IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ED104648

STATE OF MISSOURI, ex rel., THE REGIONAL CONVENTION AND SPORTS COMPLEX AUTHORITY,
Relator,

v.

THE HONORABLE MICHAEL D. BURTON,
Respondent.

Writ of Mandamus

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

Relators have filed this original writ proceeding requesting that a writ be issued to Respondent, the Honorable Michael D. Burton, of the Circuit Court of St. Louis County, ordering Respondent to deny Defendant the St. Louis Rams' Motion to Compel Arbitration due to the fact that the arbitration agreement is unenforceable and does not provide for declaratory judgment actions to be arbitrated. Respondent granted Defendant's Motion to Compel Arbitration.

This Court has jurisdiction to issue and determine original remedial writs pursuant to MO. CONST. ART. V, § 4.

STATEMENT OF FACTS

On May 1, 1996, The Regional Convention and Sports Complex Authority ("Relator") and the St. Louis Rams ("Defendant") executed the Training Facility Lease ("Lease") in which Relator agreed to lease real property located in Earth City, St. Louis County, Missouri, and to construct improvements on that property for use by Defendant as a football training facility.

On March 24, 2016, Relator filed its Petition in the Circuit Court of St. Louis County, Missouri, seeking a declaratory judgment that Section 38 of the Lease purportedly granting Defendant an option to purchase the training facility property is of no force and effect. Defendant has taken the position that the Option contained in Section 38 is valid and enforceable. Section 38 of the Lease provides, in relevant part:

> Lessor hereby grants to Lessee an option ("Option") to purchase the Premises for the sum of $1, which Option may be exercised by written notice from Lessee to Lessor sent at any time after the twenty-ninth (29th) anniversary to the RAMS Facilities Delivery Date (as defined in Section 5 of the Amended Lease). Upon exercise of the Option, Lessor shall execute and deliver to Lessee a quit claim deed conveying title to the Premises to Lessee and Lessee shall pay Lessor the sum of $1 as the purchase price for the Premises.

Additionally, the Lease provides for arbitration. Schedule I of the Lease, incorporated through Section 45, is the arbitration provision and provides as follows:

Any controversy, dispute or claim between the Parties hereto including, without limitation, any claim arising out of, in connection with, or in relation to the interpretation, performance or breach of this Lease shall be settled by arbitration conducted before three arbitrators in St. Louis, Missouri, in accordance with the most applicable then existing rules of the American Arbitration Association (or its successor or in the absence of a successor, an institution or organization offering similar services), and judgment upon any award rendered by the arbitrator may be entered by any federal or state court having jurisdiction thereof. Such arbitration shall be the exclusive dispute resolution mechanism. In the event the Parties are unable to agree on the three (3) arbitrators, the Parties shall select the three (3) arbitrators by striking alternatively (the first to strike being chosen by lot) from a list of thirteen (13) arbitrators designated by the American Arbitration Association (or its successor or in the absence of a successor, an institution or organization offering similar services); seven (7) shall be retired judges of trial or appellate courts resident in states other than Missouri, selected from the "Independent List" of retired judges (or its then equivalent) and six (6) shall be members of the National Academy of Arbitrators (or its successor or in the absence of a successor, an institution or organization having a similar purpose) resident in states other than Missouri. In the event of any such arbitration, the prevailing party shall be awarded its costs and reasonable attorneys' fees as part of the award. Each

of the parties to the arbitration shall bear the costs of the arbitration on such equitable basis as the arbitrator of the matter shall determine.

However, four portions of the Lease refer to litigation instead of arbitration. Those provisions of the Lease provide as follows:

- Section 30 of the Lease provides for the payment of reasonable attorneys' fees to the "Prevailing Party" in any action "to enforce the terms hereof or **declare rights** hereunder…." "Prevailing Party" is defined as "a Party who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, **judgment**, or the abandonment by the other Party of its claim or defense." By contrast, the separate attorneys' fees statement in the arbitration provision states that "In the event of any such **arbitration**, the prevailing party shall be awarded its costs and reasonable attorneys' fees as part of the **award**."
- Section 41 of the Lease provides: "If at any time a dispute shall arise as to any amount or sum of money to be paid by one Party to the other under the provisions hereof, the Party against whom the obligations to pay the money is asserted shall have the right to make payment 'under protest' and such payment shall not be regarded as a voluntary payment and there shall survive the right of said Party to **institute suit** for recovery of such sum."
- Section 26 of the Lease reads: "Cumulative remedies. Subject to the arbitration provisions set forth in Paragraph 45 hereof, no remedy or

election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity."

