IN THE SUPREME COURT OF MISSOURI

NO. SC96499

JEFF REED,

***Plaintiff – Appellant*,**

vs.

THE REILLY COMPANY, LLC,

***Defendant – Respondent*.**

On Appeal from the Circuit Court of Jackson County, Missouri
Honorable Marco Roldan, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff – Appellant Jeff Reed appeals the Final Judgment / Journal Entry of the Circuit Court of Jackson County, Missouri, dismissing his Petition. LF_085. No after-trial motions were filed; therefore, the trial court's Judgment / Journal Entry became final on October 26, 2017.

Appellant timely filed his Notice of Appeal to the Missouri Court of Appeals for the Western District. LF_087-88. Following briefing and argument, the Western District issued its opinion on May 2, 2017 (the "Opinion"), affirming the trial court's dismissal of this action. *Reed v. The Reilly Co., LLC*, WD80190, 2017 WL1629370 (Mo. App. W.D. May 2, 2017); Appx.,[1] A3-A15. The Opinion was authored by Judge James Edward Welsh, with Judges Thomas H. Newton and Karen King Mitchell concurring.

Appellant filed his Motion for Rehearing and Rehearing *En Banc* and his Application for Transfer to the Missouri Supreme Court on May 17, 2017. The Western District denied those motions on May 30, 2017. Appx., A16. Appellant filed his Application for Transfer in this Court on June 14, 2017, with said Application being sustained on August 22, 2017. Accordingly, this Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution and Supreme Court Rules 83.04 and 83.09.

[1] "Appx" refers to the Appendix to Appellant's Substitute Brief.

STATEMENT OF FACTS

Jeff Reed, a citizen of Jackson County, Missouri, brought this action against his former employer The Reilly Company, LLC ("Reilly"), following Reilly's termination of his employment.

Since Dec. 27, 2007, the date Reilly was organized as a Kansas limited liability company, it has also maintained its registration as a foreign company with Missouri Secretary of State. LF_057-64. For nearly a decade, Reilly has maintained a registered agent and registered office in Jackson County, Missouri, and has employed people to broker the sale of insurance in Kansas and Missouri. *Id.*; LF_005, ¶ 5; LF_026, ¶ 8; LF_057-64; LF_065, § I(A) ("Reilly's agents sell insurance to Kansas and Missouri residents throughout the metropolitan area.").

On March 22, 2010, Reilly hired Reed, and the parties contemporaneously executed three documents that purported to create a contractual employment relationship; including the Broker Agreement, Exhibit 1 to the Broker Agreement, and the Confidentiality and Proprietary Agreement (all documents are collectively referred to as the "Employment Agreement"). LF_005-6, ¶¶ 10-13; LF_032-42. Paragraph 8 of the Broker Agreement purports to restrict Reed from soliciting or attempting to hire any Reilly employee, broker, or agent, for three years following the termination of his employment with Reilly. LF_005, ¶ 8; LF_035, ¶ 8. Paragraph 9 of the Broker Agreement purports to restrict Reed from disclosing any information concerning customers, prospects, policies, insurance, accounts, or other confidential or proprietary information concerning Reilly's business, for three years following termination. LF_006,

¶ 9; LF_035-36, ¶ 9. Paragraph 10 of the Broker Agreement purports to restrict Reed, for a period of three years following termination, from (a) disclosing any information concerning any customer, account, or solicited prospect of Reilly within 24 months preceding termination; (b) soliciting, servicing, writing, handling, or assisting in handling, any insurance business, or receiving any commission or compensation on any insurance business, from any customer, account, or solicited prospect of Reilly within 24 months preceding termination; (c) interfering or engaging in conduct which may interfere with Reilly's business or any account or prospect of Reilly; or (d) receiving any commission or compensation relating to any existing or prospective customers or accounts of Reilly. LF_006, ¶ 10; LF_036, ¶ 10. The Confidentiality Agreement reiterates and expands on paragraphs 8 – 10 of the Broker Agreement, and defines many of the terms used in the Employment Agreement, although it is not included in the record. LF_006, ¶ 11.

Paragraph 7(a) and 7(b) purport to place limits on Reilly's ability to terminate Reed's employment. LF_007, ¶¶ 12-13; LF_035, ¶ 7. Specifically, if Reed was employed for longer than three years, paragraph 7(b) purportedly provides him with "at least sixty (60) days" notice of termination, during which he "will continue to receive commissions and payments as specified in Section 5 (and Exhibit 1) of the Agreement." *Id*. Exhibit 1 to the Broker Agreement provides that "Broker remains an 'at will' employee subbject *[sic]* to termination with or without cause pursuant to Section 5 of the Agreement." LF_008-9, ¶¶ 22, 23; LF_040, § II; LF_049. Paragraph 5 of the Agreement

provides that Reilly shall pay Reed commissions in the manner and amounts set forth in Exhibit 1. LF_008, ¶ 22, fn. 2; LF_034, ¶ 5.

On Oct. 31, 2015, after working for Reilly for more than five years, Reed was terminated, effective immediately, with no prior written notice. LF_007, ¶ 14; LF_009, ¶ 24; LF_050; LF_069 ("Reed worked for The Reilly Company, LLC … for more than five years."). On Nov. 4, J.R. Reilly, the organizer and registered agent of the foreign corporation, emailed Reed a Separation Agreement, and advised Reed that he had twenty-one days to sign and return it. LF_007, ¶ 15. Under the Separation Agreement, Reilly offered to pay Reed 90 days' commissions, in exchange for Reed agreeing to waive any claims related to his employment and/or termination, and reaffirming all of his purported obligations in the Employment Agreement. LF_007, ¶ 16. On Nov. 30, J.R. Reilly sent another email to Reed, in which he advised Reed that the check for October production was being mailed, and further advised that, because the 21-day period for review of the Separation Agreement had lapsed, "we will consider the offer of the agreement rescinded and no future commission checks will be made." LF_007, ¶ 17.

Reed thereafter retained counsel, who notified Reilly of its breach and attempted to initiate settlement negotiations.[2] As stated by Mr. Smithyman in his Jan. 15, 2016

[2] The undersigned's Dec. 21, 2015 demand letter is not part of the record on appeal, however, the fact that discussions were initiated is evidenced by Mr. Smithyman's correspondence.

letter, [3] the parties were unable to "resolve this to the complete satisfaction of [their] clients", and Reed brought this action in the Circuit Court of Jackson County, Missouri, filing his petition on June 30, 2016. LF_003-15; 75.

This case is premised on Reed's assertion that the Employment Agreement is unenforceable because it lacks two elements essential to any enforceable employment contract, namely, the Employment Agreement (1) contains no "statement of duration", and (2) places no limits on Reilly's rights to discharge Reed at will. LF_008-09, ¶¶ 19-23; LF_048-50. Reed also asserts that it would be unfair to enforce the outbound forum selection clause because it was allegedly procured by fraudulent misrepresentation and concealment and the forum selection clause is not neutral and reciprocal in nature; and it would be unreasonable because it would deprive him of the benefits of Chapter 407. LF_010, ¶ 29(f); LF_051, 53-54. Additionally, in part, Reed asserts that jurisdiction is proper under RSMo § 407.914, because the section of the Missouri Merchandising Practices Act under which Reed filed suit expressly provides for jurisdiction in Missouri courts, and further provides that any contractual provision purporting to waive the provisions of RSMo §§ 407.911 to 407.915 shall be void. *See* LF_014, ¶ 45; LF_046, § I(A).

In Count I, Appellant seeks a declaration that the consideration promised to him in the Agreement was illusory, because Exhibit 1 to the Broker Agreement expressly states

[3] As discussed in Point I, Appellant contends that these are matters outside the pleadings and should have been excluded by the trial court in ruling on Reilly's motion to dismiss.

that his employment was "'at will' … subbject *[sic]* to termination with or without cause", and because he was terminated effective immediately, with no prior written notice, and Reilly notified him that "no future commissions checks will be made", therefore, the Employment Agreement was illusory and is void and of no effect. LF_007, ¶¶ 14, 17; LF_008-11, ¶¶ 22-29; LF_040, § II; LF_049-50.

In Count II, Appellant seeks a permanent injunction enjoining Reilly, or anyone on Reilly's behalf, from enforcing, or attempting to enforce, any agreement which purportedly governed Reed's conduct during, or after, the duration of his at-will employment with Reilly, specifically including the Employment Agreement. LF_011, ¶¶ 30-33.

