IN THE SUPREME COURT OF MISSOURI

ROBERT EATON,	)	
	)	
Respondent,	)	No.: SC94374
	)	
v.	)	Appeal No. ED 100383
	)	
CMH HOMES, INC. and SOUTHERN ENERGY HOMES, INC.	)	Appeal from the Circuit Court of Lincoln County, Missouri
	)	
	)	
Appellants.	)	

SUBSTITUTE BRIEF OF THE RESPONDENT ROBERT EATON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTIONAL STATEMENT

The Respondent agrees with the Jurisdictional Statement of the Appellant.

STATEMENT OF FACTS

Consistent with the Supreme Court and Local Rules, the Respondent adopts the Statement of Facts as stated by Appellants in their brief.

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).

ARGUMENT

This case concerns the enforceability of the following arbitration clause:

> "All disputes, claims or controversies arising from or relating to this contract, or the subject hereof, or the parties, including the enforceability or applicability 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 into 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 the right to litigate disputes in court, but that 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. These 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 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. 46-47.

I. THE TRIAL COURT DID NOT ERROR IN DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THE CLAUSE IS UNENFORCEABLE IN THAT IT IS UNCONSCIONABLE, ILLUSORY AND IS OTHERWISE DEFECTIVE.

As a general rule, it is well-established that courts have and are willing to enforce valid arbitration agreements. Therefore, Appellant's initial assertion that arbitration

clauses – when valid and not unconscionable, illusory or otherwise defective – can serve a legitimate purpose is not disputed by Respondent.[1] This rationale is likely more true with sophisticated parties in a complex negotiation of all terms. Still, Missouri courts, like most states, have found that pre-printed form contracts are not in and of themselves invalid. See *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo.App.E.D. 2003). Notwithstanding the validity of arbitration as a method of dispute resolution, Missouri courts have refused to rubber-stamped these agreements in response to a challenge related to the enforcement of arbitration provisions even when the allegations fall within the arbitration agreement.

Traditionally, the courts, including this court, have analyzed these provisions under several broad rationales, including mutuality of consideration, unconscionable terms, and contracts of adhesion. The arbitration clause in this case, while potentially encompassing some of the allegations made by Respondent against Appellant[2] is defective in one or more of those requirements.

To bolster this concept, Appellant notes several cases. In *Swain*, the court sets out several general concepts that do are not disputed, including the notion "that those

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[1] The Supreme Court has observed that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements . . . ." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

[2] The allegations of fraudulent inducement and misrepresentation do not fall within the arbitration provision as they relate to the concept of contract formation itself.

provisions that fail to comport with reasonable expectations or are unexpected and unconscionably unfair are unenforceable." (Appellant's brief, pg. 11). In *Grossman v. Thoroughbred Ford, Inc.*, 297 S.W. 3d 918, 925 (Mo.App. W.D. 2009), the arbitration clause was found to be enforceable because it was not substantively and procedurally unconscionable under a pre-*Brewer* analysis. See *Brewer v. Missouri Title Loans, Inc.* 364 S.W.3d 486, 487 (Mo. 2012) (holding that the distinction between procedural and substantive unconscionable should be re-focused on the contract as a whole).

Finally, Appellant cites *Bass v. Carmax Auto Superstores, Inc.* No. 07-0883-CV-W-ODS, 2008 WL 2705506 (W.D.Mo. July 9, 2008) to support its position to compel arbitration in this case. While not binding on this court, in *Bass*, the district court found that an arbitration clause was valid in large part because it was not a contract of adhesion where the dealer paid the costs of any arbitration and plaintiff had choices in terms of financing arrangements. None of those choices are present in this case.

The rule garnered from these cases: While Missouri does not have a hard and fast rule invalidating form contracts due to the unworkable nature of such a rule (*see Swain*, 128 S.W.3d at 107), contracts with arbitration provisions are reviewed on a case specific assessment of the arbitration contract at issue. *Brewer* at 491. Such a review demonstrates that the Appellant's arbitration clause should be held as unenforceable as lacking mutuality and its unconscionable terms.

