IN THE SUPREME COURT OF MISSOURI

SC96225

STATE OF MISSOURI, EX REL., THE REGIONAL CONVENTION AND SPORTS COMPLEX AUTHORITY
RELATOR

v.

THE HONORABLE MICHAEL D. BURTON
RESPONDENT

WRIT OF MANDAMUS

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This action follows transfer from the Court of Appeals for the Eastern District of Missouri after that court granted a permanent writ of mandamus requiring Respondent to reinstate the underlying action and to deny the Rams' Motion to Compel Arbitration. This Court is vested with jurisdiction through its supervisory authority of Districts of the Missouri Court of Appeals and its power to issue original remedial writs. Mo. Const. art. V, § 4.

STATEMENT OF FACTS

This writ proceeding concerns enforcement of the parties' agreement to arbitrate a dispute regarding ownership of the former St. Louis Rams' training facility. In 1996, Relator The Regional Convention and Sports Complex Authority ("Relator") entered into a Training Facility Lease (the "Lease") with the St. Louis Rams, LLC ("Rams"). (Exhibit A to the Rams' Suggestions in Opposition to Petition for Writ of Mandamus; Appendix to Respondent's Substitute Brief, at p. A-12.) The Lease contains a provision governing the sale and purchase of the training facility. The Lease also contains an arbitration clause, which provided that "[a]ll disputes between the Parties hereto arising out of this Lease shall be subject to the provisions of, and adjudicated in accordance with, the Arbitration Agreement attached hereto as Schedule I, the terms and provisions of which are

incorporated herein…." (Lease, at p. A-39.) The Arbitration Agreement provided, in relevant part, as follows:

SCHEDULE I (Arbitration Agreement)

> ***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…***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***.

(Lease, p. A-39) (emphasis supplied.) Relator and the Rams have previously arbitrated under a nearly identical Arbitration Agreement within the Rams' former lease to the Stadium at America's Center.[1]

Despite the parties' previous arbitration under the Stadium Lease and their agreement to arbitrate all claims under the Lease, Relator filed a Petition in circuit

[1] The parties previously arbitrated under a nearly identical arbitration provision in *In the Matter of the Arbitration between The St. Louis Rams, LLC and The Regional Convention and Visitors Commission*, AAA No. 58 115 00134 12. (*See* Rams' Memo in Supp. of Mot. To Compel, at p. 2 n.2.)

court seeking a declaratory judgment that it owned the training facility and that the Rams had no further rights to the property. The Rams moved to compel arbitration. Relator opposed arbitration and argued the Arbitration Agreement did not apply to declaratory judgment actions and that the Arbitration Agreement was unconscionable because it lacked consideration. (Relator's Memo. In Opp. To Mot. To Compel, at p. 8.) Relator did not contend that the Arbitration Agreement failed to form a contract due to lack of consideration. (*Id.*)

After briefing and argument by the parties, Respondent entered a judgment holding the Arbitration Agreement was fully enforceable, dismissing Relator's Petition, and compelling arbitration. (Respondent's Judgment, at p. A-11.) Specifically, Respondent found that the Arbitration Agreement governed all disputes of any kind, including, but not limited to those related to the interpretation of the Lease, which met the definition of a "broad arbitration provision" within the meaning of *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). (*Id.* at pp. A-10-11.) Given that the Lease contained a broad arbitration provision, Respondent noted the court must compel arbitration absent production by Relator of the "most forceful evidence" that the parties did not intend for Relator's claims to be subject to arbitration. (*Id.* at A-10.) Respondent found Relator had failed to produce any such evidence. (*Id.*) Respondent further held that Relator had failed to demonstrate that clear and unambiguous language

excluded Relator's claim from arbitration. (*Id.*) Accordingly, Respondent compelled arbitration. (*Id.* at A-11.)

Relator subsequently petitioned the Missouri Court of Appeals for the Eastern District for an extraordinary writ of mandamus. In its Writ Petition, Relator conceded the existence of an enforceable arbitration agreement, but argued that the agreement to arbitrate did not extend to declaratory judgment actions. The Court of Appeals issued a preliminary writ and ordered the parties to file briefs that addressed whether the parties entered into a valid and enforceable agreement to arbitrate.

