, but not limited to all contract, tort and property disputes . . . ." The only exceptions are the three claims for which CMH retains the right to choose judicial relief: (1) enforcement of a security agreement; (2) enforcement of monetary obligations; and (3) foreclosure on the manufactured home. Clearly, claims for fraudulent inducement and misrepresentation must be arbitrated.

As Mr. Eaton points out, *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 (Mo. banc 2012) (Fischer, J. and Price, J., dissenting) states that each case will be looked at on a case-by-case basis. Reviewing the limited information in the sales contract, the record shows that Mr. Eaton wished to purchase a home from CMH. The contract shows Mr. Eaton selected a specific model of home with specific features at a bargained-for price. The transaction is similar to purchasing an automobile where a

customer may shop around, look at different makes, models, and features, and bargain for an acceptable price. There is nothing in the contract documents at issue to suggest Mr. Eaton did not understand what he was doing or that the bargaining positions between the parties were unequal. There is no evidence that the price paid for the home by Mr. Eaton was higher than typical market rates. There is no evidence that the interest rate charged Mr. Eaton was unconscionable or improper under the circumstances. A careful review of the available evidence indicates a normal transaction where good and sufficient consideration was given by both parties. In the absence of fraud, inadequacy of consideration is not a defense and the courts do not examine the adequacy of consideration. *Haretuer v. Klocke*, 709 S.W.2d 138, 139 (Mo. App. E.D. 1986). Unlike the facts of the *Brewer* case, there is no evidence here that: (1) the contract was non-negotiable and difficult for the average consumer to understand; (2) the terms of the agreement were one-sided; (3) CMH was in a superior bargaining position; and (4) no attorney would accept Mr. Eaton's case.

Certainly, looking at the transaction, and given that CMH sells dozens or hundreds of homes in Missouri every year, there is no evidence that this is a contract "no person in his senses and not under delusion would make." *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1755 (2011); *Brewer*, 364 S.W.2d at 495. In fact, the only similarity between the present case and the *Brewer* case is that the sellers[1] reserved

[1] Though referring to them as "seller" and "buyer" herein, CMH acknowledges the parties in *Brewer* actually were lender and borrower.

to themselves remedies outside of arbitration. However, the seller in *Brewer* was more extreme in that, in addition to reserving the right to seek judicial relief, it reserved for itself the remedy of physically taking the vehicle from the buyer.

Mr. Eaton claims that under a *Brewer* review, the arbitration clause lacks mutuality and contains unconscionable terms.

State ex rel. Vincent v. Schneider, 194 S.W.3d 853 (Mo. 2006), provides guidance on the issue of mutuality. *Vincent* states that as long as the requirement of consideration in the entire contract is met, mutuality of obligation is present. Both parties in this suit exchanged substantial consideration – CMH exchanged the home for the agreed-upon purchase price paid by Mr. Eaton. There is no lack of mutuality between CMH and Mr. Eaton.

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 AND MISSOURI COURTS ALLOW THAT THE OFFENDING PORTION OF THE AGREEMENT CAN BE STRICKEN.

Mr. Eaton argues that the section of the arbitration clause which allows CMH to seek judicial relief to enforce a security agreement, enforce the monetary obligations or foreclose on the home while seemingly disallowing Mr. Eaton to file a counterclaim is "what makes the clause unenforceable as a whole by failing in mutuality."

Both CMH and Mr. Eaton understand and agree that *Brewer* calls for a case-by-case analysis to determine whether an arbitration clause is unconscionable. When such an analysis is applied to the arbitration clause at issue, it becomes clear the clause is not so one-sided as to reach the level of unconscionability. Unlike the plaintiff in *Brewer* who objected to many terms of the arbitration agreement, Mr. Eaton has but one complaint – that CMH may exercise judicial relief under three specific circumstances. Mr. Eaton seeks to render the entire arbitration clause unconscionable – an approach that interferes with the freedom to contract and ignores the intent of the parties. Nonetheless, CMH denies that this section of the arbitration clause is unconscionable because the parties fairly bargained for the sale of the home, and because there is no evidence that Mr. Eaton did not read, understand and agree to each part of the arbitration clause, including the self-help clause. Mr. Eaton's complaint can be remedied by amending the alleged offending part of the otherwise enforceable arbitration clause to allow Mr. Eaton to assert counterclaims in court if CMH would file for judicial relief. (See *Greenpoint Credit, LLC v. Reynolds*, 151 S.W.3d 868 (Mo. App. S.D. 2004); *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo. App. E.D. 2004); and *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006)).

