IN THE SUPREME COURT OF MISSOURI

No. SC96499
CIVIL

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
Circuit Court Case No. 1616-CV15889

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

The Reilly Company, LLC ("Reilly") agrees that personal jurisdiction and venue were proper with the Circuit Court of Jackson County, Missouri at Independence, and that Judge Marco Roldan had appropriate jurisdiction to resolve and enforce the disputed forum selection clause. Reilly agrees that the initial appeal to the Missouri Court of Appeals fell within the general appellate jurisdiction granted that Court by Article V, Section 3 of the Missouri Constitution and that the Western District of the Missouri Court of Appeals properly resolved the appeal pursuant to Article V, Section 13 of the Missouri Constitution.

Finally, Reilly agrees that the Appellant Reed filed his Application for Transfer to 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.

RESPONDENT'S STATEMENT OF FACTS

A. Judge Marco Roldan's Decision.

On September 26, 2016, Judge Marco Roldan issued a Journal Entry of Dismissal dismissing the Plaintiff/Appellant's cause of action "without prejudice to the bringing of a future action in the jurisdiction and venue selected by the contract of the parties." (LF_085.) Judge Roldan's determination was based upon the following forum selection clause which governed the Plaintiff/Appellant's five-year employment with The Reilly Company, LLC ("Reilly"):

> "**21.** **Governing Law, Jurisdiction and Venue**. This Agreement shall be construed according to and governed by the laws of the State of Kansas. In 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.)

Judge Roldan's dismissal was predicated upon the parties' written agreement that Johnson County, Kansas was the sole proper jurisdiction and venue to interpret and enforce the contract of the parties.

Judge Roldan's decision was based upon the following facts developed in Reilly's Memorandum in Support of its Motion to Dismiss (LF_025-028):

1. The Reilly Company, LLC had its principal place of business at 602-8 Delaware, Leavenworth, Kansas, 66048. (LF_042; Exhibit 2, Affidavit of J. R. Reilly, ¶ 2.)

2. The Reilly Company, LLC had one auxiliary office in Johnson County, which was (and is) located at Suite 210, 11225 College Boulevard, Overland Park, Kansas, 66210. (*Id.*, ¶ 3.)

3. The Reilly Company, LLC did not have and has never had business offices in the state of Missouri. (*Id.*, ¶ 4.)

4. On March 19, 2010, Jeff Reed entered an Insurance Broker Agreement ("IBA") with Reilly Insurance, LLC (the original name of The Reilly Company, LLC). That Insurance Broker Agreement was attached to the Memorandum as Exhibit 1 (LF_033-040). Thereafter, Jeff Reed worked for The Reilly Company, LLC under the terms of the IBA for more than five years. (LF-004-015; Petition, ¶ 47.)

5. Jeff Reed's employment with The Reilly Company, LLC was at all times associated with and conducted through its Johnson County office. Mr. Reed reported to that office, had a desk at that office, received staff and sales support at that office, used that office as the nexus of his activities, and signed the IBA at that office. (LF_043; Exhibit 2, ¶ 6.)

6. During the time of Jeff Reed's employment with The Reilly Company, LLC, Mr. Reed was registered and licensed as a Kansas insurance agent. (*Id.*, ¶ 7.)

7. Although Plaintiff's Petition failed to attach the Insurance Broker Agreement of the parties, the great majority of Plaintiff's petition allegations were premised directly on that Agreement, to include references to the IBA's paragraph 7(a), paragraph 7(b), paragraph 8, paragraph 9, paragraph 10, and Exhibit 1. (LF_005-007; Petition, ¶¶ 8, 9, 10, 12, 13.)

8. While The Reilly Company, LLC was registered to do business in the State of Missouri (LF_058), it did not maintain a Missouri office at 4301 NW Briarcliff Lane, Kansas City, Jackson County, Missouri, 64116. That had been, but no longer was, the residential address of the company's previous registered agent for service of process, Tommy Taylor. (LF_042; Exhibit 2, ¶ 4.)

9. The IBA of the parties, upon which Mr. Reed had requested a declaratory judgment, contained the following provision at paragraph 21:

> "**21.** **<u>Governing Law, Jurisdiction and Venue</u>**. This Agreement shall be construed according to and governed by the laws of the State of Kansas. In 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; Exhibit 1.)

10. Contrary to the allegations within paragraphs 7 and 8 of Plaintiff's Petition, contemporaneous documents should not have been considered when

determining the legal effect of the contract provision. Paragraph 22 of the IBA (LF_038-039) stated:

"**22. Entire Agreement.** This Agreement is complete and all promises, representations, understandings, warranties and agreements of the Parties with reference to the subject matter herein have been fully and finally expressed, to the exclusion of any and all other oral and written statements, representations or agreements, whether prior to or contemporaneous with this Agreement." (LF_038-039; Exhibit 1.)

11. Finally, the notice provisions at paragraph 19 of the contract (LF_038) required that the Plaintiff hand deliver or mail notice by the United States Postal Service to:

The Reilly Company

ATTN: J. R. Reilly, President

608 Delaware, P. O. Box 9

Leavenworth, KS 66048

12. Despite (1) the notice provisions of the contract, (2) Jeff Reed's knowledge that Reilly's principal office was at 608 Delaware in Leavenworth, Kansas, and (3) Jeff Reed's five-year employment at the Johnson County office of The Reilly Company, LLC, the Plaintiff/Appellant provided no notice whatsoever of the lawsuit to Reilly at any of these addresses.

13. Ignoring each of the above means of easily contacting and notifying The Reilly Company, LLC, the Plaintiff/Appellant instead attempted service upon a residence of Tommy Taylor, the Missouri agent who had moved to a different location (LF_016; Request for Service; Summons). Failing service at that location, Plaintiff's attorney requested service solely upon the Missouri Secretary of State (LF_017-018; Alias Summons).

B. Plaintiff/Appellant Disputed Immaterial Facts.

The Plaintiff/Appellant disputed none of the material facts upon which Judge Roldan's decision was premised. Plaintiff/Appellant only disputed whether Reilly's resident agent's address for purposes of acceptance of service was considered a "registered office." That representation, found at paragraphs 3 and 8 of Reilly's Statement of Facts (LF_026-027) appeared to be the only matter disputed. (LF_047-048.) The Plaintiff/Appellant's trial court response argued that Tommy W. Taylor's residence was a "registered office," but presented nothing more than Taylor's application for registration as the registered agent of Reilly Insurance, LLC. (LF_061, ¶ 4.)

