SC 96672

IN THE SUPREME COURT OF MISSOURI

A-1 PREMIUM ACCEPTANCE, INC.

Appellant

v.

MEEKA HUNTER

Respondent

Appeal from the Circuit Court of Jackson County, Missouri
At Kansas City
The Honorable Joel P. Fahnestock, Judge
Case Number 1516-CV01797

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Transferred from the Missouri Western District Court of Appeals
Case Number WD 79735

APPELLANT'S SUBSTITUTE BRIEF

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Jurisdictional Statement

This is an appeal of a judgment entered by the Circuit Court of Jackson County, Missouri at Kansas City, denying Appellant A-1 Premium Acceptance, Inc.'s Motion to Compel Arbitration and for Stay of Proceedings. An appeal may be taken from an order denying an application to compel arbitration in the manner and to the same extent as from orders or judgments in a civil action. § 435.440.1(1) RSMo. Additionally, the Federal Arbitration Act provides that an appeal may be taken from an order denying a motion to compel arbitration or to stay proceedings pending arbitration. 9 U.S.C. § 16(a)(1)(A) and (C).

This matter is now before the Missouri Supreme Court on its Order entered December 19, 2017 to transfer from the Western District Court of Appeals following that Court's decision in favor of Appellant A-1 Premium Acceptance, Inc. entered on July 18, 2017.

Statement of Facts

On June 7, 2006 defendant Meeka R. Hunter ("Hunter") made applications for two loans from A-1, one for One Hundred Dollars ($100) and one for Three Hundred Dollars ($300). LF at 39; Appendix at A009-016 [1]. On July 1, 2006 Hunter made application to A-1 for a loan of Three Hundred Dollars ($300). LF at 39; Appendix at A017-021. On July 7, 2006, Hunter made application to A-1 for a loan of One Hundred Dollars ($100). LF at 39; Appendix at A022-026.

As a material condition of each of the loans, Hunter signed a Loan Application, copies of which for each of the loans are included in the respective loan documents. LF at 39; Appendix at A009, A012, A017 and A022. A large part of that document is a provision on handling defaults in payment by Hunter via court action and separately a provision requiring arbitration pertaining to any other claim other than Hunter's failure to pay. LF at 39; Appendix at A009, A012, A017 and A022. Specifically, the Loan Applications each provide:

> You agree and understand that a claim or demand for recovery of the balance due lender resulting from your default in payment may be asserted by lender in any court of competent jurisdiction. However, you agree that any claim or dispute including class action suits, other than that resulting from your default in payment, between you and the lender or against any agent, employee, successor, or assign of the other, whether related to this agreement or otherwise, and any claim or dispute related to this agreement or the relationship or duties contemplated under this contract, including the validity of this arbitration clause, shall be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court of competent jurisdiction. Information may be obtained and claims may be filed at any office of the National Arbitration Forum or at P.O. Box 50191, Minneapolis, MN 55405. This agreement shall be interpreted under the Federal Arbitration Act.

[1] All of the loan documents attached to the Appendix to this Brief were exhibits attached to A-1's Brief in Support of its Motion to Compel Arbitration and for Stay of Proceedings found at LF 39.

LF at 39; Appendix at A9, A12, A17 and A22.

Following Hunter's default on the loans, on January 21, 2015, then counsel for A-1 filed the petition with the Circuit Court to collect on the non-payment of the balance due on the various loans. LF at 8. This was done completely consistent and in accordance with the first sentence of the default provision in the Loan Applications. LF at 39; Appendix at A009, A012, A017 and A022. In response, Hunter has filed her counterclaims – including seeking class action certification – making claims other than those resulting from her default. LF at 14 and 21. Specifically, she is attacking the loan documents and alleging that the loan documents do not provide for any interest rate and as such A-1 has violated the Merchandising Practices Act, has violated RSMo §408.556.2 and has breached the contract between the parties, all of which are denied by A-1. LF at 21. According the clear and unambiguous terms of the default provision found in the Loan Applications, Hunter's claims are required to be arbitrated. LF at 39; Appendix at A009, A012, A017 and A022.

