IN THE SUPREME COURT OF MISSOURI

Case No. SC97018

LEWIS SOARS,
Plaintiff/Respondent

v.

EASTER SEALS MIDWEST and CHARITY TWINE,
Defendants/Appellants.

On Appeal from the Eleventh Judicial Circuit
St. Charles County Circuit Court, State of Missouri
Case No. 1611-CC01109
The Honorable Ted House
Missouri Court of Appeals for the Eastern District
Case No. ED 105456

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I. JURISDICTIONAL STATEMENT

This is an appeal from a denial of a motion to compel arbitration pursuant to MO. REV. STAT. § 435.440. (Legal File, ("LF") 207-212; Appendix ("App.") A87). Appellants Easter Seals Midwest ("ESMW") and Charity Twine (together, "Appellants") sought to enforce an arbitration agreement with Respondent Lewis Soars ("Respondent"), and moved to dismiss or, in the alternative, to stay proceedings and compel arbitration, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") (App. A76-81) and Mo. Sup. Ct. R. 55.27(a)(1) and (6) (App. A88). (LF 15-107). The Circuit Court of St. Charles County denied Appellants' motion on March 21, 2017. (LF 205-06; App. A1-2).

An immediate appeal may be taken from an order denying an application to compel arbitration in the manner and in the same extent as from orders or judgments in a civil action. MO. REV. STAT. § 435.440. (App. A87). The FAA also provides an appeal may be taken from an order denying a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(A)-(B). (App. A80). Therefore, Appellants timely filed their Notice of Appeal on March 31, 2017. (LF 207-12). *See, e.g., Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 431 (Mo. banc 2015); *Robinson v. Title Lenders, Inc*., 364 S.W.3d 505, 510 (Mo. banc 2012); *Jackson Cnty. v. McClain Enters., Inc.*, 190 S.W.3d 633, 639 (Mo. Ct. App. 2006). Jurisdiction is proper in this Court under Article V, § 10 of the Missouri Constitution because this case was transferred from the Court of Appeals by Order of this Court. Mo. Const. Art. V, § 10; *see* May 1, 2018, Mo. Sup. Ct. Mandate Sustaining Application for Transfer.

II. INTRODUCTION

On November 15, 2016, Respondent Soars filed a three-count Petition against ESMW and his former ESMW supervisor Charity Twine alleging race discrimination under the Missouri Human Rights Act ("MHRA") against ESMW in Count I, race discrimination under the MHRA against Ms. Twine in Count II, and wrongful termination in violation of public policy against ESMW in Count III. (LF 5-15). Respondent's claims against Appellants are subject to binding arbitration, as the Parties entered into a valid and enforceable Arbitration Agreement pursuant to the FAA and Missouri law, and the Arbitration Agreement specifically covers Respondent's claims.

On February 7, 2017, Appellants filed their Joint Motion to Dismiss or, in the Alternative, Motion to Stay Action and Compel Arbitration (LF 15-17) and their Memorandum in Support of the same (LF 18-36), with supporting affidavits and exhibits (collectively referred to as "Appellants' Motion to Compel Arbitration"). (LF 37-108).

Respondent conceded he was offered and accepted the Arbitration Agreement in his Response in Opposition to Appellants' Motion to Compel Arbitration ("Response"), but he nevertheless sought to avoid his obligations under the Arbitration Agreement by contending the Arbitration Agreement and its delegation clause lacked consideration, lacked mutuality of obligation, and were unconscionable. (LF 109-202). Notably, Respondent did not submit any evidence to support his Response in the lower court and now cannot rely on the unsworn averments of his pleadings or *ipse dixits* in his brief to create a supposed fact issue. (LF 109-202). *Martin v. City of Washington*, 848 S.W.2d

487, 492-93 (Mo. banc 1993).

On March 20, 2017, Appellants' Motion to Compel Arbitration was heard and submitted to the circuit court. (LF 203-04). On March 21, 2017, the circuit court denied Appellants' Motion to Compel Arbitration. (LF 205-06; App. A1-2). The circuit court's decision stated, in its entirety, "Defendants' 'Joint Motion to Dismiss Or, In the Alternative, Motion to Stay Action and Compel Arbitration' is denied." (LF 205-06; App. A1-2).

The requisite elements to enforce the Arbitration Agreement are indisputably established. Respondent has argued without evidentiary support that the Arbitration Agreement and delegation clause lacked consideration, lacked mutuality of obligation and are unconscionable. These arguments had no merit in the lower courts and are in sharp conflict with controlling precedent in both the United States Supreme Court and Missouri courts, which recognize the validity of arbitration agreements in the employment context. *See, e.g., Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832 (8th Cir. 1997); *Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 WL 1246699 (E.D. Mo. Apr. 5, 2017); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. banc 2015); *Latenser v. Tarmac Int'l Inc.*, No. WD 81089, 2018 WL 1384497 (Mo. Ct. App. Mar. 20, 2018); *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599 (Mo. Ct. App. 2015); *McIntosh v. Tenet Health Sys. Hosps., Inc.,* 48 S.W.3d 85 (Mo. Ct. App. 2001); *Young v.*

Prudential Sec., 891 S.W.2d 842 (Mo. Ct. App. 1995); *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27 (Mo. Ct. App. 1992).

First, the circuit court erred by not compelling arbitration of Respondent's claims against Appellants because the Arbitration Agreement contains valid delegation clauses, mandating that the arbitrator – not the court – has exclusive authority to decide threshold issues of interpretation, applicability, enforceability or formation. *See e.g., Rent-A-Center West,* 561 U.S. at 71-72; *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 53 (Mo. banc 2017); *Latenser*, 2018 WL 1384497 at *3; *Springleaf Fin. Servs. v. Shull*, 500 S.W.3d 276, 282 (Mo. Ct. App. 2016); *Dotson,* 472 S.W.3d at 608.

Second, notwithstanding the delegation clause, the circuit court still erred in denying Appellants' Motion to Compel Arbitration because a valid arbitration agreement exists between ESMW and Respondent and Respondent's claims against Appellants fall within its substantive scope. Indeed, the Arbitration Agreement was a valid contract: there was an offer, acceptance, and consideration.

Third, the circuit court erred because Respondent presented no evidence to support his unconscionability defense and no other legal basis existed to refuse enforcement. Finally, alternatively and hypothetically, even if a term or provision of the Arbitration Agreement was unconscionable or unenforceable, that term or provision should have been severed, thus preserving the enforceability of the Arbitration Agreement's remaining terms. The circuit court erred by not compelling arbitration of Respondent's claims. Its Order must be reversed.

III. STATEMENT OF FACTS

Appellant ESMW is a non-profit agency whose mission is to help individuals with developmental disabilities – including autism – learn, live, work, and participate in the community. (LF 37-38, 47; App. A3-4, A13). ESMW employed Respondent Soars as a Community Living Instructor from October 19, 2015 until January 12, 2016. (LF 39; App. A5).[1] Respondent was an at-will employee. (LF 104; App. A70). While Respondent was employed with ESMW, ESMW employed Appellant Charity Twine as a Community Living Supervisor. (LF 39; App. A5).

A. Respondent Entered Into a Binding Arbitration Agreement with Appellants.

ESMW presents its "Arbitration Agreement between ESMW Midwest and its Employees" (hereinafter, "Arbitration Agreement") to each of its employees[2] during their new hire orientation.[3] (LF 39; App. A5). Respondent attended an orientation on October

[1] Respondent is not an individual with a disability, and has never contended he has a disability in his Petition or in his Charge of Discrimination. (LF 5-15).

[2] The arbitration agreements that ESMW has with its 1,700 employees are essential to this non-profit so its funds can be used to support its mission (namely, to assist individuals with developmental disabilities) rather than on court litigation.

[3] All ESMW employees enter into identical agreements to use binding arbitration to address claims arising from their employment. (LF 38; App. A4). In fact, Appellant Twine executed an identical arbitration agreement as Respondent on August 31, 2015. (LF 40, 107-08; App. A6, A73-74).

19, 2015, presented by ESMW as part of the commencement of his employment. (LF 38-39; App. A4-5). During orientation, Respondent reviewed a PowerPoint presentation relating to his employment at ESMW. That presentation included a slide indicating the Arbitration Agreement was a condition of employment with ESMW. (LF 38, 102; App. A4, A68). Thereafter, Respondent had the opportunity to review, read and accept the Arbitration Agreement. (LF 39; App. A5). That same day, Respondent acknowledged acceptance of the Arbitration Agreement when he executed the Arbitration Agreement with his signature on October 19, 2015. (LF 39, 103-04; App. A5, A69-70).

By signing the Arbitration Agreement, Respondent acknowledged he received and reviewed the Arbitration Agreement and he read, understood and agreed to the Arbitration Agreement's terms and conditions. (LF 39, 103-04; App. A5, A69-70). Lori Green, Director of Human Resources of ESMW, signed Respondent's Arbitration Agreement on ESMW's behalf. (LF 39, 104; App. A5, A70). By entering into the Arbitration Agreement, Respondent agreed to submit all claims or disputes against ESMW and ESMW's current or former employees arising from his employment to final and binding arbitration. (LF 103-04; App. A69-70). ESMW is responsible for paying the arbitrator's fee and the administration fees for each arbitration conducted pursuant to the Arbitration Agreement. (LF 104; App. A70).

B. <u>The Parties Agreed Issues Regarding Interpretation, Applicability, Enforceability or Formation of the Arbitration Agreement Must be Decided by an Arbitrator.</u>

By executing the Arbitration Agreement, the Parties expressly agreed that an arbitrator should decide questions regarding the *interpretation, applicability, enforceability or formation* of the Arbitration Agreement:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or part of this Agreement is void or voidable.

(LF 104; App. A70). The Arbitration Agreement also incorporated by reference the American Arbitration Association's ("AAA") National Rules for Resolution of Employment Disputes[4] (hereinafter, "AAA Rules") which contains its own delegation provisions. (LF 104, 167). Specifically, Section 6(a) of the AAA Rules states:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of

[4] The AAA Rules explain that they were renamed: "The National Rules for the Resolution of Employment Disputes have been re-named the Employment Arbitration Rules and Mediation Procedures. Any arbitration agreements providing for arbitration under its National Rules for the Resolution of Employment Disputes shall be administered pursuant to these Employment Arbitration Rules and Mediation Procedures." (LF 165).

the arbitration agreement.