- Section 28 of the Lease reads in part: "Any **litigation** between the Parties hereto concerning this Lease shall be initiated in the City or County of St. Louis."

On April 25, 2016, Defendant filed an arbitration demand seeking a declaration that the Option is valid based upon its belief such claim is arbitrable under Schedule I of the Lease. That same day, Defendant also filed its Motion to Compel Arbitration and Memorandum in Support. Thereafter, Relator filed its Memorandum in Opposition to Defendant's Motion to Compel Arbitration and its Motion to Stay Arbitration. Relator argued: (1) that the arbitration provision is unenforceable because it "lacks mutuality and is not supported by adequate consideration;" and (2) that if the provision is found to be enforceable, the Lease does not require actions for declaratory judgment to be arbitrated. Defendant filed a consolidated pleading replying to Relator's Memorandum in Opposition and in opposition to Relator's Motion to Stay Arbitration. Relator subsequently filed a Reply Memorandum in Support of its Motion to Stay Arbitration. Following a hearing on the pending motions, Respondent entered its Order and Judgment granting Defendant's Motion to Compel Arbitration, denying Relator's Motion to Stay Arbitration, and dismissing the case.

On July 29, 2016, Relator filed its Petition for Writ of Mandamus and Suggestions in Support, seeking a preliminary and permanent writ of mandamus directing Respondent to stay arbitration and to reinstate the case on the Circuit Court's docket. On August 8,

2016, Defendant filed its Suggestions in Opposition to the Petition for Writ of Mandamus. This Court entered its preliminary order on August 25, 2016, ordering Respondent to reinstate the cause on the Circuit Court's docket and directing Relator and Respondent "to file briefs which focus on the issue of: whether or not the parties have entered into a valid and enforceable agreement to arbitrate pursuant to Missouri law."

POINTS RELIED ON

I. Respondent Erred In Granting Defendant's Motion to Compel Arbitration Because The Parties' Arbitration Agreement Is Invalid And Unenforceable In That It Lacks Mutual Consideration.

- *Jimenez v. Cintas Corp.*, 475 S.W.3d 679 (Mo. App. E.D. 2015)
- *Motormax Financial Services Corp. v. Knight*, 474 S.W.3d 164 (Mo. App. E.D. 2015)
- *Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646 (Mo. App. W.D. 2016).

II. Respondent Erred In Granting Defendant's Motion to Compel Arbitration Because, Even Assuming There Is A Valid And Enforceable Agreement To Arbitrate, The Arbitration Agreement Does Not Apply To Declaratory Judgment Actions, In That The Unambiguous Language Of The Lease Provides That Declaratory Judgment Actions Are To Be Litigated.

- *ChampionsWorld, LLC v. U.S. Soccer Federation, Inc.*, 487 F.Supp.2d 980, 989 (N.D. Ill. 2007)
- *Women's Care Specialists, LLC v. Troupin*, 408 S.W.3d 310, 319 (Mo. App. E.D. 2013)
- *Hopwood v. Citifinancial, Inc.*, 429 S.W.3d 425 (Mo. App. S.D. 2014)
- *Sankey v. Sears Roebuck & Co.*, 100 F.Supp.2d 1290 (M.D. Alabama 2000)

STANDARD OF REVIEW

Whether a dispute is covered by arbitration is relegated to the courts as a question of law. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). An appellate court's review of the arbitrability of a dispute is de novo. *Id.* at 428 (citing *Fru-Con Constr. Co. v. Southwestern Redevelopment Corp. II*, 908 S.W.2d 741, 743-44 (Mo. App. E.D. 1995)).

Point Relied On I: Respondent Erred In Granting Defendant's Motion to Compel Arbitration Because The Parties' Arbitration Agreement Is Invalid And Unenforceable In That It Lacks Mutual Consideration.