Further, none of the allegations of Mr. Eaton's Petition concern (a) enforcement of a security agreement; (b) enforcement of a monetary obligation; or (c) foreclosure. Therefore, even if CMH had not reserved judicial relief for those three categories, Mr. Eaton would still be required to submit his current claims to arbitration.

CMH urges this Court to reject the approach the court took in *Greene v. Alliance Auto., Inc.*, 435 S.W.3d 646 (Mo. App. W.D. 2014). In *Greene*, the court looked within the arbitration clause of the contract – just one part of a comprehensive agreement – to determine whether within the arbitration clause the parties had promised mutual consideration. This approach to contract interpretation has never been adopted in Missouri. As *Vincent* makes clear, sufficiency of consideration is analyzed – if at all – from the standpoint of the contract as a whole, not one specific clause.

III. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS NOT UNENFORCEABLE IN THAT IT DOES NOT EMPOWER CMH TO DIVEST ITSELF WHOLLY OF THE OBLIGATION TO ARBITRATE.

Mr. Eaton contends the arbitration clause is unfair because the three circumstances CMH has exempted from arbitration are the only three issues a seller would have against a buyer. Therefore, Mr. Eaton reasons CMH would never have to initiate arbitration. Such is not the case. For example, if due to negligence on Mr. Eaton's part, CMH's truck and/or equipment had been damaged on Mr. Eaton's property during delivery of his home, CMH must bring a claim for such damage in arbitration. Similarly, the arbitration clause would prevent CMH from seeking judicial relief against Mr. Eaton for defamation, libel or slander. Additionally, if Mr. Eaton failed to properly prepare his property for delivery, or timely install plumbing and

electric utilities on his property, delay in closing and delivery could subject CMH to additional costs. All these claims and more must be brought by CMH in arbitration.

These examples demonstrate Mr. Eaton's claim that the arbitration clause is one-sided is incorrect. Further, and as set out in CMH's Substitute Brief, adopting *Greenpoint Credit, LLC v. Reynolds*, 151 S.W.3d 868 (Mo. App. S.D. 2004) and striking the part of the clause purportedly preventing Mr. Eaton from filing a counterclaim against any action brought in court by CMH would resolve any perceived disparity between the parties.

Mr. Eaton attempts to buttress his position that the arbitration clause is unfair by referencing portions of the contract not at issue and attacking the percentage rate to which Mr. Eaton agreed when financing his home. However, the issues of contract rescission, breach and enforceability of non-arbitration parts of the sales contract are not at issue before this Court, including that CMH inadvertently admitted in its Answer that Mr. Eaton had signed the contract under duress, and are raised only to add confusion to the matter. The issue before the Court is whether the arbitration clause is unfair. Defenses to the contract as whole are in fact the issue of the underlying suit filed by Mr. Eaton and will be determined in the arbitration process itself.

In *Vincent*, 194 S.W.3d 853, this Court instructed that the contract is to be viewed as a whole to determine whether the requirement of consideration is met such that mutuality of obligation is present, not whether there is balance in each and every term of the contract. If Mr. Eaton's approach is adopted, Missouri courts will have to dissect each and every term of a contract whenever an arbitration – or any other –

provision is challenged. The better-reasoned approach was set out by this Court when it stated in *Vincent*, "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 859.

Mr. Eaton's reliance on *Baker v. Bristol Care, Inc.*, No. SC 93451, 2014 WL 4086378 (Mo. banc 2014) (Wilson, J., dissenting; Breckenridge and Fischer, JJ. concurring with dissent) to support his position that there is no mutuality of consideration to support the arbitration provision at issue herein is misplaced. In *Baker*, this Court found that continued at-will employment and the employer's promise to arbitrate claims while simultaneously retaining the unilateral right to amend, modify or revoke the agreement did not provide consideration sufficient to uphold the arbitration agreement. The instant case, however, does not involve the employment of Mr. Eaton but rather the sale of a home to him. Further, and importantly, CMH has not reserved any right to amend, modify or revoke the arbitration provision. The terms of the arbitration agreement are not subject to change. In these ways, *Baker* is not instructive here.

