IN THE MISSOURI COURT OF APPEALS
FOR THE EASTERN DISTRICT

Case No. ED 105456

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

APPELLANTS' REPLY BRIEF

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I. REPLY TO RESPONDENT'S VERSION OF THE FACTS

Respondent Lewis Soars' factual representations throughout his brief ignore the affidavit of Laurel Taylor on behalf of Appellants Easter Seals Midwest ("ESMW") and Charity Twine, which stands uncontradicted in the record. (LF 37-108). Respondent filed no affidavit in support of his positions or factual assertions in the lower court and cannot rely on the unsworn averments of his pleadings or *ipse dixits* in his brief to create a supposed fact issue. *Martin v. City of Washington*, 848 S.W.2d 487, 492-93 (Mo. 1993). Accordingly, the recitations in Ms. Taylor's affidavit stand undisputed and establish the facts in the record.

II. INTRODUCTION

The Arbitration Agreement is a valid contract in that there was an offer, acceptance, and valid consideration, as exemplified by the parties' mutual obligation to arbitrate employment-related disputes against each other. The same can be said regarding the delegation clause, which contains the exact language held enforceable by the United States Supreme Court, and provides that this Court is mandated to compel arbitration to determine any issue as to the validity of the Arbitration Agreement.

Respondent does not dispute that there was an offer and acceptance, or that the Arbitration Agreement covers claims for race discrimination and wrongful termination. Rather, Respondent seeks to avoid his obligations under the Arbitration Agreement by erroneously contending that the mutual promises to arbitrate are illusory, that the Arbitration Agreement is unconscionable and, alternatively, that Appellants waived arbitration. Respondent's arguments are either premised on inapposite and

distinguishable cases, or are in direct conflict with controlling authority.

There is a key distinction between the Arbitration Agreement at issue here and the arbitration agreements in each of the cases Respondent cites: the Arbitration Agreement is supported by a mutual, non-illusory promise by Appellant ESMW to arbitrate its claims against Respondent, and it is not subject to unilateral modification by Appellants.

As to the applicability of the Arbitration Agreement to Respondent's claim against Appellant Twine, Respondent wrongfully accuses Appellants of retroactively linking the arbitration agreement signed by Twine to Respondent's Arbitration Agreement. In so doing, Respondent ignores the plain language of the Arbitration Agreement which expressly covers Respondent's claims against "current or former employees" of ESMW, including Twine. Further, Respondent blatantly disregards the multiple alternative avenues by which Twine may enforce the Arbitration Agreement, even as a non-signatory. Respondent makes no effort to distinguish the ample controlling authority which resoundingly proves the Arbitration Agreement covers his claims against Twine.

Respondent's argument that the Arbitration Agreement is unconscionable due to unequal bargaining power, allegedly non-negotiable terms, lack of mutuality, and the applicability of the "National Rules for the Resolution of Employment Disputes" is unavailing. To start, Respondent's assertions regarding procedural unconscionability are devoid of any evidentiary support in the record. Nevertheless, even if Respondent's contentions are considered, Missouri law is well-settled that such circumstances do not invalidate an arbitration agreement: "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…" *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 809 (Mo. 2015) (quoting *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515 (Mo. 2012)).

Further, there is no foundation for Respondent's claim that Appellants waived arbitration because Respondent's right to proceed in the administrative process with the EEOC or MCHR on his underlying charge of discrimination was mandated by law, and Appellants immediately filed their Motion to Dismiss and Motion to Compel Arbitration in response to Respondent's Petition once the administrative process terminated.

The requisite elements to establish an enforceable arbitration agreement are undisputed. Respondent's arguments lack evidentiary support and essentially embrace the untenable legal position that an arbitration agreement can *never* be enforced in the employment context. This 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 (2010); *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 119 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991); *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 822 (Mo. 2015); *Dotson v. Dillard's, Inc.*, 472 S.W.3d 599, 601 (Mo. Ct. App. 2015); *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);

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 U.S. Dist. LEXIS 51797 (E.D. Mo. Apr. 5, 2017).