At the trial court, Relator argued that the arbitration provision lacks mutuality of consideration and, additionally, that the agreement is unconscionable. *See* Ex. C, § 3. Addressing this argument, the Court's judgment states:

> This court rejects Plaintiff's suggestion that the Lease may not be enforceable at all because it is "unconscionable," that is, one-sided and lacking of mutuality (because "the arbitration provision essentially grants Defendant the unilateral right to file a lawsuit while RSA does not have the corresponding right.") The unconscionability doctrine, however, guards against "one-sided contract, oppression, and unfair surprise." *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. banc 2015). This court hardly believes that Plaintiff, represented by a savvy attorney, was at such an unequal footing when it signed the Lease. The Lease as a whole is hardly unenforceable. The issue before the court is whether or not all of the terms of the contract are enforceable.

See Ex. D. Respondent failed to address Relator's argument that the arbitration agreement is void for lack of mutual consideration, instead focusing on whether the agreement is unconscionable. As set forth herein, the parties' arbitration agreement lacks a mutuality of consideration, rendering the agreement void and unenforceable. Accordingly, Respondent erred in compelling the parties to arbitrate.

As a preliminary matter, an extraordinary writ is the proper mechanism to review the trial court's grant of Defendant's Motion to Compel Arbitration. *See State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 805 (Mo. banc 2015).[1] Absent a writ of mandamus, Relator will be forced to proceed to arbitration in a case where the arbitration provision does not apply. *Id.* Such a result is "duplicative and unnecessary" and amounts to "a failure of judicial efficiency." *Id.* Accordingly, this Court's issuance of a writ of mandamus is the only appropriate remedy in this case.

In order to determine whether arbitration is required, the Court must first determine: (1) whether there is a valid agreement to arbitrate and (2) whether the specific dispute falls within the substantive scope of that agreement. *Bowers v. Asbury St. Louis, LLC*, 478 S.W.3d 423, 426 (Mo. App. E.D. 2015). Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate. *Motormax Financial Services Corp. v. Knight*, 474 S.W.3d 164, 168 (Mo. App. E.D. 2015) (abrogated on other grounds). Importantly, the party seeking to compel arbitration bears the burden of proving the existence of a valid and enforceable arbitration agreement. *Id.*

To be valid and enforceable, an arbitration agreement must have adequate consideration. *Id.* "Consideration consists either of a promise to do or refrain from doing something, or the transfer or giving up of something of value to the other party." *Id.* at 169 (citing *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 438 (Mo. App. W.D.

[1] Notably, Defendant, in its Suggestions in Opposition, does not dispute that a writ of mandamus is the appropriate remedy.

2010)). Contracts containing "mutual promises that impose a legal duty of liability on each party" are bilateral contracts supported by sufficient consideration. *Id.* Nonetheless, a contract lacks valid consideration "if it purports to contain mutual promises, yet allows one of the parties to retain the unilateral right to modify or alter the agreement as to permit the party to unilaterally divest itself of an obligation it otherwise promised to perform." *Id.* (citing *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 775 (Mo. banc 2014)).

Recent Missouri cases are instructive regarding the requirement of mutuality of consideration in agreements to arbitrate. Missouri courts have held that when one party is required to arbitrate a dispute, but the other party is able to proceed in court for the same dispute, the arbitration agreement lacks mutuality of consideration and is, therefore, void and unenforceable. *See Jimenez v. Cintas Corp.*, 475 S.W.3d 679 (Mo. App. E.D. 2015) (application for transfer denied); *Motormax*, 474 S.W.3d at 171 (application for transfer denied); *Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646, 654 (Mo. App. W.D. 2014).

In *Jimenez*, an employee and her employer entered into an agreement that purported to require the parties to arbitrate all claims (the "arbitration provision"), though expressly exempting some claims from arbitration. 475 S.W.3d at 686-87. However, another section of the agreement allowed the employer to bring actions in court to redress alleged violations of the non-compete provision; the employee did not have this same right. *Id.* at 687. This Court concluded that because the employer alone was exempted from arbitrating disputes arising under the non-compete provision, and the employee

would be bound to arbitrate those same disputes, the agreement to arbitrate was "devoid of consideration." *Id.* at 688. As such, the Court concluded that the employer's promise to arbitrate "[was] not valid consideration and [did] not support a determination that the parties formed a valid agreement under Missouri law." *Id.* at 689. Accordingly, the Court affirmed the trial court's judgment denying the employer's motion to compel arbitration. *Id.*