In Count III, Appellant asserts a claim for fraudulent / negligent misrepresentation and concealment, based on his assertion that Reilly misrepresented to him that if he worked there for longer than three years, he would enjoy sixty days' written notice prior to termination, during which he would continue to receive commission payments, and/or Reilly's concealment of the fact that the Employment Agreement contained no restrictions on Reilly's ability to terminate him at will. LF_012-14, ¶¶ 34-41.

In Count IV, Appellant asserts a claim for violations of the Missouri Merchandising Practices Act ("MMPA"), RSMo § 407.911, *et seq.*, based on Reed's assertion that Reilly was his "principal", that he was Reilly's "sales representative", that he was employed to solicit orders in the State of Missouri, and that Reilly wrongfully withheld commissions from him on one or more occasions in the five years preceding his termination. LF_011, ¶¶ 42-47.

POINTS RELIED ON

I. The Trial Court Erred In Failing To Convert The Reilly Company, LLC's ("Reilly") Motion To Dismiss Into A Motion For Summary Judgment, Because It Introduced Matters Not Encompassed By The Pleadings That Were Directed At The Merits Of The Case, In That Reilly's Reply Suggestions Asserted, For The First Time, That Insurance Practices Are Exempt From The Missouri Merchandising Practices Act ("MMPA"), And Reilly's Reply Suggestions Introduced Matters Not Encompassed By The Pleadings That Were Directed At The Merits Of The Case.

Brewer v. Missouri Title Loans, 364 S.W.3d 486 (Mo. banc 2012)

King Gen. Contr. v. Reorganized Church, 821 S.W.2d 495 (Mo. banc 1991)

Robinson v. Title Lenders, Inc., 364 S.W.3d 505 (Mo. banc 2012)

Weems v. Montgomery, 126 S.W.3d 479 (Mo. App. W.D. 2004)

Mo. R. Civ. P. 55.27(a)

Mo. R. Civ. P. 74.04

II. The Trial Court Erred In Dismissing Reed's MMPA Claim, Because Reilly Failed To Show That It Fit Within The Exemptions And Extraneous Matters Not Presented To The Trial Court Cannot Be Considered For The First Time On Appeal, In That The Trial Court Record Contains No Evidence That Reilly Was Licensed Or Regulated By The Missouri Director Of Insurance, And The

Only Evidence Presented By Reilly Was Improperly Introduced For The First Time As An Exhibit To Reilly's Appellate Brief.

Elias v. Davis, _____ S.W.3d _____, 2017 WL 3387978 (Mo. App. W.D. 2017)

Pretti v. Herre, 403 S.W.2d 568 (Mo. 1966)

Racket Merchandise Co. v. New Castle Corp., 8 S.W.3d 208 (Mo. App. W.D. 1999)

Shepard v. Shepard, 186 S.W.2d 472 (Mo. 1945)

Mo. R. Civ. P. 81.12

III. The Trial Court Erred In Dismissing Reed's MMPA Claim, Because The Entities Listed In Section 407.020.2(2) Are Not Exempt From Private Civil Actions Brought Pursuant To The Commissioned Salesperson Act, Sections 407.911 to 407.915 (The "CSA"), In That The Exemptions In Section 407.020.2(2) Are Expressly Limited To "This Section", The CSA Empowers Private Citizens, Such As Reed, With The Power To Bring A Civil Action Against His Or Her Principal, And This Court Has Already Necessarily Concluded That a Private Cause Of Action Under The MMPA Can Be Maintained Against An Insurance Company.

Christenson v. Am. Food & Vending Svcs., 191 S.W.3d 88 (Mo. App. E.D. 2006)

Finnegan v. Old Republic Title Co. of St. Louis, Inc., 246 S.W.3d 928 (Mo. banc 2008)

High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. banc 1992)

Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240 (Mo. banc 2003)

RSMo § 407.020

RSMo § 407.120

RSMo §§ 407.911 to 407.915

IV. The Trial Court Erred In Enforcing The Outbound Forum Selection Clause And Dismissing The Case, Because A Forum Selection Clause Will Only Be Enforced If It Includes "Precise Language" Requiring Tort Claims To Be Litigated In The Contractually Selected Forum, In That The Forum Selection Clause At Issue Expressly Applies Only To Claims Seeking To "Interpret And Enforce" The Terms Of The Employment Agreement, And Reed Is Not Seeking To Enforce Any Of The Terms Of The Agreement.

Jitterswing, Inc. v. Francorp, Inc., 311 S.W.3d 828 (Mo. App. E.D. 2010)

Service Vending Co. v. Wal-Mart Stores, Inc., 93 S.W.3d 764 (Mo. App. 2002)

Stiers v. Director of Revenue, 477 S.W.3d 611 (Mo. banc 2016)

V. The Trial Court Erred In Enforcing The Outbound Forum Selection Clause And Dismissing The Case, Because At-Will Employment Does Not Create A Legally Enforceable Employment Relationship, Unilaterally Imposed Provisions Of An At-Will Employment Agreement Require Additional Consideration, And A Party Cannot Seek To Enforce A Contract It Has Already Materially Breached, In That The Employment Agreement Expressly Provides That Reed's Employment Was "At Will", No Additional

Consideration Was Given In Exchange For The Outbound Forum Selection Clause, And Reilly Materially Breached The Agreement When It Terminated Reed With No Prior Notice, Effective Immediately, And Notified Him That "No Further Commissions Checks Will Be Made."

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

Durrell v. Tech Electonics, Inc., No. 16-cv-1367 (E.D. Mo. Nov. 15, 2016)

JumboSack Corp. v. Buyck, 407 S.W.3d 51 (Mo. App. 2013)

Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15 (Mo. App. W.D. 2008)

VI. The Trial Court Erred In Enforcing The Outbound Forum Selection Clause And Dismissing The Case, Because Enforcement Of The Forum Selection Clause Would Be Unfair And Unreasonable, In That The Employment Agreement Was Allegedly Procured By Fraudulent Misrepresentation And Concealment, The Forum Selection Clause Is Not Neutral And Reciprocal In Nature, And The Forum Selection Clause Purports To Deprive Reed Of The Benefits Of Chapter 407.

Elec. & Magneto Svc. Co., Inc. v. AMBAC Int'l Corp., 941 F.2d 660 (8th Cir. 1991)

Burke v. Goodman, 114 S.W.3d 276 (Mo. App. E.D. 2003)

High Life Sales Co. v. Brown-Forman Corp., 477 U.S. 365 (1986)

STANDARD OF REVIEW

The standard of review for a trial court's grant of a motion to dismiss is *de novo*. *Damon v. City of Kansas City*, 419 S.W.3d 162, 175 (Mo. App. W.D. 2013) (quoting *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. 2008) (citation omitted)); *Burke v. Goodman*, 114 S.W.3d 276, 279 (Mo. App. E.D. 2003) (the dismissal of a case on the basis of an outbound forum selection clause is subject to *de novo* review). In testing the adequacy of the petition to determine if it states a claim, all allegations are accepted as true and all reasonable inferences are granted in favor of plaintiff. *Campbell v. City Comm'n of Franklin County*, 453 S.W.3d 762, 767 (Mo. banc 2015).

> No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Nazeri v. Missouri Valley College, 860 S.W.2d 303, 306 (Mo. 1993).

"When the trial court fails to specify its reason for dismissing the petition, it must be presumed the trial court acted for one of the reasons stated in the motion to dismiss." *Guerra v. Fougere*, 201 S.W.3d 44, 46 (Mo. App. W.D. 2006). Because the trial court's Judgment / Journal Entry dismissing Reed's Petition contains no explanation or analysis, Appellant will address each issue raised in the motion to dismiss.

ARGUMENTS

I. THE TRIAL COURT ERRED IN FAILING TO CONVERT THE REILLY COMPANY, LLC'S ("REILLY") MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT, BECAUSE IT INTRODUCED MATTERS NOT ENCOMPASSED BY THE PLEADINGS THAT WERE DIRECTED AT THE MERITS OF THE CASE, IN THAT REILLY'S REPLY SUGGESTIONS ASSERTED, FOR THE FIRST TIME, THAT INSURANCE PRACTICES ARE EXEMPT FROM THE MISSOURI MERCHANDISING PRACTICES ACT ("MMPA"), AND REILLY'S REPLY SUGGESTIONS INTRODUCED MATTERS NOT ENCOMPASSED BY THE PLEADINGS THAT WERE DIRECTED AT THE MERITS OF THE CASE.