As a result, regarding the determination of which allegations of Respondent may fall within a valid arbitration clause, the further analysis herein demonstrates the

invalidity of this arbitration clause as a whole and this court need not reach the issue of which allegations fall within the clause and which do not.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION AGREEMENT IS NOT ENFORCEABLE IN THAT THE AGREEMENT DOES NOT MEET THE MUTUALITY OF CONSIDERATION REQUIREMENT.

The clause at issue is contained in a pre-printed form contract that permits the Respondent as the buyer to select options related to "the size, make, model of his home, as well as his desired finishes, appliances and other features." L.F. 43-48 and Brief of Appellant, pg. 13. While those features are minimally detailed in the retail purchase agreement, Respondent did select a particular home that was the basis of the purchase. A cursory review of the agreement itself contains no negotiated terms.

While not noted with particularity in the Trial Court's Order, this particular clause contains a self-help provision toward the end of its provisions that protects the Appellant by stating,

> "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 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."

Essentially, the Appellant, as the Seller, retains the right to file a lawsuit to enforce the security agreement, for monetary damages related to any breach or to foreclose on the home. Additionally, the retention of this power by Appellant shall not constitute a waiver of its right to compel arbitration and if enforced according to its terms, prohibit Respondent, as the buyer, from filing a counterclaim. This retention of power makes the clause unenforceable as a whole by failing in mutuality.

In *Brewer v. Missouri Title Loans*, this court re-stated its long-standing rule that "[t]his Court instead applies traditional Missouri contract law in looking at the agreement as a whole to determine the conscionability of the arbitration provision. 364 S.W.3d 486, 487 (Mo. 2012).

In determining whether a lack of mutuality prevents enforcement of arbitration, one of the bases utilized by this Court in *Brewer* to invalidate that arbitration agreement was the "the disparity between Brewer's remedial options and the title company's remedial options" in which the title company could pursue its remedies in a court of law, where the individual was limited to arbitration. *Brewer* at 495. A similar self-help protection is employed by the Appellant in its arbitration agreement.

In *Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646 (Mo.App.W.D. 2014), the Western District relying upon *Brewer*, held that an arbitration provision including a self-

help provision reserved only to one party was unenforceable. The court notes that "*Brewer* instructs that we are to no longer focus on procedural and substantive unconscionability, as we have in the past, but how unconscionability impacted the formation of the contract. *Id.* at 492 n.3." In explaining its holding, the court states, "[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. [3]

Similar to the holding in *Greene*, as the entity retaining the right of self-help in this agreement, Appellant "can exercise its primary remedy of self-help" without waiving the requirement of arbitration by Respondent. The court found such a provision unenforceable as no mutual promise to arbitrate existed. See *Greene*. Even more offensive in the Appellant's self-help provision is the specific rejection of the Respondent's ability to also use the judicial process despite the institution of proceedings by the Appellant. See L.F. 43-48 ("The institution … of a lawsuit … shall not constitute waiver of the right of any party to compel

[3] See also, *Sniezek v. Kansas City Chiefs Football Club*, 402 S.W.3d 580, 586 (Mo.App.W.D. 2013)("Because the Chiefs [the party seeking to enforce arbitration] did not prove that the Agreement was supported by consideration, they failed to establish the existence of a valid and enforceable arbitration contract.").

arbitration …including the filing of a counterclaim in a suit brought by Seller pursuant to this provision.").

Recently, this court affirmed a trial court's refusal to enforce an arbitration agreement in finding that the agreement lacked mutual consideration. In *Baker v. Bristol Care, Inc., et al.*, SC93451 (Mo. August 19, 2014), this court held that where an employer retained a "unilateral 'right to amend, modify or revoke this [employment] agreement upon thirty (30) days prior written notice to the Employee" that "its promise to arbitrate is illusory and is not consideration."