On September 28, , 2015, A-1 filed its Motion to Compel Arbitration and for Stay of Proceedings. LF at 37. Contemporaneously therewith, A-1 filed its memorandum in support of that motion. LF at 39. A-1 noted in that motion that the designated arbitrator, National Arbitration Forum ("NAF") entered into a consent order with the state of Minnesota in 2009, three years after the arbitration agreements were entered into by the parties, and as such NAF was no longer available to conduct consumer arbitrations. LF at 39; Appendix at A001, A083-A100. Therefore, A-1 sought the Circuit Court's order

appointing a substitute arbitrator as provided by the Federal Arbitration Act ("FAA"). LF at 39.

Hunter opposed this filing in the form of her Motion to Enter Scheduling Order and for Oral Hearing on Plaintiff's Motion to Compel Arbitration. LF at 75. A-1 opposed Hunter's motion for the entry of a scheduling order and moved the Circuit Court at that time to enter a protective order from the overreaching discovery that Hunter indicated she would be seeking through her own motion. LF at 83.

After obtaining leave of the Circuit Court to file a late response, Hunter opposed A-1's motion for a protective order (LF at 102) and opposed A-1's motion to compel arbitration and for a stay of litigation. LF at 122. A-1 filed its reply brief in that regard on February 3, 2016. LF at 211. On that same date, Hunter filed a motion to file a surreply brief (LF at 296) along with suggestions in support of that motion (LF at 299), which was opposed by A-1 (LF at 302); however, that last motion was rendered moot when the Court entered is subject Order from which this appeal is made. LF at 305.

Points Relied On

Point 1:

THE CIRCUIT COURT ERRED IN DENYING A-1 PREMIUM ACCEPTANCE, INC.'S MOTION TO COMPEL ARBITRATION AND FOR STAY OF PROCEEDINGS BECAUSE THE FAA PROVIDES THE COURT SHALL DESIGNATE AN ARBITRATOR WHEN FOR ANY REASON A LAPSE OCCURS IN NAMING AN ARBITRATOR IN THAT THE UNAVAILABILITY OF THE NAF DESIGNATED BY THE ARBITRATION AGREEMENT DOES NOT MAKE THE ARBITRATION AGREEMENT INVALID AND UNENFORCEABLE FOR MISSING AN INTEGRAL TERM.

Ellis v. JF Enters., 482 S.W.3d 417 (Mo. 2016)

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)

Reddam v. KPMG LLP 457 F.3d 1054 (9th Cir. 2010)

State ex rel. Hewitt v. Kerr, 461 S.W.3d 798 (Mo. banc 2015)

9 USCS § 5.

Point 2:

THE TRIAL COURT ERRED IN DENYING A-1 PREMIUM ACCEPTANCE, INC.'S MOTION TO COMPEL ARBITRATION AND FOR STAY OF PROCEEDINGS THE MISSOURI LEGISLATURE HAS ALREADY BOUND THE CIRCUIT COURT TO COMPEL ARBITRATION AS REQUIRED BY THE MISSOURI UNIFORM ARBITRATION ACT , IN THAT IT CONTAINS A PROVISION WITH EVEN CLEARER LANGUAGE THAN THE FEDERAL

STATUTE MANDATING THE APPOINTMENT OF A SUBSTITUTE ARBITRATOR FOR ANY REASON.

Ellis v. JF Enters., 482 S.W.3d 417 (Mo. 2016)

§ 435.360 RSMo.

Point 3:

THE CIRCUIT COURT ERRED IN DENYING A-1 PREMIUM ACCEPTANCE, INC.'S MOTION TO COMPEL ARBITRATION AND FOR STAY OF PROCEEDINGS BECAUSE THE SUBJECT ARBITRATION AGREEMENT POSSESSES A LATENT AMBIGUITY WITH THE MAIN INTENT OF THE PARTIES TO ARBITRATE IN THAT THE ISSUE OF THE UNAVAILABILITY OF THE NAF AS THE FORUM IS AN UNANTICIPATED ASPECT OF THE AGREEMENT WHERE THE SURROUNDING FACTS REGARDING THE AGREEMENT AND FEDERAL AND MISSOURI LAW REQUIRE THE ARBITRATION AGREEMENT TO BE SUPPLEMENTED IN FAVOR OF COMPELLING ARBITRATION.

Royal Banks of Missouri v. Fridkin, 819 S.W.2d 359 (Mo. 1991)

Boswell v. Steel Haulers, **Inc.**, 670 S.W.2d 906 (Mo. Ct. App. 1984).