A. In Reilly's Reply Suggestions, It Concedes That Jurisdiction And Venue Are Proper In Missouri, Therefore, Its Motion To Dismiss Should Have Been Treated As A Motion To Dismiss For Failure To State A Claim Upon Which Relief Could Have Been Granted.[4]

Reilly's motion to dismiss did not specify under which subsection of Rule 55.27(a) it sought dismissal, however, it appeared to be disputing jurisdiction in Jackson County, Missouri. LF_022-45; LF_025 ("On the basis of this [forum selection clause],

[4] Point I of Appellant's Substitute Brief combines the arguments in Points I and VII of Appellant's Brief filed in the Court of Appeals.

Johnson County, Kansas is the sole proper jurisdiction and venue to interpret and enforce the contract."). The affidavits and exhibits attached to Reilly's motion introduced matters outside the pleadings, however, when a motion to dismiss is based on "improper venue relating to a forum selection clause, it should be treated as an issue of jurisdiction." *Scott v. Tutor Time Child Care Sys., Inc.*, 33 S.W.3d 679, 682 (Mo. App. W.D. 2000) (*citing Chase Third Century Leasing Co., Inv. v. Williams*, 782 S.W.2d 408, 411-12 (Mo. App. 1989)); *Rell v. Burlington Northern R. Co.*, 976 S.W.2d 518, 520 (Mo. App. E.D. 1998) ("A court is not restricted to the pleadings in considering a motion to dismiss for lack of jurisdiction.") (citations omitted), *abrogated on other grounds by Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528 (Mo. banc 2002).

In its reply suggestions, Reilly acknowledged that it conducts business in Missouri, that it maintains a registered agent and registered office in this State, and that it "does not contest jurisdiction or venue." LF_065, § I(A). As such, the exercise of personal jurisdiction over the parties is proper. *See Bennett v. Shaul*, 318 S.W.2d 307, 309 (Mo. 1958) ("'where the court has jurisdiction over the subject matter or cause of action, jurisdiction over the persons of the parties may be conferred by consent …'") (*quoting* 21 C.J.S. Courts § 85c, p. 133).

Additionally, Missouri courts have subject matter jurisdiction over a disputed forum selection clause. *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 496 (Mo. banc 1992) (jurisdiction is retained to determine whether a forum selection clause is "necessary or desirable and not unfair …"); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 491 (Mo. banc 2012) ("state law contract defenses including 'fraud, duress,

and unconscionability 'may be applied to invalidate arbitration agreements without contravening [the FAA].'"") (*quoting AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 355, n. 1 (2012) (Thomas, J., concurring) (*quoting Doctors Assoc's., Inc.*, 517 U.S. 681, 687 (1996))); *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 513 (Mo. banc 2012) (same); *Dunn Indus. Group v. City of Sugar Creek*, 112 S.W.3d 421, 432 (Mo. banc 2003) (citations omitted) ("An arbitration clause is simply a particular type of forum selection clause"). Further, RSMo § 407.914 provides that an out-of-state principal who contracts with a sales representative to solicit orders in this state is subject to the jurisdiction of Missouri courts. *See* Appx., A26.

B. Reilly's Reply Suggestions Introduced Matters Outside The Pleadings Which Were Directed At The Merits Of The Case, And Its Motion To Dismiss Should Have Been Converted Into A Motion For Summary Judgment.

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, when "matters outside the pleadings are presented to and not excluded by the court," Rule 55.27(a) provides that "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 74.04." *See* Appx., A34. In part, Rule 74.04 requires the moving party to attach a statement of uncontroverted facts to its motion, and provides that the responding party shall have thirty days to file a response, and fifteen days to file a sur-reply. *See* Rules 74.04(c)(1)-(4); Appx., A37-A38. Rule 74.04(c)(6) provides that the court shall decide the motion "[a]fter the response, reply and any sur-reply have been filed or the deadlines therefor have expired …" Appx., A39.

Reed's pleadings make no mention of whether Reilly is "subject to chartering, licensing, or regulation by the director" of any entity listed in RSMo § 407.020.2(2). *See generally* LF_004-15. Likewise, Reilly made no mention of the Missouri Merchandising Practices Act ("MMPA") in its motion to dismiss. LF_25-31. Only in its reply suggestions does Reilly make the bare assertion that "the 'MMPA' does not pertain to insurance practices." LF_066. Reilly's reply suggestions also introduced an affidavit of counsel and a number of extraneous documents, which were directed to the merits of the case. The stated purpose of said materials was to "eviscerate any assertions of fraud or misconduct." LF_069.

The trial court entered its Judgment / Journal Entry dismissing Reed's case on Friday, September 23, just nine days after Reilly filed its reply suggestions; and it was filed with the clerk on Monday, September 26.[5] LF_085. Had Reilly's motion to dismiss been converted into a motion for summary judgment as required by Rule 55.27(a), the time limits for his response would have been determined under Rule 74.04(c). Reed's response would not have been due for thirty days, or October 14, and his sur-reply would have been due fifteen days from Reilly's reply. At the very least, Reed should have been given ten days to respond, as required by Jackson County Local Rule 33.5.1. *See* Appx., A32.

The trial court erred in failing to exclude these extraneous matters from consideration as required by Rule 55.27(a), or in failing to convert the motion to dismiss

[5] Pursuant to Rule 44.01(a), the tenth day fell on September 26.

into a motion for summary judgment. Because these matters were not excluded from consideration, the trial court erred in not allowing Reed thirty days to file his response or fifteen days to file his sur-reply as required by Rule 74.04(c), and in not allowing Reed a "reasonable opportunity to present all material made pertinent to such a motion" as required by Rule 55.27(a). *See* Appx., A34.

If, as the Court of Appeals determined, the trial court did not consider Reilly's reply suggestions in dismissing Reed's case, Reilly's assertion that "the 'MMPA' does not pertain to insurance practices" would not have been at issue on appeal. However, the Court of Appeals determined that "the MMPA [does] not apply to Reilly as it was a company licensed or regulated by the director of the department of insurance[;]" therefore, it necessarily accepted Reilly's assertions regarding "insurance practices" in holding that the MMPA did not apply to Reilly. Opinion, p. 8; Appx., A10.

The trial court erred in failing to convert Reilly's motion to dismiss into a motion for summary judgment. Absent Reilly's assertions regarding "insurance practice", the record contained no evidence upon which the trial court have determined that Reilly was subject to chartering, licensing, or regulation by the Missouri director of insurance. Because the Judgment / Journal Entry of Dismissal was characterized as a dismissal, because Reed lacked notice that the trial court intended to consider matters outside the pleadings or to treat the motion to dismiss as a motion for summary judgment, and because the motion was decided prior to the expiration of the deadlines provided in Rule 74.04(c), the Court should avoid addressing the merits of the case or considering evidence outside the pleadings, and limit its review to a *de novo* review of whether

Reed's Petition states actionable claims. *See, e.g., Weems v. Montgomery*, 126 S.W.3d 479 (Mo. App. W.D. 2004) (*quoting Brennan By and Through Brennan v. Curators of the Univ. of Mo.*, 942 S.W.2d 432, 434 (Mo. App. W.D. 1997)); *King Gen. Contr. v. Reorganized Church*, 821 S.W.2d 495, 499 (Mo. banc 1991) ("Great caution must be exercised in granting summary judgment as it 'borders on denial of due process.'") (*quoting Y.G. v. Jewish Hospital of St. Louis*, 795 S.W.2d 488, 494 (Mo. App. 1990)).

II. THE TRIAL COURT ERRED IN DISMISSING REED'S MMPA CLAIM, BECAUSE REILLY FAILED TO SHOW THAT IT FIT WITHIN THE EXEMPTIONS AND EXTRANEOUS MATTERS NOT PRESENTED TO THE TRIAL COURT CANNOT BE CONSIDERED FOR THE FIRST TIME ON APPEAL, IN THAT THE TRIAL COURT RECORD CONTAINS NO EVIDENCE THAT REILLY WAS LICENSED OR REGULATED BY THE MISSOURI DIRECTOR OF INSURANCE, AND THE ONLY EVIDENCE PRESENTED BY REILLY WAS IMPROPERLY INTRODUCED FOR THE FIRST TIME AS AN EXHIBIT TO REILLY'S APPELLATE BRIEF.

Reed did not allege that Reilly was an entity listed in RSMo § 407.020.2(2), nor has he ever conceded this point. The only reference Reilly makes to section 407.020.2 is the bare assertion that "the 'MMPA' does not pertain to insurance practices." LF_066, § I(B) (*citing* RSMo § 407.020.2). Even if the legislature did intend to exempt "insurance practices" from "this chapter" or "any section" as opposed to "this section", there are no

facts properly in the record from which the trial court could have determined whether Reilly fit within the claimed exemption.

