IN THE MISSOURI SUPREME COURT

SC96225

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 SUBSTITUTE REPLY BRIEF

BLITZ, BARDGETT & DEUTSCH, L.C.

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Response to Defendant's Misstatements of Fact

Preliminarily, Relator finds it necessary to respond to Defendant's misstatements of facts, included in its Substitute Respondent's Brief, meant to support its arguments. If Defendant's arguments are to prevail, it should be because the law and the correct facts lead to that result. That incorrect facts are included in Respondent's Brief suggests that the law and the correct facts are not enough, on their own, to support Defendant's positions.

Defendant refers to an earlier arbitration, insinuating that because another dispute was arbitrated, this one must be arbitrated as well. Defendant knowingly and intentionally makes the false statement that "Relator and the Rams have previously arbitrated disputes under an identical Arbitration Agreement that was made part of the Lease between the parties for the Stadium at America's Center." Respondent's Brief, p. 2. Contrary to the mention of "disputes," Defendant then mentions *one* dispute in a footnote by citing to Defendant's own allegations before the trial court, not to any actual documents. *Id*.

In fact, Relator filed the documents to the arbitration with the trial court when Defendant made the same false statement below, and those documents reveal Defendant's statement to this Court to be intentionally misleading. The arbitration referred to by Defendant involved a contract, the Stadium Lease, to which Relator was not a signatory. The Stadium Lease is an entirely different contract, involving an entirely different building, than the Lease in this case. Before the trial court, contrary to their claim before

this Court, Defendant admitted that Relator was not one of the parties to that earlier arbitration concerning the Stadium Lease. *See* Defendant's Memorandum in Support, p. 1, 4 (defining the parties to the arbitration to include only "political and civic leaders of the City of St. Louis, St. Louis County and the State of Missouri," not Relator). In fact, the only reason Relator was a party to that arbitration for a short time was because Defendant named Relator as a party, despite the fact that Relator was not a proper party to the arbitration by the express language of the Stadium Lease. Relator immediately filed a motion to dismiss on that very basis – that it was not a proper party to the arbitration because it was not a signatory to the Stadium Lease – and filed a motion for attorneys' fees and costs for Defendant's frivolous arbitration. In a very unusual step, Defendant quickly and voluntarily "agreed to the Authority's Motion to Dismiss" and dismissed Relator from the arbitration. *See* Appendix to Relator's Substitute Reply Brief, at p. A-3, A-4, and A-10.

The attempt to state falsely that these parties arbitrated a similar dispute, and to imply that this dispute must, therefore, be arbitrated, is inappropriate. Relator was not a proper party to that previous arbitration and Defendant dismissed Relator because it was not a signatory to the Stadium Lease at issue in that case, a wholly different contract than the Lease at issue here.

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.[1]

Defendant continues to argue that Relator's request for declaratory judgment is within the scope of the parties' arbitration agreement. However, as set forth below, the language of the Lease clearly and unambiguously requires litigation of declaratory judgment actions. First, the arbitration provision in this case is not a broad arbitration provision. Furthermore, even if the Court concludes that the arbitration provision is broad, claims for declaratory judgment are excepted from arbitration under the clear and express terms of the Lease.

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

Defendant argues that the Lease contains a broad arbitration provision, citing *Dunn Indust. Group v. City of Sugar Creek*, 112 S.W.3d 421 (Mo. banc 2003). However, the *Dunn* case did not concern a contract in which four separate provisions belie the arbitration provision by suggesting that certain matters, such as declaratory judgments,

[1] Because the Court of Appeals' decision found Point II of Relator's Brief to be dispositive, and Defendant first addresses Relator's Point II in its Substitute Respondent's Brief, Relator now replies to Defendant's arguments regarding Point II first.

are to be litigated. No Missouri case has considered such a contract.[2] The *Dunn* case states that when arbitration is limited to specific types of disputes, it is a "narrow" arbitration provision. 112 S.W.3d at 428. In this case, several sections of the Lease carve out certain actions from arbitration. The result is that the arbitration provision is limited to other disputes. Therefore, the arbitration provision is, in effect, a narrow arbitration provision.[3]

[2] Both Respondent and the Missouri Court of Appeals noted the uniqueness of the present case. *See State ex rel. Regional Convention and Sports Complex Authority v. Burton*, 2016 WL 7387705, at *5 (Mo. App. E.D. 2016) (quoting Respondent's order and judgment, specifically Respondent's statement that, "This Court has not seen a Missouri case that addresses the enforcement of an arbitration clause with as many apparent inconsistencies as the . . . Lease. . . .").