To contrast this analysis, Appellant asserts that *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo.2006) controls the analysis of this provision, in quoting the Restatement of (Second) Contracts, section 79 (1979)("[i]f the requirement of consideration is met, there is no additional requirement of ... `mutuality of obligation,"). However, a closer examination of the language of *Vincent* affirmed the requirement for consideration, just not mutuality in isolation, as fundamental to contract formation. *State ex rel. Vincent*, 194 S.W.3d at 859. Furthermore, while it is noted by Appellant as conflicting, *Vincent* ultimately held that "[i]t is unconscionable to have a provision in an arbitration clause that puts all fees for arbitration on the consumer. This is particularly true when the cost-shifting terms could work to grant one party immunity from legitimate claims on the contract." *State ex rel. Vincent*, 194 S.W.3d at 860.

So, while the *Vincent* opinion categorizes the agreement as unconscionable, contrary to Appellant's assertions, the court did not ignore the lack of mutuality in its analysis.

Furthermore, while *Baker* is an employment case, a similar analysis to its holding, *Brewer* and *Greene* should be employed in this case. The unilateral ability of the Appellant to seek relief outside of arbitration makes the arbitration agreement unenforceable as Missouri courts have recognized the requirement of mutuality with respect to these clauses.

In relying upon that rationale the trial court and the Court of Appeals' underlying opinion that an arbitration provision including a self-help provision reserved only to one party is unenforceable should be affirmed under this traditional notion of contract formation.

III. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS UNCONSCIONABLE IN THAT ITS TERMS ARE ONE-SIDED, NON-NEGOTIABLE AND OFFENSIVE TO GENERAL NOTIONS OF FAIRNESS.

While Appellant contends the trial court erred in finding that the arbitration clause unenforceable, the decision of the trial court should be affirmed because the contract is unconscionable.

This agreement between the parties is a contract of adhesion due to the lack of bargaining of terms. An arbitration clause in a contract of adhesion is not enforceable. *Vincent,* 194 S.W.3d 853 (2006). A contract of adhesion, as opposed to a negotiated contract, is a form contract that is created and imposed by the party with greater bargaining power. *Robin v. Blue Cross Hospital Service, Inc.* 637 S.W. 2d 695, 697 (Mo.

1982). While not mutually exclusive or inclusive of each other, a contract (of adhesion) is unconscionable when "[t]he terms of the contract are imposed on the weaker party and unexpectedly or unconscionably limit the obligations and liability of the stronger party." *Id.* at 697. An unconscionable contract including an arbitration clause will not be enforced. *Whitney v. Alltel Communications, Inc.* 173 S.W.3d 300, 308 (Mo.App.2005).

By distancing itself from the self-help provision is *Greene*, the Appellant contends that its provision "clearly sets out only three circumstances under which [Appellant] could seek judicial relief and requires [it] to arbitrate all other claims just as Mr. Eaton." Of course, this same language contains no circumstances by which Mr. Eaton could seek judicial relief and even prohibits a counterclaim when Appellant avails itself to its three separate options of judicial enforcement. Furthermore, as the seller of a manufactured home, the three circumstances where Appellant can seek judicial relief within reason encompass the most common rights that a seller would possibly seek against a buyer, i.e., enforcement of security interest, seeking money for non-payment, and foreclosure, leaves little else where it would need to arbitrate.

In *Brewer,* this court found an one-sided arbitration clause unconscionable. 364 S.W.3d at 495. The purpose of the unconscionability doctrine is to guard against one-sided contracts, oppression, and unfair surprise. *Id.* at 492-93. The *Brewer* court determined that an agreement can be found to be unconscionable when it is non-negotiable; when one party is in superior bargaining position; and when the terms of the agreement are extremely one-sided. *Id.* 493. While the court cautions that an unconscionable analysis may involve both procedural and substantive elements,

"[o]ppression and unfair surprise can occur during the bargaining process or may become evident later, when a dispute or other circumstances invoke the objectively unreasonable terms. In either case, the unconscionability is linked inextricably with the process of contract formation because it is at formation that a party is required to agree to the objectively unreasonable terms." *Id.*