Similarly, in *Motormax*, this Court discussed an agreement between a consumer and lender that provided for arbitration of all disputes. 474 S.W.3d at 170. The agreement also permitted the lender to repossess the consumer's vehicle without waiving arbitration or review by a court. *Id.* at 170-71. Again, the Court concluded that the arbitration agreement lacked consideration and was unenforceable, as it allowed the lender to "unilaterally divest itself of the obligation to arbitrate." *Id.* at 171. In so holding, the Court referenced *Greene*, in which the Court held that where there is no mutual promise to arbitrate, because one party may proceed in court or by self-help repossession, the parties' agreement to arbitrate is unenforceable. *Id.* (citing *Greene*, 435 S.W.3d at 654).

Based upon *Jimenez*, *Motormax*, and *Greene*, it is clear that Missouri courts have concluded that arbitration agreements are unenforceable where the parties' promises to arbitrate are not mutual. The same is true of the arbitration agreement here. While the parties purportedly agreed to arbitrate "[a]ny controversy, dispute or claim" arising between them, Section 41 of the Lease also provides in part:

> If at any time a dispute shall arise as to any amount or sum of money to be paid by one Party to the other under the provisions hereof, the Party against whom the obligations to pay the money is asserted shall have the right to make payment 'under protest' and such payment shall not be regarded as a voluntary payment and there shall survive the right on the part of said Party *to institute suit* for recovery of such sum.

(Emphasis added). Although Section 41 appears to apply mutually to both parties, Defendant is the only party who, under the terms of the Lease, is required to make any payments. Section 1.5 of the Lease requires Defendant to make monthly rent payments; no provision of the Lease requires the Relator to make payments to Defendant. As a result, Section 41 essentially grants Defendant, in the event of a rent dispute, the unilateral right to file a lawsuit, while Relator does not have the corresponding right. In *Jimenez*, this Court pointed out that the exception to arbitration permitted the employer to "refrain from arbitrating those claims it is most likely to bring against [the employee]." 475 S.W.3d at 687. The same is true in the present case. As the agreement between the parties is a lease of property, the most likely claims to arise between the parties are related to the payment of rent.

In arguments presented to the trial court, Defendant cited to *Eaton v. CMH Homes, Inc.* for the contention that "lack of mutuality of the agreement to arbitrate does not by itself render an agreement to arbitrate unconscionable." 461 S.W.3d 426, 434 (Mo. banc 2015). The trial court also relied on *Eaton* in rejecting Relator's argument that the

arbitration provision is invalid. However, this case is not governed by *Eaton*, but rather by *Jimenez*, *Motormax*, and *Greene*.

In *Eaton*, the Court addressed the unconscionability of an arbitration agreement that did not contain mutual agreements to arbitrate. *Id.* The Court stated that in unconscionability analysis, one factor the courts must consider is whether the contract, as a whole, is supported by mutual consideration. *Id.* at 429. The *Eaton* Court did not consider the distinct issue presented in this case: whether the parties' arbitration agreement fails for lack of mutuality of consideration, as Defendant may proceed in court on claims that Relator is required to pursue through arbitration. As noted, this issue was addressed by *Jimenez*, *Motormax*, and *Greene*. If *Eaton* controls, the question presented in this case – whether the agreement to arbitrate is supported by mutual consideration – the outcome is that an arbitration provision that is completely one-sided, allowing one party to litigate all claims and the other party to arbitrate all claims, would be upheld if there were *any other* adequate consideration for the parties' agreement. *Greene*, *Jimenez*, and *Motormax* make clear that this is simply not an outcome that Missouri courts intended.

Notably, the Missouri Supreme Court denied transfer of *Jimenez* on the same day that it issued the *Eaton* opinion regarding unconscionability. This evidences that when the Missouri Supreme Court was presented with both lines of cases at the same time, the Court took note of the distinct differences in the issues presented. The *Eaton* line of cases addresses unconscionability, while *Greene* and *Jimenez* address lack of mutuality of consideration for arbitration agreements. As such, *Jimenez*, addressing lack of

mutuality of consideration, is not only good law, but is also bolstered by this Court's opinion in *Motormax* – which was decided **after** *Eaton* and transfer denied by the Missouri Supreme Court – and the Western District's earlier opinion in *Greene*.