[3] Relator respectfully disagrees with the Court of Appeals' determination that the arbitration provision is broad. Regardless, as the Court of Appeals concluded, declaratory judgment actions are explicitly excluded from arbitration by the express terms of the Lease and, therefore, the present case does not fall within the scope of the parties' arbitration agreement. *State ex rel. Regional Convention and Sports Complex Authority*, 2016 WL 7387705, at *5.

B. The Language of Section 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.

Section 30 of the Lease, especially in conjunction with the separate attorneys' fees provision that is specific to arbitrations, demonstrates that declaratory judgments in particular are claims that are meant to be litigated, not arbitrated. First, Defendant attempts to respond by making an obvious misstatement of fact. Second, Defendant fails to respond to the argument that the separate attorneys' fees provision for arbitrations makes clear that the attorneys' fees provision in section 30 is meant to apply to litigation before a court, not arbitration.

At the outset, Defendant attempts to muddy this Court's standard of review of whether a court should have granted a motion to compel arbitration. Defendant concedes that interpretation of the Lease is subject to *de novo* review, but also argues that this Court must defer to Respondent's conclusion that Relator's argument is not supported by "clear and unambiguous" and "forceful evidence." *See* Respondent's Brief, p. 12-13. This argument is distracting error. The only evidence before the Court were the relevant documents, specifically the Lease. The parties did not present evidence outside of the pleadings, and Respondent did not make any evidentiary decisions. Indeed, the intent of the parties is "gathered solely from the terms of the contract." *See State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 860 (Mo. banc 2006). The contract—the Lease—was

presented to the trial court for interpretation. The issues present here are simply subject to *de novo* review.

Defendant contends that although section 30 may demonstrate that some matters are to be litigated, it does not demonstrate that declaratory judgments such as that filed in this case are to be litigated. To the contrary, the very first clause of the very first sentence of section 30 of the Lease is "In any proceeding to enforce the terms hereof or declare rights hereunder…" (emphasis added). The section specifically mentions declaratory judgment actions. The section, therefore, consistent with Relator's arguments to this Court, both demonstrates that some matters are to be litigated and that one of the types of matters to be litigated is declaratory judgments.

Defendant also attempts to explain section 30 by suggesting that the only purpose of that section is to allow for an award of attorneys' fees when a party has to go to court to confirm an arbitration award. The language of the Lease does not support that argument. First of all, there is no language in section 30 that limits it only to confirmations of arbitrations. In fact, there is language – mainly the reference to "any proceeding to enforce the terms hereof or declare rights hereunder" – that makes it clear that the section relates to actions other than an action to enforce an arbitration award.

Defendant has already conceded that one section of the Lease allows it to file civil litigation instead of an arbitration when Defendant pays under protest (section 41). Respondent's Brief, p. 16. Having conceded that, Defendant must also concede that the attorneys' fees provision in section 30 must relate to those civil actions. In other words, Defendant has already conceded that there are instances beyond confirming an arbitration

award to which section 30 of the Lease applies. Section 30 of the Lease, by referring to attorneys' fees in connection with proceedings that result in a judgment, demonstrates that some actions under the Lease are meant to be litigated, not arbitrated. The section also specifically identifies some of those actions meant for litigation, including proceedings to "declare rights." Relator's action was to declare rights in this case. Therefore, the Lease allows for declaratory judgment actions to be litigated.

Defendant also takes issue with any reliance on the word "proceeding" in Paragraph 30, arguing that arbitration actions are "proceedings" under Missouri law. *See* Respondent's Brief, p. 17-20. Simply because arbitrations may be referred to as a "proceeding" in another context does nothing to suggest that "proceeding" in Paragraph 30 could mean an arbitration. We are required to look at all of the language of this contract. *Lacey v. State Bd. of Registration For The Healing Arts*, 131 S.W.3d 831, 838 (Mo. App. W.D. 2004) ("Contract language is not interpreted in a vacuum, but by reference to the contract as a whole."); *Women's Care Specialists, LLC v. Troupin*, 408 S.W.3d 310, 319 (Mo. App. E.D. 2013) (citations omitted).