The record reflects that Respondent purchased a manufactured home from Appellant. L.F. 6 & 32 (Answer of CMH to p. 5 of Petition). Appellant also admits that Respondent signed the contract for the home under duress. L.F. 7 & 32 (Answer of CMH to p. 9 of Petition). The annual percentage rate on the purchase is 9.68% and the amount financed of $104,156.30 will cost the Respondent $320,328.00 as a total purchase price. L.F. 43. In addition to the previously discussed self-help provision, the agreement gives Appellant a security interest in the manufactured home and the real property owned by Appellant. L.F. 43. The agreement also states that:

- The "Seller may take legal action against Buyer, and Seller may repossess the Manufactured Home." L.F. 46 (Delinquency and Default).
- "In the event of default, Buyer (Appellant) also agrees to pay Seller's expenses for (a) reasonable attorney's fees, not to exceed 15% of Buyer's unpaid debt … (b) court costs and disbursements; and (c) costs of repossessing the Manufactured Home…" L.F. 46 (Delinquency and Default).
- Any personal property of Buyer's in or attached to the Manufactured Home which is not subject to the Seller's security interest may be held by Seller without liability if the Manufactured Home is repossessed. L.F. 46 (Id.).

Appellant asserts that, as the drafter of the agreement, it is not similar to the loan company in *Brewer*. A review of this agreement on a case-by-case basis shows that the Appellant is a lot closer to the lender in *Brewer* than Appellant describes.

To avoid a finding of unconscionability, Appellant asserts the arbitration provision is valid because it exchanged a substantial home completed to Respondent's specifications. Disregarding the allegations in the petition that Appellant failed to perform under the agreement, the analysis of conscionability does not end with such a finding, instead courts review the formation of the entire agreement. Here, the reasonable inference in the above terms shows that Respondent was presented with a preprinted form contract with multiple pages of essential terms and conditions in small print which were non-negotiable. The agreement reflects that Respondent did not initial, check, or otherwise indicate on the agreement that he was electing arbitration after discussion, negotiation, or bargaining. Further, there is no evidence, by Appellant, that this was contemplated or even part of their procedures.

This agreement is therefore unconscionable substantively and procedurally in numerous aspects. The agreement fails to provide adequate notice that the Buyer must arbitrate its claims. The agreement violates R.S.Mo. §435.460 (Notice of Arbitration Procedures) in two ways: (1) the absence of the required capitalized language, and (2) the nonexistence of the required language adjacent to, or above the signature space on the agreement. Rather, the attempted mandatory binding arbitration provision is contained within a contract of adhesion drafted by Appellant, a large manufactured home retailer. There are few options in the essential terms of the contract and none related to arbitration.

Also, the arbitration clause seeks a substantively unfair advantage over Respondent by barring his access to civil courts and compelling arbitration for contract disputes, while leaving Appellant an option to use judicial relief to enforce the monetary obligations or to foreclose the home. This unequal and powerful tool is unduly harsh because it allows Appellant to seek judicial relief for three specific actions, but prohibits Respondent from seeking judicial relief for breaches or omissions committed by Appellant. The clause furthermore forces the Respondent to accept the policies and procedures of the Federal Arbitration Act and merely permits him to consent to the appointment of an arbitrator.

As a result, the agreement is unconscionable and the refusal of the trial court to enforce the arbitration agreement should be affirmed by this Court.

IV. THE TRIAL COURT DID NOT ERR IN DENYING CMH'S MOTION FOR ARBITRATION BECAUSE THE LACK OF CONSIDERATION AND UNCONSCIONABILITY DO NOT ALLOW FOR A JUDICIAL REMEDY IN THAT THE CHOICE OVER METHOD OF DISPUTE RESOLUTION WOULD REMAIN WITH THE APPELLANT.

Recognizing that the self-help provision falls within the exceptions to enforcement of a valid arbitration clause, the Appellant suggests modification of the clause is more appropriate result. Relying on the court's analysis in *Greenpoint Credit, LLC v. Reynolds*, 151 S.W.3d 868 (Mo.App.S.D. 2004), the Appellant suggests that the better result in this case is to allow a counterclaim ("to the extent the last sentence could be construed to prevent Mr. Eaton from filling any counterclaim") when and if Appellant seeks to enforce its right under the contract to seek judicial enforcement.