Argument

Point 1:

The Circuit Court erred in denying A-1 Premium Acceptance, Inc.'s Motion to Compel Arbitration and for Stay of Proceedings because the FAA provides the court shall designate an arbitrator when for any reason a lapse occurs in naming an arbitrator in that the unavailability of the NAF designated by the arbitration agreement does not make the arbitration agreement invalid and unenforceable for missing an integral term. ***Ellis v. JF Enters.,*** 482 S.W.3d 417 (Mo. 2016); ***Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1 (1983); ***Reddam v. KPMG LLP*** 457 F.3d 1054 (9th Cir. 2010); **9 USCS § 5**.

A. Standard of Review:

Appellate review of a trial court's denial of a motion to compel arbitration is *de novo*. ***Lawrence v. Beverly Manor***, 273 S.W.3d 525, 527 (Mo. banc 2009); ***Dunn Indus. Group, Inc. v. City of Sugar Creek***, 112 S.W.3d 421, 428 (Mo. banc 2003). The interpretation of a contract is a question of law. ***Dean Machinery Co. v. Union Bank***, 106 S.W.3d 510, 520 (Mo. Ct. App. 2003). Appellate review of a question of law is de novo. ***Id***. No deference is given to the trial court's interpretation of the contract. ***Id***. However, since the subject arbitration agreement is covered by the FAA, the U.S. Constitution's Supremacy Clause mandates that the rules of contract construction and interpretation not be applied any manner which has a "disproportionate impact" on

arbitration or "interferes" with the congressional intent that arbitration agreements be enforced. ***AT&T Mobility LLC v. Concepcion***, 563 U.S. 333, 341-343 (2011).

B. <u>Federal Law Designates a Replacement Arbitrator for Any Reason, Including Failure of a Specifically Designated Arbitrator</u>

The arbitration agreement provided in the Loan Agreement is short and straightforward. It is a simple paragraph that concludes with one sentence: "This agreement shall be interpreted under the Federal Arbitration Act." To the extent that Missouri law applies, "every word in the contract is to be given meaning if possible." ***Gulf Ins. Co. v. Noble Broad.***, 936 S.W.2d 810, 814 (Mo. banc 1997); ***Armstrong Bus. Servs. V. H & R Block***, 96 S.W.3d 867, 878 (Mo. Ct. App. 2002). The parties' intention is crystal clear – they want to arbitrate any dispute, and if they do, the provisions of the FAA are to be applied. As discussed herein, this specifically includes Section 5 of the FAA to provide for the appointment of a substitute arbitrator.

The Court should determine "whether a valid arbitration agreement exists," and if the "dispute falls within the scope of the arbitration agreement." ***Nitro Distrib., Inc. v. Dunn***, 194 S.W.3d 339, 345 (Mo. 2006). "Federal law in terms of the Arbitration Act governs [the arbitrability of the dispute] in either state or federal court." ***Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.***, 460 U.S. 1, 24 (1983). In this case, the parties' arbitration agreement states that the "agreement shall be interpreted under the Federal Arbitration Act." LF at 0308. Section 5 of the FAA provides for an appointment of a substitute arbitrator:

> [i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no

> method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or **if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators** or umpire, or in filling a vacancy, then upon the application of either party to the controversy **the court shall designate** and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement **with the same force and effect as if he or they had been specifically named therein**; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 USCS § 5. (emphasis added)

The Missouri Supreme Court in ***Ellis v. JF Enters., LLC*** states that "the FAA, not Missouri law governs what courts may consider in determining whether an agreement to arbitrate is enforceable." 482 S.W.3d 417, 420 (Mo. 2016). While the Circuit Court properly cites to ***Ellis*** to establish under the FAA that "agreements are enforceable unless the arbitration agreement itself—in isolation—is invalid under generally applicable state law principles," not a single Missouri case is provided that establishes the subject arbitration agreement is invalid. ***Id.*** The FAA contains a "congressional declaration of a liberal federal policy favoring arbitration agreements." ***Moses H. Cone Mem'l Hosp.***, 460 U.S. at 1. In contrast to the Circuit Court's holding, the Missouri Supreme Court acknowledges and favors the liberal Federal policy. ***See Ellis***, 482 S.W.3d at 419-20 (holding an arbitration agreement to be valid when the rest of the contract was void under Missouri state law). Also as eloquently stated by the Missouri Supreme Court in ***Ellis***, "it does not behoove this Court to parse its clear language in search of a way to achieve what the Supreme Court so clearly has held Congress and the FAA prevent." ***Id***. at 419.