This contract provides at least two indications that "proceeding" in Paragraph 30 does not mean an arbitration. First, Paragraph 30 itself, says not only "proceeding," but "judgment," another term which refers to litigation, not arbitration. *See State ex rel. Regional Convention and Sports Complex Authority*, 2016 WL 7387705, at *6 (citing *Black's Law Dictionary* 846 (7th ed. 1999)) ("[T]he plain, ordinary, and usual meaning of the terms "proceeding," "declare rights" and "judgment" suggest . . . court involvement rather than arbitration."). Courts enter judgments; arbitrators issue awards. Second, this

contract contains an entirely separate provision for awarding attorneys' fees in an arbitration. There is no need for "proceeding" to mean an arbitration in Paragraph 30 in order to allow for attorneys' fees in an arbitration, because **an entirely separate provision already exists for that**. Indeed, "proceeding" in Paragraph 30 cannot mean an arbitration because, if it meant that, the inclusion of the separate arbitration attorneys' fees provision would be nonsensical. Looking at the contract as a whole, Paragraph 30 clearly and unambiguously provides that a party who obtains a "judgment" in a "proceeding" to "declare rights" is entitled to a payment of reasonable attorneys' fees. The fact that the word "proceeding" in other contexts—unrelated to the interpretation of the present contract—may refer to arbitration does not change the fact that the language used in Paragraph 30 refers *exclusively* to litigation. Defendant seeks to impose an entirely new standard of contract interpretation, wherein any conceivable meaning of a term can be read into the contract, without any reference to the contract as a whole. That, however, results in the exact opposite outcome that Missouri courts seek and renders provisions of the contract superfluous or without function or sense. *Troupin*, 408 S.W.3d at 319.[4]

[4] Defendant further argues that, "even if the arbitration provision applied to every possible dispute between the parties," and one of the parties wrongly filed litigation to resolve a dispute, Section 30 acts to award attorneys' fees for that litigation. Section 30 is very strangely worded if that is the case. If the parties had intended this meaning of Section 30, they explicitly would have stated. Additionally, this reading would render

Defendant also states that under Relator's arguments (as well as the Court of Appeals' decision), "it is unclear what, if any, possible disputes would not be excluded from arbitration." *See* Respondent's Brief, p. 19. Again, this is untrue and distracts from the actual issue presented by this case. Looking at the language of the Lease, including the arbitration provision, it is clear when the Lease contemplates arbitration and when the Lease contemplates litigation. The arbitration provision provides that for arbitration of "any claim arising out of, in connection with, or in relation to the interpretation, performance, or breach of this Lease." Paragraph 30 allows for litigation of "any proceeding to enforce the terms hereof or declare rights hereunder." Defendant's implicit argument is that "enforce" must include nearly every possible, or every possible, proceeding that concerns the Lease. However, that argument (like many of Defendant's) ignores the requirement that all sections of the Lease be read together. "Enforce" cannot mean, for instance, an action for "breach" of contract because the arbitration provision specifically mentions claims for "breach of the Lease." There are plenty of claims that may still be arbitrated, namely, claims concerning the "interpretation, performance, or breach of this Lease."

This case involves a claim for declaratory judgment. The question here is whether a declaratory judgment action must be arbitrated or not. Under the terms of Lease all taken together, particularly Paragraph 30, that claim must be litigated, and that is the only

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Section 30 completely superfluous, as the arbitration agreement already has an attorneys' fees provision, under which the arbitrator could award fees for "wrongly filed litigation."

question to be decided. The question before this Court is **not** what "enforce" means – it certainly does not mean an action for breach of contract and perhaps it only means injunctive relief. It is not necessary to decide and the issue is not presented.

Finally, Defendant argues that, under *Dunn*, the Court is required to apply a reasonable interpretation of Paragraph 30 that results in the dispute's arbitration. *See* Respondent's Brief, p. 19. This argument ignores clearly established Missouri law, as noted by the Court of Appeals, that the public policy favoring arbitration simply "is not enough, standing alone, to extend the application of an arbitration provision beyond its intended scope." *Kohner Properties, Inc. v. SPCP Group VI, LLC*, 408 S.W.3d 336, 346 (Mo. App. E.D. 2013). Arbitration is a matter of contract. *Id*. As such, a party is only required to arbitrate disputes that it agreed to arbitrate. *Dunn*, 112 S.W.3d at 435.