Such a result is inconsistent with notions of contract formation. In comparison to Appellant's clause, in *Greenpoint Credit*, the court notes, "the contract provides that neither party can require the other to arbitrate certain issues. This includes 'any proceeding in which a lien holder may acquire or convey ... possession of any property which is security under [the] Agreement.' " *Id*. At 875 [emphasis added.] The starting point of the court's analysis – the clause itself – is a more inclusive clause than the one at issue in this case lending itself to the result in *Greenpoint*.

Furthermore, while other courts have struck non-essential terms in arbitration clauses, "[w]hether a contract is severable in this manner depends on the circumstances of the case, such as whether the term is essential to the agreement, and is largely a question of the parties' intent. *Swain*, 128 S.W.3d at 108 ("the venue provision is not essential to enforcement of the rest of the arbitration clause.")

Here, the modification suggested by Appellants still results in a unilateral decision by one party – namely, the Appellant - to control the decision whether arbitration is the appropriate forum for a claim. Eliminating an unfair forum clause of an arbitration provision contrasts with the intention of a party to unilaterally allow it to choose whether a dispute should be arbitrated. Additionally, if the court trends toward the selective enforcement of particular provisions, it will provide less certainty to parties than the rule that unilateral dispute resolution selections are invalid under Missouri law.

As a result, this court should not modify the clause and should affirm the order of the Trial Court denying the Motion to Compel Arbitration.

V. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THE METHOD FOR SELECTING AN ARBITRATOR IS PART OF THE UNCONSCIONABLE ANALYSIS IN THAT THIS PROVISION IS ONE OF MANY EMPOWERING APPELLANT WITH MORE RIGHTS THAN RESPONDENT.

While not specifically noted by the trial court or the Court of Appeals, as noted by Appellant, the arbitration clause drafted by Appellant provides that the issue between the parties will be resolved "by one arbitrator selected by Seller with Buyer's consent." This provision is one example of the one-sided nature of the entire clause and is properly considered by this court as an example of the unconscionable analysis.

Appellants assert that the clause is enforceable because it includes an option for Respondent to participate in the arbitrator selection process by consenting to the Appellant's choice. In contrast to this minimal vesting of power, the remainder of the arbitration clause fails because the provision for selecting the arbitrator is vague, unduly harsh, and unfair to Respondent. *Vincent* at 858-861 (holding that the arbitration selection method was unconscionable where the drafter retained sole authority to select an arbitrator).

Here, the clause provides that disputes shall be resolved by mandatory binding arbitration by one arbitrator selected by Seller with Buyer's consent. This reliance on Buyer's consent as indicative of its fairness fails for two reasons. First, it does not fully proscribe the procedure for selecting the arbitrator. The clause leaves open the question of the number of selections each party has in selecting and consenting. Second, the

clause fails because it gives Appellant the unfair advantage of selecting the pool of potential arbitrators from which Respondent must pick. As the drafter of the clause, Appellant has a reasonably better knowledge of the pool of arbitrators and their history in making decisions. Such a process falls short of the mutuality of obligations. While the trial court in *Vincent* held that the selection process was unconscionable and enforced a different procedure, the case specific assessment here identifies this provision as another unfair term related to arbitration.

As a result, the trial court did not err and the order denying the motion to compel arbitration should be affirmed.

VI. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE REQUIREMENT THAT THE FEDERAL ARBITRATION ACT APPLIES IS UNCONSCIONABLE IN THAT THE RESPONDENT DID NOT NEGOTIATE IT APPLICATION AND AS A WHOLE DEMONSTRATES THE ADHESIVE NATURE OF THE AGREEMENT.