Whether Mr. Taylor's residence was a "registered office" for Reilly was immaterial to issues related to the contractual selection of the appropriate forum. Reilly's attorney entered an appearance on behalf of Reilly on November 28, 2016 (LF_020-021). Thereafter, service was never an issue; hence, the registered office was never an issue. More important,

the Plaintiff/Appellant provided no other evidence of any type to contest the statements of fact upon which Judge Roldan's decision was premised.

C. The Material Facts Upon Which Judge Roldan's Decision Were Premised Were Not Contested.

The Plaintiff/Appellant did not contest and does not contest the basic facts upon which the contract was generated and Judge Roldan's decision entered. Mr. Reed did not contest that he reported to the Johnson County, Kansas office, had a desk at the Johnson County, Kansas office, received staff and sales support at the Johnson County office, used the Johnson County office as the nexus of his activities, signed the Insurance Broker Agreement ("IBA") at the Johnson County office, and registered as a Kansas insurance agent. Mr. Reed did not contest that after execution of the IBA, he worked for The Reilly Company, LLC at the Johnson County office for more than five years. Mr. Reed's claims were all predicated upon the IBA. (Appellant's Appendix (hereinafter "A. Appx."), A11.) There was nothing unjust or unreasonable about enforcing a forum selection clause which specified the primary county in which the employment relationship existed. Mr. Reed presented no law or facts which would make enforcement of the forum clause unreasonable. Thus, upon the very simple facts presented by the appeal parties, and upon the clear and unequivocal Missouri case law enforcing forum selection clauses within contracts, Judge Roldan's determination was correct.

Reed presented six points of appeal to the Western District of the Missouri Court of Appeals. (Opinion, A. Appx. at A4.) In rejecting those points, the Western District of the Missouri Court of Appeals held:

(1) That Judge Roldan had proper jurisdiction and venue in Jackson County, Missouri sufficient to consider and enforce the forum selected by the parties to the Independent Broker Agreement ("IBA");

(2) That Reed's MMPA claims did not apply because said claims were exempted under Section 407.020.2(2), R.S.Mo. Cum. Supp. 2013;

(3) That Reed's declaratory judgment action and action to enforce commission payment provisions within the IBA were appropriately addressed by the enforcement of the outbound forum selection clause;

(4) That the IBA's employment "at will" provision did not affect, alter or restrict enforcement of the remaining employment or forum selection provisions;

(5) That enforcement of the forum selection clause was fair and reasonable; and

(6) That nothing within Judge Roldan's decision reflected that he even considered the affidavit in dismissing Reed's Petition in favor of the forum selected by the parties.

Thus, the Western District Court of Appeals affirmed Judge Roldan's "dismissal without prejudice of Reed's petition for declaratory judgment, injunctive relief, fraudulent misrepresentation and concealment, and violations of the MMPA against Reilly." (*Id.* at 13.)

STANDARD OF REVIEW

An appellate court's review of a trial court's order granting a motion to dismiss is *de novo*. *Burke v. Goodman*, 114 S.W.3d 276 (Mo. App. E.D. 2003). The *Burke* decision, for which a transfer application to this Court was denied, addresses virtually every out-bound forum selection clause enforcement issue presented in this litigation.

That said, the Defendant/Respondent Reilly disputes Appellant's statement that the trial court failed to specify its reason for dismissing the Petition. The trial court stated that, "Plaintiff's cause of action is dismissed without prejudice to the bringing of a future action in the jurisdiction and venue selected by the contract of the parties." (LF_085.) This statement indicates that the trial court simply enforced the forum selection clause of the parties' Independent Broker Agreement.

ARGUMENTS

I. THE TRIAL COURT PROPERLY CONSIDERED AND EVALUATED THE REILLY COMPANY, LLC'S MOTION TO DISMISS AND PROPERLY ISSUED AN ORDER OF DISMISSAL WITHOUT PREJUDICE, TO ALLOW RESOLUTION IN THE FORUM SELECTED BY THE PARTIES' CONTRACT.

- *Burke v. Goodman*, 114 S.W.3d 276 (Mo. App. E.D.2003)
- *Doe v. Visionaire Corp.*, 13 S.W.3d 674 (Mo. App. E.D. 2000)
- *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. banc 1992)

A. Reed's Argument Distinguishing a Motion to Dismiss from a Motion for Summary Judgment was not Raised to the Circuit Court or to the Missouri Court of Appeals.

For his first appellate point, Reed argues that Judge Roldan failed to convert Reilly's motion to dismiss into a motion for summary judgment because Reilly's reply introduced matters not encompassed by the pleadings. This issue was not presented to Judge Roldan in the Circuit Court. Upon issuance of Judge Roldan's decision, Reed did not raise an objection or request reconsideration. If Reed truly believed that disputed facts were placed before Judge Roldan in a reply brief, Reed had every opportunity to file an appropriate objection or file a motion for reconsideration to address such issues. Reed did neither.

Reed's civil case information form addressed the five issues which he intended to appeal. (LF_93.) None addressed the dismissal/summary judgment distinction. (*Id.*) Reed's appeal brief issues did not mention the dismissal/summary judgment distinction. (Respondent's Appendix (hereinafter "R. Appx.") RA-15 - 18.) Similarly, at the conclusion of Reed's appellate briefing, the Court of Appeals enumerated the "six points" which Reed presented on appeal. (Opinion, A. Appx. at A4.) None addressed the dismissal/summary judgment distinction. *Id.* Indeed, no portion of Reed's trial or initial appeal brief argued error associated with distinguishing a motion to dismiss from a motion for summary judgment. (LF_46-55; R. Appx. RA-1 - 44.) No portion of Respondent's Brief addressed the issue. (R. Appx. R-45 - 78.) These omissions resulted, no doubt, because Judge Roldan did not issue a summary judgment determination.