AAA Rules, § 6(a). (LF 167). Likewise, Section 6(b) of the AAA Rules provides:

> The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

AAA Rules, § 6(b). (LF 167).

C. <u>The Arbitration Agreement is Mutual.</u>

As set forth in the first two paragraphs of the Arbitration Agreement, the Parties mutually agreed to use binding arbitration, not the courts, for resolution of all employment-related claims they may have against each other:

> As consideration for employment with Easter Seals-Midwest, I hereby knowingly agree and consent to submit any disputes, claims or controversies that may arise out of my application for employment, employment, and/or termination of employment with Easter Seals-Midwest to binding arbitration in any such claims against Easter Seals-Midwest and/or its current or former employees. It is also agreed that judgment upon any award entered by the arbitrators may be entered by any court having jurisdiction thereof. I understand that the execution of this Arbitration Agreement is a necessary condition for my initial or continued

employment with Easter Seals-Midwest.

> In return for my execution of this Arbitration Agreement and by offering this Arbitration Agreement to me for my signature, Easter Seals-Midwest likewise agrees to submit any disputes, claims or controversies that may arise out of my application for employment, hiring, employment, and/or termination of employment with Easter Seals-Midwest to binding arbitration, and agrees that judgment upon the award entered by the arbitrators may be entered by any court having jurisdiction thereof.

(LF 103; App. A69). The Parties' agreement to use binding arbitration to resolve their disputes is mutual, as Respondent expressly agrees to binding arbitration for "any such claims against Easter Seals-Midwest and/or its current or former employees" in the first paragraph of the Arbitration Agreement, and, "Easter Seals-Midwest likewise agrees to submit any disputes, claims, or controversies" that may arise out of Respondent's employment to binding arbitration in the second paragraph. (LF 103; App. A69). Additionally, the Parties each acknowledged that they waived their rights to a jury trial in favor of arbitration, which is legally sufficient to support a promise. (LF 103; App. A69).

D. <u>Respondent's Claim Against Twine is Covered by the Arbitration Agreement.</u>

As Appellant Twine is a "current or former employee" of ESMW, the Arbitration Agreement covers Respondent's claim against Twine individually as well by providing:

> I hereby knowingly agree and consent to submit any disputes, claims or controversies that may arise out of my application for employment,

> employment, and/or termination of employment with Easter Seals-Midwest to binding arbitration in any such claims against Easter Seals-Midwest *and/or its current or former employees*.

(LF 39, 103-104; App. A5, A69-70) (Emphasis added).

E. <u>Respondent's Discrimination and Wrongful Termination Claims are Included within the Scope of the Arbitration Agreement.</u>

On January 12, 2016, Respondent's employment with ESMW ceased when Respondent refused to participate in an internal investigation involving accusations against Respondent of abuse or neglect of ESMW's clients. (LF 39, 105; App. A5, A71). Respondent subsequently filed the underlying action with the circuit court alleging wrongful discharge in violation of public policy against ESMW and race discrimination against Appellants. (LF 5-14). However, ESMW and Respondent mutually agreed that arbitration, not court, is the exclusive forum for resolution of all claims arising out of Respondent's employment with ESMW, including the described covered claims:

> This Arbitration Agreement includes all claims and controversies arising out of my application for employment, hiring, employment, and/or termination (hereinafter referred to as "Claims"), including but not limited to, Claims concerning discipline and/or discharge, Claims for breach of contract or covenant whether express or implied; tort Claims (including but not limited to defamation, negligent or intentional infliction of emotional distress, invasion of privacy, battery, and/or assault); Claims for harassment

> and/or discrimination (including but not limited to race, color, sex, religion, national origin, age, marital status, pregnancy, disability, citizenship, military status or sexual orientation or preference); Claims for retaliation; Claims concerning absence or leave; Claims concerning wages or pay; Claims for wrongful discharge; or any Claims brought pursuant to any federal, state and local law, statute, ordinance.

(LF 103; App. A69). Respondent's claims for discrimination based on race and wrongful discharge expressly fall within the covered Claims.

F. <u>Respondent's Exclusive Remedy for his Discrimination and Wrongful Discharge Claims is Arbitration.</u>

The Arbitration Agreement explicitly provides that it is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (LF 104; App. A70). The Arbitration Agreement describes the arbitration process and provides "the arbitration shall be conducted in accordance with the American Arbitration Association's National Rules for the Resolution of Employment Disputes." (LF 104; App. A70). The Parties acknowledged they were waiving their right to a jury trial:

> By agreeing to mediate and arbitrate the above-described disputes, claims or controversies that may arise out of my application for employment, employment and/or termination of employment with ESMW-Midwest, I expressly waive my right to a jury trial for those disputes, claims or controversies. (LF 103; App. A69).

IV. POINTS RELIED ON

I. THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS AND COMPEL ARBITRATION, BECAUSE THE ARBITRATION AGREEMENT CONTAINS VALID DELEGATION CLAUSES, AGREED TO BY THE PARTIES, WHICH MANDATE THAT THE ARBITRATOR, NOT THE COURT, HAS EXCLUSIVE AUTHORITY TO DECIDE THRESHOLD ISSUES OF INTERPRETATION, APPLICABILITY, ENFORCEABILITY, OR FORMATION OF THE ARBITRATION AGREEMENT.

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Dotson v. Dillard's, Inc., 472 S.W.3d 599 (Mo. Ct. App. 2015)

9 U.S.C. §§ 2-4

II. ALTERNATIVELY, EVEN IF THE DELEGATION CLAUSES DID NOT APPLY, THE CIRCUIT COURT NEVERTHELESS ERRED IN DENYING APPELLANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS AND COMPEL ARBITRATION, BECAUSE A VALID AGREEMENT TO ARBITRATE EXISTS BETWEEN THE

PARTIES IN THAT THERE WAS AN OFFER, ACCEPTANCE, AND VALID CONSIDERATION, AND RESPONDENT'S CLAIMS AGAINST APPELLANTS FALL WITHIN THE SUBSTANTIVE SCOPE OF THAT AGREEMENT.

Cases and Other Authorities

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)

Ellis v. JF Enterprises, LLC, 482 S.W.3d 417 (Mo. banc 2016)

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

9 U.S.C. §§ 2-4

III. EVEN IF THE DELEGATION CLAUSES DID NOT APPLY, THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS AND COMPEL ARBITRATION, BECAUSE THE ARBITRATION AGREEMENT WAS NOT UNCONSCIONABLE AND THERE IS NO OTHER BASIS UNDER APPLICABLE LAW FOR REFUSING TO ENFORCE THE ARBITRATION AGREEMENT.

Cases and Other Authorities

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)

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

Springleaf Fin. Servs. v. Shull, 500 S.W.3d 276 (Mo. Ct. App. 2016)

V. STANDARD OF REVIEW

The Court reviews the denial of a motion to compel arbitration *de novo*, giving no deference to the circuit court's legal conclusions. *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016). Because the Arbitration Agreement is governed by the FAA, the U.S. Constitution's Supremacy Clause mandates that the rules of contract construction and interpretation not be applied in any manner that has a "disproportionate impact" on arbitration or "interferes" with the congressional intent to enforce arbitration agreements. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (FAA preempts any state rule that discriminates on its face against arbitration or that covertly accomplishes the same objective by disfavoring arbitration agreements); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342-44 (2011); *Robinson v. Title Lenders, Inc.*, 364 S.W. 3d 505, 515 (Mo. banc 2012).

VI. ARGUMENT

I. THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY PROCEEDINGS AND COMPEL ARBITRATION, BECAUSE THE ARBITRATION AGREEMENT CONTAINS VALID DELEGATION CLAUSES, AGREED TO BY THE PARTIES, WHICH MANDATE THAT THE ARBITRATOR, NOT THE COURT, HAS EXCLUSIVE AUTHORITY TO DECIDE THRESHOLD ISSUES OF INTERPRETATION, APPLICABILITY, ENFORCEABILITY, OR FORMATION OF THE ARBITRATION AGREEMENT.

Because Respondent and Appellant ESMW agreed to commit the question of arbitrability to the arbitrator through a clear and unmistakable delegation clause, the courts below erred in denying Appellants' Motion to Compel Arbitration. *See, e.g., Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010); *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 53 (Mo. banc 2017); *Latenser v. Tarmac Int'l Inc.*, No. WD 81089, 2018 WL 1384497 at *3 (Mo. Ct. App. Mar. 20, 2018); *Ford Motor Credit Co., LLC, v. Jones*, No. WD 80809, 2018 WL 1384505 at *8 (Mo. Ct. App. Mar. 20, 2018); *Springleaf Fin. Servs. v. Shull*, 500 S.W.3d 276, 282 (Mo. Ct. App. 2016); *Dotson v. Dillard's, Inc.,* 472 S.W.3d 599, 608 (Mo. Ct. App. 2015). Appellants preserved this error for appellate review by timely filing their Notice of Appeal on March 31, 2017. (LF 207-12). The Court reviews the denial of a motion to compel arbitration *de novo*, giving no deference to the circuit court's legal conclusions. *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016); *Dotson*, 472 S.W.3d at 602.

A. The FAA Governs the Arbitration Agreement and Requires Arbitration of Respondent's Claims.

Respondent does not dispute the Arbitration Agreement explicitly provides it is governed by the FAA. (LF 104; App. A70). The FAA was enacted to overcome courts' reluctance to enforce arbitration agreements, and "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008); *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 420 (Mo. banc 2016). The FAA espouses a "liberal federal policy favoring arbitration" and

requires vigorous judicial enforcement of arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 807 (Mo. banc 2015). Congress enacted the FAA "to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined . . . by state courts or legislatures." *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984).