Following briefing, the Court of Appeals made its preliminary writ permanent. In its Opinion, the Court of Appeals assumed the validity of the agreement to arbitrate and did not address that issue further. (Court of Appeals Opinion, at p. A-55.) The Court of Appeals agreed that the Arbitration Agreement was a broad provision within the meaning of *Dunn*. (*Id.*, at pp. A-57-59.) The Court of Appeals, however, concluded the Attorneys' Fees Provision of the Lease specifically exempted declaratory judgment actions from arbitration. (*Id.* at pp. A-60-62.) The Court of Appeals reasoned the Attorneys' Fees Provision's statement that "proceedings" to "declare rights" could lead to a "judgment" suggested "court-involvement." (*Id.* at p. A-61.) The Court of Appeals determined that the existence of this possible interpretation of the Attorneys' Fees Provision provided

forceful evidence of any intent by the parties that declaratory judgment actions would be brought as circuit court proceedings. (*Id.* at p. A-61.)

Respondent's motion for rehearing or, in the alternative, transfer, was denied on January 30, 2017. Respondent timely requested this Court accept transfer. On May 2, 2017, this Court sustained Respondent's application for transfer. Relator did not timely file a Substitute Brief under Rule 83.08. Respondent now files its Substitute Brief.

POINTS RELIED ON

I. **Relator is not entitled to the extraordinary remedy of a writ of mandamus because Relator's request for declaratory judgment as to the parties' rights under the Lease falls within the scope of the parties' broad agreement to arbitrate all disputes relating to the interpretation of the Lease (Responsive to Relator's Point II).**

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

II. **Relator is not entitled to the extraordinary remedy of a writ of mandamus because the Arbitration Agreement is valid and enforceable in that both the Arbitration Agreement and the underlying Lease are supported by consideration (Responsive to Relator's Point I).**

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

Eaton v. CMH Homes, Inc., 461 S.W.3d 426 (Mo. banc 2015).

Baker v. Bristol Care, Inc., 450 S.W.3d 770 (Mo. banc 2014).

STANDARD OF REVIEW

The party requesting a writ has the burden to produce evidence showing it has "a clear, unequivocal, specific right to be enforced." *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 825-26 (Mo. banc 2015); *Estate of Hutchison v. Massood*, 494 S.W.3d 595, 608 (Mo. App. W.D. 2016); *State ex rel. Kopper Kettle Restaurants, Inc. v. City of St. Robert*, 424 S.W.2d 73, 80 (Mo. App. S.D. 1968). "The function of the writ of mandamus is to enforce, not to establish, a claim or right; the office of the writ is to execute, not to adjudicate." *State ex rel. Isselhard v. Dolan*, 465 S.W.3d 496, 498 (Mo. App. E.D. 2015).

Motions to compel arbitration are decided as summary proceedings and reviewed under the same standards that apply when reviewing a judgment entered in a court-tried case. *Greene v. All. Auto., Inc.*, 435 S.W.3d 646, 649 (Mo. App. W.D. 2014). The reviewing court defers to the trial court's assessment of evidence on contested issues of fact. *State ex rel. Greitens v. Am. Tobacco Co.*, 509 S.W.3d 726, 741 (Mo. banc 2017). Even when the trial court's decision rests solely on records, the appellate court will "defer to the trial court as the finder of fact in determining whether there is substantial evidence to support the judgment and whether the judgment is against the weight of the evidence." *Greene*, 435 S.W.3d at 649. A trial court's finding that a party has failed to produce "the most forceful evidence of a purpose to exclude the claim from arbitration" must be upheld unless

it is not supported by substantial evidence or is against the weight of evidence. *Id.; see also Dunn*, 112 S.W.3d at 429.

ARGUMENT

I. Relator is not entitled to the extraordinary remedy of a writ of mandamus because Relator's request for declaratory judgment as to the parties' rights under the Lease falls within the scope of the parties' broad agreement to arbitrate all disputes relating to the interpretation of the Lease (Responsive to Relator's Point II).[2]

The Court applies the normal rules of contract interpretation to determine whether an arbitration provision covers a particular matter. *Dunn*, 112 S.W.3d at 429. The Court must read the contract as a whole and gives words and phrases their plain meaning. *Id.* If the plain language of a contract is unambiguous, the contract is applied as written. *Id.* If the contract contains a "broad" arbitration provision but is susceptible to multiple interpretations, the Court will apply any reasonable interpretation that subjects the dispute to arbitration and will order arbitration of "any dispute that touches matters covered by the parties' contract."

[2] Relator did not timely file a Substitute Brief in this Court. Accordingly, Respondent's Substitute Brief responds to Relator's Points Relied On as asserted in Relator's Court of Appeals Opening Brief.

Id.; *Ruhl v. Lee's Summit Honda,* 322 S.W.3d 136, 139 (Mo. banc 2010) (quotation omitted).