Judge Roldan issued a dismissal without prejudice, to accommodate the refiling and consideration of all remaining issues in the forum selected by the parties. Dismissal without prejudice is not a dispositive determination. *Burke v. Goodman*, 114 S.W.3d 276 (Mo. App. E.D. 2003). Generally, an order dismissing a case without prejudice is not final for the purposes of appeal. *Doe v. Visionaire Corp.*, 13 S.W.3d 674, 676 (Mo. App. E.D. 2000).

To bolster his summary judgment/dismissal distinction, Reed argues that response time limit variances between summary judgment and motions to dismiss prejudiced him at the trial court level. However, at the conclusion of the Western District Court of Appeals' consideration of Reed's arguments, Judge Roldan's decision was sustained. Obviously, Reed

was not, and could not have been, prejudiced by any time variances. In the eight months between Judge Roldan's decision and the determination of the Court of Appeals, Reed did not present any additional facts or argument to alter the dismissal without prejudice. Reed has not presented this Court with any facts to justify the existence of a time variance prejudice.

Finally, while Judge Roldan in no way referred to matters presented in Reilly's reply brief (*see* A. Appx. A15), Reilly's reply appropriately addressed Reed's misleading statement in his response brief that Reilly "refused to pay [Reed] 60-days' commissions for November and December 2015, which would have been due under ¶ 7(b) to the Agreement if the employment agreement had been anything more than an illusory and unenforceable adhesion contract." (LF_050.) To rebut any potential argument that a "prior breach" by Reilly would void Reed's remaining obligation to abide by the forum selection clause of the contract, Reilly's reply brief included an affidavit and the documentation associated with the attempted tender of the 60 days of commissions for November and December 2015. (LF_071-084.) The Western District Court of Appeals addressed that argument by determining that enforcement of the outbound forum selection clause was in no way affected by Reed's presentation of the issue or by Reilly's response. (A. Appx. A15.) The Court of Appeals determined that nothing within the Circuit Court's dismissal order evidenced that it even considered the affidavit or the issue. *Id*.

B. Jurisdiction and Venue in the Circuit Court of Jackson County is Clear.

In his first appellate point and in arguments thereafter, Reed continues intermittent jurisdictional argument as if the jurisdiction is contested. (Appellant's Brief, R. Appx. RA-14, 22, 37, 40.) Reed's position is unclear. In his first appellate point at the Court of Appeals, Reed contended "that the circuit court erred in dismissing the case because jurisdiction is proper in Missouri and venue is proper in Jackson County." (A. Appx., A6.) The argument confused the appellate court. (A. Appx., A6.) The Appellant's Substitute Brief continues the confusion.

From the outset, Reilly acknowledged that it was registered to do business, did business and maintained a registered agent in Missouri. Reilly "does not contest jurisdiction or venue" in the state of Missouri. (LF_065.) The parties agree that 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). At all times, Reilly indicated that the Jackson County Circuit Court had proper jurisdiction and venue to determine whether or not enforcement of the IBA forum selection clause was appropriate.

Reed's appellate references to R.S.Mo. § 407.914 are superfluous to the fact that the Circuit Court of Jackson County already had proper jurisdiction and venue for issuance of the decision generated by Judge Roldan. While Reilly strongly disputes the applicability of R.S.Mo. § 407.914, there is no question that, independent of this statute, the Circuit Court

in Jackson County had appropriate jurisdiction and venue to issue the order of dismissal without prejudice.

C. Reilly's Reply Brief Appropriately Addressed MMPA Issues Raised for the First Time in Reed's Suggestions in Opposition.

Reed states that "Reilly made no mention of the Missouri Merchandising Practices Act ("MMPA") in its motion to dismiss." (Appellant's Substitute Brief, at p. 15; LF_25-31.) That accurate statement was premised upon Reilly's position that:

> Plaintiff's cause of action is solely and completely predicated upon the Insurance Broker Agreement executed between the parties on March 19, 2010. The Petition recites that plaintiff's employment with The Reilly Company, LLC existed pursuant to that contract for longer than a five-year period. (Petition at ¶ 47.)

(LF_028.) Reed's jurisdictional suggestions imply, without specifically stating, that the MMPA allegations could override the forum selection provision of the parties' IBA, allowing jurisdiction and venue to remain in Jackson County. Obviously, the MMPA commission allegations were directly predicated on the contract of employment between Reed and Reilly. For five years, the employment commissions were directly governed and paid pursuant to the IBA (LF_033-39) and Exhibit 1 thereto (LF_040). The conduct of the parties clearly conferred appropriate jurisdiction and venue in Jackson County, Missouri or Johnson County, Kansas, independent of the applicability of R.S.Mo. § 407.914. It is the contractual forum

selection clause that limits the proper forum for dispute resolution to Johnson County, Kansas.

Jurisdiction and venue existed in each state for purposes of enforcing the forum selected by the parties' IBA. Reed's assertions regarding R.S.Mo. § 407.914 were first addressed in Reilly's response to present the reasons why the MMPA was not applicable to Reed's cause of action. Reilly's original Motion to Dismiss did not need to address any of the law upon which the contractual rights of the parties were based. "If the forum selection clause, standing alone, is found to be valid, the court having jurisdiction over the dispute is to decide whether the contract is enforceable or void ab initio." (A. Appx. A7, fn. 3.) Reilly's Motion to Dismiss was premised upon the validity of that forum selection clause.

II. THE TRIAL COURT PROPERLY ENFORCED THE PARTIES' FORUM SELECTION CLAUSE TO DISMISS REED'S CLAIMS, AND ALLOW RESOLUTION IN THE FORUM SELECTED BY THE PARTIES.

- *Borrson v. Missouri-Kansas-Texas R. Co.*, 172 S.W.2d 835 (Mo. 1943)
- *Hiatt v. Wabash Ry. Co.*, 69 S.W.2d 627 (Mo. 1933)
- *Kansas City v. City of Raytown*, 421 S.W.2d 504 (Mo. banc 1967)
- *McGrew v. Missouri Pac. Ry. Co.*, 132 S.W. 1076 (Mo. 1910)

A. There Is No Dispute in the Trial Court as to Reilly's Status as an Insurance Agency Licensed by the State of Missouri.