Under the FAA, an arbitration agreement "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; *Concepcion,* 563 U.S. at 336; *State ex. rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 50 (Mo. banc 2017); *Ellis*, 482 S.W.3d at 420. Additionally, the FAA "supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration." *Preston*, 552 U.S. at 349. Simply put, the FAA pre-empts conflicting state law. *Preston*, 552 U.S. at 352-53; *see also Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 29 (Mo. Ct. App. 1992) ("Under the supremacy clause, we are obliged to apply federal law when reviewing an action under the FAA."). That preemptive mandate applies at all stages, from contract formation to contract enforcement. *See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 (2017). Thus, the FAA's reach is especially broad. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312, n.5 (2013) (noting that *Concepcion* established "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the

prosecution of low-value claims.").

"In line with these principles, courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *Concepcion*, 563 U.S. at 339; *Pinkerton*, 531 S.W.3d at 48; *Hewitt*, 461 S.W.3d at 807. The United States Supreme Court specifically held the FAA's provisions apply to arbitration agreements covering employment-related claims. *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 119 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

"The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp*., 460 U.S. 1, 24-25 (1983); *Lyster v. Ryan's Family Steak Houses, Inc*., 239 F.3d 943, 945 (8th Cir. 2001); *Boogher*, 825 S.W.2d at 30. Thus, the Arbitration Agreement should be liberally enforced according to its terms.

B. Under the Express Terms of the Arbitration Agreement, All Issues Related to the Interpretation, Applicability, Enforceability or Formation of the Arbitration Agreement Must Be Deferred to the Arbitrator.

By executing the Arbitration Agreement and ratifying the delegation clauses therein, Respondent and Appellant ESMW agreed questions regarding the interpretation,

applicability, enforceability or formation of the Arbitration Agreement must be decided by an arbitrator. (LF 104, 167; App. A70). The circuit court's one-sentence denial of the Motion ignored the Arbitration Agreement's delegation provision and erroneously applied the law, contrary to controlling legal precedent. (LF 205-06; App. A1-2). *See, e.g.*, *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010); *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 53 (Mo. banc 2017); *Latenser v. Tarmac Int'l Inc.*, No. WD 81089, 2018 WL 1384497 at *3 (Mo. Ct. App. Mar. 20, 2018); *Ford Motor Credit Co., LLC, v. Jones*, No. WD 80809, 2018 WL 1384505 at *8 (Mo. Ct. App. Mar. 20, 2018); *Springleaf Fin. Servs. v. Shull*, 500 S.W.3d 276, 282 (Mo. Ct. App. 2016); *Dotson v. Dillard's, Inc.,* 472 S.W.3d 599, 608 (Mo. Ct. App. 2015). The circuit court's decision must be reversed.

1. Delegation Clauses are Valid Pursuant to Federal and Missouri Law.

A delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. *Rent-A-Center*, 561 U.S. at 68; *Pinkerton*, 531 S.W.3d at 50. The question of "who has the primary power to decide arbitrability" turns upon what the parties agreed to. *Sadler v. Green Tree Servicing, LLC*, 466 F.3d 623, 625 (8th Cir. 2006); *Springleaf Fin. Servs.*, 500 S.W.3d at 281. "Parties can agree to arbitrate 'gateway questions of arbitrability,'" including formation, enforceability, or the applicability of the arbitration agreement where, as here, their agreement clearly and unmistakably so provides. *Rent-A-Ctr.*, 561 U.S. at 68-69; *First Options of Chi., Inc. v.*

Kaplan, 514 U.S. 938, 944 (1995); *Pinkerton*, 531 S.W.3d at 43; *Latenser*, 2018 WL 1384497, at *2; *Springleaf Fin. Servs.*, 500 S.W.3d at 282. In such cases, the court's only role is to examine the underlying contract to determine whether the parties have, in fact, clearly and unmistakably agreed to commit the question of arbitrability to the arbitrator. *Rent-A-Center*, 561 U.S. at 70 ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.").

Importantly, the "clear and unmistakable" requirement "pertains to the parties' *manifestation of intent*, not the agreement's *validity*... ." *Rent-A-Ctr.*, 561 U.S. at 69 n.1 (emphasis in original); *Pinkerton*, 531 S.W.3d at 44 ("When the language of a contract is clear and unambiguous, the intent of the parties will be gathered from the contract alone…"). It is improper to consider the sophistication of the contractual parties in determining the parties' intent with respect to arbitration agreements. *Pinkerton*, 531 S.W.3d at 48. "[A] delegation provision that gives an arbitrator the authority to resolve disputes relating to the 'enforceability,' 'validity,' or 'applicability' of an arbitration agreement constitutes clear and unmistakable evidence that the parties intended to arbitrate arbitrability," and must be enforced. *Springleaf Fin. Servs.*, 500 S.W.3d at 282; *Dotson*, 472 S.W.3d at 604.

2. The Arbitration Agreement's Delegation Clauses are Valid.

Here, the Parties clearly and unmistakably tasked the arbitrator with the authority

to decide whether the Arbitration Agreement was formed, applicable and enforceable. First, that intent was expressly stated in the Arbitration Agreement:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or part of this Agreement is void or voidable.

(LF 104; App. A70).

Importantly, the delegation clause at issue here is identical to the clause upheld by the United States Supreme Court in *Rent-A-Center*. There, analyzing the same delegation clause, the United States Supreme Court mandated that all issues relating to interpretation, applicability, enforceability or formation must be submitted to and decided by the arbitrator, not a court. *Rent-A-Center*, 561 U.S. at 66.

Second, the clear and unmistakable intent to delegate issues of arbitrability is manifested through the Arbitration Agreement's incorporation by reference of the AAA's National Rules for Resolution of Employment Disputes which, in turn, contain their own delegation provisions. (LF 104, 167). Incorporating a delegation clause by reference, by itself, has been upheld as creating a valid delegation clause. In *Pinkerton*, this Court unequivocally held an arbitration agreement which incorporated by reference AAA arbitration rules containing a delegation provision clearly and unmistakably evidenced the parties' intent to delegate threshold issues of arbitrability to the arbitrator. *Pinkerton*,

531 S.W.3d at 48. (LF 104, 167); *see also, Latenser*, 2018 WL 1384497 at *3 (holding AAA rules incorporated into the arbitration provision delegated authority to the arbitrator to adjudicate threshold arbitrability issues); *Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 WL 1246699, at *1 (E.D. Mo. Apr. 5, 2017); (holding arbitration agreement's incorporation of the AAA's rules constitutes a clear and unmistakable expression of the parties' intent to leave the question of arbitrability to an arbitrator).

By expressly and impliedly including language which clearly and unmistakably assigns the arbitrator the exclusive authority to decide issues of interpretation, applicability, enforceability or formation of the Arbitration Agreement, the Parties agreed an arbitrator, not a court, must decide those issues. *See Rent-A-Center*, 561 U.S. at 68-70; *citing First Options of Chicago, Inc.,* 514 U.S. at 943 (holding "a court *must defer* to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration") (emphasis added); *Sadler*, 466 F.3d at 625-26 (holding when an arbitration agreement stated an arbitrator was to resolve "any controversy concerning whether an issue is arbitrable," the question of whether certain claims were arbitrable was for arbitrator, not court to decide); *Ford Motor Credit Co., LLC,* 2018 WL 1384505 at *8 (holding arbitration agreement delegated an arbitrator to decide whether the arbitration agreement was unconscionable and whether company waived arbitration); *Springleaf Fin. Servs.*, 500 S.W.3d at 282 (holding delegation provision providing for arbitrator to determine arbitrability must be enforced); *Dotson*, 472 S.W.3d at 608 (holding delegation provision

providing for arbitrator to determine arbitrability must be enforced).

Unlike *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. banc 2014), where the Missouri Supreme Court found the purported arbitration agreement did not specifically delegate contract formation disputes to an arbitrator, the Parties here expressly delegated the decision-making on such disputes to the arbitrator. (LF 104; App. A70). *See e.g.*, *Dotson*, 472 S.W.3d at 607 ("The delegation provision here, unlike that in *Baker*, expressly provides authority for the arbitrator to decide claims regarding contract formation . . . The delegation provision here is much more like the provision in *Rent-A-Center* than the provision in *Baker.*"). The United States Supreme Court and Missouri courts recognize clauses delegating the authority to rule on contract formation issues to an arbitrator, rather than a court, as valid and enforceable. *Rent-A-Center*, 561 U.S. at 66, 71-72 (upholding enforceability of delegation clause within arbitration agreement providing that all issues related to the interpretation, applicability, enforceability or formation of the arbitration agreement are determined by the arbitrator); *Pinkerton*, 531 S.W.3d at 49 ("[B]oth issues of formation and enforceability of arbitration clauses can be delegated to an arbitrator."); *Ford Motor Credit Co., LLC*, 2018 WL 1384505 at *6 ("Both issues of formation and enforceability can be delegated to an arbitrator if the delegation clause so provides.").

3. Respondent's Attempts to Invalidate the Delegation Clauses Cannot Succeed.

Respondent does not dispute the language of the delegation clauses here provide

clear and unmistakable evidence that the Parties intended to arbitrate their claims. Significantly, Respondent does not even attack the wording or the language of the delegation clause at all. Rather, Respondent attempts to differentiate the delegation clause here from those upheld in *Rent-A-Center*, *Springleaf Financial Services, Inc. v. Shull*, and *Dotson v. Dillard's*. To do this, Respondent alleges these cases are distinguishable because the opposing parties did not directly challenge the enforceability of the delegation provision itself. His contentions are meritless.

"To invalidate an arbitration agreement a specific challenge must be made to the arbitration agreement, not to the contract as a whole." *See Pinkerton*, 531 S.W.3d at 50; *see also*, *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 423-24 (Mo. banc 2016); *Latenser*, 2018 WL 1384497 at *2; *Ford Motor Credit Co.*, *LLC*, 2018 WL 1384505 at *7; *Dotson*, 472 S.W.3d at 605. In this context – unlike other cases where the arbitration provision is a term of a general contract – the delegation clauses here are a subset of the Arbitration Agreement, which itself is a standalone contract. Thus, Respondent was required to specifically challenge the delegation clauses. He did not. Instead, his alleged "challenge" is nothing more than an ill-disguised attack on the Arbitration Agreement as a whole.