In citing ***Carideo v. Dell, Inc***., 2009 U.S. Dist. LEXIS 104600, *16 (W.D. Wash. Oct. 26, 2009), the Circuit Court cites to but a single case to directly support its holding,

one that is not even from Missouri. In doing so, the Circuit Court ignores a mountain of other case law and the national trend and fails to head to the Missouri Supreme Court's reflection stated above. Further, in light of the 9th Circuit's opinion in ***Reddam v. KPMG LLP*** [2] published less than a year after ***Carideo***, ***Carideo*** is likely no longer good case law. ***See*** 457 F.3d 1054, 1060-61 (9th Cir. 2010).[3]

The Circuit Court actually cites for support to ***Reddam***, 457 F.3d at 1060 (which holds when the NASD refused to arbitrate for a lack of jurisdiction, the selection of NASD as the forum was not integral to the agreement). LF at 0308-0309. The court therein expressly stated that "[t]here is no evidence that the naming of the NASD was so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end" (rejecting ***In re Salamon*** for lack of reasoning). ***Id.*** at 1060-61. Comparing its decision to "our approach to forum selection clauses," the court explained that it has "not treated the selection forum as exclusive of all other forums, unless the parties have expressly stated that it was." ***Id.***

So, it is apparent that the ***Reddam*** decision actually would mandate that the subject arbitration agreement, be deemed valid and enforceable, and that A-1's motion be

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[2] Also cited by the Circuit Court in its opinion.

[3] The Circuit Court fails to cite any relevant section from a case that is on point with the facts of the instant case, except for ***Carideo***. Although ***Ranzy v. Tigerina***, 393 Fed. Appx 174, 176 (5th Cir. 2010) is on point, the opinion is unpublished, bears no precedential value, and relied heavily on ***In re Salomon Inc. Shareholders' Derivative Litig.***, 68 F.3d 554 (2d Cir. 1995) (uncited by the Circuit Court's opinion). However, in the 20 years since ***In re Salomon***, the national trend has shifted away from its holding. Further, the instant case is distinguishable from ***In re Salomon*** because the court therein had been influenced in its decision making by a four-year, ongoing, and delayed litigation. ***Id***. at 561.

granted. Here, finding that the designation of the NAF is integral and requires invalidation of the arbitration agreement directly contradicts the authority cited by the Circuit Court as law to be followed.

Again ignoring the gravamen of a cited authority, the Circuit Court also cites to ***Brown v. ITT Consumer Financial Corp.***, 211 F.3d 1217, 1222 (11th Cir. 2000) to explain that a court may substitute the arbitral forum only when such forum is not integral to the arbitration agreement. LF at 0308. ***Brown***, however, holds that exclusively designating an arbitration forum is NOT integral to the agreement, stating: "Brown also argues that the arbitration clause is void because the specified forum, the National Arbitration Forum (NAF), had dissolved. **This argument is without merit**." ***Id.*** at 1222 (emphasis added). Relying on § 5 of the FAA, the court therein states: "[t]he unavailability of the NAF does not destroy the arbitration clause." ***Id.***

Other parts of the Circuit Court's opinion continue to confuse a reader of the subject Order: "Section 5 of the FAA is a default provision 'meant to tell a court what to do just in case the parties say nothing else.'" LF at 0310, (citing ***Hall St. Assocs., LLC v. Mattel, Inc.***, 552 U.S. 576, 587-88 (2008)). This circumstance exactly (when the parties said nothing on the issue of replacement arbitral forums) seems to be the very reason—and one which the Supreme Court seems to recognize—§ 5 of the FAA exists. ***See also Robinson v. EOR-ARK, LLC***, 2015 U.S. Dist. LEXIS 130293, *15 (W.D. Ark. June 19, 2015) (holding that "[t]he unavailability of the NAF to arbitrate this matter, does not make this Arbitration Agreement unenforceable," relying on the ***Khan v. Dell Inc.***, 669 F.3d 350 (3d Cir. 2012) and ***Brown*** decisions). One just needs to read that clip in

conjunction with § 5 and the other controlling case law to reach the just result as done in ***Khan***.