For his second appellate point, Reed argues that the trial court record contained no evidence that Reilly was licensed or regulated by the Missouri Director of Insurance. Such evidence appeared totally unnecessary before the trial court. Consider the second heading within Reed's suggestions in opposition at the trial court (LF-047). That heading contained the following in bold letters:

> ***Reilly has been registered as a foreign company in Missouri for nearly a decade, it still maintains a registered agent in Missouri, it continues to solicit and sell insurance in Missouri, and is subject to the jurisdiction of the Courts of Missouri***.

(*Id.*)

Reed's suggestions further represented that Reed had been a "licensed Missouri insurance agent since March 22, 2010, all while selling insurance as an agent of The Reilly Company, LLC." (LF_048.) Reed introduced Reilly's registration paperwork (LF_056-064) which established Reilly's purpose "shall be to employ insurance agents." (LF_061.) Given Reed's representations, evidence of further licensing or registration was not necessary. Given Reed's statements to the trial court, evidence of further Missouri registration or regulation would serve no purpose. The parties submitted briefs and the Court's decision correctly determined that the defendant insurance agency was appropriately licensed and regulated by the director of the Missouri Department of Insurance. Reed does not dispute Reilly's license status. Reed presents no evidence to the contrary. Indeed, there is no evidence to the contrary.

B. Evidence of The Reilly Company, LLC License Responded to Reed's Licensing Arguments Which Were First Presented at the Court of Appeals.

Reed's appellate brief argued, for the first time, that there had been no trial court evidence that The Reilly Company, LLC was licensed by the State of Missouri Department of Insurance. In response, Reilly provided Respondent's Appendix Ex. 1 (R. Appx. RA-75 - RA-78) illustrating the annual Department of Insurance licenses issued by the State of Missouri to The Reilly Company during the years of Reed's employment. Again, Reed tendered no argument otherwise. Reed presents this Court with no contrary information or

evidence that this is an inaccurate presentation. Indeed, there is no evidence to the contrary. Any suggestion that this case be returned to the trial court for a finding that The Reilly Company, LLC is subject to licensing by the Missouri Department of Insurance -- a fact which is obvious to all -- would promote form over substance to the detriment of these parties and justice.

The registration of an insurance company within the State of Missouri is a simple matter for which judicial notice may be taken. Clearly, the trial court, Court of Appeals or this Supreme Court could take judicial notice of Missouri's public records of registration. *Kansas City v. City of Raytown*, 421 S.W.2d 504 (Mo. banc 1967); *Borrson v. Missouri-Kansas-Texas R. Co.*, 172 S.W.2d 835 (Mo. 1943); *Hiatt v. Wabash Ry. Co.*, 69 S.W.2d 627 (Mo. 1933); *McGrew v. Missouri Pac. Ry. Co.*, 132 S.W. 1076 (Mo. 1910). Such judicial notice has been taken in Missouri for registrations associated with presidential elections (*Jackson Cnty. v. Arnold*, 36 S.W. 662 (Mo. 1896)), court records (*State v. Quinn*, 717 S.W.2d 262 (Mo. App. S.D. 1986)), voters (*State, ex rel. Harrison v. Frazier*, 11 S.W. 973 (Mo. 1889)), bond issuances (*Kansas City v. City of Raytown*, 421 S.W.2d 504 (1967)), census data (*Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006)), and foreign judgments (*In re Marriage of Erickson*, 419 S.W.3d 836 (Mo. App. S.D. 2013)). Judicial notice of the public filings of insurance licensure would seem equally appropriate. Thus, Reed's arguments alleging absence of proof of licensure or regulation lack merit.

III. THE COURT OF APPEALS PROPERLY DISMISSED REED'S MMPA CLAIM BECAUSE THE REILLY COMPANY, LLC IS LICENSED AND REGULATED BY THE DIRECTOR OF THE DEPARTMENT OF INSURANCE.

- *Meyers v. Kendrick* --- S.W.3d --- (2017); 2017 WL 4276261 (Mo. App. S.D.)
- *Myers v. Sander*, 2014 WL 409081 (E.D. Mo.)
- *Rashaw v. United Consumers Credit Union*, 685 F.3d 739 (8th Cir. 2012)(Cert. denied at 133 S. Ct. 1250, 185 L. Ed. 2d 180 (2013)
- *Rashaw v. United Consumers Credit Union*, 2011 WL 2110806 (W.D. Mo.), aff'd, 685 F.3d 739 (8th Cir. 2012)

A. Introduction.

At appellate point three, Reed argues that Reed's MMPA claim is wholly based on violations of the Commissioned Sales Act ("CSA," R.S.Mo. §§ 407.911 - 407.915) which provisions are not subject to the exemptions within R.S.Mo. § 407.020.2(2). (Appellant's Substitute Brief, pp. 21-22.) Reed argues that the exclusion provided by R.S.Mo. § 407.020.2(2) is expressly limited to claims brought within "this section," which Reed interprets to exempt only § 407.020 claims, not claims under any other provisions within the MMPA.

B. Reed's Argument Distinguishing "Section" from "Chapter" Myopically Ignores the Purpose for the Exclusions of R.S.Mo. § 407.020.2(2).

In this third appellate point, Reed utilizes six pages to distinguish the statutory interpretation of "section" from the term "chapter" in a convoluted argument of legislative intent. The needlessly complex argument obscures the fact that the requested result would virtually eliminate the MMPA provision excluding the coverage of regulated entities:

> "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**, financial institutions and professional registration under chapter 354, RSMo, or chapters 374 to 385, RSMo, the director of the division of credit unions under chapter 370, RSMo, or director of the division of finance under chapter 361 to 369, RSMo, or chapter 371, RSMo, **unless such directors specifically authorize the attorney general to implement the powers of this chapter or such powers are provided to either the attorney general or a private citizen by statute**."