Indeed, Respondent claims the delegation clauses are not enforceable for the exact same reasons he claims the Arbitration Agreement as a whole is not enforceable: lack of consideration, no mutuality of obligation, and unconscionability. Such mischaracterization of a "direct challenge" has already been flatly rejected. *See,*

Pinkerton, 531 S.W.3d at 50; *Ellis*, 482 S.W.3d at 423-24; *Latenser*, 2018 WL 1384497 at *2 (enforcing delegation clause, because employee's arguments "concerning unconscionability, lack of consideration, or illusoriness are challenges to the employment agreement, or to the arbitration clause, as a whole."); *Ford Motor Credit Co.*, *LLC*, 2018 WL 1384505 at *7; *Dotson*, 472 S.W.3d at 605.

Such a tactic does not pass muster, because the challenge must be independent to the delegation clause and not one that applies equally to the Arbitration Agreement. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that a fraud-in-the-inducement challenge to the contract as a whole, that would indirectly have invalidated the arbitration clause contained within the contract, was properly referred to arbitration rather than resolved by the district court); *see also, Pinkerton*, 531 S.W.3d at 51 (holding claims that the arbitration agreement's terms are incomprehensible, unconscionable, and the print is too small are challenges to the agreement as a whole); *Ellis*, 482 S.W.3d at 423-24; *Latenser*, 2018 WL 1384497 at *2 (enforcing delegation clause, because employee's arguments "concerning unconscionability, lack of consideration, or illusoriness are challenges to the employment agreement, or to the arbitration clause, as a whole."); *Ford Motor Credit Co., LLC*, 2018 WL 1384505 at *7 (holding complaints that the delegation provision "couldn't be negotiated," was "buried within the consumer contract," and was itself unconscionable due to anti-waiver language constituted a challenge on the arbitration agreement as a whole); *Dotson v. Dillard's, Inc.*, 472 S.W.3d at 605. ("[E]ven where… the alleged fraud

that induced the whole contract equally induced the agreement to arbitrate which was part of that contract [, the Court] nonetheless require[s] the basis of the challenge to be directed specifically to the agreement to arbitrate [the arbitrability issues] before the court will intervene.") (quoting *Rent-A-Center*, 561 U.S. at 71).

Further, even if Respondent's challenges regarding consideration, mutuality of obligation, and unconscionability could be considered as direct challenges to the delegation clauses, Respondent's claims still fail. Appellants have demonstrated the delegation clauses are enforceable for the same reason the Arbitration Agreement as a whole is enforceable: there was an offer, acceptance, and valid consideration, as exemplified by the Parties' mutual obligation to arbitrate claims against each other.

Respondent creates confusion where none exists. The circuit court's only role should have been to examine the underlying contract to determine whether the Parties agreed to commit the question of arbitrability to the arbitrator. *Rent-A-Center*, 561 U.S. at 70. The plain language of the delegation clauses provide clear and unmistakable language that mandate that an arbitrator has the exclusive authority to decide issues of interpretation, applicability, enforceability or formation of the Arbitration Agreement. *See, e.g.*, *Rent-A-Center West, Inc.*, 561 U.S. at 71-72; *Pinkerton*, 531 S.W.3d at 53; *Latenser*, 2018 WL 1384497 at *3; *Ford Motor Credit Co., LLC,* 2018 WL 1384505 at *8; *Springleaf Fin. Servs.*, 500 S.W.3d at 282; *Dotson*, 472 S.W.3d at 608. The circuit court's failure to compel arbitration must be reversed.

II. ALTERNATIVELY, EVEN IF THE DELEGATION CLAUSES DID NOT APPLY, THE CIRCUIT COURT NEVERTHELESS ERRED IN DENYING APPELLANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY PROCEEDINGS AND COMPEL ARBITRATION, BECAUSE A VALID AGREEMENT TO ARBITRATE EXISTS BETWEEN THE PARTIES IN THAT THERE WAS AN OFFER, ACCEPTANCE, AND VALID CONSIDERATION, AND RESPONDENT'S CLAIMS AGAINST ALL APPELLANTS FALL WITHIN THE SUBSTANTIVE SCOPE OF THAT AGREEMENT.

When faced with a motion to compel arbitration, the trial court must determine whether a valid arbitration agreement exists, and if so, whether the specific dispute falls within its scope. *Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016). Here, the delegation clauses clearly and unmistakably assigned issues of arbitrability to the arbitrator. The analysis should have ended there. *See, State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 49 (Mo. banc 2017); *see also*, *Ford Motor Credit Co., LLC, v. Jones*, No. WD 80809, 2018 WL 1384505 at *6 (Mo. Ct. App. Mar. 20, 2018). However, even without the delegation clauses, arbitration should have been compelled. The Arbitration Agreement in this case formed a valid contract in that there was an offer, acceptance, and valid consideration, exemplified by the mutual obligations to arbitrate claims against the other. The circuit court erred by denying Appellants' Motion to Compel Arbitration on March 21, 2017, which Appellants timely appealed. (LF 207-12).

This Court reviews the denial of a motion to compel arbitration *de novo*, giving no deference to the circuit court's legal conclusions. *Ellis*, 482 S.W.3d at 419; *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 602 (Mo. Ct. App. 2015).

A. The Parties Formed A Valid Contract.

Under the FAA, ordinary contract principles govern whether the parties have entered a valid agreement to arbitrate. *See Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 510 (Mo. banc 2012); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 807 (Mo. banc 2015); *McIntosh v. Tenet Health Sys. Hosps., Inc.,* 48 S.W.3d 85, 89 (Mo. Ct. App. 2001).[5] In Missouri, a valid contract requires an offer, acceptance, and consideration. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014). If the Court concludes a valid contract exists, then it must order the parties to arbitration. *See* 9 U.S.C. § 4 (App. A78); *Torres v. Simpatico, Inc.*, 781 F.3d 963, 968 (8th Cir. 2015). Here, the Parties consented to submit their employment-related disputes to arbitration, pursuant to the Arbitration Agreement, by entering into a valid and binding agreement to arbitrate. The Arbitration Agreement is enforceable under Missouri law applicable to ordinary contracts, backed by adequate consideration, and covers Respondent's claims in his Petition.

[5] State rules, however, may not be applied in a manner that discriminates against arbitration. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *Perry v. Thomas*, 482 U.S. 483, 493, n.9 (1987).

1. ESMW Offered the Arbitration Agreement to Respondent and Respondent Accepted it.

Respondent admits the first two elements of contract formation, offer and acceptance, are present here. On October 19, 2015, Respondent was presented the Arbitration Agreement and had the opportunity to review, read and accept it. (LF 38-39; App. A4-5). The Arbitration Agreement uses contractual terms to identify the Parties' rights and responsibilities with respect to arbitration. (LF 103-04; App. A69-70). The offer is contained within the express terms of the Arbitration Agreement, as it states:

> As consideration for employment with Easter Seals-Midwest, I hereby knowingly agree and consent to submit any disputes, claims or controversies that may arise out of my application for employment, employment, and/or termination of employment with Easter Seals-Midwest to binding arbitration in any such claims against Easter Seals-Midwest and/or its current or former employees. It is also agreed that judgment upon any award entered by the arbitrators may be entered by any court having jurisdiction thereof. I understand that the execution of this Arbitration Agreement is a necessary condition for my initial or continued employment with Easter Seals-Midwest.
>
> In return for my execution of this Arbitration Agreement and by offering this Arbitration Agreement to me for my signature, Easter Seals-Midwest likewise agrees to submit any disputes, claims or controversies

> that may arise out of my application for employment, hiring, employment, and/or termination of employment with Easter Seals-Midwest to binding arbitration, and agrees that judgment upon the award entered by the arbitrators may be entered by any court having jurisdiction thereof.

(LF 103; App. A69). Under Missouri law, the language of the Arbitration Agreement constitutes a contractual offer to arbitrate. *See Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832, 835 (8th Cir. 1997) (employee-employer arbitration agreement is valid where it "uses contractual terms such as 'I understand,' 'I agree,' [and] I 'agree to abide by and accept…'") (applying Missouri law).

Here, the Arbitration Agreement identifies the parties to the contract, identifies the purpose of the agreement, and sets forth the scope of the agreement to arbitrate by setting out covered claims. (LF 103; App. A69). Further, the Arbitration Agreement describes the arbitration process and identifies the AAA's National Rules for the Resolution of Employment Disputes as applicable. (LF 103-04; App. A69-70).

Respondent executed the Arbitration Agreement on October 19, 2015. (LF 39, 103-04; App. A5, A69-70). By signing the Arbitration Agreement, Respondent acknowledged he received and reviewed the Arbitration Agreement and he read, understood and agreed to the Arbitration Agreement's terms and conditions. (LF 39, 103-04; App. A5, A69-70). In Missouri, signatures remain a common method of demonstrating acceptance of a contract. *See Gannon v. Circuit City Stores, Inc.,* 262 F.3d 677, 682 (8th Cir. 2001) (finding Respondent demonstrated her intent to arbitrate

employment disputes by signing agreement); *McIntosh*, 48 S.W.3d at 89 (finding Respondent's signature on an employee acknowledgement form constituted acceptance of arbitration agreement).

Moreover, Lori Green, Director of Human Resources, also signed the Arbitration Agreement on behalf of ESMW, indisputably demonstrating ESMW's assent to contractually obligate itself to arbitrate its employment-related disputes. (LF 39, 103-04; App. A5, A69-70).

Respondent's Response lacked any evidence indicating he failed to read, understand, or sign the Arbitration Agreement. Further, Respondent now cannot avoid enforcement of the Arbitration Agreement by claiming he did not read it or understand its terms because his signature corroborates his acceptance. It has been black letter law in Missouri for more than 100 years that a party who assents to a written contract is bound by its provisions regardless of his failure to read or understand the terms. *See Donnelly v. Missouri-Lincoln Trust Co.*, 239 Mo. 370 (Mo. 1912) (holding a "written contract is the highest evidence of the terms of an agreement between the parties and one who signs such is bound by its provisions although he failed to read it or inform himself of its provisions").