Recently, the Court of Appeals for the Western District addressed a similar issue, albeit the appeal was from a grant of summary judgment. The court hypothesized various instances in which it "may indeed have been a good idea" for the school to have a rule or regulation pertaining to the method and manner in which an adult can physically participate in football practice with teenaged players, "the record before us does *not* reference such a MSHSAA regulation." *Elias v. Davis*, _____ S.W.3d _____, 2017 WL 3387978, at *3 (Mo. App. W.D. Aug. 8, 2017) (emphasis in original).

> Instead, for the first time on appeal, Elias attempts to inject the text of a purported MSHSAA regulation or ByLaw that he argues is both relevant to the direction given to the coaches in the instruction of high school student athletes during football practices and constitutes a material dispute as to the ministerial duties of the coaches in the subject practice.
>
> …
>
> An exhibit that was not offered to the trial court is not part of the record on appeal, and an issue not expressly presented or decided by the trial court is not preserved for appellate review.

Id. (*citing Jos. A Bank Clothiers, Inc. v. Brodsky*, 950 S.W.2d 297, 304 (Mo. App. E.D. 1997).

In Reilly's appellate brief, it did not dispute the absence of evidence in the record; instead, for the first time on appeal, Reilly attached extraneous documents as exhibits to its appellate brief. *See* Respondent's Brief, p. 10 (referencing the extraneous documents attached to its brief, Reilly asserted, "[t]hus, nothing within the MMPA should apply to the IBA executed by the parties."). However, long-standing precedent of this Court makes it clear that the record on appeal cannot be supplemented by extraneous matters not presented to the trial court nor conceded by adverse counsel, and such matters cannot be considered for the first time on appeal. *Pretti v. Herre*, 403 S.W.2d 568, 569 (Mo. 1966); *Nelson v. Hammett*, 189 S.W.2d 238, 242 (Mo. 1945); *See also Crestwood Commons v. 66 Drive-In, Inc.*, 812 S.W.2d 903, 909 (Mo. App. E.D. 1991) ("evidence extraneous to the trial court record should not be considered on appeal"); *Spires v. Lawless*, 493 S.W.2d 65, 73-74 (Mo. App. 1973) (An appellate court's "jurisdiction on appeal is solely appellate, and we cannot receive nor consider new evidence.") (citation omitted); *City of Joplin v. Village of Shoal Creek Drive*, Mo. App., 434 S.W.2d 25, 28-29 (Mo. App. 1973) ("Our appellate courts review the evidence de novo … but they do not and never have literally tried cases anew, … Our jurisdiction in this case is appellate only.") (citations omitted).

Rule 81.12(b)(2) provides that the legal file shall include the following matters, in chronological order: (a) the pleadings upon which the action was tried; (b) the verdict; (c) the findings of the court or jury; (d) the judgment or order appealed from; (e) motions and orders after judgment; and (f) the notice of appeal. *See* Appx., A42. Rule 81.12(b)(3) provides that the legal file "shall not set forth any … part of the record not introduced in

evidence." Appx., A42; *see also Robinson v. Empiregas Inc. of Hartville*, 906 S.W.2d 829, 836 (Mo. App. S.D. 1995) ("[A]n appellate court is not a forum in which new points will be considered, … a party seeking the correction of error must stand or fall on the record made in the trial court, …") (*quoting Handshy v. Nolte Petroleum Co.*, 421 S.W.2d 198, 202 (Mo.1967) (*quoting* 4 C.J.S. Appeal & Error § 253, p. 770). Reed obtained certified copies of the trial court record from the clerk of the court, and filed the record with the Court of Appeals in accordance with the rules. Reilly did not dispute any portion of the record as submitted by Appellant; supplement the record pursuant to Rules 81.12(e) or (g); or file a motion to expand the record on appeal. Likewise, Reilly did not dispute that the appellate record was devoid of any evidence from which it could be determined whether it was licensed or regulated by the Missouri department of insurance. Instead, for the first time on appeal, Reilly attached extraneous documents as exhibits to its brief. Reilly's attempt to introduce extraneous material for the first time on appeal is "improper [and] unfair to opposing counsel …" *Jones v. Keller*, 850 S.W.2d 383, 383-84 (Mo. App. E.D. 1993). It is a "violation of the Rules [that should] not [be] condoned." *Crestwood Commons,* 812 S.W.2d at 909.

The procedures for the filing, and supplementation, of the record on appeal are the most fundamental of the appellate rules. As this Court has made clear on numerous occasions, "the record … made in the trial court is not a loose-leaf ledger so as to permit insertion of matters subsequently transpiring, but … constitutes a closed book binding on the parties to the suit." *Shepard v. Shepard*, 186 S.W.2d 472, 477 (Mo. 1945). As was

the case in *Racket Merchandise Co. v. New Castle Corp.*, 8 S.W.3d 208, 210 (Mo. App. W.D. 1999),

> Without such facts in the record, the circuit court had no basis for granting New Castle's motion. The circuit court, therefore, abused its discretion in granting New Castle's motion.

Appellant submits that the Court should likewise remand this case to the trial court so that the record can be fully developed in the first place.

III. THE TRIAL COURT ERRED IN DISMISSING REED'S MMPA CLAIM, BECAUSE THE ENTITIES LISTED IN SECTION 407.020.2(2) ARE NOT EXEMPT FROM PRIVATE CIVIL ACTIONS BROUGHT PURSUANT TO THE COMMISSIONED SALESPERSON ACT, SECTIONS 407.911 TO 407.915 (THE "CSA"), IN THAT THE EXEMPTIONS IN SECTION 407.020.2(2) ARE EXPRESSLY LIMITED TO "THIS SECTION", THE CSA EMPOWERS PRIVATE CITIZENS, SUCH AS REED, WITH THE POWER TO BRING A CIVIL ACTION AGAINST HIS OR HER PRINCIPAL, AND THIS COURT HAS ALREADY NECESSARILY CONCLUDED THAT A PRIVATE CAUSE OF ACTION UNDER THE MMPA CAN BE MAINTAINED AGAINST AN INSURANCE COMPANY.

A. Based On The Plain Language Of The Statute, The Exemptions In Section 407.020.2(2) Do Not Apply To Reed's Employment-Related Claims, Because The Exemptions Are Expressly Limited To "This Section".

In its reply suggestions, Reilly makes the bare assertion that "the 'MMPA' does not pertain to insurance practices." LF_066, § I(B) (*citing* RSMo § 407.020.2). While Appellant disputes that the record contains facts from which the trial court could have determined whether Reilly was licensed or regulated by the Missouri director of insurance, even if such evidence were in the record, Reilly would still not be exempt from Reed's employment-related claims.

The exemptions listed in RSMo § 407.020.2(2) are expressly limited to claims brought under "this section", *i.e.*, RSMo § 407.020, and Reed's Petition makes no mention of section 407.020.[6] To the contrary, Reed's MMPA claim is wholly based on Reilly's alleged violations of RSMo §§ 407.911 to 407.915 – sections containing no reference to RSMo § 407.020, or any other section of the MMPA for that matter.

"'When interpreting a statute, the primary goal is to give effect to legislative intent as reflected in the plain language of the statute.'" *Stiers v. Director of Revenue*, 477 S.W.3d 611, 615 (Mo. banc 2016) (*quoting State v. Moore*, 303 S.W.3d 515, 520 (Mo. banc 2010)); *Lewis v. Gibbons*, 80 S.W.3d 461, 465 (Mo. banc 2002) (same). "The legislature is presumed to have intended exactly what it states, and if the language used in the statute is plain and unambiguous, then there is no reason for any construction." *United Air Lines, Inc. v. State Tax Commission*, 377 S.W.2d 444, 448 (Mo. banc 1964).

[6] The issue of whether a consumer can bring a civil suit brought under RSMo § 407.025 against a person or entity exempted from enforcement actions under § 407.020 is a separate matter not at issue in this case.

In *Landman v. Ice Cream Specialties, Inc.*, this Court held that "[t]here is a difference between the phrases 'all costs under *this section*' and 'the whole costs of *the proceedings*.'" *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251 (Mo. banc 2003) (emphasis added), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). "When different terms are used in different subsections of a statute, it is presumed that the legislature intended the terms to have different meaning and effect." *Id*. at 251-52 (*citing Armco Steel v. City of Kansas City, Mo.*, 883 S.W.2d 3, 7 (Mo. banc 1994)).