(A. Appx. A29; emphasis supplied.) The Western District Court of Appeals determined that The Reilly Company, LLC was exempt from the MMPA provisions in their entirety, because it was an insurance agency licensed and regulated by the Director of the Department of Insurance. The logic of the exclusion is unassailable. The Director of the Department of

Insurance has complete and total control over procedures, licensing, regulation, claims resolution and all requirements imposed upon licensed insurance entities conducting business within the state. Statutory and regulatory control is undertaken upon many areas of the insurance business, due to its specialized and unique nature -- from underwriting, policy preparation and required coverage to sales solicitations, claims resolution, remuneration and commission payments. R.S.Mo. §§ 375.001, et seq.; 200 CSR 100-1.010, et seq. The MMPA statutes regulating the merchandising practices of the many unregulated industries within Missouri are unnecessary, and probably inappropriate, because of the specialized and unique nature of the entities regulated by the Department of Insurance. The MMPA exclusions reveal a legislative appreciation for the fact that while merchandising practices regulations may be beneficial and helpful in unregulated areas of Missouri commerce, they are not necessary -- in fact, they would be downright harmful -- in the regulated areas excluded by the statute. However, the statute goes further to indicate that the Director of the Department of Insurance may specifically authorize the Attorney General to "**implement the powers of this chapter**"[1] where necessary or appropriate. The statute also allows that such powers may be statutorily delegated (again, to "**implement the powers of this chapter**")[2] to either the Attorney General or to private citizens. Clearly, no such statutory power was delegated to the Attorney General or private citizens. There is no regulation or order in

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[1] Emphasis supplied.

[2] Emphasis supplied.

which the Director of Insurance has authorized the Attorney General to implement any specific "powers of this chapter" related to the MMPA. Neither the Director of the Missouri Department of Insurance nor the Missouri legislature has authorized, by order or by statute, that a private citizen be empowered to "implement the powers of this chapter" of the MMPA. Reed's arguments to the contrary have been addressed and refuted by Missouri's Southern and Western District Courts of Appeal and by all of the federal courts addressing MMPA coverage issues, as will be more fully discussed below.

C. Section 407.020.2(2) Excludes the Described Regulated Industries From All MMPA Governance.

The Western District Court of Appeals rejected Reed's argument that the § 407.020.2(2) exemptions were limited to § 407.020, stating that Sections 407.912 and 407.913 were "merely qualifications of Section 407.020 as to what an unfair practice was in a case involving a principal who fails to timely pay commissions to a sales representative, and the exemptions in section 407.020.2(2) would be applicable in such an action." (A. Appx. A10.) The Court of Appeals' concluded that while the CSA applied to other commission disputes in unregulated industries between a principal and a sales representative, the CSA did not apply to practices of companies licensed or regulated by the Department of Insurance because the Section 407.020.2(2) exclusion exempted such entities from all MMPA provisions, to include the CSA.

Reed argues that the CSA statutes provide him with the power "to implement the powers of this chapter" as a private citizen which thereby circumvent the statutory exemption. But careful review of the CSA statutes reflects that the provisions provide nothing more than a cause of action in contract for a commission deficiency no different than that provided by common law, with the one notable addition being a claim for attorney fees pursuant to R.S.Mo. § 407.913. There is no statement that the CSA is "giving private citizens the power to enforce" the MMPA, § 407.913 or the CSA. While § 407.913 may augment the recovery which a plaintiff would otherwise have for commission compensation in unregulated industries, reading it as providing a statutory power which negates the exclusion of § 407.020.2(2) is circular. Under such circular reasoning, *any* statute within the MMPA addressing consumer rights or obligations can be argued to be the statutory empowerment to a private citizen negating the exclusion of § 407.020.2(2). Such reasoning eviscerates any meaning or effect to § 407.020.2(2) because, by that reasoning, every MMPA statute serves to empower a private citizen.

In *Myers v. Sander*, 2014 WL 409081 (E.D. Mo.), the United States District Court for the Eastern District of Missouri examined a similar argument. There, a title insurer argued that the exception from § 407.020.2 applied, making it exempt from the MMPA. *Id.* at *7. The court noted that it found no evidence that any statute provided an MMPA cause of action to private citizens against title insurance companies, citing another case dismissing a title insurance MMPA claim, *Smith v. J. Wells Inv. Group, LLC*, 2008 WL 8487908 (Mo. Cir.

Ct.). The *Myers* plaintiffs argued that the language in § 407.025 granting private citizens the general right to bring MMPA actions constituted a "power" given to the private citizens "by statute" that took precedence over the regulated insurance entity exemption. *Id.* The court noted that the argument was circular. *Id.* at fn. 7. The court reasoned that to negate the exemption applying to a title insurance company, the plaintiffs would have to "point to a statute giving private citizens the power to enforce § 407.020 specifically against title companies." *Id.*

The Eighth Circuit Court of Appeals also addressed this argument, holding "the contention that one provision of the MMPA completely negates another violates well-accepted principles of statutory construction." *Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 745 (8th Cir. 2012)(Cert. denied by *Rashaw v. United Consumers Credit Union*, 133 S. Ct. 1250, 185 L. Ed. 2d 180 (2013)). In *Rashaw*, the Eighth Circuit consolidated three separate appeals in MMPA class action lawsuits that were dismissed by the United States District Court for the Western District of Missouri. *Id.* The appellate court affirmed the United States District Court for the Western District of Missouri dismissal, which, upon examining an argument similar to that of Reed in this case, found that the argument was "circular" and refused to apply plaintiff's interpretation. *See Moran v. Missouri Central Credit Union*, 2011 WL 2110824 (W.D. Mo.). There, the District Court for the Western District of Missouri stated "§407.025 gives private citizens the powers granted by §407.020, but §407.020 does not apply to credit unions. For Plaintiff's argument

to be credited, what must be granted is the power to enforce §407.020 *against credit unions*. To hold otherwise would eliminate the exclusion." *Id*. at *5. The District Court similarly held in the underlying *Rashaw* case:

> Plaintiffs' second argument is that the statute does not apply because private citizens are permitted to sue, as provided in section 407.025. This argument is predicated on the exlusion's last clause, which states that the exclusion does not apply if the ability to implement the powers of section 407.020 is "provided to either the attorney general or a private citizen by statute." This argument is circular: section 407.025 gives private citizens the powers granted by section 407.020, but section 407.020 does not apply to credit unions. For Plaintiffs' argument to be credited, what must be granted is the power to enforce section 407.020 *against credit unions*. To hold otherwise would eliminate that exclusion.

Rashaw v. United Consumers Credit Union, 2011 WL 2110806, at *6 (W.D. Mo.), aff'd, 685 F.3d 739 (8th Cir. 2012).