Appellant's assert the arbitration provision is valid because enforcing the agreement will not deny Respondent his right to seek relief under Missouri law. The Federal Arbitration Act is drafted to favor the enforcement of arbitration provisions. Generally, applicable state law contract defenses such as fraud, duress and unconscionability may be used to invalidate all or part of an arbitration agreement without contravening the FAA. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103, 107 (Mo.App.2003).

Here, it is not the incorporation of the FAA in and of itself that makes the clause invalid. Rather, it is yet another example of non-negotiated terms in the contract. It is essentially a choice of law agreement that was not subject to negotiations between Appellant and Respondent. It was listed among the many contract terms in the pre-printed contract presented to Respondent at the time of sale. Furthermore, the circumstances around the contract and purchase support the conclusion that FAA procedures were not negotiated and were imposed on Respondent. The Respondent is a resident of the State of Missouri. The contract between the parties was signed in the State of Missouri. Appellant sold and Respondent took delivery of the manufactured home in the State of Missouri, which is now in use in the State of Missouri. Now, Appellant seeks to prohibit Respondent from seeking relief under the laws of the state where he resides and where the transaction took place or use procedures that he did not negotiate as part of the agreement to protect his interests.

Therefore, because Appellant imposed another unconscionable contract term on Respondent, Appellant created a provision that should not be enforced by the Court and the trial court should be affirmed.

VII. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE APPELLANT'S MOTION IS PREMATURE IN THAT THERE ARE QUESTIONS OF AGENCY BETWEEN THE OTHER DEFENDANTS AND APPELLANT.

In his Petition, Respondent alleges that damages due to the negligence of Appellant by and through its agents, servants and employees. L.F. 9, Petition, para.

22(b). Henry Concrete poured the foundation where the manufactured home was placed. L.F. 7, Petition, para. 12. The Respondent expects that there may be evidence that Henry Concrete was an agent of the Appellant. "Whether an agency relationship exists is generally a factual question . . . ." *West v. Sharp Bonding Agency, Inc.*, 327 S.W.3d 7, 11 (Mo. App. W.D. 2010).

Therefore, in contrast to Appellant's position, any Motion to Compel Arbitration at the present time is premature because not all Defendants in this cause have answered Respondent's petition and this issue was pending before further action could be pursued against other Defendants. As a result, granting Appellant's Motion to Compel Arbitration would be improper at this point because it may affect the rights of the other Defendants against Respondent and/or other Defendants. Therefore, while not conceding that this issue should not otherwise be resolved on the previous points, any order compelling arbitration may be premature in that not all parties have responded to plaintiff's petition.

CONCLUSION

This Court should affirm the trial court's order and the Court of Appeal's opinion affirming that the denial of Appellant's Motion to Compel arbitration because the clause is unenforceable in that it contains no mutual consideration or obligation, is unilateral in the enforcement of arbitration, the choice of law and in the selection of arbitrations. Additionally, the arbitration clause fails because it violates R.S.Mo §435.460 in that it does not contain the statutorily required language to force mandatory binding arbitration.

Appellant chose to employ a pre-printed form sales contract that severely limited its financial and public relations exposure for claims while preserving its own ability to use the courts of this state for enforcement of its rights. An analysis of its terms finds them unenforceable under Missouri law.

WHEREFORE, for the foregoing reasons, Respondent Robert Eaton prays that this Honorable Court affirm the decision of the trial court and remand this matter to the Circuit Court of Lincoln County, Missouri for further proceedings consistent with the court's opinion, for costs, and for such other and further relief that this court deems just and necessary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this substitute brief complies with the limitations prescribed in the Missouri Supreme Court Rule 84.06(b) in that it contains 4,718 words excluding cover, table of contents, table of cases, certificate of service, and certificate of compliance; and certifies that the original signed copy is retained by the undersigned as required by Rule 55.03 .

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Respondent's Substitute Brief was filed through the e-filing system with the Missouri Supreme Court this 10th day of November, 2014, to be served by operation of the Court's electronic filing system on: Christopher P. Leritz, Leritz, Plunkert, and Bruning, P.C., 555 Washington Avenue, Suite 600, St. Louis, Missouri 63101, cleritz@leritzlaw.com.

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