> It is logical to follow that presumption here – "all costs under this section" plainly refers to all the costs that the commission may authorize under section 287.560, … "[T]he whole cost of the proceedings," on the other hand, is plainly broader than just those costs that are identified in "this section." Otherwise, the words "whole" and "of the proceedings" would be rendered superfluous and without meaning.

Id. at 252. "It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute." *Id*. (*citing Hyde Park Housing Partnership v. Director of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993)).

Similar to the legislature's use of the different terms "all costs under this section" and "the whole cost of the proceeding" in RSMo § 287.560, the legislature uses the term "[n]othing contained in this section" to qualify the scope of the exemptions in RSMo §

407.020.2, as opposed to using a broader term such as "this chapter" or "any section".[7] *See* Appx., A17. Further, as discussed in Point III(B), *infra*, in 1986, the legislature deliberately narrowed the scope of the exemptions in section 407.020.2, changing the term "herein contained" to "contained in this section". *See* V.A.M.S. 407.020, Appx., A30. Additionally, in 1985, the legislature amended 407.020.2(3), changing the phrase "unless the directors of such divisions specifically authorize the attorney general to implement the powers of *sections 407.010 to 407.130*" to "unless the directors of such divisions specifically authorize the attorney general to implement the powers of *this chapter*". *Id*. (emphasis added).

Appellant submits that the legislature clearly intended to limit the scope of the exemptions in RSMo § 407.020.2 to actions brought pursuant to RSMo § 407.020, as evidenced by the fact that the legislature deliberately changed the term "herein contained" to "contained in this section". The scope of 407.020.2(3) was also broadened, substituting "this chapter" for "sections 407.010 to 407.130". *See* V.A.M.S. 407.020, Appx., A30. The use of the term "this chapter", as opposed to "this section", in a different subsection of the section 407.020 is further evidence that the legislature intended for these words to have different meanings and effect.

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[7] The current version of section 407.020.2(2) provides, in part, "Nothing contained **in this section** shall apply to … (2) Any institution, company, or entity that is subject to chartering, licensing, or regulation by the director of the department of insurance, …" RSMo. § 407.020.2(2) (emphasis added).

Not surprisingly, relying on *Landman*, the Missouri Courts of Appeals for the Eastern District and the Southern District are in agreement that when the legislature uses the words "section" and "chapter" in different subsections of the same section, it presumably intends for those different words to have different meanings.

> The legislature uses the word 'section' instead of 'chapter' several times within other subsections of 288.045. We presume the legislature intended for these two words to have different meaning and effect.

Div. of Employment Sec. v. Comer, 199 S.W.3d 915, 921 (Mo. App. S.D. 2006) (*quoting Christenson v. Am. Food & Vending Svcs*., 191 S.W.3d 88, 93 (Mo. App. E.D. 2006)).

In determining whether the legislature intended for the term "this section" to have a different meaning than "this chapter", the Court can also look to other sections of the MMPA. *See e.g., Dover v. Stanley*, 652 S.W.2d 258, 263 (Mo. App. W.D. 1983) (in attempting to reconcile and harmonize sections of the MMPA that appeared to be in conflict, the court looked to other sections within Chapter 407) (attempting to harmonize and reconcile statutes that appeared to be in conflict, the court looked to other sections within the MMPA) (*citing S.W. Forest Indus. v. Loehr Employment, Etc.*, 543 S.W.2d 322, 323 (Mo. App. 1976)).

RSMo § 407.292.8 exempts pawnbrokers from "this section", even though chapter 367 entities are exempt from enforcement actions under section 407.020. RSMo § 407.456.2 exempts fraternal organizations, among others, from sections 407.459 to 407.462, and 407.469.1, even though chapter 378 entities are exempt from enforcement

actions under section 407.020. RSMo § 407.1400.5 exempts state or national banks, state or national savings associations, credit unions, and trade or business organizations or associations, that offer a credit card processing service or is a party to a contract that offers a credit card processing service, from "this section", even though chapters 361, 362, 364, 368, 369, and 371 entities are exempt from enforcement actions under section 407.020.

If, as Reilly asserts, when the legislature changed the language of section 407.020.2 from "herein contained" to "contained in this section", it really intended for "this section" to mean "this chapter" or "any section", then the above provisions would be superfluous and meaningless.

Similarly, violations of RSMo §§ 407.295.4, 407.430 to 407.436, and 407.1070 to 407.1085, are expressly subject to the provisions of sections 407.010 to 407.130. Violations of RSMo §§ 407.660 to 407.664, and 407.670 to 407.678, are expressly subject to the provisions of sections 407.010 to 407.145. Violations of RSMo §§ 407.485, 407.677, 407.800, 407.1120 to 1132, are expressly deemed to be violations of section 407.020. Finally, violations of RSMo § 407.610.4 are expressly deemed to be violations of section 407.020, and violations of section RSMo § 407.610.5 are expressly deemed to be violations of section 407.025.

If, as the Court of Appeals determined, a violation of RSMo §§ 407.911 to 407.915 is just another "unlawful practice" as defined by section 407.020, then the above provisions, which expressly reference sections 407.020, 407.025, or 407.010 to 407.145, would also be meaningless. If a violation of any section of the MMPA is an "unlawful

practice" as defined by section 407.020, regardless of whether the legislature has defined it as such, then any person aggrieved by a violation of any section of the MMPA could presumably bring a claim under section 407.025, regardless of whether the legislature has authorized such a claim, and regardless of whether other sections of the MMPA, such as sections 407.911 to 407.915, provide causes of action separate and distinct from sections 407.010 to 407.145. Clearly the legislature intended to define only some sections of the MMPA as "unlawful practices", and likewise only intended for some sections of the MMPA to be actionable under sections 407.020, 407.025, 407.010 to 407.130, or 407.010 to 407.145.

As shown above, a determination that the exemptions in section 407.020.2 apply to every section of the MMPA would render the language in numerous other sections of the MMPA as nothing more than "idle verbiage or superfluous language". *Landman*, 107 S.W.3d at 252. Likewise, it would also presumably authorize consumers to bring a claim under section 407.025 for violations of any section of the MMPA, regardless of whether the statute provides for it. These inconsistencies make it clear that such an interpretation would go against one of the primary rules of construction, as the court presumes that "the General Assembly did not intend or commit a useless act …" *Dover v. Stanley*, 652 S.W.2d at 264 (*citing Anderson v. Dyer*, 456 S.W.2d 808, 813 (Mo. App. 1970)); *Landman*, 107 S.W.3d at 251 ("it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute.").

B. The Commissioned Salesperson Act, Sections 407.911 to 407.915 (The "CSA") Empowers Private Citizens, Such As Reed, With The Power To Bring A Civil Action Against His Or Her Principal.

When the Missouri legislature enacted the Commissioned Salespersons Act ("CSA"), RSMo §§ 407.911 to 407.915, it empowered private citizens, such as Reed, with the ability to bring a civil action against his or her principal. *See* RSMo § 407.913; Appx., A26 (any principal who violates the CSA "*shall be liable* to the sales representative in a civil action …") (emphasis added). Additionally, the CSA expressly provides for jurisdiction in Missouri courts. *See* RSMo § 407.914; Appx., A27. Like the liquor franchise laws at issue in *High Life Sales v. Brown-Forman Corp.*, 823 S.W.2d 493, 499 (Mo. banc 1992), which make "any effort to waive or modify its provisions [] unenforceable[;]" the CSA provides,

> Any provision in any contract between a sales representative and a principal purporting to waive any provision of sections 407.911 to 407.915, whether by expressed waiver or by a contract subject to the laws of another state, shall be void.

RSMo § 407.915; Appx. A28 (emphasis added). In part, based on the above provisions of the CSA, Reed asserted that the contractual forum selection clause was void, because it purported to deprive him of jurisdiction in Missouri courts. In dismissing Reed's case, the trial court overlooked these important provisions of the CSA, as well as the legislative history of the MMPA.

Since the inception of the MMPA, the Missouri Legislature has consistently narrowed scope of the exemptions in subsection 407.020.2(2); while, at the same time, consistently expanding the rights of Missouri citizens. In 1986, the Legislature passed Mo. S.B. 685, which, in part, modified the language of sections 407.020 and 407.120.[8] The scope of RSMo § 407.020.2(2) was changed from "nothing *herein contained*" to "nothing contained *in this section*". *See* V.A.M.S. 407.020; Appx., A30 (emphasis added). Conversely, the scope of the MMPA's savings provision was changed from "*herein declared* to be unlawful" to "*declared* to be unlawful *by this chapter*." *See* V.A.M.S. 407.120; Appx., A31 (emphasis added). The current version reads as follows:

> The provisions of *sections 407.010 to 407.130 shall not bar any civil claim against any person* who has acquired any moneys or property, real or personal, *by means of any practice declared to be unlawful by this chapter.*

RSMo § 407.120; Appx., A23 (emphasis added).