The same principle applies (and under the FAA *must* apply) to arbitration agreements, regardless of a party's sophistication. *Pinkerton v. Fahnestock*, 531 S.W.3d 36, 48 (Mo. banc 2017) ("Missouri courts apply the longstanding principle that a party's failure to read or understand the terms of a contract is not a defense to enforcement of

those terms"); *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 228 (Mo. banc 2013) (holding "a signer's failure to read or understand a contract is not, without fraud or the signer's lack of capacity to contract, a defense to the contract"). Appellant ESMW made a valid offer to arbitrate, which Respondent indisputably accepted. (LF 39; App. A5).

2. The Parties' Mutual Agreement to Arbitrate Supplies Valid Consideration.

The Parties' mutual agreement to arbitrate their employment-related disputes constitutes valid consideration in support of the Arbitration Agreement. Consideration "consists either of a promise (to do or refrain from doing something) or the transfer or giving up of something of value to the other party." *Baker*, 450 S.W.3d at 774. Within the context of enforcing arbitration agreements, "bilateral contracts are supported by consideration and enforceable when each party promises to undertake some legal duty or liability." *Id.* at 776; *see, e.g. Thomas v. Fiserv Sols.*, No. 4:16 CV 2157 CEJ, 2017 WL 2332639 (E.D. Mo. Apr. 26, 2017) (enforcing an arbitration agreement containing mutual promises to arbitrate in the employment context); *see also, Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 WL 1246699, at *1 (E.D. Mo. Apr. 5, 2017); *Franklin v. Cracker Barrel Old Country Store*, No. 4:17 CV 00289 JMB, 2017 WL 7691757, at *7 (E.D. Mo. Apr. 12, 2017); *Hewitt*, 461 S.W.3d at 808-09 (holding that arbitration agreement in the employment context was supported by adequate consideration where both the employee and employer mutually promised and agreed that

any dispute which may arise between them was subject to mandatory arbitration); *McIntosh*, 48 S.W.3d at 89 (enforcing an arbitration agreement containing mutual promises to arbitrate in the employment context).

Here, the Arbitration Agreement is a contract containing mutual promises by Respondent and Appellant ESMW. (LF 103; App. A69). Respondent and Appellant ESMW promised to forego court litigation and instead to arbitrate employment-related disputes between them in exchange for the other party's promise to do the same. (LF 103; App. A69). As the Arbitration Agreement highlights, Respondent expressly agrees to binding arbitration for "any such claims against Easter Seals-Midwest and/or its current or former employees" in the first paragraph of the Arbitration Agreement, and, "Easter Seals-Midwest likewise agrees to submit any disputes, claims, or controversies" that may arise out of Respondent's employment to binding arbitration in the second paragraph. (LF 103; App. A69).

Because Respondent and Appellant ESMW mutually waived their right to bring claims against the other in court and mutually promised to bring all such claims in arbitration, valid consideration exists for the Arbitration Agreement. *Hewitt*, 461 S.W.3d at 808-09; *McIntosh*, 48 S.W.3d at 89.

3. Appellant ESMW's Agreement to Arbitrate its Claims Against Respondent is Not Illusory.

Appellant ESMW's agreement to arbitrate its claims against Respondent supplies adequate consideration. Moreover, Appellant ESMW does not have unilateral authority to

amend the Arbitration Agreement retroactively and thus Appellant ESMW's promise to be bound by the Arbitration Agreement is not illusory.

First, there is no provision in the Arbitration Agreement that would empower either party unilaterally to amend the terms of their agreement. (LF 103-04; App. A69-70). Thus, consistent with Missouri law, including the Missouri Supreme Court's decisions in *Baker* and *Hewitt*, the Parties' mutual agreement to arbitrate their employment disputes represents valid consideration in support of the Arbitration Agreement. *See Baker*, 450 S.W.3d at 776-77. In *Baker*, the Court held that an agreement to arbitrate lacks consideration when it is subject to unilateral change and as such, the return promise purportedly made is effectively illusory. *Baker*, 450 S.W.3d at 777. The *Baker* Court found the employer's retention of "unilateral authority to amend the agreement retroactively" rendered its promise to arbitrate illusory and was not consideration for a valid contract. *Id*. at 776-77; *see also, e.g.*, *Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646, 654 (Mo. Ct. App. 2014) (invalidating arbitration agreement that allowed appellant to unilaterally divest itself of the promise to arbitrate); *Whitworth v. McBride & Sons Homes, Inc.*, 344 S.W.3d 730, 742 (Mo. Ct. App. 2011) (invalidating arbitration agreement contained within employee handbook for lack of consideration where handbook stated it could be "revised or changed from time to time with or without prior notice as the Company deems appropriate and advisable"); *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 25 (Mo. Ct. App. 2008) (arbitration agreement held illusory because it stated Hallmark "may at its sole discretion modify or discontinue

the [arbitration program] at any time.").

Critically, and unlike the agreements in *Baker*, *Greene*, *Whitworth*, and *Morrow*, the Arbitration Agreement here has no provision providing ESMW with the "unilateral authority to amend the agreement retroactively." There simply is no clause in the Arbitration Agreement that Respondent signed which permits any party to amend the terms of their agreement. (LF 103-04; App. A69-70). Thus, consistent with Missouri law, including the Missouri Supreme Court's decisions in *Baker* and *Hewitt*, the Parties' mutual agreement to arbitrate their employment disputes represents valid consideration in support of the Arbitration Agreement.

Second, there are no illusory promises. Respondent erroneously claimed the mutual obligations are illusory because Appellants reserved for themselves the right to bring into court the most likely claims it would have against Respondent. (LF 103; App. A69). Not so. The Arbitration Agreement clearly binds the Parties to arbitrate all employment-related claims against the other as well as many other claims. (LF 103; App. A69). Notably, the exclusion provision of the Arbitration Agreement only carves out a small subset of claims. Specifically, it excludes: 1) claims by Respondent for workers' compensation or for which workers' compensation provides the exclusive remedy; 2) claims by Respondent for unemployment benefits; and 3) "**claims by either party** for equitable or injunctive relief, for such things as, **but not limited to**, disclosure of confidential or privileged information, unauthorized use of trade secrets, or ejectment." (LF 103; App. A69) (emphasis added).

There is no debate regarding the first two categories, excluding workers compensation and unemployment benefit claims from arbitration.[6] The third category of excluded claims pertains to claims for equitable or injunctive relief by EITHER Party, not just Appellants. (LF 103; App. 69). There are equitable and injunctive causes of action that Respondent could have against Appellants, such as claims for unlawfully using his likeness in advertising or publications, continued or ongoing defamation, or for the prevention of disclosure of private information, such as disclosure of medical or financial information. Further, there are countless other possible legal causes of action that Appellant ESMW could have against Respondent arising out of his employment which are not included in the excluded claims provision, such as claims for any kind of tort or negligence, breach of contract, tortious interference with contract, destruction of property, defamation, assault, battery, fraud, etc. Thus, the avenues for the Parties to pursue equitable or injunctive relief are the same.

Under the FAA the Parties may agree to arbitrate certain claims but not others. *Concepcion* reaffirmed that "parties may agree to limit the issues subject to arbitration," just as parties to any ordinary contract may agree to limit its application to certain matters

[6] Workers' Compensation claims and unemployment claims cannot be subject to arbitration in Missouri as a matter of law. *See* MO. REV. STAT. § 288.070.1 (unemployment determinations must be made by the division); MO. REV. STAT. § 287.390 (worker's compensation rights cannot be waived, and settlements must be approved by the division or commission).

and to exclude others. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Any holding that arbitration agreements are governed by rules more restrictive than those that apply to ordinary contracts is preempted by the FAA. *Kindred*, 137 S. Ct. at 1426; *Perry v. Thomas*, 482 U.S. 483, 493, n.9 (1987).

Despite this unambiguous mandate, Respondent relies on *Jimenez v. Cintas Corp.*, 475 S.W.3d 679 (Mo. Ct. App. 2015) to deceptively assert the court "invalidated a very similar provision within a very similar purported agreement." The only commonality between this Arbitration Agreement and the *Jimenez* arbitration agreement is both arbitration agreements contain language excluding injunctive relief. However, that is where the similarities end. Consideration in the *Jimenez* arbitration agreement was held illusory because the agreement allowed the employer an avenue to pursue legal and equitable remedies in court that the employee could not, *to wit*:

> *Employer*[,] may apply to any court of competent jurisdiction for a temporary restraining order, preliminary injunction or other injunctive relief to enforce Employee's compliance with the obligations, acknowledgements and covenants in this Section 4. *Employer* may also include as a part of such injunction action any claims for injunctive relief under any applicable law arising from the same facts or circumstances as any threatened or actual violations of Employee's obligations, acknowledgments and covenants in this Section 4.

Jimenez, 475 S.W.3d at 687 (emphasis added). Based upon this one-sided language, the

court determined, "[w]e agree with Jimenez that Cintas alone is exempted from arbitrating disputes concerning Section 4's Non-Compete Provisions, while Jimenez is bound to arbitrate those same claims." *Id.* Here, unlike in *Jimenez*, "claims by either party for equitable or injunctive relief" are excluded from Respondent's and Appellants' Arbitration Agreement. (LF 103; App. A69). Importantly, the *Jimenez* court emphasized:

> Equally critical to resolution of this issue is that the plain language of Section 4 allows Cintas to file 'any claims for injunctive relief *under any applicable law* arising from the same facts or circumstances as any threatened or actual violation of Employee's obligations…in this Section 4.'

Jimenez, at 688 (emphasis added). In holding this language rendered Cintas' mutual promises illusory, the court explained:

> This expansive clause arguably renders illusory Cintas's promise to arbitrate, by permitting Cintas to seek redress in the courts based upon its bare allegation that such claims are tied to Section 4's Non-Compete Provisions. Cintas may litigate at its discretion, while Jimenez is bound to arbitrate all of her legally arbitrable claims.

Id. This one-sided language is absent from Respondent's Arbitration Agreement.