As this Court stated in *Jimenez*, "[N]either party is bound unless both are bound." 475 S.W.3d at 686. Because the Lease does not bind both parties to arbitrate all claims, and allows Defendant to proceed in court for claims that Relator cannot pursue in court, the arbitration agreement lacks mutuality of consideration and is unenforceable. Accordingly, Respondent erred in granting Defendant's Motion to Compel Arbitration.

Point Relied On II: Respondent erred in granting Defendant's Motion to Compel Arbitration because, even assuming there is a valid and enforceable agreement to arbitrate, the arbitration agreement does not apply to declaratory judgment actions, in that the unambiguous language of the Lease provides that declaratory judgment actions are to be litigated.

Relator contends that, in the event this Court concludes the parties have a valid and enforceable agreement to arbitrate, this Court should nonetheless issue a permanent writ of mandamus to prevent Respondent from compelling the parties to arbitrate an issue that the parties did not agree to arbitrate. As set forth herein, Respondent failed to give effect to the clear and unambiguous language of the agreement, which provides that declaratory judgment actions are to be litigated.

As noted in Point I, *supra*, in determining whether arbitration is required, the Court must decide: (1) whether a valid agreement to arbitrate exists between the parties and (2) whether the specific dispute falls within the substantive scope of that agreement. *Bowers*, 478 S.W.3d at 426. The guiding principle of contract interpretation under Missouri law is that the Court will seek to ascertain the intent of the parties and to give effect to that intent. *Id.* The intent of the parties to a contract is presumed to be expressed by the ordinary meaning of the contract's terms. *Id.* The Court must give effect to the plain, ordinary, and usual meaning of the contract's words and consider the document as a whole. *Women's Care Specialists, LLC v. Troupin,* 408 S.W.3d 310, 319 (Mo. App. E.D. 2013) (citations omitted). Further, rules of contract construction in Missouri require that a contract be read to give effect to all provisions so as to avoid

rendering any provision superfluous. *Id.* A construction that attributes a reasonable meaning to all the provisions of the agreement is preferred over one that leaves some of the provisions without function or sense. *Id.* (citing *Stacy v. Redford*, 226 S.W.3d 913, 917 (Mo. App. S.D. 2007)).

A. The Language of Paragraph 30 of the Lease Alone, And in Conjunction with the Attorneys' Fees Clause of the Arbitration Provision of the Lease, Clearly and Unambiguously Requires Litigation of Declaratory Judgment Actions.

Relator's claim is for a declaratory judgment. The language of the Lease excludes declaratory judgment actions from the scope of arbitration. Paragraph 30 of the Lease expressly provides in part:

> In any **proceeding** to enforce the terms hereof **or declare rights hereunder,** the Prevailing Party . . . in such proceeding shall be entitled to reasonable attorneys' fees and costs. The term "Prevailing Party" shall include, without limitation, a Party who substantially obtains or defeats the relief sought, as the case may be, whether by compromise, settlement, **judgment**, or the abandonment by the other Party of its claim or defense….

(Emphasis added). Paragraph 30 of the Lease is clear and unambiguous that a party who obtains a "judgment" in a "proceeding" to "declare rights" is entitled to a payment of reasonable attorneys' fees. This demonstrates that such a "proceeding" is before a court, not an arbitrator, as the language used in paragraph 30 refers exclusively to litigation. In a case relied upon by Defendant below, *ChampionsWorld, LLC v. U.S. Soccer*

Federation, Inc., 487 F.Supp.2d 980, 989 (N.D. Ill. 2007), the Court, citing Black's Law Dictionary, defined "proceeding" to be "a word much used to express the business done in courts" and to refer to litigation rather than arbitration.

That paragraph 30 clearly references litigation of declaratory judgment claims is further bolstered by the comparison with the attorneys' fees statement in the arbitration provision in Schedule I to the Lease. The attorneys' fees statement in the arbitration provisions provides in part that "[i]n the event of any such **arbitration**, the prevailing party shall be awarded its costs and reasonable attorneys' fees as part of the **award**." The use of the word "judgment" in paragraph 30 and the use of the word "award" in the arbitration provision demonstrate that the parties intended that paragraph 30 of the Lease concerns litigation of proceedings to "declare rights," not arbitration.