Over the years, the legislature has continued its expansion of the MMPA, and its corresponding narrowing of the exemptions in RSMo § 407.020.2(2). In 1992, the legislature added the following exception to subsection 407.020.2 (2), "*or such powers are provided to* either the attorney general or *a private citizen by statute*." RSMo § 407.020.2(2); Appx., A30 (emphasis added). In pertinent part, the current version of RSMo § 407.020.2(2) reads as follows:

[8] RSMo § 407.120 was included as part of the 1967 version of the MMPA.

2. Nothing contained in this section shall apply to:

…

(2) Any institution, company, or entity that is subject to chartering, licensing, or regulation by the director of the department of insurance, … *unless … [the] powers [of this chapter] are provided to … a private citizen by statute*.

RSMo § 407.020.2(2); Appx., A17 (emphasis added). Over the past fifteen years, the statutory exception for private civil lawsuits in section 407.020.2(2) has remained unchanged, as has the expanded scope of the MMPA's savings provision, RSMo § 407.120.

The CSA empowers private citizens, such as Reed, to bring a private civil action against his or her principal. Based on the plain language of sections 407.020.2(2) and 407.120, Reed's CSA claim is statutorily excepted from the exemptions listed in section 407.020.2(2). This is especially true if, as the Court of Appeals determined, it is an "unlawful practice where a principal fails to timely pay a sales representative commissions …" Opinion, p. 6. *See* RSMo § 407.120, Appx., A23 ("sections 407.010 to 407.130 shall not bar [Reed's] civil claim against any person [Reilly] who has acquired any moneys or property, real or personal, *by means of any practice declared to be unlawful by this chapter* …") (emphasis added). Given the expanded scope of private citizens' rights under the MMPA, and the corresponding exceptions to the exemptions in RSMo § 407.020.2(2), Reed submits that, even if evidence were properly in the appellate

record from which it could be determined that Reilly was licensed or regulated by the Missouri director of insurance, it still would not be exempt from Reed's CSA Claim.

Accepting Reed's allegations as true, the outbound forum selection clause is void because it purports to force Reed to waive jurisdiction in Missouri courts, which is expressly provided for in section 407.914. *See, e.g., High Life*, 823 S.W.2d at 498 (contractual provisions are invalid if they purport to nullify the protections of the MMPA).

C. This Court Has Already Necessarily Concluded That a Private Cause Of Action Under RSMo § 407.025 Can Be Maintained Against An Insurance Company.

In 2008, this Court reversed the dismissal of three class action cases against title insurance companies. *See Finnegan v. Old Republic Title Co. of St. Louis, Inc.,* 246 S.W.3d 928 (Mo. banc 2008) (consolidating Case Nos. SC 88761, SC 88762, SC 88763). In each of the consolidated *Finnegan* cases, the appellants alleged violations of the Missouri Notary Public Statute, RSMo § 486.350, unjust enrichment, and violations of the MMPA, RSMo §§ 407.020 and 407.025. The underlying claims were premised on the appellants' contention that the respondent title insurance companies had improperly charged fees for notarizing documents without recording anything in the notary journal.

Importantly, the very issue of the applicability of 407.020.2(2) was at issue before this Court, having been briefed in *Rokusek v. Security Title Insurance Company and Security Title Insurance Agency*, No. SC88762 ("Security Title"), and in *Rokusek v. Commonwealth Land Title Insurance Company*, No. 88763 ("Commonwealth"). *See*

Security Title's Substitute Brief, 2007 WL 5395296, at *43 ("the MMPA does not apply to insurance agencies such as Security Title. … In turn, Mo. Rev. Stat § 407.020 bars recovery from institutions or companies 'under the direction or supervision of the director of the department of insurance.'"); Commonwealth's Substitute Brief, 2007 WL 5395297, at *28 ("Missouri's Merchandising Practices Act does not apply to [Commonwealth] in that it is a company under the direction and supervision of the Director of the Department of Insurance …").

This Court reversed and reinstated each of the consolidated *Finnegan* cases, holding that "the failure of the notaries to record their notarizations of Plaintiffs' signatures before charging them was a violation of the plain language of section 486.350.1." 246 S.W.3d at 930. The Appellants' unjust enrichment and MMPA claims were also reinstated, on the basis that "[t]he trial court's disposition of these claims were predicated on their erroneous conclusions about the requirements of section 486.350.1." *Id*.

In order to reinstate the appellants' MMPA claims against entities under the "direction or supervision of the director of the department of insurance[,]" this Court must have necessarily concluded that a private cause of action under section 407.025 could be maintained against an insurance company. As such, this Court has already decided this issue in Reed's favor by "necessary implication." *See Carver v. Delta Innovative Svcs.*, 419 S.W.3d 792, 794-95 (Mo. App. W.D. 2013) ("The Missouri Supreme Court has made clear that '[w]hat is contemplated in an opinion by necessary implication is equivalent to that which is clearly expressed and stated.'") (*quoting Frost*

v. Liberty Mut. Ins. Co., 813 S.W.2d 302, 305 (Mo. banc 1991)); *see also Serras v. Warner*, 707 S.W.2d 448, 450 (Mo. App. S.D. 1986) ("[A] final and appealable judgment … ordinarily should dispose of all the parties and the issues in the case, specifically or by necessary implication.") (*citing Glick v. Glick*, 372 S.W.2d 912, 915 (Mo. 1963) (additional citations omitted)).

If, as is implied by the Court of Appeals' Opinion, the entities listed in section 407.020.2(2) are exempt from any "unfair practice" under the MMPA, this Court's act of reinstating the MMPA claims in *Finnegan* would have been meaningless; undoubtedly leading to needless litigation and wasted judicial resources.

IV. THE TRIAL COURT ERRED IN ENFORCING THE OUTBOUND FORUM SELECTION CLAUSE AND DISMISSING THE CASE, BECAUSE A FORUM SELECTION CLAUSE WILL ONLY BE ENFORCED IF IT INCLUDES "PRECISE LANGUAGE" REQUIRING TORT CLAIMS TO BE LITIGATED IN THE CONTRACTUALLY SELECTED FORUM, IN THAT THE FORUM SELECTION CLAUSE AT ISSUE EXPRESSLY APPLIES ONLY TO CLAIMS SEEKING TO "INTERPRET AND ENFORCE" THE TERMS OF THE EMPLOYMENT AGREEMENT, AND REED IS NOT SEEKING TO ENFORCE ANY OF THE TERMS OF THE AGREEMENT.

It is well-established that a contract is construed against the drafter as opposed to the one who merely signed it. *Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772 (Mo. 2005). The words used in a contract are given their common and ordinary meaning,

unless the context makes clear that a technical or special meaning was intended or unless the words used have a special meaning in the particular trade or business of the parties. *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006); *Sonoma Mgmt. Co., Inc. v. Boessen,* 70 S.W.3d 475 (Mo. App. W.D. 2002).

The outbound forum selection clause at issue provides, "[i]n the event of a dispute, the Parties agree that the sole proper jurisdiction and venue to *interpret and enforce* any and all terms of this Agreement shall be the District Court of Johnson County, Kansas." LF_038, ¶ 21 (emphasis added); LF_022, 25, 27, 30, 69. Addressing this very issue, this Court recently held that the use of the word "*and* … on its face seems to require that three simulator solutions set at different concentration levels be used to calibrate each breath analyzer." *Stiers*, 477 S.W.3d at 615. The Court noted that, while sometimes, such as when interpreting an insurance policy, "'and' *can* mean 'or', most commonly 'and' means simply 'and'." *Id*.

In its motion to dismiss, Defendant asserted the case should be dismissed because the courts of Jackson County, Missouri "are not the contractually sanctioned jurisdiction and venue *for actions predicated upon the contract* agreed upon by the parties." LF_022-23 (emphasis added). In response, Reed asserted, "despite Reilly's contention that Plaintiff's claims are 'solely and exclusively predicated on the [Agreement] …', Reed has not sued to enforce the Agreement, but has sued for a declaration that the Agreement is illusory and unenforceable, …" LF_054, § III.

There is no evidence that the phrase "interpret and enforce" has a technical or special meaning, in the context of the Employment Agreement or otherwise. Because the

words "interpret" and "enforce" are joined by the word "and", and because there is no evidence that the word "and" is intended to mean "or", or any other disjunctive word, the outbound forum selection clause plainly applies only to actions seeking to "interpret" *and* to "enforce" the terms of the Agreement.