Unquestionably, in the present case, the excluded claims apply to all Parties and the mutual promises are identical on their face. However, *even if* Respondent claimed the practical implication inures only to Appellants' benefit, his claims would still fail. While

ESMW can bring claims for injunctive relief relating to trade secrets, HIPAA, or ejectment in court, many other potential claims, such as breach of contract, defamation, fraud, invasion of privacy, and destruction of property must be arbitrated. Similarly, Respondent could seek injunctive or equitable relief against ESMW for, by way of example, disclosing confidential financial or medical information, preventing continued defamation, invasion of privacy, use of likeness, or HIPAA violations; but, like ESMW, Respondent must arbitrate his legal claims.

Further, any analysis invalidating the Arbitration Agreement based on the *adequacy* of consideration – as opposed to the *existence* of consideration – is barred by uncontroverted Missouri law governing ordinary contracts. "Consideration is either present…or it is not. Courts have no authority to attempt to value the bargained-for consideration in an effort to determine wither the promisor is – or is not – receiving "adequate" return for the promise given." *Baker*, 450 S.W.3d at 781. A court cannot invalidate an agreement because it believes there is not *enough* consideration. *Id.*; *Doss v. EPIC Healthcare Mgmt. Co.*, 901 S.W.2d 216, 220 (Mo. Ct. App. 1995); *Hackett v. St. Joseph Light & Power Co.*, 761 S.W.2d 206, 212 (Mo. Ct. App. 1988).

Accordingly, the court cannot require identical consideration from each party. *Eaton v. CMH Homes*, *Inc.*, 461 S.W.3d 426, 434 (Mo. banc 2015); *see also, USA Chem, Inc. v. Lewis*, 557 S.W.2d 15, 24 (Mo. Ct. App. 1977) (explaining mutuality of obligation is often confused with consideration, and that consideration is essential but mutuality of obligation is not). In *Eaton*, the party opposing arbitration, Mr. Eaton, alleged that the

excluded claims provision in the applicable arbitration agreement effectively meant that the other party, CMH, would never have to arbitrate claims it filed, because the three listed types of claims are the only types of claims CMH would ever sue on. *Eaton*, 461 S.W.3d at 433. Eaton argued that, "[u]nless both parties are required to arbitrate all or comparable claims … the agreement to arbitrate is not mutual and, so, not supported by adequate consideration, therefore rendering it unconscionable and unenforceable." *Eaton*, 461 S.W.3d at 433. The Missouri Supreme Court rejected Eaton's argument, holding that the lack of mutuality as to the arbitration agreement did not itself invalidate the arbitration agreement, reasoning, "To hold that the agreement is unconscionable solely due to lack of mutuality because CMH, but not Mr. Eaton, is given the option of litigating the issues most important to it is inconsistent with the principles set out in *Vincent*." *Id.* at 434. Therefore, *even if* it were more likely for one party to bring a claim than another, it would be improper for a court to invalidate an agreement on that basis.

Here, Appellant ESMW's agreement to arbitrate claims against Respondent supplies adequate consideration. Appellant ESMW does not have unilateral authority to amend the Arbitration Agreement retroactively, Appellant ESMW's promise to be bound by the Arbitration Agreement is not illusory, and the parties to the Arbitration Agreement are mutually obligated to arbitrate their employment-related claims against each other. Arbitration must be compelled.

B. The Arbitration Agreement Covers Respondent's Employment-Related Claims Against Appellants.

As shown above, questions of whether the Arbitration Agreement is "applicable" to Respondent's claims or was validly formed are themselves arbitrable. The Court, therefore, must compel arbitration even if there is a dispute over that issue. *See, e.g., Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 66 (2010); *Lyster v. Ryan's Family Steak Houses, Inc*., 239 F.3d 943, 945 (8th Cir. 2001); *Swain v. Auto Servs.*, 128 S.W.3d 103, 107 (Mo. Ct. App. 2003). As demonstrated above, the Arbitration Agreement is a valid contract because there was an offer, acceptance, and adequate consideration. The circuit court's ruling denying arbitration erred in that regard. The circuit court's ruling also erred in denying arbitration because Respondent's disputes against both Appellants fall within the scope of the Arbitration Agreement.

1. The Arbitration Agreement Covers Respondent's Claims for Race Discrimination and Wrongful Termination.

Under the FAA, the scope of an arbitration agreement is given a liberal interpretation, with any doubts resolved in favor of arbitration. *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25; *Lyster*, 239 F.3d at 945; *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 30 (Mo. Ct. App. 1992).

Here, Respondent's Petition seeks damages against Appellants for alleged discrimination based on race under the MHRA and wrongful discharge, which plainly fall within the scope of the Arbitration Agreement. (LF 5-10). The Arbitration Agreement

provides: ". . . I hereby knowingly agree and consent to submit any disputes, claims, or controversies that may arise out of my application for employment, employment, and/or termination of employment with ESMW-Midwest and/or its current or former employees." (LF 103; App. A69). Specific examples of covered Claims include:

> Claims concerning discipline and/or discharge … ***tort Claims*** … Claims for harassment and/or ***discrimination*** (including but not limited to ***race***, color, sex, religion, national origin, age, marital status, pregnancy, disability, citizenship, military status or sexual orientation or preference); Claims for retaliation; Claims concerning absence or leave; Claims concerning wages or pay; ***Claims for wrongful discharge***; or any Claims brought pursuant to any federal state and local law, statute, ordinance.

(LF 103; App. A69) (Emphasis added). Thus, the Arbitration Agreement expressly encompasses Respondent's claims for discrimination based on race and wrongful discharge and the circuit court erred by not compelling arbitration.

2. The Arbitration Agreement Covers Respondent's Claims Against Appellant Twine Individually.

Respondent incorrectly asserts his claims against Appellant Twine are not covered because Twine is not a signatory on Respondent's Arbitration Agreement. However, Respondent expressly agreed to binding arbitration for "any such claims against [ESMW] **and/or its current or former employees**" in the first paragraph of the Arbitration Agreement. (LF 103; App. A69). Respondent alleged Appellant Twine was an employee

of ESMW. (LF 6). As Appellant Twine is a "current or former employee" of ESMW, the Arbitration Agreement explicitly covers Plaintiff's claims against Appellant Twine as well.[7] (LF 39; 103; App. A5, A69).

Respondent's contention also fails for several other independent reasons. "Whether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability." *Eckert/Wordell Architects, Inc. v. FJM Props. of Willmar,* LLC, 756 F.3d 1098, 1100 (8th Cir. 2014) (citing *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84-85 (2002)). For this reason alone, arbitration should be compelled as to Respondent's claims against Appellant Twine.

Further, Appellant Twine can enforce the Arbitration Agreement against Respondent because of her employment with ESMW. *See Finnie v. H & R Block Fin.*

[7] Notably – though not required for the determination that Respondent's claims against Appellant Twine are covered – Appellant Twine executed an identical arbitration agreement as Respondent on August 13, 2015, where she also expressly bound herself to arbitration for "any such claims against Easter Seals-Midwest and/or its current or former employees. (LF 107-08; App. A73-74). Because Twine and Soars are bound by the same agreement to arbitrate disputes they may have with each other, Twine is fully entitled to enforce that agreement. In fact, all employees of ESMW are required to enter into agreements to use arbitration to address employment related concerns or complaints. (LF 38; App. A34).

Advisors, Inc., 307 Fed. App'x. 19, 21 (8th Cir. 2009) (holding plaintiff was required to arbitrate her discrimination, harassment, and retaliation claims against her former supervisor, even though he was not a party to the arbitration agreement, because of his close relationship to the company defendant and because the plaintiff's allegations all arose out of the supervisor's conduct while acting as an officer of the company) (applying Missouri law); *CD Partners v. Grizzle*, 424 F.3d 795, 798-800 (8th Cir. 2005) (holding that the relationship of individually-sued principals of a franchisor company to the franchisor company was sufficiently close to permit the principals to enforce the arbitration agreement between the plaintiff and the franchisor company, particularly because the plaintiff's tort allegations arose out of the principals' conduct while acting as officers for the franchisor company).

Next, a signatory plaintiff cannot avoid enforcement of an arbitration agreement when the plaintiff treats signatory and non-signatory defendants as a "single unit." *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 814-15 (Mo. banc 2015). In *Hewitt*, the court held defendants who were not signatories to an arbitration agreement in the employment context could enforce the arbitration agreement against plaintiff. *Id.* at 814-15. The court reasoned the plaintiff alleged all defendants – including those who were not signatories to the arbitration agreement – fired him due to age discrimination. *Id.* at 815. The court did not find there was a lack of consideration or mutuality of obligations between the *non-signatories* and the plaintiff, even where the consideration in support of the arbitration agreement was the mutual obligation for the *signatories* and plaintiff to

submit their claims against each other to arbitration. *Id.* at 808-09, 814-15. The same rationale applies here as Respondent treats Appellants as a single unit in his Petition. (LF 5-10). *See also, Franklin v. Cracker Barrel Old Country Store*, No. 4:17 CV 00289 JMB, 2017 WL 7691757, at *7 (E.D. Mo. Apr. 12, 2017) (enforcing arbitration agreement in employment context between employee and non-signatory supervisor).

Additionally, Missouri law recognizes "the general principal that 'signatories to contracts containing an arbitration agreement [could be] estopped from avoiding arbitration with non-signatories when the issues the non-signatories were seeking to resolve in arbitration were intertwined with the agreement signed by the signatory' that is, where the claims against the non-signatories 'were integrally related to the contract containing the arbitration provision.'" *David v. Metron Services, Inc.*, 2011 U.S. Dist. LEXIS 101652, at *9-10 (E.D. Mo. Sept. 8, 2011); *see also, Arnold v. DirectTV, Inc.*, No. 4:10 CV 00352 JAR, 2013 WL 6159456, at *2 (E.D. Mo. Nov. 25, 2013) (enforcing arbitration agreement as to all defendants in the employment context, including non-signatories, reasoning, "Plaintiffs cannot be permitted to argue Defendants are joint employers while, at the same time, argue their relationship is not so close that all Defendants cannot compel arbitration."). Further, if Respondent's claims against Appellant Twine are separately litigated in court while her claims against Appellant ESMW are arbitrated, ESMW's Arbitration Agreement would be "practically eviscerated." *See*, *Arnold*, 2013 WL 6159456, at *4.