Respondent, however, disregarded the obvious intent to exclude declaratory judgment actions from arbitration evidenced by the language in paragraph 30. Although Respondent identified the language as "questionable" and "somewhat inconsistent with the arbitration language of the lease," he found that it did not flatly contradict the language of the arbitration provision that all disputes are to be resolved by arbitration. Although Respondent acknowledged that paragraph 30 used litigation terms, Respondent found these litigation terms served "no purpose."

A finding that the agreed-upon language of a contract serves "no purpose" is diametrically opposed to the mandated analytical framework that requires the Court to attribute meaning to all the terms of the agreement and to leave no term without function or sense. Furthermore, the "purpose" of the language is self-evident. It is to provide for

attorneys' fees in the event of litigation, including litigation in a proceeding to declare rights. The provision is necessary, because the arbitration provision providing for attorneys' fees applies only to arbitration; both provisions are necessary because the Lease calls for some actions to be litigated and some actions to be arbitrated. Harmonizing the provisions identifies and serves that evident purpose, instead of ignoring the plain language of the Lease.

Respondent gave no effect to the fact that there were two separate provisions relating to attorneys' fees, one clearly applicable for arbitration and one applicable for litigation involving actions to declare rights. As noted above, rules of contract construction require that the Lease be read to give effect to all provisions so as to avoid rendering any provision superfluous or without function or sense. *Troupin*, 408 S.W.3d at 319. It would be nonsensical to have two paragraphs of the same contract addressing the exact same topic. The only sensible explanation for the existence of two separate attorneys' fees provisions is that the parties intended to litigate some disputes, including declaratory judgment actions, and arbitrate others. Therefore, Respondent should have given effect to both of these separate attorneys' fees provisions and recognized that declaratory judgment actions are to be litigated and the prevailing party in such litigation is entitled to recovery of its attorneys' fees.

Respondent also indicated that Relator was unable "to present clear and unambiguous language in the Lease that excludes certain disputes (in this case, relating to declarative relief) from being resolved by arbitration." As shown above, the language of paragraph 30, by referring to litigation in the context of a "proceeding" to "declare

rights," is clear and unambiguous. Nothing more is required. It appears that Respondent misread *Dunn* to require that the arbitration provision include language such as "declaratory judgment actions are excluded from this arbitration provision." However, the Supreme Court in *Dunn* did not dictate the language that must be used to convey the parties' intent to exclude matters from arbitration. Rather, the Court indicated that the intent of the parties is to be gathered from the contract as a whole and by giving meaning to all of the terms of the agreement. *Dunn*, 112 S.W.3d at 428-29. In fact, in some instances, even silence is sufficient to indicate the parties' intent to exclude matters from arbitration. *See, e.g., Hopwood v. Citifinancial, Inc.*, 429 S.W.3d 425 (Mo. App. S.D. 2014). In *Hopwood*, the defendants executed three separate arbitration agreements in connection with three separate loan transactions, each of which provided for arbitration of any claim relating to the note or the agreement. *Id.* at 426. Subsequently, the defendants executed a note that was silent on arbitration and defendants did not sign another arbitration provision. *Id.* The plaintiff argued the prior arbitration provisions applied to the subsequent note and pointed to language in the arbitration provision suggesting it applied to future extension of credit. *Id.* at 427. The Court found that the arbitration provisions did not apply to the current claims on the note given its silence on the issue of arbitration, the failure to execute a new arbitration agreement, and the merger clause contained in the note. *Id.* at 428.

Our Supreme Court has not mandated particular language required to demonstrate an intent to exclude matters from an arbitration provision and instead requires the parties' intent to be gleaned from the terms used and the whole agreement. Therefore, when

viewing the terms used in paragraph 30 and considering the Lease as whole, Respondent should have concluded that the parties to the Lease intended to litigate declaratory judgment actions instead of arbitrating them. The language in paragraph 30, as well as language from other sections in the Lease, is more than clear enough with respect to the intentions of the parties.

B. Other Sections of the Lease Refer to Litigation of Disputes Rather Than Arbitration.

Further evidence that the parties intended to limit the situations for which arbitration would be required is borne out by other provisions of the Lease. In addition to paragraph 30, other provisions of the Lease indicate the parties intended for litigation to be an avenue for resolving disputes. In particular, paragraphs 41, 26, and 28 reflect the parties' intent to reserve litigation as a dispute resolution mechanism.