See also, Smith v. J. Wells Investment Group, LLC, 2008 WL 8487908; *Reitz v. Nationstar Mortg., LLC*, 954 F. Supp. 2d 870, 893 (E.D. Mo. 2013); *In re Brauer v. Bankers Life & Cas. Co.*, 2016 WL 4083480 at *7 (W.D. Mo.). Other unpublished decisions also find Reed's argument untenable. *Simon v. Blue Cross & Blue Shield of Mo.*, Case No. 1416-CV12765 (R. Appx. RA-79 - 83); *Riley v. JCN Inc Auto, LLC*, Case No. 1416-CV22896

(R. Appx. RA-84 - 85). The most recent court decision interpreting the exemption language of Section 407.020.2(2) is *Meyers v. Kendrick*, --- S.W.3d --- (2017); 2017 WL 4276261 (Mo. App. S.D.). There, the court addressed the § 407.020.2(2) exemption as it related to § 407.025. The appeals court held that while § 407.025 authorized suit by a private citizen under the MMPA under specific circumstances, § 407.020.2(2) expressly excluded financial institutions from suit through § 407.025, due to the exemption of § 407.020.2(2) for any "institution, such as a Bank, that is chartered, licensed or regulated by the director of the division of finance." *Id*, at *5. Identical reasoning should exempt Reilly, as a licensed insurance entity regulated by the director of the Department of Insurance, from a private citizen's suit alleging violations of the MMPA.

D. While Correct, the Court of Appeals' Determination Would Appear to be Dicta.

The Court of Appeals' determination that Reed has no private right of action under the MMPA accurately reflects the opinions of the great majority of courts which have considered the issue. That said, that determination would appear to have been unnecessary in upholding Judge Roldan's decision. Judge Roldan simply determined that the "jurisdiction and venue selected by the contract of the parties" would address the substantive issues of fact and law presented by the Petition. The potential applicability of the MMPA exclusion or the CSA statutes were issues to be determined by the District Court of Johnson County, Kansas construing and governing the litigation issues by the laws of the State of Kansas. Stated

differently, the issues of (1) whether and how Kansas state law would address the MMPA provisions, (2) whether R.S.Mo. § 407.020.2(2) would exclude consideration of all MMPA provisions, to include the CSA statutes, (3) whether and how (if applicable) R.S.Mo. § 407.913 might modify the contract of the parties, and (4) whether and how (if applicable) R.S.Mo. § 407.010 would affect the IBA contract provisions were all issues to be decided in the forum selected by the parties.

To the extent that the Court of Appeals rejected Reed's MMPA argument, that court was reinforcing its determination that the MMPA did not provide stand-alone jurisdiction and venue sufficient to alter or nullify the contractually agreed upon venue of the parties. That much is clearly accurate. The provisions of the Commissioned Sales Act, even if applicable -- and they are not -- would solely serve to impose the written terms of the IBA upon the parties. (R.S.Mo. § 407.912.1(1); A. Appx. A25.) Even if the CSA did apply -- and it does not -- the statutes would hold that "[T]he written terms of the contract between the principal and sales representative shall control." *Id.* Enforcement of the IBA's written provisions, to include the forum selection paragraph, is exactly what Reilly's motion to dismiss was predicated upon. The parties to the IBA agreed that those written terms were subject to construction and governance by the laws of the State of Kansas in the District Court of Johnson County, Kansas. Enforcement of that agreement's dispute resolution methodology was the only action taken by Judge Roldan. He did not need to consider the MMPA or other issues of law to make that determination. Hence, all subsequent discussion of the MMPA

exclusions or the CSA's applicability became mere dicta. The Court of Appeals correctly perceived that Judge Roldan's initial validity determination to enforce the forum selection clause did not speak to the remaining legal issues left for resolution by the forum selected by the parties. (A. Appx. A7, fn. 3.)

IV. BECAUSE REED PRESENTED NO TORT CLAIM WHICH WAS INDEPENDENT OF AND UNRELATED TO THE INSURANCE BROKER AGREEMENT OF THE PARTIES, THE COURT PROPERLY DISMISSED REED'S CAUSE OF ACTION IN FAVOR OF THE PARTIES' CONTRACTUAL FORUM.

- *Captiva Lake Investments, LLC v. Ameristructure, Inc.*, 436 S.W.3d 619 (Mo. App. E.D. 2014)
- *Donovan v. Las Brands, Inc.*, 242 S.W.3d 487 (Mo. App. W.D. 2008)
- *Major v. McCallister*, 302 S.W.3d 227 (Mo. App. S.D. 2009)

In Reed's fourth appellate point, he argues that because he "has not sued to enforce the Agreement, but has sued for a declaration that the Agreement is illusory and unenforceable," the forum selection provision of the IBA is inapplicable. (Appellant's Substitute Brief, p. 34.) Reed further argues that the forum selection clause would be inapplicable for "recovery on his statutory and common law tort claims." Such argument fails because Reed's cause of action is solely and exclusively predicated in contract upon commission entitlements associated with the IBA and Exhibit 1. Nothing about Reed's claim -- or the CSA for that matter -- would imply that a tort cause of action has been presented. Review of Appellant's Substitute Brief reflects a Statement of Facts in which Reed provides three pages of argument solely and exclusively predicating his cause of action on provisions of the IBA. (Appellant's Substitute Brief at 2-5.) Reed's Petition in the Circuit Court was

also solely predicated upon the IBA. (LF_004-015.) Reed worked for Reilly and was paid pursuant to the IBA for five years. Reed's cause of action addresses 60 days of commissions which he alleges (inaccurately) were not tendered to him at the time of termination. Reed's causes of action, whether for (1) a declaratory order adjudicating the Agreement void, (2) an injunction preventing enforcement of the Agreement, or (3) the 60-day commission obligation alleged to be due and owing, are all causes of action directly based upon the IBA contract. Even the fraudulent and negligent misrepresentation allegations reference the alleged failure to complete IBA obligations. Because the misrepresentation causes of action are solely and exclusively for breach of contract; they do not provide the basis for a tort action. *Donovan v. Las Brands, Inc.*, 242 S.W.3d 487 (Mo. App. W.D. 2008).