Respondent ignores that there is no way to end-run controlling United States Supreme Court precedent. *See, e.g.*, *Marmet Health Care Ctr. Inc. v. Brown*, 565 U.S. 530, 530-31 (2012) (ordering remand because the Supreme Court of Appeals of West Virginia's interpretation of the FAA to categorically prohibit arbitration of a particular type of claim was both incorrect and inconsistent with clear instruction in the precedents of the United States Supreme Court; "When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established"); *see also*, *Nitro-Lift Techs., LLC v. Howard*, 568 U.S. 17, 20-21 (2012) (holding the Oklahoma State Supreme Court failed to adhere to a correct interpretation of the FAA by declaring the noncompetition agreements null and void, rather than enforcing the delegation clause and leaving that determination to the arbitrator; "Oklahoma Supreme Court must abide by the FAA, which is 'the supreme law of the Land,' U.S. Const., Art. VI, cl.2, and by the opinions of the Supreme Court interpreting that law.") Respondent asks this Court to nullify that precedent. After all, as but one example, the delegation clause here is the same as the delegation clause, fully enforced, in *Rent-A-Center West, Inc*. 561 U.S. at 66. Respondent's claims that he should be relieved of his contractual obligations cannot be sustained on this record; thus, the lower court should be reversed and this case sent to arbitration in accordance with the parties' agreements.

III. 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 A VALID DELEGATION CLAUSE, AGREED TO BY THE PARTIES, WHICH MANDATES THAT THE ARBITRATOR, NOT THE COURT, HAS EXCLUSIVE AUTHORITY TO DECIDE THRESHOLD ISSUES OF INTERPRETATION, APPLICABILITY, ENFORCEABILITY, OR FORMATION OF THE ARBITRATION AGREEMENT.

A. The Arbitration Agreement is Governed by the FAA, Which Requires Arbitration of Respondent's Claims.

Respondent does not dispute that the Arbitration Agreement is governed by the Federal Arbitration Act ("FAA"). However, he appears to contend that the FAA is somehow inapplicable to one provision in the Arbitration Agreement, *to wit*, the delegation clause. Specifically, Respondent erroneously proclaims, "The FAA does not apply to this purported delegation clause because the clause is invalid, and the FAA only applies to valid contracts." Respondent's Brief, p. 6. This unsupported conclusory proclamation is nonsensical, and in direct conflict with controlling authority in *Rent-A-Center*, which states, "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." *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (emphasis added). Respondent's argument lacks merit, as the Arbitration Agreement explicitly provides that it is governed by the FAA, and therefore, the FAA applies equally to the delegation clause. (LF 104; App. A70).

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.

Respondent does not dispute that the United States Supreme Court recognizes clauses delegating the authority to rule on contract formation issues to an arbitrator, rather than a court, as valid and enforceable. *See, e.g.*, *Rent-A-Center*, 561 U.S. at 66, 71-72. Respondent does not dispute that arbitrability becomes an issue for the arbitrator to decide where the agreement provides clear and unmistakable evidence that the parties intended to arbitrate those issues. *Springleaf Fin. Servs. v. Shull*, 500 S.W.3d 276, 282 (Mo. Ct. App. 2016). Respondent does not even dispute that the language of the delegation clause here provides clear and unmistakable evidence that the parties intended to arbitrate their claims. Significantly, Respondent does not even attack the wording or language of the delegation clause at all, which is identical to that in the delegation clause enforced by the United States Supreme Court in *Rent-A-Center*, and mandates that all

issues relating to interpretation, applicability, enforceability or formation must be submitted to and decided by an arbitrator, not a court. *Rent-A-Center*, 561 U.S. at 66.

Rather, Respondent attempts to differentiate the issue regarding the delegation clause here from those in *Rent-A-Center*, *Springleaf Financial Services, Inc. v. Shull*, and *Dotson v. Dillard's* by contending that the above-referenced cases enforcing very similar (if not identical) delegation clauses are distinguishable because the opposing parties did not directly challenge the enforceability of the delegation provision itself. Respondent's theory is unavailing, as his alleged "challenge to the delegation provision itself" is nothing more than an ill-disguised attack on the Arbitration Agreement as a whole, rather than a specific attack challenging that the language of the delegation clause clearly and unmistakably provides authority for the arbitrator to decide threshold issues of arbitrability. 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 as a whole. *See 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). If the purported reason to invalidate the delegation clause is identical to the purported reasons to invalidate the arbitration agreement as a whole, that challenge must be referred to arbitration. *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).