For examples of exclusive forum selection clauses held as non-integral parts to the arbitration agreement, ***see Khan***, 669 F.3d at 354 rejecting ***Carideo*** (holding that the contract provision "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM" was **not** integral to the agreement). For example, in ***Khan***, the court held that "the parties must have unambiguously expressed their intent not to arbitrate their disputes in the event the designated arbitral forum is unavailable." ***Id***. If you applied ***Khan*** to this instant matter, it would be dispositive of the issue, since the subject arbitration agreement contains no such qualification.

For other examples of forum selection held as <u>not</u> integral to the arbitration agreement, ***see Adler v. Dell, Inc.***, 2009 U.S. Dist. LEXIS 112204 (E.D. Mich. De. 3, 2009) rejecting ***Carideo*** (holding the reasoning of ***Brown*** is more consistent with 6th Circuit reasoning, and the clause "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF)" was **not** integral to the agreement; thus, an order to compel arbitration was entered) (citing ***McMullen v. Meijer, Inc.***, 166 Fed. Appx. 164, 169 (6th Cir. 2006) (holding the arbitrator selection provision of the agreement *could be severed* and the district court properly appointed a new arbitrator)); ***see also Jones v. GGNSC Pierre LLC***, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010) (holing the language in the arbitration to be "substantially similar to the language in ***Brown***" and compelling

arbitration); ***GGNSC Lancaster v. Roberts***, 2014 U.S. Dist. LEXIS 43102, *33 (E.D. Pa. Mar. 31, 2014) (discussing and following ***Khan***'s reasoning in holding forum selection clause not integral to the agreement).

This matter can be even further illuminated by the holding in ***Green v. U.S. Cash Advance Ill., LLC*** finding whether the forum selection clause is an "integral" part of arbitration agreement is not a legal requirement; rather, the question is merely an approach to determine whether § 5 of the FAA should be applied. 724 F.3d 787, 791 (7th Cir. 2013). The court therein states that "[i]nstead of asking whether one or another feature is "integral," a court could approach this from a different direction and assume that a reference to an unavailable means of arbitration is equivalent to leaving the issue open." ***Id***. at 792. For example, that court cited to recent United States Supreme Court Decision ***American Express Co. v. Italian Colors Restaurant***, 133 S. Ct. 2304 (2013) (holding that adding to requirements of the FAA can delay the arbitration process, which goes against the very purpose of the Act) and insists that district judges should not add requirements to the FAA. ***Id.*** at 792.

Finally, the "majority of courts that have addressed whether a substitute arbitrator can be appointed pursuant to § 5 of the FAA have utilized the approach set out in ***Brown v. ITT Consumer Financial Corp***." ***Courtyard Gardens Health & Rehab., LLC v. Arnold***, 485 S.W.3d 669, 677 (Ark. 2016). ***See also Sarasota Facility Operations, LLC v. Manning***, 112 So. 3d 712, 714 (Fla. Dist. Ct. App. 2d Dist. 2013) (reversing a circuit court's decision to not compel arbitration when the NAF had been designated as the forum); ***Torrence v. National Budget Fin.***, 753 S.E.2d 802, 806-07 (N.C. Ct. App. 2014)

(reversing a circuit court's decision to not compel arbitration and holding "[t]he United States Supreme Court has made it clear that it will no longer tolerate State courts or laws which seek to frustrate the intent of Congress in enacting the FAA"); ***In re Brock Specialty Servs., LTD.***, 286 S.W.3d 649, 652, 656 (Tex. App. Corpus Christi 2009) (holding the contract clause, "All Disputes shall be administered by NMAI and conducted before one (1) NMAI arbitrator" as **not** integral to the agreement); ***White v. Eskridge Auto Group***, 326 P.3d 544, 547 (Okla. Ct. App. 2014) (affirming the trial court's decision to compel arbitration when the chosen arbitrator was no longer available).

While this seems to be an issue of first impression for the Missouri Court of Appeals, the applicable provisions of law combined with an overwhelming amount of case law favors A-1's position. As the Arkansas Supreme Court stated, an overwhelming majority of courts have adopted ***Brown's*** reasoning. The Third, Sixth, Seventh, Eighth, Ninth, and Eleventh circuits, as well as an impressive amount of states, all favor the overarching Federal policy that states a court shall appoint a replacement arbitrator for any reason.