The Court of Appeals indicated that Missouri case law provides that "generally speaking, whether a forum selection clause by its terms applies to contract actions also reaches non-contract claims 'depends on whether resolution of the claims relates to interpretation of the contract.'" *Major v. McCallister*, 302 S.W.3d 227, 231 (Mo. App. S.D. 2009). Here, all of Reed's claims are clearly based upon the contract and the interpretation of same.

Here there are no statutory or common law tort claims independent of alleged contractual entitlement. "The economic loss doctrine prohibits a plaintiff from seeking to recover in tort for economic losses that are contractual in nature." *Captiva Lake Investments, LLC v. Ameristructure, Inc.*, 436 S.W.3d 619, 628 (Mo. App. E.D. 2014) (citing *Autry*

Morlan Chevrolet Cadillac, Inc. v. RJF Agencies, Inc., 332 S.W.3d 184, 192 (Mo. App. S.D. 2010)). Tort claims for damages of a purely economic nature are "limited to cases where there is personal injury, damage to property other than that sold, or destruction of the properly sold due to some violent occurrence." *Id.* This is because there is no duty in tort to prevent another's economic loss. *See Id*. Because Reed asserts no claim of injury to person or to property, no tort claim is presented.

V. BECAUSE WRITTEN AT-WILL EMPLOYMENT AGREEMENTS ARE LEGALLY ENFORCEABLE, THE COURT PROPERLY DISMISSED REED'S CAUSE OF ACTION IN FAVOR OF RESOLUTION BY THE FORUM CONTRACTUALLY SELECTED BY THE PARTIES.

- *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. banc 2014)
- *Braudis v. Helfrich*, 265 S.W.2d 371, 372 (Mo. 1954)
- *Drummond Realty & Inv. Co. v. W.H. Thompson Trust Co.*, 178 S.W. 479 (Mo. 1915)
- *Ragan v. Schreffler*, 306 S.W.2d 494, 499 (Mo. 1957)

For his fifth point on appeal, Reed argues that because the IBA provided for employment at will, the outbound forum selection clause was unenforceable. Misinterpreting the four-three decision in *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014), Reed argues there was "no separate consideration" for the outbound forum selection clause. Reed's argument is not supported by *Baker*. In *Baker*, the issue was whether an Arbitration Agreement, separate and apart from the employment agreement, which was provided for continued at-will employment, could be enforced. There, the majority concluded that while "no court would adopt a construction of the agreement allowing Bristol to disclaim or modify its arbitration promises unilaterally at any time for its own benefit, the fact remains that the language of the agreement would permit Bristol to do just that." (*Id.* at 777.) Nothing about *Baker* inferred that a forum selection provision would not be enforced in an at-will contract,

particularly where that forum selection provision existed in a contract of employment which exchanged numerous and detailed mutual promises by each of the contracting parties. Here, Reilly promised to:

- Provide marketing assistance, office space, telephone service, dues in business organization, tuition, 401(k) benefits, paid vacation to Reed.
- Paid home office supplies, phone and travel expenses of Reed.
- Remunerate Reed pursuant to the commission schedules at Exhibit 1.
- Provide certain additional commission payments to Reed upon termination without cause after three years of employment.
- Continue commission payments for specified periods if termination was caused by death or disability.

(LF_032-040.) These promises, provided within the employment contract and in consideration for numerous promises by Reed, clearly constituted a contract enforceable by either party on any number of issues. Moreover, "separate consideration" need not be identified for the forum selection clause at § 21. Bilateral contracts are supported by consideration. *Ragan v. Schreffler*, 306 S.W.2d 494, 499 (Mo. 1957). Mutual promises constitute sufficient consideration for a bilateral contract. *Braudis v. Helfrich*, 265 S.W.2d 371, 372 (Mo. 1954). Separate consideration is not required for each contemporaneous promise. *Drummond Realty & Inv. Co. v. W.H. Thompson Trust Co.*, 178 S.W. 479, 482 (Mo. 1915). *Baker v. Bristol*, *supra* at 782-83.

VI. THE TRIAL COURT'S ENFORCEMENT OF THE FORUM SELECTION CLAUSE OF THE PARTIES' CONTRACT WAS FAIR, REASONABLE AND APPROPRIATE.

- *Burke v. Goodman*, 114 S.W.3d 276 (Mo. App. E.D. 2003)
- *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. banc 1992)
- *Major v. McCallister*, 302 S.W.3d 227 (Mo. App. S.D. 2009)
- *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d 592 (Mo. App. E.D. 2000)

A. In an Action Based on the Contract, Allegations of Fraud, Misrepresentation and Adhesion are Insufficient to Avoid the Contractual Forum Selection Clause.

For his sixth appellate point, Reed argues that the trial court's enforcement of the outbound forum selection clause was unfair and unreasonable, hence in error. Reed argues that the employment agreement was an "illusory and unenforceable adhesion contract," in part because Reilly "did terminate plaintiff effective immediately . . . and refused to pay him 60-days' commission for November and December." (LF_050; *but see* LF_071-084.) Plaintiff further asserted that his allegations of "fraudulent/intentional/negligent misrepresentation and/or concealment," rendered enforcement of the IBA to be "unfair and unreasonable," and that additional and separate consideration must be provided to support the forum selection clause. None of these contentions have merit. In *Whelan Sec. Co., Inc.*

v. Allen, 26 S.W.3d 592 (Mo. App. E.D. 2000), the employee presented similar arguments. While enforcing an inbound Missouri forum and law selection clause, the Court stated:

> Defendant first contends that the forum selection clause was unfair because it was not freely negotiated and it was adhesive. The only specific evidence defendant provided to the court to establish that the Agreement was not freely negotiated was the averment in his affidavit that he was told by his employer that, if he did not sign the Agreement containing the forum selection clause, he would be let go. As in *Chase Third Century* [782 S.W.2d 408 (Mo. App. W.D. 1989)] this averment does not include facts showing the overreaching or fraud necessary to avoid the forum selection clause on the grounds of unfairness. (*Id.* at 412.) The fact that an employment contract is a prerequisite to employment does not force the employee to accept and execute it; the employee has the option of forgoing the employment if the terms of the agreement are not satisfactory. *Adrian N. Baker & Co. v. DeMartino*, 733 S.W.2d 14, 19 (Mo. App. E.D.1987); *USA Chem, Inc. v. Lewis*, 557 S.W.2d 15, 24 (Mo. App. 1977). The same rationale applies where the employment contract is a prerequisite to continued employment of an employee at will since the employer has no obligation to continue the employment and the employee has no obligation to remain. *See Reed, Roberts Associates, Inc. v. Bailenson*, 537 S.W.2d 238, 241 (Mo. App. 1976).