Based on the plain language of the forum selection clause at issue, it does not apply to Reed's claims. In *Jitterswing, Inc. v. Francorp, Inc.*, 311 S.W.3d 828 (Mo. App. E.D. 2010), the court held that "[t]he existence of a forum selection clause in a contract that requires contractual disputes to be litigated in a specific forum, does not require tort claims between the same parties to be litigated in that forum absent precise language to that effect." *Id*. at 830 (*citing Service Vending Co. v. Wal-Mart Stores, Inc.*, 93 S.W.3d 764, 768 (Mo. App. S.D. 2002)). Further, a contractual forum selection clause "does not control the site for litigation of a tort claim simply because the dispute that produced the tort claim would not have arisen absent the existence of a contract." *Id*. (*citing Service Vending*, 93 S.W.3d at 769).

Reed does not seek to enforce any portion of the Employment Agreement. Quite to the contrary, Reed seeks (1) a declaration that the Employment Agreement is illusory and unenforceable, (2) an injunction prohibiting enforcement of the Employment Agreement, and (3) recovery on his statutory and common law tort claims. Because the forum selection clause does not include "precise language" requiring Reed's tort claims to be litigated in Johnson County, Kansas, and because Reed is not seeking to "interpret" *and* to "enforce" any of the terms of the Employment Agreement, the trial court erred in enforcing the forum selection clause and dismissing the case.

V. THE TRIAL COURT ERRED IN ENFORCING THE OUTBOUND FORUM SELECTION CLAUSE AND DISMISSING THE CASE, BECAUSE AT-WILL EMPLOYMENT DOES NOT CREATE A LEGALLY ENFORCEABLE EMPLOYMENT RELATIONSHIP, UNILATERALLY IMPOSED PROVISIONS OF AN AT-WILL EMPLOYMENT AGREEMENT REQUIRE ADDITIONAL CONSIDERATION, AND A PARTY CANNOT SEEK TO ENFORCE A CONTRACT IT HAS ALREADY MATERIALLY BREACHED, IN THAT THE EMPLOYMENT AGREEMENT EXPRESSLY PROVIDES THAT REED'S EMPLOYMENT WAS "AT WILL", NO ADDITIONAL CONSIDERATION WAS GIVEN IN EXCHANGE FOR THE OUTBOUND FORUM SELECTION CLAUSE, AND REILLY MATERIALLY BREACHED THE AGREEMENT WHEN IT TERMINATED REED WITH NO PRIOR NOTICE, EFFECTIVE IMMEDIATELY, AND NOTIFIED HIM THAT "NO FURTHER COMMISSIONS CHECKS WILL BE MADE."

A. At-will employment does not create a legally-binding employment relationship.

"The essential elements of any contract … are 'offer, acceptance, and bargained for consideration.'" *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014) (*quoting Johnson v. McDonnell Douglas Corp.*, 745 S.W.2d 661, 662 (Mo. banc 1998)). The at-will employment doctrine is well-established in Missouri. Absent a contract with a "'definite statement of duration … an employment at will is created.'" *Id*. at 775

(*quoting Luethans v. Washington Univ.*, 894 S.W.2d 169 (Mo. banc 1995) , *abrogated on other grounds by Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (Mo. banc 2010))). "Key indicia of at-will employment include … the employer's option to terminate the employment immediately without cause." *Id.* at 775. "Employment at-will is not a *legally enforceable employment relationship* because it is terminable at the will of either party, on a moment-by-moment basis." *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 26 (Mo. App. W.D. 2008) (emphasis added) (*citing McDonnell Douglas Corp.*, 745 S.W.2d at 662)).

Because the Employment Agreement was expressly "'at will' subbject *[sic]* to termination with or without cause", it did not create "a legally enforceable employment relationship …"[9] Therefore, in order to determine whether the unilaterally imposed outbound forum selection clause was enforceable, the trial court would first have to determine whether independent consideration was given in exchange for these unilaterally imposed requirements. *See Morrow*, 273 S.W.3d at 25 ("When an employer unilaterally imposes a requirement on employees, one might look to see if the employer has also promised anything, if the requirement is purported to be a 'contract.'").

[9] Employment-at-will "is sometimes called a 'unilateral contract' because there is an implied (if not expressed) promise that if the employee performs work as directed, the employer will pay." *Morrow*, 273 S.W.3d at 26.

B. No consideration was given in exchange for the unilaterally imposed outbound forum selection clause or non-compete clause.

Taking the allegations in Reed's Petition as true, and drawing all reasonable inferences therefrom, the only relevant contractual promise Reilly made to Reed was to hire him to work as an at-will employee, however, "[a]n offer of at-will employment, or the continuation of at-will employment, is simply not a source of consideration under Missouri contract law … [t]herefore, there must be another source of consideration." *Durrell v. Tech Electronics, Inc.*, No. 16-cv-1367, 2016 WL 6696070, at *5 (E.D. Mo. Nov. 15, 2016) (*quoting Strain v. Murphy Oil USA, Inc.*, No. 15-cv-3246, 2016 WL 540810, at *4 (W.D. Mo. Feb. 9, 2016) (*citing Bristol Care, Inc.*, 450 S.W.3d at 775)); *Jimenez v. Cintas Corp.*, 475 S.W.3d 679, 685 (Mo. App. 2015); *Baker Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 438 (Mo. App. 2010); *Morrow*, 273 S.W.3d at 26)); *JumboSack Corp. v. Buyck*, 407 S.W.3d 51, 55-57 (Mo. App. 2013).

Because Reed worked for Reilly for more than three years, the only other potential source of consideration was Reilly's purported promise to provide him at least sixty days' notice prior to termination, during which time he would continue to receive commission payments. However, accepting Reed's allegation that the contract was illusory, Reilly was not actually obligated to fulfill its promise, as evidenced by Reed's allegations that Reilly did terminate him effective immediately, with no prior notice, after which it advised him that "no future commission checks will be made." An illusory promise that is expressly disavowed provides no additional consideration.

C. Even assuming the validity of the agreement and sufficiency of consideration, Reed alleged that Reilly materially breached the Employment Agreement, therefore Reilly cannot seek to enforce the terms of the Agreement.

Even if independent consideration existed as a basis to enforce the outbound forum selection clause or the non-compete clause, and even if the Employment Agreement was enforceable, which Reed contends that it is not, taking Reed's allegations as true, Reilly materially breached the Employment Agreement by failing to give him at least sixty days' written notice prior to termination and by notifying Reed that "no future commissions checks will be made." Because Reilly was the first to materially breach the contract, it is precluded from seeking to enforce its terms, including the outbound forum selection clause.

> "An employer that has materially breached an employment agreement before an employee has violated a covenant not to compete may not enforce the covenant." *Washington County Mem'l Hosp. v. Sidebottom*, 7 S.W.3d 542, 546 (Mo. App. E.D. 1999); *see also Supermarket Merch. & Supply, Inc. v. Marschuetz*, 196 S.W.3d 581, 585 (Mo. App. E.D. 2006). This is because "[a] party to a contract cannot seek to enforce its benefits where he is the first to violate its terms." *Ozark Appraisal Serv., Inc. v. Neale*, 67 S.W.3d 759, 764 (Mo. App. S.D. 2002). An employer's unilateral change to an employment agreement may constitute a material breach of the

> agreement if it substantially alters the manner and/or amount that the employer pays the employee. *See, e.g., Marschuetz*, 196 S.W.3d at 585; *Luketich v. Goedecke, Wood & Co., Inc.*, 835 S.W.2d 504, 507 (Mo. App. E.D. 1992); *Smith-Scharff Paper Co., Inc. v. Blum*, 813 S.W.2d 27, 29 (Mo. App. E.D. 1991); *Forms Mfg., Inc. v. Edwards*, 705 S.W.2d 67, 69 (Mo. App. E.D. 1985).

JumboSack, 407 S.W.3d at 57; *see also Stephenson v. Village of Claycomo*, 246 S.W.3d 22, 28 (Mo. App. W.D. 2007) ("A party to a contract is obviously released from the contract when the other party repudiates it without legal justification."); *Forms Mfg., Inc.*, 705 S.W.2d at 69 ("If company breached the employment agreement before employee allegedly violated the covenant not to compete, then company is barred from enforcing the restrictive covenant against employee.") (*citing S.G. Adams Printing v. Central Hardware Co.*, 572 S.W.2d 625, 629 (Mo. App. 1978)).