C. Application of the "Integral Term" Analysis as to Arbitration Agreements Contradicts Existing Law And Evidences Judicial Hostility Toward Arbitration

The Circuit Court's decision to find that the identification of the NAF was an "integral term" to the parties' arbitration agreement is part of what can be seen as part of a judicial trend to find a way to evade the federal mandate to favor arbitration by twisting

the construction of the arbitration agreement in such a way to avoid arbitration. Despite that trend, the Missouri Supreme Court itself has honored the mandate as recently as its decision in ***State ex rel. Hewitt v. Kerr***, 461 S.W.3d 798 (Mo. banc 2015).

In ***Hewitt***, the Court found that the appointment of a specified arbitrator was unconscionable[4]. However, it did not find that the term was "integral" necessitating that the arbitration agreement be avoided, but rather treated it appropriately that since the named arbitrator was not now available, a substitute would be appointed. ***Hewitt*** at 813.

Further, to apply the Circuit Court's integral term construction to avoid arbitration would be in direct contravention of the requirement of Section 2 of the FAA which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

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[4] In fact, a definite parallel can be drawn between the finding in ***Hewitt*** that the naming of an industry-related arbitrator was unconscionable to the complaint made against the NAF by the State of Minnesota that the NAF had industry ties which created a bias against consumers in its consumer arbitrations. ***See State of Minnesota v. National Arbitration Forum, Inc., et al.***, State of Minnesota District Court, County of Hennepin Fourth Judicial District, Case Number 27-CV-09-18550, of which this Court may take judicial notice. Appendix at A083-A100. As such, it would not be a stretch of any imagination for the Circuit Court to have found the appointment of NAF in the subject case as unconscionable (assuming that NAF was still available at the relevant point in time) and appointed a substitute arbitrator just as was done in ***Hewitt***.

One of the key phrases in this provision is the last two words of the last sentence – "any contract." The construction used by the Circuit Court to find that the NAF was "integral" does not treat the parties' arbitration agreement the same as "any contract" but rather creates a special rule for an arbitration agreement to limit and/or invalidate the arbitration of the parties' dispute. Missouri recognizes that the FAA places arbitration agreements on an equal footing with all other contracts, and the courts are to "examine arbitration agreements in the same light as they would examine any contractual agreement." ***Triarch Indus. V. Crabtree***, 158 S.W. 3d 772, 776 (Mo. banc 2005)(citing to cases therein). To follow the Circuit Court's application of the "integral" construction would be in direct contradiction of established law.

The FAA preserves "generally applicable contract defenses" but preempts "defenses that apply only to arbitration or that derive meaning from the fact that an agreement to arbitrate is at issue." ***Hewitt***, 461 S.W.3d at 823 (***citing to Concepcion***, 563 U.S. at 341-343). In addition to putting arbitration agreements on equal footing with other contracts, this provision is meant to "lessen perceived judicial hostility toward arbitration." ***Hewitt*** at 823 (***citing to Robinson v. Title Lenders, Inc.***, 364 S.W.3d 505, 512 (Mo. banc 2012)). The cites were made in the separate opinion filed by Judge Teitelman concurring in part and dissenting in part which was filed in ***Hewitt,*** which then went on to state that "The elimination of perceived judicial hostility toward arbitration does not require unbridled judicial enthusiasm for arbitration. Instead, all that is required is neutrality." ***Hewitt*** at 823.

Neutrality is required. Application of a special "integral term" analysis is not neutral but is a hostilely-created justification to invalidate an arbitration agreement.

Point 2:

The trial court erred in denying A-1 Premium Acceptance, Inc.'s Motion to Compel Arbitration and for Stay of Proceedings because the Missouri Legislature has already bound the Circuit Court to compel arbitration as required by the Missouri Uniform Arbitration Act, in that it contains a provision with even clearer language than the Federal Statute, the appointment of a substitute arbitrator for any reason ***Ellis v. JF Enters.,*** 482 S.W.3d 417 (Mo. 2016); **§ 435.360 RSMo.**