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

Section 41 of the Lease explicitly allows for the filing of a "suit" to be "adjudged," which courts have determined means a civil suit, not arbitration. Despite this language, Defendant argues that suit perhaps means arbitration, or that suit means a civil suit, but only a suit to confirm an arbitration award. Both readings are at odds with the Lease language, all of which must be read together and given meaning, and with previous precedent.

Courts have interpreted "suit" and "adjudged" to mean litigation, not arbitration. *See, e.g., ChampionsWorld, LLC*, 487 F.Supp.2d at 989. Despite these cases, Defendant suggests "suit" maybe actually means arbitration. This suggestion is nonsensical. If

there is already an arbitration agreement, as Defendant suggests, there is no purpose to have a separate statement in section 41 calling for arbitration in some instances, particularly by using the term "suit" when it means to say "arbitration." Contracts must be read to give meaning to every word, not supplied with tortuous interpretations that would make certain words meaningless. *Jimenez v. Cintas Corp.*, 475 S.W.3d 679, 686-87 (Mo. App. E.D. 2015). Hedging its bets, Defendant also proposes that section 41 may refer to litigation, but only to confirm an arbitration award. However, we know section 41 does not refer only to litigation that confirms an arbitration award, because it specifically concerns the payment of money under protest and the right to "institute suit **for the recovery of such sum**." (Emphasis added). The section is perfectly clear about the point of filing suit, and it is not to simply confirm an arbitration award.

Section 41 of the Lease is not limited to arbitration. It demonstrates that certain claims, like the declaratory judgments specifically mentioned in section 30, are to be litigated rather than arbitrated.

With respect to the other provisions of the Lease that suggest that some disputes are to be litigated instead of arbitrated, Relator relies on its previous briefs to this Court. Similarly, Relator does not restate its argument here that, even if the arbitration provision is not declared unenforceable, still the claims at issue in this case should not be arbitrated because they do not concern interpretation, performance, or breach of the Lease.

Point 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.

In its Respondent's Brief, Defendant argues that this case is governed by *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 433 (Mo. banc 2015) and *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853, 858 (Mo. banc 2006). Defendant's argument is in error, and this Court should enter its permanent writ of mandamus.

A. Relator Presented The Issue Of Whether The Arbitration Agreement Lacked Consideration (As Well As The Issue Of Unconscionability) To The Trial Court.

Defendant contends that Relator did not argue before the trial court that the Lease lacked consideration. *See* Respondent's Brief, p. 3. A review of the pleadings before the trial court shows that this contention is false. In Relator's Memorandum in Opposition to Defendant's Motion to Compel Arbitration, Relator argued that the arbitration provision lacks consideration and is unconscionable. *See* Ex. C to Relator's Petition for Writ of Mandamus, p. 8. Relator specifically stated, "[T]here is inadequate consideration for the agreement and/or the arbitration provision is unconscionable." *Id.* Relator stated the same – that the arbitration provision lacks consideration and is unconscionable – in its Motion to Stay Arbitration. *See* Ex. D to Relator's Petition for Writ of Mandamus, p. 2. As such, Relator presented and preserved this issue before the trial court.

Additionally, Defendant suggests that Relator has admitted that an enforceable arbitration agreement was formed. Again, this suggestion is false. In its pleadings

below, Relator argued that the arbitration agreement does not apply to declaratory judgment actions *and, in the alternative*, that the arbitration provision lacked consideration and was unconscionable. *See* Motion to Stay, Ex. D, p. 2; Memorandum in Opposition to Motion to Compel, Ex. C, p. 8. Therefore, Relator did not and has never conceded that an enforceable arbitration agreement was formed.