Paragraph 41 relates to payment of money under protest and the right to institute suit for the recovery of such sum. Paragraph 41 expressly provides that if a party makes a payment under protest, "there shall survive the right on the part of said Party to institute **suit** for recovery of such sum. If it shall be **adjudged** that there was no legal obligation on the part of said Party to pay . . . said Party shall be entitled to recover such sum . . ." Obviously, paragraph 41 provides a situation in which arbitration does not apply. Respondent's conclusion that this case does not concern a suit for the recovery of money misses the point. Paragraph 41 is clear evidence that the parties intended to litigate some disputes (and that the arbitration provision does not cover "any" dispute, see below).

Paragraph 26 of the Lease provides "Cumulative remedies. Subject to the arbitration provisions set forth in paragraph 45 hereof, no remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity." Paragraph 28 provides: "[a]ny **litigation** between the Parties hereto concerning this Lease shall be initiated in the City or County of St. Louis."

Respondent disregarded the rules of contract construction requiring Respondent to give effect to all terms of the agreement by discounting the significance of both paragraphs 26 and 28. Rather than harmonizing these sections with the arbitration provision, Respondent declared them "meaningless" or inadvertent. However, it is possible to harmonize these provisions with the arbitration provision and, if it is possible, Respondent must do so.

Paragraph 26, the cumulative remedies provision, can readily be harmonized with the arbitration provision. Given the parties' intent to litigate some disputes as evidenced by paragraphs 26, 30 and 41, the meaning of paragraph 26 is clear. For disputes that are subject to arbitration, the provisions of paragraph 45 and Schedule I provide the exclusive remedy. For those that are not subject to arbitration, the remedies are cumulative and the Parties retain all of those remedies. Similarly, paragraph 28, the forum selection clause, is easily harmonized with the arbitration provisions of the Lease. Where litigation is required under the Lease, such as in paragraphs 30 and 41, the forum selection clause requires those actions to recover money paid under protest or to declare rights to be brought either in St. Louis City or St. Louis County. Otherwise, the arbitration provision applies.

Rather than guessing that contract terms may have been inadvertently included on the basis of no evidence, Respondent should have read all of the inconsistent provisions of the Lease to give effect to them. Paragraphs 41, 26, and 28 of the Lease demonstrate that the parties did not intend to send every claim to arbitration. Paragraph 30 demonstrates that among the claims to be litigated were claims to "declare rights…." In order to give meaning to the entire contract, because Relator's claims are to declare rights, the Motion to Compel Arbitration should have been denied. The Court should issue its writ in order to prevent unnecessary and unwarranted arbitration.

C. The Arbitration Provision in This Case Is Not A Broad Arbitration Provision.

Respondent's decision to compel arbitration was based in part on his finding that the arbitration provision was a "broad" arbitration provision. Respondent noted that the arbitration provision in paragraph 45 and Schedule I to the Lease use the phrases "all disputes between the parties arising out of the lease shall be subject to the provisions . . . of the Arbitration Agreement" and "any controversy, dispute or claim . . . shall be settled by arbitration." As a result of that finding, Respondent required Relator to present the "most forceful evidence" of the parties' purpose to exclude the claim from arbitration. Respondent noted that under *Dunn* such evidence is necessary when a contract includes a broad arbitration clause.

The question presented is whether an arbitration provision that purports to cover "any" controversy, dispute, or claim is actually a broad arbitration provision when four sections of the contract provide for litigation instead of arbitration. Respondent noted that no Missouri case to date considers the application of a purported broad arbitration

provision where the contract, in four separate sections, refers to litigation of some disputes instead. Relator contends that an arbitration provision is not broad, no matter its language, when other portions of the contract require litigation of some disputes, because at that point the arbitration provision does not cover "any" dispute. At that point, the arbitration provision applies only to those claims that are not subject to litigation, and a limited arbitration provision cannot be a broad arbitration provision. *See Dunn Indus.* Group, 112 S.W.3d at 428 (stating "a narrow provision limits arbitration to specific types of disputes.")