A. The Lease contains a broad Arbitration Agreement.

Courts categorize arbitration provisions as either broad or narrow. *Dunn*, 112 S.W.3d at 428. "A broad arbitration provision covers all disputes arising out of a contract to arbitrate; a narrow provision limits arbitration to specific types of disputes." *Id.* When an arbitration provision is broad and contains no express provision excluding a particular type of dispute from arbitration, "only the most forceful evidence of a purpose to exclude the claim from arbitration" may be used to show the parties did not intend the matter to be subject to arbitration. *Id.* at 429.

The only reasonable conclusion from the record before the Court is that—as found by both Respondent and the Court of Appeals—the Arbitration Agreement at issue here is a broad arbitration provision. (Relator's Judgment, at p. A-10-11; Court of Appeals Opinion, at p. A-58-59.) In *Dunn,* the Missouri Supreme Court concluded that the language "[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration" constituted a broad arbitration provision. *Id.* at 428. The Arbitration Agreement in this case contains the exact same language, but is even broader, and states:

> 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….

(Lease, at p. A-42.) The language that "any controversy, dispute or claim" is subject to arbitration is unambiguous and nearly identical to, if not more encompassing than, the language the Court found constituted a broad arbitration provision in *Dunn*.

Relator does not point to any language in the Arbitration Agreement, or any other part of the Lease, that specifically "limits arbitration to specific types of disputes," as was its burden under *Dunn*. *Dunn*, 112 S.W.3d at 428. Instead, Relator contends that the Arbitration Agreement is not "broad" because it does not purport to cover "all" disputes in that some parts of the Lease other than the Arbitration Agreement refer to litigation. (Relator's Brief, at p. 25.) As noted in the Court of Appeals' Opinion, however, Relator's argument fails because, as a matter of law, when determining whether an arbitration provision is broad, the Court may only consider the arbitration provision itself, and may not entertain extraneous provisions. (Court of Appeals Opinion, at p. A-59 (citing *Dunn*, 112 S.W.3d at 428-30; *Manfredi v. Blue Cross & Blue Shield of Kansas City*, 340 S.W.3d 126, 130-31 (Mo. App. W.D. 2011) (en banc.)) As every court to review the provision has already concluded, the Arbitration Agreement requires any

controversy under the Lease to be subject to arbitration, and is, therefore, a broad provision under *Dunn*.

B. Relator's Petition is subject to arbitration because the Lease's broad Arbitration Agreement can be reasonably read to cover those claims.

Given that the Arbitration Agreement is "broad" under *Dunn*, Relator cannot avoid arbitration by merely showing the Lease could be viewed to exempt declaratory judgment actions from arbitration. Instead, Relator must carry the heavy burden of proving that the Lease can ***only*** be read to exempt declaratory judgment actions from arbitration. *See Dunn*, 112 S.W.3d at 429. Relator must also show that Respondent's evidentiary finding, including Respondent's weighing of the evidence, were not supported by substantial evidence or were against the weight of the evidence. *Greitens*, 509 S.W.3d at 741; *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 736 (Mo. App. W.D. 2011) (citing *Manfredi*, 340 S.W.3d at 126).

The claims in Relator's Petition fall squarely within the scope of the Arbitration Agreement. The Arbitration Agreement states that "[a]ny controversy, dispute, or claim between the Parties…including, without limitation" disputes "***in relation to the interpretation***" of the Lease will be subject to arbitration. (Lease, at p. A-42) (emphasis supplied.) Count I of Relator's Petition requests the Circuit Court interpret Paragraph 38 of the Lease and declare that provision does not

survive expiration of the Lease. (Relator's Petition, at pp. A-46-47.) Count II requests the Circuit Court interpret Paragraph 38 of the Lease to find that paragraph violates the Rule Against Perpetuities. (*Id.* at A-47-48.) Count III similarly requests the Circuit Court interpret Paragraph 38 of the Lease and declare it is void on the ground it grants the Rams a perpetual right to purchase the property at issue. (*Id.* at A-48-49.) Each of Relator's claims, on its face, requests the Circuit Court to interpret the language of Paragraph 38 of the Lease. Relator's requests fall squarely within the parties' agreement to arbitrate disputes "in relation to the interpretation, performance or breach of this Lease." In fact, Relator requests no relief except a declaration as to the interpretation of Paragraph 38. Even if reasonable minds can disagree as to whether Relator's Petition can be read to request an interpretation of the Lease, the fact that the claims in Relator's Petition arguably fall within the parties' agreement to arbitrate such disputes is all that is required to enforce a broad arbitration provision. *Greitens*, 509 S.W.3d at 741.