However, the dissent in *Baker* argued that where, as in both *Baker* and the instant case, the Federal Arbitration Act governs, "state law principles that purport to apply special rules for the formation of contracts containing promises to arbitrate are preempted . . ." *Id.* at *6. Applying this rule to the *Baker* case, the dissent stated, "Accordingly, Ms. Baker's consideration claim must be analyzed only under principles of Missouri law that are 'arbitration neutral,' i.e. that treat all contracts the same regardless of whether they contain a promise to arbitrate." *Id.* at *7 (citing *Allied-Bruce*

Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 281 (1995)) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.")

The dissent in *Baker* is consistent with this Court's holding in *Vincent* that, when looking at the contract has a whole, "As long as the requirement of consideration is met, mutuality of obligation is present, even if one party is more obligated than the other." *Vincent* at 859.

Lastly, Mr. Eaton argues that the arbitration agreement fails because it violates R.S. Mo. § 435.460 (2014) which requires a contract contain specific language in capitalized letters notifying the signatories to the contract of the existence of the arbitration provision. This argument is without merit, however. The notice provision of R.S. Mo. § 435.460 (2014) has been held to be invalid when applied to commercial contracts involving interstate commerce because it is preempted by the Federal Arbitration Act, 9 U.S.C.A. §§ 1, *et seq. Bungee Corp. v. Perryville Feed and Produce, Inc.*, 685 S.W.2d 837, 839 (Mo. 1985).

IV. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATON CLAUSE IS NOT UNENFORCEABLE IN THAT BOTH PARTIES GAVE MUTUAL AND ADEQUATE CONSIDERATION TO COMPLETE THE CONTRACT.

The language of the arbitration agreement is clear and concise, and all rights and duties of the parties are plain. It remains CMH's position that there is mutual and adequate consideration on both sides of the agreement – a home specifically selected by Mr. Eaton for an agreed-upon purchase price – and parties who knowingly and willingly agreed to the terms of the agreement as developed earlier in this brief.

However, if the part of the arbitration agreement denying Mr. Eaton the right to file a counterclaim in any litigation filed by CMH to (1) enforce a security agreement; (2) enforce a monetary obligation; or (3) foreclose on the manufactured home, the most efficient and equitable remedy is to amend the provision to allow Mr. Eaton to file a counterclaim in court rather than filing the same counterclaim in arbitration.

Mr. Eaton states that such a result would be inconsistent with contract formations, but he cites no cases in support of this position. On the contrary, many Missouri courts have done exactly that. In *Greenpoint Credit, LLC v. Reynolds*, 151 S.W.3d 868 (Mo. App. S.D. 2004), the arbitration clause allowed for the lender to file a replevin action in court, but did not allow the borrower access to that same court in order to assert claims of wrong by the lender arising out of the same facts. The appeals court struck only the provision denying the borrower access to court in those specific circumstances, but did not strike the arbitration clause as a whole or even the self-help clause in particular. Additionally, in *Swain*, 128 S.W.3d 103, the court struck the provision of the arbitration clause requiring arbitration in Arkansas but otherwise upheld the arbitration clause.

In *Vincent*, 194 S.W.3d 853, the court struck two sections of the arbitration clause it found unconscionable, but otherwise enforced the remainder of the arbitration clause.

Even in its initial review of the *Brewer* matter, this Court stated:

> The conclusion that Missouri Title Loans cannot be compelled to participate in class arbitration does not mean that Brewer must submit to individual arbitration. The trial court found that the class arbitration waiver was conscionable and unenforceable and ordered the case to proceed to arbitration for a determination of whether class arbitration is appropriate. In effect, the trial court, consistent with prior Missouri cases, severed what it found to be an unconscionable clause (the class arbitration waiver) from the otherwise enforceable arbitration contract.

Brewer v. Missouri Title Loans, Inc., 323 S.W.3d 18, 21 (Mo. 2010).

Missouri courts recognize that the preferred approach is to strike the offending clause while otherwise enforcing the rest of the arbitration clause. Mr. Eaton presents no compelling reason why the court should not follow this approach as well in the present case.

V. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS NOT UNENFORCEABLE IN THAT THE METHOD PROVIDED FOR SELECTING THE ARBITRATOR IS FAIR, REASONABLE AND GIVES MR. EATON VETO POWER OVER THE SELECTION OF THE ARBITRATOR.