B. This Case Is Governed By *Greene* and *Motormax*; *Eaton* Does Not Control.

Notably, Defendant's Substitute Respondent's Brief fails to address the *Greene* and *Motormax* cases, despite having argued considerably about their import before the Court of Appeals. See *Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646 (Mo. App. W.D. 2014); *Motormax Financial Services Corp. v. Knight*, 474 S.W.3d 164 (Mo. App. E.D. 2015). Both of these cases analyze whether arbitration agreements have mutual consideration and conclude that the arbitration agreements in question were unenforceable for a lack of mutual consideration.

In *Greene*, the Western District focused on whether the arbitration agreement "lacks the third necessary element for a valid contract—mutual **consideration**." 435 S.W.3d at 652 (emphasis added). This was part of the Court's analysis that began by stating that "[w]hen considering whether a party is compelled to arbitrate, we first must determine if a valid arbitration agreement exists." *Id*. at 650. The Court then noted that for a valid contract, there must be offer, acceptance, and bargained for consideration. *Id*. The Court concluded that the arbitration agreement in question satisfied the offer and acceptance requirements. *Id*. at 650-52. The Court continued on to mutual consideration, concluding that the arbitration agreement allowed the defendant "to unilaterally divest

itself of the promise to arbitrate." Therefore, the arbitration agreement lacked mutual promises to arbitrate. *Id*. at 654. The Court stated that when an arbitration provision lacks mutual promises, it lacks mutuality of consideration and is unenforceable. *Id.*

The same is true of this Court's holding in *Motormax*. The appellant argued that the trial court erred in denying its motion to compel arbitration "based on its finding that the Agreement was not enforceable for lack of mutual consideration." *Id*. at 168. The Court noted that a contract does not have 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*. at 169. The Court ultimately concluded that the arbitration agreement did not contain binding mutual promises to arbitrate, and, therefore, lacked consideration and was unenforceable. *Id*. at 171.

Whether an arbitration agreement lacks mutual promises is a separate inquiry from whether the agreement is unconscionable, or whether a contract, which includes an arbitration provision, has sufficient consideration. As noted in *Motormax*, the *Eaton* Court differentiated *Greene* from cases where there was a valid agreement to arbitrate, but the terms were unconscionable. *Motormax*, 474 S.W.3d at 169-70. For example, in *State ex rel. Vincent v. Schneider*, this Court concluded that the arbitration agreement was not unconscionable simply because only one party had the ability to initiate arbitration. 194 S.W.3d 853, 855-56 (Mo. banc 2006). In both *Eaton* and *Schneider*, this Court addressed mutuality in the context of a defense to the enforcement of the contract as a whole. *Eaton*, 461 S.W.3d at 433; *Schneider*, 194 S.W.3d at 858. However, in cases

where both parties purport to make a mutual promise to arbitrate, but one party is able to unilaterally divest itself of the promise to arbitrate, the promise to arbitrate is illusory. *Motormax*, 474 S.W.3d at 170. In that circumstance, there is not an enforceable arbitration agreement. *Id*.

Indeed, both *Greene* and *Motormax* focus on the fact that both parties to the arbitration agreement were not required to arbitrate the same disputes. For example, the *Greene* Court was careful to explain that "we need not decide whether the anti-waiver clause precludes waiver here, because, at the very least, it proves that the arbitration agreement lacks mutuality." *Greene*, 435 S.W.3d at 653. The *Greene* Court, of course, goes on to find that the arbitration agreement is unenforceable because it permits one party to unilaterally divest itself of the obligation to arbitrate disputes. *See id*. at 653-54. The *Motormax* Court followed this reasoning explicitly, holding that the important point was not the existence or non-existence of a particular waiver provision, but that "simply put, the Agreement effectively allowed Motormax to unilaterally divest itself of the obligation to arbitrate." *Motormax*, 474 S.W.3d at 171.

Just as in *Greene* and *Motormax*, in this case there is a provision in the contract that allows Defendant to unilaterally divest itself of the agreement to arbitrate: section 41 of the Lease. Whether it is called a "waiver" provision or "self-help" or anything else, by that provision, only Defendant, the only party required to pay money pursuant to the Lease, is allowed to file a civil suit instead of an arbitration. Therefore, like in *Greene* and *Motormax*, the arbitration provision fails for lack of mutual consideration.

C. Missouri Courts Have Consistently Considered The Enforceability Of Arbitration Agreements Even When There Is Consideration For The Entire Contract.