Again, *Major v. McCallister*, 302 S.W.3d 227, 231 (Mo. App. S.D. 2009), held:

> Generally speaking, whether a forum selection clause that by its terms applies to contract actions also reaches non-contract claims depends on whether resolution of the claims relates to interpretation of the contract.

Here, all complaints and assertions of the Plaintiff/Appellant clearly related directly to the IBA executed between the parties. If mere allegations of fraud were sufficient to defeat forum selection clauses, such clauses would be worthless and unenforceable. It is equally obvious that a Kansas court sitting in Johnson County is as convenient and competent a forum to resolve a dispute between a Kansas corporation and its Kansas registered agent as its Missouri counterpart.

B. Missouri Law Enforces Forum Selection Clauses.

Missouri enforces forum selection clauses. In *Major v. McCallister, et seq.*, 302 S.W.3d 227 (Mo. App. S.D. 2009), the Missouri Court of Appeals stated:

> We should honor the forum selection clause unless it is unfair or unreasonable to do so. *Burke v. Goodman*, 114 S.W.3d 276, 279-80 (Mo. App. 2003)(citing *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 497 (Mo. banc 1992)). The party resisting such a clause generally bears a heavy burden to show why it should not be held to its bargain. *Id.* at 280 (citing *Whelan Sec. Co. v. Allen*, 26 S.W.3d 592, 596 (Mo. App. 2000)).

High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493, 495 (Mo. banc 1992), was the seminal Missouri case in which the Missouri Supreme Court joined the majority of jurisdictions by concluding that Missouri should no longer treat outbound forum selection clauses as per se violations of public policy. Since that time, Missouri has held that an outbound forum selection clause should be enforced unless it is unfair or unreasonable to do so. *Id.* at 497. In *Burke v. Goodman*, 114 S.W.3d 276 (Mo. App. E.D. 2003), the Court stated:

> The party resisting enforcement of the forum selection clause bears a heavy burden in convincing the court that he or she should not be held to the bargain. *Whelan Sec. Co., Inc. v. Allen*, 26 S.W.3d at 596. Whether or not the party presented sufficient evidence to show that enforcement of the clause would be unfair or unreasonable is a question of law that we review independently on appeal. *Id.* at 595.
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> . . . A clause that provides that the litigation shall be brought at the principal place of business of the defendant, mitigates in favor of fairness and discourages hasty litigation because a "race to the courthouse by either party puts the lawsuit in the opponent's back yard. *See High Life Sales Co.*, 823 S.W.2d at 497."

C. Enforcement of the IBA Forum Selection Clause was Fair and Reasonable.

In *High Life Sales*, while considering a "neutral and reciprocal" forum selection clause, the Missouri Supreme Court specifically stated that litigation in the principal place of business of the defendant favors fairness and discourages a hasty litigation through a "race to the courthouse." (823 S.W.2d at 497.) Here, the particular venue selected in the contract of the parties was the principal office at which the Plaintiff/Appellant undertook employment. Johnson County, Kansas is the county in which Mr. Reed's office of employment was located. Reilly had only two offices. Reilly's primary office was located in Leavenworth County, Kansas. The IBA selected the Plaintiff/Appellant's place of employment and the office closest to the primary sales locations of the Plaintiff/Appellant's insurance clients. Clearly, Johnson County, Kansas was a fair, reasonable and appropriate location to interpret and enforce the contract of employment -- a contract of employment in which the Plaintiff/Appellant had served at Reilly's offices within Johnson County, Kansas for five years.

CONCLUSION

On August 22, 2017, this Court accepted Reed's Application for Transfer. Because Reed's arguments attacking the forum selection clause of the parties (1) were properly rejected by the Western District Court of Appeals, and (2) presented no new or novel issues of Missouri law, transfer appears to have been accepted in order to address the MMPA exclusion provision of R.S.Mo. § 407.020.2(2). While the Missouri Supreme Court's resolution of the meaning and effect of that statute will assist the lower courts, it is unclear whether this is the proper case for such a determination. The Western District Court of Appeals' regulatory exemption decision is logical, sound and consistent. It follows the great majority of Missouri decisions in all aspects. However, to the extent that the MMPA regulatory exemption determination need not have been decided, this Court may conclude that the transfer was improvidently granted and that re-transfer of the case to the Court of Appeals pursuant to Supreme Court Rule 83.09 is appropriate.

Should this Court determine that a resolution of the MMPA regulatory exemption provided by § 407.020.2(2) is of sufficient import that a determination should be made, Reilly urges the Court to adopt the reasoning and analysis reflected in the Western District's decision herein, the Southern District's decision in *Meyers v. Kendrick, infra*, and in the *Rashaw* decision of the United States District Court for the Western District of Missouri, as affirmed by the Eighth Circuit Court of Appeals. Under any and all circumstances, however, this Court should uphold enforcement of the forum selection clause in the county of Reed's

employment to be fair, reasonable and appropriate to an at-will contract of employment, and for the efficient resolution of all remaining claims within the contractually selected forum of the parties.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with:

(1) the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure, because it contains only 9,755 words; and

(2) the typeface and type style requirements of Rule 84.06(a) as this brief has been prepared in a proportionally spaced typeface in the Times New Roman 13 point font.

This brief also includes the information required by Rule 55.03, and the undersigned certifies the he has signed the original brief as attorney for the Defendant/Respondent, The Reilly Company, LLC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 25, 2017, the foregoing Respondent's Substitute Brief and Appendix to Respondent's Substitute Brief are being electronically filed with the Clerk of the Court for the Supreme Court of Missouri via the Court's electronic filing system. The undersigned further certifies that electronic copies of this Brief and the Appendix have been served via email on counsel for the Plaintiff/Appellant Jeff Reed, and *Amici Curiae* National Consumer Law Center, American Financial Services Association and Missouri Auto Dealers Association. Counsel who will be duly served via the Court's electronic filing system and with an electronic copy via email are:

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