That section of the arbitration agreement at issue concerning the selection of the arbitrator states as follows: "All disputes, claims or controversies…shall be resolved by mandatory binding arbitration by one arbitrator selected by Seller with Buyer's consent."

The language allows Mr. Eaton veto power over any arbitrator CMH might select.

Additionally, the Federal Arbitration Act, 9 U.S.C.A. § 5 (2014), states, in pertinent part:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein . . . , then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been

> specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Courts have found that the failure to specify the identity of the arbitrator, method for selecting an arbitrator, rules to govern arbitration, forum, location, whether arbitration is binding, or allocation of costs from the arbitration does not render an arbitration clause unenforceable. The court simply makes the necessary decision but enforces the remainder of the arbitration clause. (See *Heller v. Tri Energy*, 877 F. Supp. 2d 414, 431 (N.D. W.V. 2012); *Blinco v. Green Tree Servicing, LLC*, 400 F.3d 1308, 1312-13 (11th Cir. 2005); *South Alabama Pigs, LLC v. Farmer Feeders, Inc.*, 305 F. Supp. 2d 1252, 1261-62 (M.D. Ala. 2004); and *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1166-68 (D. S.D. 2010)).

Respondent points to *Vincent* because in that case the drafter of the agreement had the sole authority to select the arbitrator and the court found the clause unconscionable. That is not the situation in the Eaton case. However, the court in *Vincent* simply struck the offending part of the clause and enforced the remainder of the arbitration clause.

VI. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS NOT UNENFORCEABLE IN THAT MISSOURI AND FEDERAL COURTS HAVE HELD THAT THE FEDERAL ARBITRATION ACT IS BINDING ON SIGNATORIES AND THERE IS NO EVIDENCE MR. EATON DID NOT NEGOTIATE THE APPLICATION OF THE FEDERAL ARBITRATION ACT.

There is no question that the Federal Arbitration Act, 9 U.S.C.A. §§ 1, *et seq.*, is valid and enforceable. *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740. Mr. Eaton claims that the incorporation of the Federal Arbitration Act into the agreement is an example of an unconscionable and non-negotiated term in the contract. Mr. Eaton also appears to claim that because he is a citizen of Missouri and because the transaction occurred in Missouri, the Federal Arbitration Act should not apply to him. However, Mr. Eaton cites no legal authority for these positions.

This case is before the Court on the pleadings only. There is no evidence that the terms of the arbitration agreement were unilaterally imposed upon Mr. Eaton, were not negotiated, or that Mr. Eaton did not fully understand and agree with the arbitration provision. Additionally, there is no legal authority holding that applying the Federal Arbitration Act to an arbitration agreement is unconscionable. Missouri courts have identified a number of factors indicating unconscionability in the formation of a contract, such as high pressure sales tactics, unreadable fine print, misrepresentation or unequal bargaining positions. *Swain*, 128 S.W.3d 103. However, application of the

Federal Arbitration Act is not one of them. CMH denies that the contract in general, and the arbitration agreement in particular, is a contract of adhesion because both Mr. Eaton and CMH negotiated the terms of the contract including the model of the home, the features of the home, the price of the home and other features to the contract.

VII. THE TRIAL COURT ERRED IN DENYING CMH'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS NOT UNENFORCEABLE IN THAT HENRY CONCRETE, LLC WAS NOT A SIGNATORY TO THE ARBITRATION AGREEMENT AT ISSUE AND BECAUSE MR. EATON HAS NOT PLED THAT HENRY CONCRETE, LLC WAS AN AGENT OF CMH.

There is no evidence or allegation that Henry Concrete, LLC signed the contract of which the arbitration agreement is a part. As a non-signatory to the arbitration agreement, Henry Concrete, LLC cannot be compelled to arbitrate. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. 2003).

Additionally, there is no allegation in the pleadings that Henry Concrete, LLC was an agent of CMH.

CONCLUSION

There is no question that Mr. Eaton's claims fall within the scope of the arbitration agreement. The arbitration agreement is not unconscionable because the parties exchanged mutual, adequate 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 was not an agent for CMH, its presence is not required arbitration. 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: November 20, 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 reply brief includes the information required by Rule 55.03; and
2. This reply 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 and the signature block is 4,680 words.

Dated: November 20, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Substitute Reply Brief of Appellant CMH Homes, Inc. was filed through the e-filing system with the Supreme Court of Missouri this 20th day of November, 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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