For the same reason, the existence of this interpretation of the Lease forecloses any challenge to Respondent's evidentiary rulings. In the underlying Judgment, Respondent held that Relator did not meet its evidentiary burden of producing "clear and unambiguous" and "forceful" evidence of an intent by the parties to exclude the matter from arbitration. (Respondent's Judgment, at p. A-

10.) While the interpretation of the Lease is subject to *de novo* review, Respondent's ruling regarding the evidence is not. *See id.* Respondent's holding that Relator failed to produce sufficiently persuasive evidence of an intent by the parties to exclude the dispute from arbitration must be upheld unless it is not supported by sufficient evidence or is against the weight of evidence. *Id.* Relator has not addressed, much less proven, that Respondent's conclusion as to the persuasiveness of Relator's evidence was not supported by substantial evidence or was against the weight of evidence.[3]

C. None of the provisions Relator cites expressly exempt declaratory judgment actions from arbitration.

Given that the Arbitration Agreement is a broad arbitration provision, Relator cannot demonstrate declaratory judgment actions—such as those in its Petition—are excluded from the Arbitration Agreement unless Relator produces "the most forceful evidence to exclude" declaratory judgment actions from arbitration. *See Dunn*, 112 S.W.3d at 429. Relator has not met this burden because none of the provisions it cites expressly exempt any matter from arbitration, let alone the type of claims at issue in Relator's Petition.

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[3] Relator's failure to properly preserve and address this issue is a sufficient basis to deny the extraordinary relief it seeks. *See Ivie v. Smith*, 439 S.W.3d 189, 199 n.11(Mo. banc 2014).

1. Attorneys' Fees Provision.

Both Relator and the Court of Appeals relied on the Attorney's Fees Provision as the basis for their conclusions that the parties expressed their intention that declaratory judgment actions should be exempt from arbitration. The Attorneys' Fees Provision states, in relevant part:

> 30. **Attorneys' Fees.** In any proceeding to enforce the terms hereof or declare rights hereunder, the Prevailing Party (as hereafter defined) 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 abandonment by the other Party of its claim or defense.

(Lease, at p. A-35.) The plain language of the provision shows that, as the name of that provision suggests, the Attorneys' Fees Provision establishes the right of the parties to receive repayment of their attorneys' fees in the event of a breach by the opposing party. (*Id.*) The self-evident intent behind this short one-paragraph provision is to award attorneys' fees to the prevailing party, nothing more.

Nevertheless, Relator asks the Court to read into the definition of "Prevailing Party" a separate agreement to exclude declaratory judgment actions from arbitration because that definition notes a party may prevail through a "judgment."

(Relator's Brief, at p. 18-19.) The Court of Appeals similarly relied on the Attorneys' Fees Provision's statement that "proceedings" to "declare rights" could lead to the prevailing party receiving a "judgment" when it concluded the provision suggested "court-involvement" to decide declaratory judgment actions. (Court of Appeals Opinion, at p. A-60-61.) The interpretations of the words "judgment" and "proceedings" submitted by Relator and the Court of Appeals are inconsistent with the Lease and Missouri Law.

i. The Arbitration Agreement specifically states that "judgments" may be entered upon arbitration awards.

Relator contends that the word "judgment" in relation to actions to declare rights somehow forecloses arbitration. Relator reasons that if declaratory judgment actions result in "judgments," those actions are not subject to arbitration. (Relator's Brief, at p. 19.) Relator's view is wrong for several reasons. First, the Arbitration Provision specifically states that arbitration actions may, following arbitration, result in a circuit court judgment:

> 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…***and judgment upon any award*** rendered by

the arbitrator may be entered by any federal or state court having jurisdiction thereof.

(Lease, at p. A-42) (emphasis supplied.) To the extent the Attorneys' Fees Provision has any bearing on the proper forum for bringing declaratory judgment proceedings, its reference to "judgments" is entirely consistent with the Arbitration Provision's recognition that "judgments" may follow arbitration awards. This conclusion is also in harmony with ample Missouri statutes and case law regarding the fact that arbitration awards may be confirmed, vacated, or modified by a court and transcribed as a judgment. § 435.415, RSMo.; *see also Glen Martin Eng'g, Inc. v. Huawei Techs. Jamaica Co.*, Ltd., 09-4083-CV-CNKL, 2010 WL 318504, at *3 (W.D. Mo. Jan. 20, 2010) (holding language in forum selection clause referencing litigation was "consistent with an intent to address post-arbitration litigation.").