Here, Respondent's discrimination and wrongful termination claims against Twine

are completely intertwined with his claims against Appellant ESMW for the same actions and thus are covered under the Arbitration Agreement. (LF 5-15, 103-104; App. A69-70). Moreover, Appellant Twine, as an employee of ESMW, has also individually agreed to be bound by the Arbitration Agreement. (LF 106-07; App. A73-74).

Finally, Appellant is a third-party beneficiary to the Arbitration Agreement who may enforce the Arbitration Agreement against Respondent. *See, e.g. Torres v. Simpatico, Inc.*, 781 F.3d 963, 968 (8th Cir. 2015) (holding that non-signatory parties, as third-party beneficiaries to the agreement, could invoke and enforce the arbitration provision); *Lyster*, 239 F.3d at 944, 947 (holding Steak House could enforce arbitration agreement regarding employment-related disputes as a third-party beneficiary)*; Franklin*, 2017 WL 7691757, at *7 (enforcing arbitration agreement in employment context between employee and non-signatory supervisor); *Slate v. Boone County Abstract Co.*, 432 S.W.2d 305, 307 (Mo. 1968) ("It has long been the law in Missouri that a third party may sue upon a contract between two other parties…").

Both Respondent and Appellant Twine agreed to arbitrate any employment-related disputes against any other ESMW employee. (LF 103-04, 107-08; App. A69-70, A73-74). Respondent's claims for race discrimination and wrongful termination against Appellants squarely fall within the substantive scope of covered claims in the Arbitration Agreement. Accordingly, the circuit court erred in denying Appellants' Motion to Compel Arbitration, thereby mandating reversal of its ruling.

III. EVEN IF THE DELEGATION CLAUSE DID NOT APPLY, THE CIRCUIT COURT ERRED IN DENYING APPELLANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY PROCEEDINGS AND COMPEL ARBITRATION, BECAUSE THE ARBITRATION AGREEMENT WAS NOT UNCONSCIONABLE AND THERE IS NO OTHER BASIS UNDER APPLICABLE LAW FOR REFUSING TO ENFORCE THE ARBITRATION AGREEMENT.

Arbitration agreements are "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 (App. A76); *Eaton v. CMH Homes*, *Inc.*, 461 S.W.3d 426, 432 (Mo. banc 2015) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011)). In the instant case, no grounds existed for the revocation of the Arbitration Agreement. Disputes over "enforceability" of the Arbitration Agreement, including whether it was unconscionable, were delegated to the arbitrator, and thus the courts may not address that issue. However, if the Court were to do so, arbitration still must be compelled and the circuit court erred by failing to do so. Appellants preserved this error for appellate review by timely filing their Notice of Appeal on March 31, 2017. (LF 207-12). Again, the circuit court's decision must be reviewed *de novo*. *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016); *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 602 (Mo. Ct. App. 2015).

A. <u>The Arbitration Agreement is Not Unconscionable.</u>

Respondent's arguments regarding unconscionability are groundless.

Unconscionability is defined as "an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." *Eaton v. CMH Homes*, *Inc.*, 461 S.W.3d 426, 432 (Mo. banc 2015) (citations omitted). "Unconscionability guards against one-sided contracts, oppression, and unfair surprise." *Id; see also, Torres v. Simpatico, Inc.*, 781 F.3d 963, 969 (8th Cir. 2015). He cannot make such a showing here.

First, Respondent offered no evidence, in the form of an affidavit or otherwise, the Arbitration Agreement is unconscionable, and as such, any factual allegations regarding unconscionability are unsupported. *See, e.g.*, *Martin v. City of Washington*, 848 S.W.2d 487, 492-93 (Mo. banc 1993). Missouri law thus is clear that unconscionability requires more than unsupported assertions that the Parties had unequal bargaining power, that the terms were allegedly non-negotiable, and that the Arbitration Agreement adopts arbitration rules.

Second, Respondent presented no evidence and does not allege he ever attempted to negotiate the Arbitration Agreement's terms or made any inquiry about refusing to sign the Arbitration Agreement. Instead, Respondent asserted he should be allowed to escape the contract he signed because it was drafted by ESMW and offered on a "take it or leave it" basis. This assertion has no merit. "Mere inequality in bargaining power . . . is not sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 809-10 (Mo. banc 2015) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)).

For instance, in *Hewitt*, the Missouri Supreme Court stated, "post-*Concepcion*, a court should not invalidate an arbitration agreement in a consumer contract simply because it is contained in a contract of adhesion or because the parties had unequal bargaining power… ." *Hewitt*, 461 S.W.3d at 809 (quoting *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515 (Mo. banc 2012)); *see also, Lyster v. Ryan's Family Steak Houses, Inc*., 239 F.3d 943, 947 (8th Cir. 2001) (upholding enforcement of arbitration agreement between an employer and employee, rejecting employee's argument that the arbitration agreement was an unconscionable adhesion contract); *Franklin v. Cracker Barrel Old Country Store*, No. 4:17 CV 00289 JMB, 2017 WL 7691757, at *7 (E.D. Mo. Apr. 12, 2017) (enforcing arbitration agreement between employer and employee); *Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 WL 1246699, at *2 (E.D. Mo. Apr. 5, 2017) (upholding enforcement of arbitration agreement between an employer and employee, rejecting employee's argument that the arbitration agreement was unconscionable due to unequal bargaining power); *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 47-48 (Mo. banc 2017) ("Missouri courts have never considered the sophistication of the contractual parties in determining the parties' intent with respect to arbitration agreements."); *Swain v. Auto Servs.*, 128 S.W.3d 103, 108 (Mo. Ct. App. 2003) ("An agreement choosing arbitration over litigation, even between parties of unequal bargaining power, is not unconscionably unfair."); *USA Chem, Inc. v. Lewis*, 557 S.W.2d 15, 24 (Mo. Ct. App. 1977) (upholding arbitration agreement in employment context, reasoning, "[t]he contract was a prerequisite to employment, but no

one forced Mr. Lewis to accept and execute it. He, at all times, had the option to forego employment with USAchem, but he chose to accept employment in the justified belief it would be mutually gainful.").

Additionally, Respondent's "mere failure to read the contract does not make it voidable for unconscionability." *Cova v. Charter Communs., Inc.*, 4:16 CV 00469 RLW, 2017 WL 66609, at *8 (E.D. Mo. Feb. 17, 2017); *see also*, *Pinkerton*, 531 S.W.3d at 48 ("[a] party's failure to read or understand the terms of a contract is not a defense to enforcement of those terms").

Strain v. Murphy Oil USA, Inc., No. 6:15 CV 03246 MDH, 2016 WL 540810 (W.D. Mo. 2016) is also instructive. There, Respondent, a prospective employee, was presented with an arbitration agreement through an online employment application program. *Strain*, 2016 WL 540810 at *1-2. The arbitration agreement was a non-negotiable condition of employment presented on a take-it-or–leave-it basis. *Strain*, 2016 WL 540810 at *3. Respondent claimed the agreement was unconscionable because "the agreement was drafted by Appellant; she was not given an opportunity to negotiate any terms; there was a disparity in bargaining power; and she was 'merely filling out an electronic application on a computer for an hourly position as a gas station cashier.'" *Id.* at *5-6. The Court rejected her argument, reasoning:

> The Supreme Court of Missouri has made clear, 'lack of negotiation and the adhesive nature of a contractual agreement are factors to consider in unconscionability, but post-*Concepcion*, a court should not invalidate an

> arbitration agreement in a consumer contract simply because it is contained in a contract of adhesion or because the parties had unequal bargaining power, as these are the hallmarks of modern consumer contracts…Mere inequality in bargaining power…is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.

Strain, 2016 WL 540810 at *6 (citing *Hewitt*, 461 S.W.3d at 809-10). The Court in *Strain* held that the arbitration agreement was not unconscionable, as Respondent did not allege she "was coerced or defrauded" into agreeing to the arbitration clause, or provide any evidence that the Appellant abused its power in formation of the arbitration agreement. *Id.*

Additionally, the terms of the Arbitration Agreement are not unduly harsh. Under the Arbitration Agreement, the employer and employee both waived their right to a jury trial and are subject to identical procedures and rules governing their claims. Requiring both the employee and employer to arbitrate their claims against one another *under the same rules and procedures* cannot be considered unduly harsh, especially when there has been no showing or contention that the rules and procedures are unfair or biased to one party.

Significantly, even if his legal arguments had merit, Respondent has presented no evidence to support them. The record is devoid of evidence that he did not or was not able read the Arbitration Agreement, that he did not understand the Arbitration Agreement, that he ever attempted to negotiate the Arbitration Agreement's terms, or that

he made any inquiry about refusing to sign the Arbitration Agreement. While these arguments are legally inadequate, regardless, Respondent failed to submit any evidence or an affidavit in his Response to support them. *Martin*, 848 S.W.2d at 492-93. Consequently, the undisputed factual record resoundingly establishes Respondent and ESMW entered into a valid agreement to arbitrate their employment-related claims, and there is no indication that the formation or substance of the Arbitration Agreement is unconscionable.

Further, Respondent's hyperbolic, bare proclamation, unsupported by any evidence, that he had to "sign the agreement or starve" exemplifies his untenable legal position that an arbitration agreement can *never* be enforced in the employment context. Respondent's proposition sharply conflicts with controlling precedent in both the United States Supreme Court and Missouri courts, recognizing the validity of arbitration agreements in the employment context. *See, e.g., Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 75-76 (2010); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 119 (2001); *Gilmer*, 500 U.S. at 32-33; *Patterson v. Tenet Healthcare, Inc.,* 113 F.3d 832, 837 (8th Cir. 1997); *Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 WL 1246699 (E.D. Mo. Apr. 5, 2017); *Hewitt*, 461 S.W.3d at 822; *Dotson*, 472 S.W.3d at 601; *McIntosh v. Tenet Health Sys. Hosps., Inc.,* 48 S.W.3d 85, 87 (Mo. Ct. App. 2001); *Young v. Prudential Sec.*, 891 S.W.2d 842, 845 (Mo. Ct. App. 1995); *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 30 (Mo. Ct. App. 1992); *see also*, *USA Chem, Inc. v. Lewis*, 557 S.W.2d 15, 24 (Mo. Ct. App. 1977) (upholding arbitration agreement in

employment context, reasoning, "[t]he contract was a prerequisite to employment, but no one forced Mr. Lewis to accept and execute it. He, at all times, had the option to forego employment with USAchem, but he chose to accept employment in the justified belief it would be mutually gainful."). Arbitration must be compelled.