A. Standard of Review

Appellate review of a trial court's denial of a motion to compel arbitration is *de novo*. ***Lawrence v. Beverly Manor***, 273 S.W.3d 525, 527 (Mo. banc 2009); ***Dunn Indus. Group, Inc. v. City of Sugar Creek***, 112 S.W.3d 421, 428 (Mo. banc 2003). The interpretation of a contract is a question of law. ***Dean Machinery Co. v. Union Bank***, 106 S.W.3d 510, 520 (Mo. Ct. App. 2003). Appellate review of a question of law is de novo. ***Id***. No deference is given to the trial court's interpretation of the contract. ***Id***. However, since the subject arbitration agreement is covered by the FAA, the U.S. Constitution's Supremacy Clause mandates that the rules of contract construction and interpretation not be applied any manner which has a "disproportionate impact" on arbitration or "interferes" with the congressional intent that arbitration agreements be enforced. ***AT&T Mobility LLC v. Concepcion***, 563 U.S. 333, 341-343 (2011).

B. <u>Missouri Law Designates a Replacement Arbitrator for Any Reason</u>, <u>Including Failure of a Specifically Designated Arbitrator</u>

Arbitration agreements are enforceable "unless the arbitration agreement itself – in isolation – is invalid under generally applicable state law principles." ***Ellis, supra***, 482 S.W.3d at 420. Arbitration agreements are governed by Missouri state law. ***See generally*** **UNIFORM ARBITRATION ACT § 435 RSMO.** Specifically the statute states:

> If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails **or is unable to act and his successor has not been duly appointed**, the court on application of a party **shall appoint one or more arbitrators**. An arbitrator has all the powers of one specifically named in the agreement.
>
> APPOINTMENT OF ARBITRATORS BY THE COURT § 435.360 RSMo.

The language cannot be any clearer than that. If the agreed method fails for any reason OR is unable to act (what has happened in this case), AND his successor has not been duly appointed, the court SHALL appoint an arbitrator. The Missouri Legislature has already legally validated this sort of contract provision under state law principles. The Circuit Court failed to acknowledge or take into consideration the statute governing arbitration provisions in Missouri. Further, the state of Missouri has already congressionally issued its policy favoring arbitration agreements. If the line of reasoning follows from ***Ellis***, which is cited by the Circuit Court as governing authority, then the Circuit Court abused its discretion in not compelling arbitration because it was bound by statute to do so.

Point 3:

The Circuit Court erred in denying A-1 Premium Acceptance, Inc.'s Motion to Compel Arbitration and for Stay of Proceedings because the subject arbitration agreement possesses a latent ambiguity with the main intent of the parties to arbitrate in that the issue of the unavailability of the NAF as the forum is an unanticipated aspect of the agreement where the surrounding facts regarding the agreement and Federal and Missouri law require the arbitration agreement to be supplemented in favor of compelling arbitration. ***Royal Banks of Missouri v. Fridkin***, 819 S.W.2d 359 (Mo. 1991); ***Boswell v. Steel Haulers,* Inc.**, 670 S.W.2d 906 (Mo. Ct. App. 1984).

A. Standard of Review

Appellate review of a trial court's denial of a motion to compel arbitration is *de novo*. ***Lawrence v. Beverly Manor***, 273 S.W.3d 525, 527 (Mo. banc 2009); ***Dunn Indus. Group, Inc. v. City of Sugar Creek***, 112 S.W.3d 421, 428 (Mo. banc 2003). The interpretation of a contract is a question of law. ***Dean Machinery Co. v. Union Bank***, 106 S.W.3d 510, 520 (Mo. Ct. App. 2003). Appellate review of a question of law is de novo. ***Id***. No deference is given to the trial court's interpretation of the contract. ***Id***. However, since the subject arbitration agreement is covered by the FAA, the U.S. Constitution's Supremacy Clause mandates that the rules of contract construction and interpretation not be applied any manner which has a "disproportionate impact" on arbitration or "interferes" with the congressional intent that arbitration agreements be enforced. ***AT&T Mobility LLC v. Concepcion***, 563 U.S. 333, 341-343 (2011).