Second, even if the Court found that the parties intended that ***some*** matters might be resolved by litigation, that would still be insufficient evidence to prove the parties agreed ***this*** matter should be litigated. Relator must show the parties specifically agreed that declaratory judgment actions are exempt from arbitration. *See Dunn*, 112 S.W.3d at 428-29. But the Attorneys' Fees Provision can easily be given effect without disregarding the broad Arbitration Agreement. For example, some types of causes of action, none of which are at issue here, are expressly

precluded from arbitration, in which case an agreement concerning litigation of such actions reconciles perfectly with a more general agreement to arbitrate all other claims. *See, e.g.,* § 435.350, RSMo. (prohibiting arbitration of various disputes). Similarly, even if the arbitration provision applied to every possible dispute between the parties, a party could still wrongly file a litigation proceeding—as occurred in this case—which would trigger the Attorneys' Fees Provision as to that litigation.

ii. Arbitration actions are "proceedings."

Relator's reliance on the word "proceedings" is also misplaced. Relator suggests that the word "proceeding" is limited to court-based litigation and excludes arbitration. Relator, citing Illinois law, asserts that the word "proceeding" means "business done in courts," which excludes arbitration. (Relator's Brief, at p. 19) (quoting *ChampionsWorld, LLC v. U.S. Soccer Fed'n, Inc.*, 487 F. Supp. 2d 980, 989 (N.D. Ill. 2007.))) Relator is incorrect in its assertion that Missouri does not refer to arbitration actions as "proceedings." The Missouri Uniform Arbitration Act repeatedly refers to arbitration actions as "proceedings." For example, § 435.355(2), RSMo. states:

> On application, the court may stay an ***arbitration proceeding*** commenced or threatened on a showing that there is no agreement to arbitrate.

Id. (emphasis supplied); *see also* § 435.012.1, RSMo. ("In order to insure that all parties to an ***arbitration proceeding*** are aware of their rights ….") (emphasis supplied); § 435.014.2 ("***Arbitration, conciliation and mediation proceedings*** shall be regarded as settlement negotiations.") (emphasis supplied).

Numerous other Missouri statutes also identify arbitration actions as "arbitration proceedings." *See, e.g.,* §§ 32.200; 105.450(1); 288.381.2; 347.163.5(1); 351.1174; 351.1177(3); 351.1207.1; 351.1213(6)(a); 356.231.1(1); 359.551.5(1); 385.436, RSMo. (all of which refer to "arbitration proceedings"). Indeed, the Missouri Cooperative Associations Act specifically defines "proceeding" to include arbitration actions. § 351.1081.2(3), RSMo. This Court has described arbitration actions as "arbitration proceedings" for over 130 years in at least a dozen cases, including the two seminal cases on the issue of arbitration, *Dunn* and *Schneider*. *Dunn*, 112 S.W.3d at 431 ("the trial court's judgment staying the ***arbitration proceedings*** was correct.") (emphasis supplied); *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 863 (Mo. banc 2006) (Limbaugh, J., concurring). There simply is no Missouri legislative or judicial precedent for concluding that the word "proceeding" excludes arbitration.

Relator's interpretation also ignores that the "proceedings" referred to in the Attorneys' Fees Provision are not limited to actions to declare rights, but apply equally to "any proceeding to enforce the terms [of the Lease]." (Lease, at p. A-

35.) If actions to "declare rights" are excluded from arbitration, as Relator suggests, so are all proceedings "to enforce the terms" of the Lease. Under Relator's view, all such disputes would be forced into litigation and excluded from arbitration. Applying Relator's interpretation, it is unclear what, if any, possible disputes would not be excluded from arbitration. Relator's proposed interpretation that the "broad" arbitration provision applies to few if any disputes cannot be reconciled with *Dunn*.

Under *Dunn*, the Court is required to apply any reasonable interpretation of the Attorneys' Fees Provision that subjects the dispute to arbitration. *Dunn*, 112 S.W.3d at 429. A more sensible reading of the Attorneys' Fees Provision is that it allows either party to obtain their attorneys' fees from any court-based proceedings to confirm, vacate, or modify an arbitration award. Another reasonable interpretation of the Attorneys' Fees Provision that preserves the parties' agreement to arbitrate is that the provision awards attorneys' fees incurred in court-based litigation following a party's wrongful filing of a civil case rather than an arbitration proceeding, as is required under the Lease. Either of these interpretations is more consistent with *Dunn's* commandment to read contracts to uphold arbitrate agreements, if at all possible.

Accordingly, the Attorneys' Fees Provision does not provide a basis to avoid subjecting Relator's Petition to arbitration.