B. Appellants did not Waive their Right to Arbitrate Respondent's Claims.

Respondent's alternative contention that Appellants' waived their right to arbitrate Respondent's claims is unavailing. Appellants moved to enforce arbitration of Respondent's claims at their first opportunity by filing a Motion to Compel Arbitration in response to Respondent's Petition. (LF 2-4). Further, Respondent's allegation that Appellants waived arbitration by failing to enforce the Arbitration Agreement during the Equal Employment Opportunity Commission's ("EEOC") and the Missouri Human Rights Commission's ("MCHR") administrative processing of his claims fails as a matter of law. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28-29 (1991).

Indeed, Respondent's "waiver" argument lacks traction pursuant to the Arbitration Agreement's unambiguous language stating: "Nothing in this Arbitration Agreement should be read to prevent an employee from filing a charge with any local, state or federal administrative agency, such as the Equal Employment Opportunity Commission or the Missouri Commission on Human Rights." (LF 103; App. A69). Even more explicitly, the Arbitration Agreement provides for the interplay between administrative filings and arbitration:

> It is agreed that any Claim asserted will be timely only if brought within the time in which an administrative charge or complaint could have been filed if the Claim is one which could be filed with an administrative agency. It is your option whether you want to proceed directly to arbitration with your Claim, or file a charge or claim initially with the appropriate administrative agency, such as the Equal Opportunity Commission or the any state agency enforcing discrimination or wage laws, ***before proceeding with arbitration if the Claim does not resolve before the administrative agency***. If the Claim raises an issue which could not have been filed within an administrative agency, then the Claim must be filed within the time set by the applicable statute of limitations.

(LF 104; App. A70) (emphasis added). Thus, the Arbitration Agreement expressly anticipates an employee may choose to proceed directly to arbitration or, as here, proceed first in the administrative forum *and then to arbitration*. It is wholly illogical to conclude that ESMW (or, for that matter, an employee) waives arbitration by participating in an administrative proceeding in accordance with the Arbitration Agreement's express language permitting the employee to do so. Further, any doubts about an allegation of waiver, delay, or a like defense to arbitration must be resolved in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985); *Moses H. Cone Memorial Hospital*, 460 U.S. at 24-25; *Boogher v. Stifel, Nicolaus & Co., Inc.*, 825 S.W.2d 27, 30at 29 (Mo. Ct. App. 1992).

More importantly, under most state and federal employment laws, an employee

has a statutory right to file a complaint or charge. For instance, a person "claiming to be aggrieved by an unlawful discriminatory practice" has a statutory right under the Missouri Human Rights Act to file a complaint with the Missouri Commission on Human Rights, MO. REV. STAT. § 213.075.1, and the MCHR has a right to investigate that complaint, MO. REV. STAT. § 213.075.32. (App. A82-85). Likewise, under Title VII, an aggrieved person has a right to file a charge of discrimination with the Equal Opportunity Commission, and the EEOC has a right to investigate that charge. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5. (App. A91-97).

To contend that an employer has a right to prevent a charge from being filed or to prevent a governmental agency from investigating a complaint by claiming the existence of an arbitration agreement is not only absurd, but against public policy. It is well-settled that the administrative enforcement of statutory claims does not preclude their arbitrability, and in fact, Appellants could not legally prevent Respondent from filing an administrative charge even if they wanted to. *Gilmer*, 500 U.S. at 28 (An individual claimant with a discrimination claim subject to an arbitration agreement "will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action."); *see also, Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 946 (8th Cir. 2001) ("by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum."); *Boogher*, 825 S.W.2d at 30 (rejecting plaintiff's argument

that his employer waived its right to arbitration of his age discrimination claim under the MHRA).

Appellants could not have precluded Respondent from processing his claim administratively, and as such his argument that Appellants waived arbitration by failing to do so is disingenuous and legally unsound. In any event, the Arbitration Agreement addresses this very issue, anticipating, not surprisingly, that an employee may first proceed with an administrative filing before arbitrating his dispute.

Further, Appellants did not waive their right to arbitration once Respondent filed his lawsuit, because Appellants sought to enforce arbitration in their response to the Petition, and Respondent was not prejudiced. Courts apply a three-part test to determine whether there has been a waiver of the right to arbitrate. *Springleaf Fin. Servs. v. Shull*, 500 S.W.3d 276, 280 (Mo. Ct. App. 2016). Waiver will be found where the alleged waiving party: "(1) had knowledge of the existing right to arbitrate; (2) acted inconsistently with that existing right; and (3) prejudiced the party opposing arbitration by such inconsistent acts." *Springleaf Fin. Servs*., 500 S.W.3d at 280; *McIntosh v. Tenet Health Sys. Hosps., Inc.,* 48 S.W.3d 85, 89 (Mo. Ct. App. 2001). A determination that the other party was prejudiced is essential to a finding of waiver of the right to arbitrate. *Springleaf,* 500 S.W.3d at 281. "[W]aiver of arbitration is not a favored finding, and there is a presumption against it." *Springleaf,* 500 S.W.3d at 281. The burden of showing prejudice is on the party seeking waiver. *Id.* Prejudice may result from lost evidence, duplication of efforts, use of discovery methods unavailable in arbitration, or

the litigation of substantial issues going to the merits. *Springleaf,* 500 S.W.3d at 281.

Here, Respondent's waiver argument fails at the outset. Appellants acted consistently with their right to arbitrate; they filed their Motion to Compel Arbitration in response to Respondent's Petition. (LF 1-4). The Parties did not litigate any substantive issues going to the merits of Respondent's claim in front of the circuit court, apart from the Motion at issue here. (LF 1-4). Appellants sought to prevent the duplication of any efforts by moving to stay the underlying action pending appeal, including discovery, which the circuit court granted. (LF 213-18, 220). Respondent filing a Petition in circuit court and issuing discovery to Appellants (within the same week, before they were served) does not constitute prejudice. *See, e.g. Springleaf Fin. Servs*, 500 S.W.3d at 281 (finding no waiver of arbitration); *McIntosh*, 48 S.W.3d at 90-91; *see also*, *Boogher*, 825 S.W.2d at 30; *Berhorst v. J.L. Mason of Missouri, Inc.*, 764 S.W.2d 659, 664 (Mo. Ct. App. 1988) (holding no waiver of arbitration where motions to dismiss and motions for summary judgment were filed, but not ruled on). Based upon the foregoing, there are no grounds to find that Appellants waived their right to arbitrate Respondent's claims.

C. Alternatively, even if a Term or Provision of the Arbitration Agreement is Deemed Unconscionable or Unenforceable, the Term or Provision is Severable and does not Invalidate the Entire Agreement to Arbitrate.

Alternatively and hypothetically, even if a term or provision of the Arbitration Agreement is considered unconscionable or unenforceable, it may be severed from the

Arbitration Agreement and the remainder of the Arbitration Agreement may still be enforced. *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 436-37 (Mo. banc 2015). Here, the Arbitration Agreement contains a severability clause which states, "I agree that if any provision of this Arbitration Agreement is held unenforceable, the remainder of this Arbitration Agreement will remain in effect." (LF 104; App. A70). The court "will give effect to a severability clause when the clause being severed is not a necessary part of the contract," even in the arbitration context. *Eaton*, 461 S.W.3d at 436.

In *Eaton*, the court determined the agreement to arbitrate was unconscionable as written when an anti-waiver clause was considered together with the lack of mutuality of the obligation to arbitrate. 461 S.W.3d at 436. However, the court held the anti-waiver clause was severable, and thereafter the agreement to arbitrate should be enforced. *Id.* at 436-39. Similarly, in *Vincent v. Schneider*, the court held although provisions of the arbitration agreement allowing an inherently biased individual to serve as arbitrator and placing all costs of arbitration on the individual were unconscionable, these provisions could be severed from the remainder of the agreement, and the agreement still enforced. 194 S.W.3d 853, 859-61 (Mo. banc 2006). And, in *Hewitt*, the court held that a provision in the arbitration clause that named the NFL commissioner as the arbitrator was unconscionable because the commissioner was an employee of the NFL franchise owners, making him inherently biased. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 807 (Mo. banc 2015). Nevertheless, *Hewitt* held the "unconscionability of the terms does not invalidate the entire agreement to arbitrate." *Id.* There, the court severed the arbitrator-

selection clause and replaced it with the Missouri Uniform Arbitration Act's default arbitrator-selection term found in section 435.360 of the Missouri Revised Statutes. MO. REV. STAT. § 435.360 (App. A86).

Accordingly, *even if* a term or provision of the Arbitration Agreement is determined unconscionable or unenforceable, this would not invalidate the entire agreement to arbitrate. Rather, as Missouri courts have consistently done under these circumstances, and as the Arbitration Agreement mandates, the offending term or provision should be severed and the remainder of the Arbitration Agreement must "remain in effect." (LF 104; App. A70).

VII. CONCLUSION

For the reasons set forth above, the circuit court erred in denying Appellants' Motion to Compel Arbitration. Because Respondent has agreed to pursue his claims against Appellants only through a valid and enforceable arbitration agreement, Appellants request this Court remand this matter to the trial court with directions that the matter be stayed pending arbitration.

Respectfully Submitted,

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Dated: May 21st, 2018

CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellants states that Appellants' Substitute Brief complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that, Appellants' Substitute Brief contains 15,110 words. The word count was generated by Microsoft Word, and complies with the word limitations contained in Rule 84.06(c). Counsel further states that Appellants' Substitute Brief includes the information required by Missouri Supreme Court Rule 55.03. Appellants' Substitute Brief has been scanned for viruses, and it is virus-free.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of May, 2018, Appellants' Substitute Brief was delivered through the Missouri electronic filing system to the following: Mr. Bret Kleefuss, Attorney for Respondent, 1708 Olive, St. Louis, Missouri 63103.

/s/ Charles E. Reis, IV