In its Substitute Respondent's Brief, Defendant first argues that the Rams' promise to pay rent constitutes consideration for the Arbitration Agreement. However, Defendant's conception of the issues in this case is far too simplistic and ignores much of the language in the relevant cases, including the cases they cite, such as *Eaton* and *Schneider*. Defendant believes that if a contract is supported by any consideration at all, then all inquiry is finished and the arbitration provision in said contract is valid and enforceable. Respectfully, this has never been the law and simply cannot be the case. Under Defendant's theory, an arbitration agreement that is completely unbalanced – stating that both parties will arbitrate disputes, but also stating that one party can pursue all of its claims in court – will be enforceable if there is any consideration for the contract as a whole.

Even in Defendant's most heavily relied upon unconscionability cases, *Eaton* and *Schneider*, the Court looked to the specific language of the arbitration provisions at issue, *after* considering the issue of consideration for the contract as a whole. In *Eaton*, the Court noted that "[b]oth parties exchanged consideration for the entire contract." 461 S.W.3d at 434. However, the Court's inquiry did not end there. The Court then turned to the issue of mutuality of promise in the arbitration provision. *Id.* The same is true of *Schneider*. After considering whether the contract as a whole had sufficient consideration, the Court turned to the specific language of the arbitration provision. 194

S.W.2d at 859. If the analysis is as limited as Defendant contends, there would be no reason for Missouri courts to consider any other issues aside from consideration for the contract as a whole.

Furthermore, Defendant's simplistic approach is contrary to the very foundation of the courts' consideration of arbitration provisions. As stated in *Greene*, "When considering whether a party is compelled to arbitrate, we first must determine if a valid arbitration agreement exists." 435 S.W.3d at 650 (citing *M & I Marshall & Ilsley Bank v. Sader & Garvin, LLC*, 318 S.W.3d 772, 776 (Mo. App. W.D. 2010)). The Court did not state that it must first determine whether the contract containing the arbitration provision is supported by consideration; rather, the Court's first consideration is **whether a valid arbitration agreement exists**. The piece missing from Defendant's argument is supplied by *Greene* and *Motormax*. As explained herein, these cases clarify that there is a second inquiry beyond that of overall consideration. Regardless of the overall contract's consideration, arbitration agreements must have mutuality of promise to arbitrate disputes and cannot permit a party to unilaterally divest itself of its arbitration promise.

Defendant's dismissal of *Greene*, *Motormax*, and *Jimenez* is equally simplistic and equally mistaken. Defendant argues that Relator is attempting to avoid application of *Eaton*, *Schneider* and *Baker* "by citing to several intermediate appellate court decisions." *See* Respondent's Brief, p. 26. However, the *Eaton* Court addressed *Greene*, approved of it, and noted specifically that "the promise to arbitrate in Greene was illusory." 461 S.W.3d at 435. The Court noted that *Greene* does not rely upon *Schneider* because the issues presented are, in fact, different. *Id.* The *Eaton* Court, considering *Greene*,

explicitly explained that one party's ability to "divest itself of . . . the agreed-upon consideration" resulted in an arbitration agreement that lacks consideration. *Id.* at 435-36. Based upon the *Eaton* Court's analysis and thoughtful review of *Greene*, it is clear that Missouri courts consider more than whether a contract as a whole is supported by consideration.

Also, this Court denied transfer of *Jimenez v. Cintas Corporation*,[5] 475 S.W.3d 679 (Mo. App. E.D. 2015), on the same day that it issued the *Eaton* opinion regarding unconscionability. This clearly evidences that this Court was presented with both lines of cases, at the exact same time, and took note of the distinct differences in the issues presented. Similarly, *Motormax* was decided well after this Court's decision in *Eaton*. Then, this Court denied transfer of *Motormax*. The *Motormax* opinion includes a long, detailed discussion of the differences between *Eaton*, *Schneider*, and *Greene*. *Id.* at 169-70. The *Motormax* application for transfer to the Missouri Supreme Court squarely requested that the Supreme Court review this Court's conclusion that lack of a mutual agreement to arbitrate results in a lack of consideration. See Relator's Appendix to Substitute Reply Brief, at p. A-27. If this Court disagreed with the *Motormax* Court's analysis, it had the opportunity to address the issue but declined to do so.