2. Performance Under Protest Provision.

Relator next identifies the Performance Under Protest Provision as another candidate for the parties' alleged agreement to exempt declaratory judgment actions from arbitration. Relator gleans great meaning from the phrase a payment under protest "shall not be regarded as a voluntary payment and there shall survive the right on the part of said Party to initiate suit for recovery of such sum" and the party may recover that sum if it is "adjudged" that the party had no obligation to pay that sum. (Lease, at p. A-38.) According to Relator, the words "suit" and adjudge" indicate an implicit agreement that declaratory judgment actions should not be arbitrated.

Relator's argument ignores that the self-evident purpose of this provision is to establish the parties' agreement that parties do not waive the right to pursue a claim under the voluntary payment doctrine if the party makes payment "under protest." (Lease, at p. A-38.) Nothing in that provision implicitly, let alone expressly and forcefully, establishes an agreement by the parties to exempt declaratory judgment actions from the broad arbitration provision. The words "initiate suit" are also broad enough to include the initiation of arbitration, not just the commencement of a civil action. Moreover, even under Relator's interpretation, "instituting suit ***for recovery or such sum***" is consistent with

Missouri law regarding confirmation, vacation, or modification of an arbitration award through a circuit court judgment. § 435.415, RSMo.

3. Remaining Provisions.

Relator makes the identical argument with respect to other Lease provisions, all of which address matters other than whether any specific claim is excluded from the Lease's broad Arbitration Agreement. In Relator's view, the forum selection clause's statement that any "litigation between the Parties hereto concerning the Lease shall be initiated in the City or County of St. Louis" shows the parties intended for disputes to be filed in circuit court. Conspicuously absent from that provision are the words "arbitration," "exclude," "court," or "filed." (Lease, at p. A-35.) The forum selection clause only establishes St. Louis City or County as the geographic location where the parties will enter arbitration. The provision also establishes that actions to confirm, vacate, or modify arbitration awards (or, for that matter, any civil action wrongfully filed in breach of the Arbitration Agreement) will be commenced in a court within St. Louis City or County.

Lastly, Relator suggests the Cumulative Remedies Provision provides the necessary express agreement to exempt declaratory judgment actions from arbitration. That provision, in full, states:

> 26. Cumulative Remedies. ***Subject to the arbitration provision 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.

(Lease, at p. A-34) (emphasis supplied.) The Cumulative Remedies Provision explicitly states that it is "[s]ubject to the arbitration provision." By definition, a provision "subject to" another provision cannot contradict or weaken that provision. In addition, the phrase "cumulative with all other remedies at law or in equity" on which Relator relies, is nearly identical to the provision in *Dunn* that the Missouri Supreme Court found insufficient to meet the high standard for exempting a matter from a broad arbitration provision. *Dunn*, 112 S.W.3d at 429 (holding the phrase "either party, at any time, may resort to their respective contract remedies or remedies as provided by law" was insufficient to remove the matter addressed from a broad arbitration clause.).

Relator has not produced any evidence the parties agreed to exempt declaratory judgment actions from arbitration, let alone the "most forceful" evidence necessary to exempt such actions in light of the Lease's broad arbitration provision. Nor has Relator carried its burden of demonstrating Respondent's evidentiary rulings, including whether Relator's evidence was sufficiently persuasive, are either against the weight of evidence or not supported by

substantial evidence. Relator's request for an extraordinary writ of mandamus should be denied.

II. Relator is not entitled to the extraordinary remedy of a writ of mandamus because the Arbitration Agreement is valid and enforceable in that both the Arbitration Agreement and the underlying Lease are supported by consideration (Responsive to Relator's Point I).

Relator also contends that the Arbitration Agreement is unenforceable because, according to Relator, the Arbitration Agreement is not supported by consideration. Consideration may come from either giving something of value or through reciprocal promises. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014). The parties agreement to arbitrate contains both forms.

A. The Rams gave consideration through its mutual promises throughout the Lease; arbitration provisions do not require separate consideration.

Relator's overarching argument is that the Arbitration Agreement does not form a binding contract because, in Relator's view, the Rams did not exchange a mutual promise to arbitrate.[4] As set forth below, even if the Rams did not agree to

[4] Relator's argument contradicts its previous assertion that the Arbitration Agreement was an enforceable contract, but simply did not apply to declaratory judgment actions. (Relator's Writ Petition, at p. 7 ("it is clear that the parties

arbitrate all its disputes—which it did—the Arbitration Agreement would still be supported by consideration through the Lease agreement it is within.