Again, it is not only the language of the arbitration clause that controls; the entire contract must be taken into account. "Any" dispute does not mean any dispute when no less than four sections of the contract refer to litigation and even identify classes of claims that may be litigated. Therefore, Respondent erred in applying the "most forceful evidence" standard to the motions before the trial court. Nevertheless, as set out above, the four provisions in the Lease that concern litigation, including the section that refers to proceedings to declare rights, provide forceful evidence that the claims in this case are not subject to arbitration. This Court should issue a writ to prevent those claims from being arbitrated.

D. The Declaratory Judgment Action Does Not Fall Within The Limited Arbitration Provision Because It Does Not Involve Interpretation, Performance Or Breach Of The Lease.

Although the arbitration provision, despite its language, does not apply to "any" dispute, it still applies to the "interpretation, performance or breach" of the Lease. This

limiting language has been construed to be a limitation on the types of claims that are to be arbitrated. *See, e.g., Sankey v. Sears Roebuck and* Company, 100 F.Supp.2d 1290, 1296 (M.D. Alabama 2000). In *Sankey,* the arbitration provision stated "[t]he purchaser and [Pest Control] agree that any controversy or claim between them arising out of or relating to the interpretation, performance or breach of any provision of this agreement shall be settled exclusively by arbitration." The federal district court noted that this clause was "unlike many broad arbitration clauses that simply apply to any controversy or claim arising out of or relating to the contract" and found that the arbitration clause was limited to interpretation, performance or breach of the agreement. *Id.* "The limiting language suggests that not all controversies were to be considered arbitrable." *Id.* Thus, Schedule I, like the arbitration provision in *Sankey,* is not a broad provision but instead limits arbitration to interpretation, breach or performance issues and the Respondent erred in concluding otherwise.

The instant declaratory judgment claim does not fall within the limited arbitration provision. The Petition alleges nothing about a performance issue, as the option referenced in the Petition does not even vest for a number of years. No breach of the Lease is alleged in the Petition, nor is there any allegation of any termination of the Lease. Despite Respondent's suggestion that Relator's claim "arguably" relates to the interpretation of the Lease's application, it is clear from the Petition that Relator is not asking the Court to interpret the Lease. The purported option says what it says and no interpretation is required. Pursuant to Missouri law, where terms are clear and unambiguous, no interpretation is required. *State of Missouri ex rel. Addington Stewart*

v. Civil Service Commission of the City of St. Louis, 120 S.W.3d 279, 287-88 (Mo. App. E.D. 2003); *Conrad v. Allis-Chalmers MFG Co.*, 73 S.W.2d 438, 446 (Mo. App. 1934). Relator's claim concerns the plain language of the Lease and whether it is valid under the law. In sum, this dispute does not fall within the types of claims to be arbitrated, namely, those involving the interpretation, performance, or breach of the Lease.

Finally, Respondent ultimately reached its decision by simply relying upon the general principle that doubts must be resolved in favor of arbitration.[2] While courts look favorably upon clauses entitling a party to arbitration, this does not mean that a court may read a right to arbitrate into a contract where, as here, the contract does not provide such a right. *See Triarch Industries v. Crabtree*, 158 S.W.3d 772, 777 (Mo. banc 2005); *AJM Packaging Corp. v. Crossland Const. Co., Inc.*, 962 S.W.2d 906, 911 (Mo. App. S.D. 1998). The pro-arbitration policy does not operate without regard to the intent of the contracting parties, for arbitration is a matter of consent, not of coercion. A party cannot be forced to submit to arbitration of any dispute he has not agreed to submit. *Triarch*, 158 S.W.3d at 777. Respondent erred in forcing Relator to arbitrate the declaratory judgment claim when there is no agreement to arbitrate such disputes.

[2] Moreover, the principle of resolving doubts in favor of arbitration does not apply to the issue presented in Point Relied On I, where Defendant, as the party seeking to compel arbitration, bears the burden of proving the existence of a valid and enforceable arbitration agreement. *See Motormax*, 474 S.W.3d at 168.

CONCLUSION

Relator The Regional Convention and Sports Complex Authority respectfully prays this Court enter its permanent writ of mandamus directing Respondent, the Honorable Michael D. Burton, to stay arbitration and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed and served electronically through the Court's electronic filing system on this 3rd day of October, 2016.

/s/ Christopher O. Bauman

CERTIFICATE OF COMPLIANCE

I certify that the foregoing includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. This brief contains 6920 words in total, in compliance with this Court's Local Rule 360.

/s/ Christopher O. Bauman