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[5] As noted in Relator's Brief, the *Jimenez* Court held that when an arbitration agreement lacks mutuality of promise, *i.e.*, one party is required to arbitrate its claims while the other party can proceed in court on the same claims, the agreement lacks consideration. 475 S.W.3d at 688-89.

D. The Parties' Agreement To Arbitrate Lacks Mutuality.

Although Defendant contends that there are reciprocal promises to arbitrate, here those promises are illusory because Defendant can unilaterally divest itself of its promise. The arbitration agreement in the Lease lacks consideration and is unenforceable because the Lease allows Defendant to unilaterally divest itself of the obligation to arbitrate. Specifically, section 41 of the Lease provides that "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." 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. Therefore, the exception to arbitration permits Defendant to "refrain from arbitrating those claims it is most likely to bring . . ." and the arbitration agreement is unenforceable. *See Jimenez*, 475 S.W.3d at 687.

Relator has made this argument repeatedly, first to the trial court and then to this Court prior to this Court issuing the preliminary writ. Surprisingly, now, for the first time, Defendant suggests that the exception to arbitration when there is a dispute over an obligation to pay money can be used by both Defendant and Relator because both Defendant and Relator have an obligation to pay money under the Lease. Defendant likely has not made this argument before for two reasons. First, by admitting that Defendant may institute suit pursuant to section 41 of the Lease, Defendant has **finally admitted the Lease contemplates litigation instead of arbitration in many instances.**

Second, Defendant's argument that Relator is obligated to pay money under the Lease is not supported by the language of the Lease.

Defendant cites to eight sections to suggest that Relator must make payment to Defendant under the Lease, thereby implicating the right to pay under protest and then file suit. These sections are 9.2, 13.4, 14, 15, 19, 30, 41, and the arbitration provision in Schedule I. None of these sections require a payment from Relator to Defendant. In fact, one of the sections cited by Defendant is section 41 itself. Section 41 is the very provision at issue that allows for a party to file suit if it has an obligation to make a payment under the Lease; it does not itself provide for any payment from Relator to Defendant. It is nonsensical bootstrapping to argue that section 41 applies to both parties simply because section 41 purports to apply to both parties. The very point is that it does not apply to both parties, because throughout the Lease the only payments of money required are payments made by Defendant to Relator, not the other way around.

The other sections cited by Defendant fare no better. Sections 9.2 and 14 concern payments, but not payments by Relator to Defendant. Both sections explicitly provide for payments from third parties (an insurance company and condemning authority, respectively) to Defendant and provide explicit authorization for those payments to go directly to Defendant, not Relator. Section 13.4 is simply a breach provision, does not mention any payment, and states that Relator can only default under four sections of the Lease, none of which concern payment by Relator to Defendant. Section 15 concerns indemnification against claims by brokers and does not mention a payment to Defendant. Section 19 is a provision on interest for past-due obligations. As the Lease does not

require Relator to make payments to Defendant, this section can never apply to Relator. Finally, Defendant apparently cites to the separate attorneys' fees provisions for both litigation (section 30) and arbitration (Schedule I). Attorneys' fees would be paid pursuant to an order of a court. Defendant apparently implies, without saying so, that this implicates section 41 because Relator could be ordered to pay attorneys' fees, then pay them under protest, and then file suit to recover the attorneys' fees that the court already ordered. This fanciful notion is absurd on its face. The purpose of section 41 is to allow a party to file suit, not arbitration, when a "dispute" arises about a payment due pursuant to the Lease. Once attorneys' fees are adjudicated, there is no more dispute arising, and certainly not a dispute under the Lease; the dispute has been adjudicated through a court order. Section 41 of the Lease was not intended to apply to such a situation. At any rate, *Jimenez* does not require a court to sustain an arbitration provision if there is a single, unheard-of situation that could be dreamed up that would make the provision apply to both parties. Rather, this Court pointed out that an arbitration provision could not be enforced where one party can unilaterally excuse itself from arbitration for disputes that were "most likely" to arise. *See Jimenez*, 475 S.W.3d at 687.

CONCLUSION

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

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

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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 29th day of June, 2017.

/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 5,628 words in total, in compliance with this Court's Local Rule 360.

/s/ *Christopher O. Bauman*