Under Missouri law, arbitration provisions do not require independent consideration. Rather, this Court has repeatedly held that an arbitration provision, even if unilateral, is enforceable so long as the party seeking enforcement gave consideration somewhere in the contract in exchange for the opposing party's promise to arbitrate. *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 433 (Mo. banc 2015) ("as long as the contract as a whole meets the consideration requirement, an arbitration clause in the contract will not be invalidated for a lack of mutuality of the obligation to arbitrate.") (citation omitted);[5] *Schneider*, 194 S.W.3d at 858 ("mutuality is satisfied if there is consideration as to the whole agreement,

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intended that certain disputes would be resolved by arbitration and certain other disputes, including, but not limited to, litigation of actions to declare rights, were to be resolved by litigation in the City or County of St. Louis."))

[5] The *Eaton* Court concluded the unilateral arbitration clause in that case was unconscionable, but did not invalidate the clause based on lack of consideration. *Eaton*, 461, S.W.3d at 436. Although Relator argued before Respondent that the Arbitration Agreement is unconscionable, Relator abandoned that argument on appeal.

regardless of whether the included arbitration clause itself was one-sided."); *Baker*, 450 S.W.3d at 774.

Missouri's rule is consistent with the majority of other jurisdictions that have concluded that a party's agreement to arbitrate is enforceable and supported by consideration so long as the contract as a whole contains consideration in exchange for the opposing party's promise to arbitrate. *See, e.g., Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) (collecting federal and state cases holding arbitration provisions do not require separate consideration). Under this substantial body of law, Relator's promise to arbitrate is supported by consideration so long as the Rams gave ***any*** consideration in the Lease. The Rams' promise to pay rent is sufficient consideration for the contract as a whole. *See Schneider*, 194 S.W.3d at 859.

Relator, however, takes issue with this Court's statement in *Eaton* that arbitration clauses do not require separate consideration. Relator contends that this Court should ignore its prior statement that mutuality is not required because, according to Relator, "[t]he *Eaton* Court did not consider the distinct issue presented in this case: whether the parties' arbitration agreement fails for lack of mutuality of consideration...." (Relator's Brief, at p. 15.) The briefing filed in *Eaton* proves the Court considered this exact issue. (*Eaton* Appellant's Substitute Brief, *Eaton v. CMH Homes, Inc.*, SC94374 (Mo. banc 2015), at pp. 4, 13-16,

attached as Exhibit A to Respondent's Court of Appeals Brief; *Eaton* Respondent's Substitute Brief, *Eaton v. CMH Homes, Inc.*, SC94374 (Mo. banc 2015), at pp. 12-16, attached as Exhibit B to Respondent's Court of Appeals Brief; *Eaton* Appellant's Substitute Reply Brief, *Eaton v. CMH Homes, Inc.*, SC94374 (Mo. banc 2015), at pp. 7-9, attached as Exhibit C to Respondent's Court of Appeals Brief.)[6]

Relator attempts to avoid the direct application of this Court's rulings in *Schneider*, *Baker*, and *Eaton* by citing intermediate appellate court decisions. (Relator's Brief, at pp. 12-13.) Contrary to Relator's contention, however, these cases do not change the requirement that arbitration provisions do not require separate consideration. For example, in *Jimenez v. Cintas Corp.*, 475 S.W.3d 679 (Mo. App. E.D. 2015), the court expressly stated the arbitration provision in that case would be supported by adequate consideration if ***either*** a mutual promise to

[6] The Rams request the Court take judicial notice of the Appellant's and Respondent's Substitute Briefs in *Eaton v. CMH Homes, Inc.*, SC94374 (Mo. banc 2015) to evaluate Relator's statement the court did not consider whether arbitration provisions require separate consideration. This Court may take judicial notice of materials filed in the Missouri Supreme Court. *Johnson v. State*, 581 S.W.2d 847, 848 (Mo. App. E.D. 1979).

arbitrate ***or*** at-will employment constituted consideration. *Jimenez*, 475 S.W.3d at 684.

The exact same analysis and conclusion were reflected in *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 775 (Mo. banc 2014) and *Bowers v. Asbury St. Louis Lex, LLC*, 478 S.W.3d 423, 427 (Mo. App. E.D. 2015). Each of these cases discusses, at length, whether continued at-will employment is sufficient consideration for a unilateral arbitration provision. If arbitration provisions required separate consideration, as Relator suggests, there would be no need for these courts to examine whether at-will employment was adequate consideration as a substitute for consideration in the form of a mutual promise to arbitrate. The fact that these courts deemed it necessary to examine whether at-will employment was consideration in exchange for the promise to arbitrate shows the courts concluded the arbitration provisions would be enforceable if ***any*** consideration was given.

B. The Rams also gave consideration for the Arbitration Agreement through its reciprocal promise to arbitrate all disputes.