B. The Latent Ambiguity in the Contract Must be Resolved in Favor of Arbitration

The Circuit Court denied A-1's motion to compel arbitration and to stay the court proceedings by its finding that the designation of the NAF was integral to the parties' agreement, and due to the unavailability of the NAF to conduct any such arbitration, the agreement was thus invalid and unenforceable. As noted above in the statement of facts, the NAF was active and able to conduct arbitrations of matters such as this case would fall within when the parties' arbitration agreement was made in 2006. In 2009, when the NAF entered into its consent decree with the state of Minnesota prohibiting it from further involvement in "consumer arbitration" it was no longer available to arbitrate the dispute which has now arisen between the parties hereto. However, to allow the Circuit Court's order to stand, its interpretation of "integral" would ignore the clear intent of the parties expressed by having an agreement to arbitrate in the first place, and contravene Federal and state law.

Under the circumstances of this matter, the parties' arbitration agreement facially appears to be clear and unambiguous with regard to the appointment of the NAF to arbitrate any disputes between the parties. The later-arising unavailability of the NAF to do so has illuminated a latent ambiguity in the arbitration agreement. Neither party anticipated that the NAF would be forced to cease handling consumer arbitrations.

Missouri has a long history of recognizing latent ambiguities in contracts. *See* ***Alack v. Vic Tanny Int'l***, 923 S.W.2d 330, 337 (Mo. 1996); ***Royal Banks of Missouri v. Fridkin***, 819 S.W.2d 359, 362 (Mo. 1991). "A 'latent ambiguity' arises where a writing

on its face appears clear and unambiguous, but some collateral matter makes the meaning uncertain." ***Royal Banks***, 819 S.W.2d at 362. When the contract does not "completely alter[] the plaintiff's underlying obligation," the contract will be held valid (analyzed now with an ambiguity). ***Id.* at 362-63.** For example, in the ***Royal Banks*** case the difference in the plaintiff having to pay $10,000 to $50,000 was not a "material alteration. ***Id.*** "A latent ambiguity is not apparent on the face of the writing and therefore, must be developed by extrinsic evidence." ***Id.*** at 362. Therefore, "the cardinal principle is to determine the intent of the parties." ***Id.*** "Whether an ambiguity exists in the contract is a question of law." ***Boswell v. Steel Haulers,* Inc.**, 670 S.W.2d 906, 913-14 (Mo. Ct. App. 1984). If no extrinsic evidence conflicts, then "it becomes the duty of the court and not the jury to construe the contract." ***Id.***

In the instant case, the parties' underlying obligation (one to arbitrate) is not altered. Although the writing appears unambiguous at first—requiring the NAF to be the forum of arbitration—the unanticipated question of the unavailability of the NAF was not addressed. The issue of unavailability, however, is addressed by (and Federal Law requires) § 5 of the FAA, and also under state law, § 435.360, RSMo.

Analyzing the arbitration provision under the applicable Federal and/or state law and contract principles, the subject arbitration provision is similar to the agreement for payment in ***Royal Banks***. In ***Royal Banks***, a material alteration would have been if the plaintiff no longer had to make any payment at all; changing the payment was not a material alteration to the agreement. In this case, a material alteration to the subject arbitration agreement would be if no arbitration was to be held at all; changing the entity

to administer the arbitration is not a material alteration to the agreement.

Conclusion

The Circuit Court erred in denying A-1's Motion to Compel Arbitration and for Stay of Litigation. The unavailability of the NAF did nothing more than trigger the application of §5 of the FAA (and § 435.360, RSMo), and the Circuit Court should have thereupon appointed a substitute arbitrator for the parties, and the parties should have thereupon been compelled to participate in arbitration of their disputes.

A-1 respectfully prays that this Honorable Court reverse the Order of the Circuit Court, uphold the Order of the Western District Court of Appeals, and remand this case with directions to the Circuit Court to grant A-1's Motion to Compel Arbitration and for Stay of Litigation and appoint a substitute arbitrator pursuant to the provisions of 9 USCS §5, and order the parties to participate in binding arbitration as agreed by the parties.

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Certificate of Compliance with Rule 84.06

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule 84.06, that the brief contains 6,190 words.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January 2018, a copy of the foregoing was electronically filed with the Clerk of the Court through the eFiling system, and that a copy was also emailed through the eFiling system to Dale K. Irwin, Esq., The Irwin Law Firm, P.O. Box 140277, Kansas City, Missouri 64114; and David Angle, Esq., Angle Wilson Law LLC, 920 East Broadway, 2nd Floor, Columbia, Missouri 65, 205, attorneys for respondent.

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