In sum, the trial court erred in failing to determine whether the Employment Agreement was valid and enforceable, and in failing to determine whether the unilaterally imposed outbound forum selection clause was supported by independent consideration, before entering its Judgment / Journal Entry of dismissal. Taking Reed's allegations as true, "[n]othing in the [petition] shows that [Reilly] offered any consideration in addition to [Reed's] at-will employment status to secure his agreement to this clause." *Durrell, supra*. Therefore, as the District Court held in *Durrell*, on the face of Plaintiff's petition, he has adequately stated a claim upon which relief can be granted, and the trial court erred in holding otherwise. Further, Reilly, as the alleged party who first materially

breached the Employment Agreement, "is barred from enforcing the restrictive covenant against employee." *Forms Mfg.,* 705 S.W.2d at 69.

VI. THE TRIAL COURT ERRED IN ENFORCING THE OUTBOUND FORUM SELECTION CLAUSE AND DISMISSING THE CASE, BECAUSE ENFORCEMENT OF THE FORUM SELECTION CLAUSE WOULD BE UNFAIR AND UNREASONABLE, IN THAT THE EMPLOYMENT AGREEMENT WAS ALLEGEDLY PROCURED BY FRAUDULENT MISREPRESENTATION AND CONCEALMENT, THE FORUM SELECTION CLAUSE IS NOT NEUTRAL AND RECIPROCAL IN NATURE, AND THE FORUM SELECTION CLAUSE PURPORTS TO DEPRIVE REED OF THE BENEFITS OF CHAPTER 407.

A. Enforcement of the outbound forum selection clause would be unfair because the Employment Agreement was allegedly procured by fraudulent misrepresentation and concealment, and because the forum selection clause is not neutral and reciprocal in nature.

A forum selection clause "must have been obtained through freely negotiated agreements absent fraud and overreaching and its enforcement must not be unreasonable and unjust." *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592, 596 (Mo. App. E.D. 2000) (*citing Chase Third Century Leasing Co. Inc.*, 782 S.W.2d at 411)). In determining fairness, Missouri courts consider (1) whether the contract was "adhesive", *i.e.*, whether the parties to the contract had unequal standing in terms of bargaining power such as a corporation versus an individual, or whether the contract was "obtained through freely

negotiated agreements absent fraud and overreaching"; and (2) whether the forum selection clause is "neutral and reciprocal in nature". *Burke v. Goodman*, 114 S.W.3d 276, 278 (Mo. App. E.D. 2003) (*citing High Life*). With regards to the first factor, Missouri case law generally requires "an assertion of … overreaching or fraud …" *Chase*, 782 S.W.2d at 413.

In the instant case, Reed alleged that he entered into an Employment Agreement that provided, if he worked for Reilly for more than three years, he would receive at least sixty days' written notice of termination, during which he would continue to receive his regular commission payments. LF_007, ¶¶ 12-13; LF_012, ¶ 35. Reed alleged that he did work for Reilly for more than three years, yet Reilly terminated him effective immediately, with no prior written notice. LF_007, ¶¶ 14; LF_009, ¶ 24. Reed alleged that, following termination, J.R. Reilly advised him via email that "no future commission checks will be made." LF_008-9, ¶¶ 17, 18, 24. Reed alleged that Exhibit 1 to the Employment Agreement specifically provided that he "remains an 'at will' employee" who could be "terminated with or without cause." LF_008-09, ¶¶ 22, 23. Reed alleged that when Reilly offered him employment, it represented that its ability to terminate Reed's employment would be subject to certain contractual limitations; that, because Reilly drafted the Employment Agreement, it was in a superior position of knowledge as to its illusory nature; that it knew, or should have known, that the promises in the Employment Agreement were material and Reed would rely on them; that it misrepresented and/or concealed the illusory nature of the Employment Agreement from Reed; and that Reilly's conduct in terminating Reed, with no prior notice, effective

immediately, and advising that "no future commission checks will be made", provided additional evidence of the illusory nature of the Employment Agreement. LF_012-13, ¶¶ 24, 35-40.

Reed brought tort claims against Reilly for fraudulent misrepresentation and concealment, as well as statutory claims for violating the MMPA, and Appellant submits that the first factor in determining fairness weighs heavily in his favor. *See* LF_051 ("Plaintiff's lawsuit is premised on the claim that Reilly defrauded him … a claim which is the very embodiment of the notion 'unfair [and] unreasonable'".).

With regards to the second factor, the forum selection clause at issue is not "neutral and reciprocal"; it simply provides for one particular venue where all litigation shall be brought, which happens to be the principal place of business of Reilly. Appellant submits that the second factor in determining fairness also weighs in his favor. *See e.g., High Life*, 823 S.W.2d at 497 (noting that a forum selection clause that "provid[es] one particular venue where all litigation shall be brought …" is evidence of unfairness.).

B. Enforcement of the outbound forum selection clause would be unreasonable because it would deprive Reed of the benefits of Chapter 407.

In determining whether a forum selection clause is unreasonable, the court looks to the subject matter of the petition to determine whether public policy favors retaining jurisdiction in Missouri courts. In *High Life*, the Missouri Supreme Court seized on the fact that the case involved a claim arising under RSMo § 407.413, which "involves a matter of important public policy to the state of Missouri." 823 S.W.2d at 497. The

panel relied on the Eighth Circuit case of *Electrical and Magneto Service Co., Inc. v. AMBAC Int'l Corp.*, 941 F.2d 660 (8th Cir. 1991), which refused to apply a South Carolina choice of law provision, because to do so would deprive the plaintiff "of the benefits of Chapter 407" and would therefore "'violate a fundamental policy of Missouri.'" 823 S.W.2d at 498 (*quoting AMBAC*).

> Chapter 407 is designed to regulate the marketplace to the advantage of those traditionally thought to have unequal bargaining power as well as those who may fall victim to unfair business practices. Having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection.
>
> …
>
> The Missouri statutes in question, relating to merchandising and trade practices, are obviously a declaration of state policy and are matters of Missouri's substantive law. To allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statutes useless and meaningless.

Id. (*quoting AMBAC*, 941 F.2d at 663-64).

The Supreme Court in *High Life* also noted that it would be unreasonable to send the case to Kentucky, given that "§ 407.413 has never been interpreted by the Missouri courts, [so] there are no guidelines for an out-of-state court with respect to whether the

statute should be applied in this situation." *Id*. at 498. Finally, noting the importance of the MMPA to the public policy of the state of Missouri, "evidenced in part by the fact that any effort to waive or modify its provisions is unenforceable," the Supreme Court declined to "abrogate the responsibility of interpreting this important statute to the Kentucky Courts." *Id*. at 500-01.

As asserted by Reed in response to Reilly's motion to dismiss,

> [T]he provision of the MPA under which Plaintiff sued was specifically designed to govern the conduct of out-of-state principals who contract with sales representatives to solicit business in Missouri, and enforcement of the MPA is fundamental to the public policy of Missouri. To deprive Plaintiff of jurisdiction in Missouri, and of "the benefits of Chapter 407", would thus "violate a fundamental policy of Missouri."

LF_054 (*quoting High Life*, 823 S.W.2d at 494). Additionally, in the instant case, there is very little Missouri case law which interprets RSMo §§ 407.911 to 407.915. Appellant submits that these Missouri statutes, which govern the conduct of businesses that hire commissioned salespersons to solicit business in this State, are just as important to the public policy of Missouri as the liquor statutes at issue in *High Life*. As such, the trial court erred in enforcing the outbound forum selecting clause and dismissing the case, and in abrogating the responsibility of interpreting this important statute to the District Court of Johnson County, Kansas. *High Life*, 823 S.W.2d at 500-01.

CONCLUSION

The trial court erred in failing to treat all allegations in Reed's Petition as if they were true, and in failing to liberally grant all reasonable inferences in favor of Reed, as is required when reviewing a motion to dismiss. When Appellant's claims are reviewed in accordance with these standards, all counts of Reed's Petition state actionable claims. Accordingly, the Judgment / Journal Entry of dismissal below should be reversed and the case remanded for development of the record and resolution on the merits.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 84.06(b) of the Missouri Rules of Civil Procedure, because it contains 13,094 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and type style requirements of Rule 84.06(a) because this brief and its supplements have been prepared in a proportionally spaced typeface using Microsoft Word 2016 in font size 13 of Times New Roman. This brief also includes the information required by Rule 55.03.

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2017, the foregoing Substitute Brief and Appendix to the Substitute Brief have been electronically filed with the Clerk of the Court for the Missouri Supreme Court using the Court's electronic filing system, to be served on all counsel of record, as follows:

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