Even if the Lease did not contain consideration from the Rams elsewhere, the Arbitration Agreement contains consideration in the form of the parties' mutual promises to arbitrate all disputes.

When the purported consideration for an arbitration agreement is exclusively an exchange of reciprocal promises to arbitrate, Missouri law is clear the

agreement lacks consideration only when one party is bound to arbitrate, but the other party is free to bring claims in circuit court. *Baker*, 450 S.W.3d at 775. However, adequate consideration is provided when ***any*** promise is made regarding an agreement to arbitrate, even if the parties do not have identical obligations. *Harris*, 183 F.3d at 180 (collecting cases); *Keena v. Groupon*, Inc., No. 3:15-CV-00520-GCM, 2016 WL 3450828, at *6 (W.D.N.C. June 21, 2016); *In re Pate*, 198 B.R. 841, 844-45 (Bankr. S.D. Ga. 1996).

The plain language of the Arbitration Agreement belies Relator's assertion that the arbitration provision is unilateral. The Arbitration Agreement provides, in relevant part:

SCHEDULE I (Arbitration Agreement)

> 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….

(Lease, at p. A-42.) (emphasis supplied.) This provision is clear and unambiguous and requires that any claim made by either party may only be brought in arbitration. Unlike any of the cases cited by Relator, neither the Arbitration Agreement nor the Lease, contain any waiver provision that would allow the Rams

to avoid arbitration at its sole discretion. The Rams' promise to arbitrate is binding and cannot be waived.

Although Relator does not allege the Lease contains an arbitration waiver provision such as those at issue in the cases on which Relator relies, Relator nonetheless asks this Court to infer such a provision into existence. Relator ignores the provision in the Lease that directly addresses the right of parties to bring an action—the Arbitration Agreement—and, instead, refers the Court to a provision governing "Performance under Protest." (Relator's Brief, at pp. 13-14, 22.) Although Relator acknowledges the plain language applies to both parties, Relator avers that "[the Rams] is the only party who, under the terms of the Lease, is required to make payments." (Relator's Brief, at p. 14.) Relator's reading of the Lease is patently incorrect.

The Lease provides at least eight circumstances in which Relator may be required to tender payment to the Rams. (Lease, at pp. A-26, 30-32, 35, 38, 42; ¶ 9.2 - Damage or Destruction Near End of Term, ¶ 13.4 - Breach by Lessor, ¶ 14 - Condemnation, ¶ 15 - No Brokers, ¶ 19 - Interest on Past-Due Obligations, ¶ 30 - Attorneys' Fees, ¶ 41 - Performance Under Protest, Schedule I - Arbitration Agreement, respectively.) As Relator acknowledges, the Lease also refers to the possibility of the Rams making payments to Relator in at least 16 separate provisions of the contract. (Lease, at pp. A-14, 17, 19, 21, 24, 25, 27, 29-32, 34,

37, 38, 42; ¶ 1.5 - Base Rent, ¶ 4 - Rent, ¶ 6.2(c) - Indemnification of Lessor by Lessee, ¶ 7.3 - Alterations, ¶ 8.7 - Indemnification Re: Use, ¶ 9.1 - Repair/ Reconstruction, ¶ 10.1 - Payment of Taxes, ¶ 13.2 - Remedies, ¶ 15 - No Brokers, ¶ 19 - Interest on Past-Due Obligations, ¶ 25 - Holdover, ¶ 26 - Cumulative Remedies, ¶ 30 - Attorneys' Fees, ¶ 38 - Options, ¶ 41 - Performance Under Protest, Schedule I - Arbitration Agreement, respectively.)

In sum, the Arbitration Agreement in the Lease is supported by consideration by the Rams' promise to pay rent and reciprocal promise to arbitrate all disputes. Accordingly, the underlying action falls within a valid and enforceable arbitration provision. Relator's request for an extraordinary writ of mandamus should be denied.

CONCLUSION

Relator's declaratory judgment action falls within the valid, enforceable, and broad Arbitration Agreement. Relator has failed to either produce the most forceful evidence necessary to defeat the assumption in favor or arbitration, or demonstrate that Respondent's factual findings regarding the parties intent to arbitrate and the persuasiveness of Relator's evidence was against the weight of evidence or not supported by substantial evidence. Having failed to satisfy any of its burdens, Relator's request for an extraordinary writ of mandamus should be denied.

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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 12th day of June, 2017.

/s/ Roger K. Heidenreich

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 7,179 words, exclusive of the sections exempted under Rule 84.06(b).

/s/ Roger K. Heidenreich