Tellingly, Respondent claims that the delegation clause is not enforceable for the exact same reasons he claims the Arbitration Agreement as a whole is not enforceable. Specifically, Respondent claims that, "[t]he disputed delegation clause, however, fails under Missouri Supreme Court law because there is no consideration and no mutuality of obligation." Respondent spends the first nineteen pages of his brief addressing the delegation clause, and then incorporates his arguments regarding the delegation clause by reference into his arguments as to why the Arbitration Agreement as a whole is unenforceable, stating: "For the same reasons the delegation clause fails, the agreement as a whole must fail too" and "The arbitration agreement as a whole is unconscionable for the same reasons described above in Point I." Respondent's Brief, p. 21. Because the alleged attack on the delegation clause is no different than Respondent's attack on the Arbitration Agreement as a whole, this is an issue for the arbitrator to decide.

Even if the non-specific challenges to the delegation clause raised by Respondent are considered – lack of consideration, no mutuality of obligation, and unconscionability – Respondent's argument nevertheless fails. Just as Respondent contends that the delegation clause fails for the same reason the agreement as a whole fails, Appellants have demonstrated that the delegation clause is enforceable for the same reason the Arbitration Agreement as a whole is enforceable. As described in more detail below, the

Arbitration Agreement in this case formed a valid contract in that there was an offer, acceptance, and valid consideration, as exemplified by the parties' mutual obligation to arbitrate claims against each other. The same can be said regarding the delegation clause.

The plain language of the delegation clause speaks for itself. Respondent creates confusion where none exists. By incorporating language which clearly and unmistakably requires that the arbitrator has the exclusive authority to decide issues of interpretation, applicability, enforceability or formation of the Arbitration Agreement, the parties have agreed that 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. v. Kaplan,* 514 U.S. 938, 943 (1995); *see also, Springleaf Fin. Servs.*, 500 S.W.3d at 282; *Dotson*, 472 S.W.3d at 608; *Sadler*, 466 F.3d 623, 625-26 (8th Cir. 2006); *Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 U.S. Dist. LEXIS 51797, *3 (E.D. Mo. Apr. 5, 2017). Respondent does not dispute that the language in the delegation clause clearly and unmistakably delegates authority to the arbitrator to decide threshold issues of arbitrability.

The Circuit Court's only role should have been to examine the underlying contract to determine whether the parties had in fact agreed to commit the question of arbitrability to the arbitrator. The court below should not have determined any issues with respect to formation, applicability, enforceability, or formation of the Arbitration Agreement. The Circuit Court disregarded the Arbitration Agreement's delegation provision without any justification or explanation, and erred in denying Appellants' Motion to Compel Arbitration. (LF 205-06; App. A1-2). As such, its ruling must be reversed.

II. ALTERNATIVELY, EVEN IF THE DELEGATION CLAUSE 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.

A. The Parties Formed A Valid Contract.

When faced with a motion to compel arbitration and the agreement does not contain a delegation clause, the trial court must determine whether a valid arbitration agreement exists, and if so, whether the specific dispute falls within the scope of the arbitration agreement. *Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 419 (Mo. 2016). In Missouri, a valid contract requires an offer, acceptance, and consideration. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 774 (Mo. 2014).

Respondent does not dispute that there was an offer and acceptance, or that the Arbitration Agreement covers claims for race discrimination and wrongful termination. Rather, Respondent seeks to avoid his obligations under the Arbitration Agreement by contending that the mutual promises to arbitrate are illusory, that the Arbitration Agreement is unconscionable, and, alternatively, that Appellants waived arbitration.

Respondent's arguments are either premised on inapposite and distinguishable cases, or cases that are in direct conflict with controlling authority.

By signing the Arbitration Agreement on October 19, 2015, Respondent agreed the parties would arbitrate their employment disputes against each other, which includes Respondent's claims of discrimination and wrongful termination alleged in his Petition. Even if we were to assume that the delegation clause was not present, the Arbitration Agreement is enforceable under Missouri law, backed by adequate consideration, and covers Respondent's claims in his Petition. Because a valid contract exists, the Court must order the parties to arbitration. *See* 9 U.S.C. § 4 (App. A78-79); *Torres v. Simpatico, Inc.*, 781 F.3d 963, 968 (8th Cir. 2015).

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

The undisputed factual record clearly establishes that Appellants offered Respondent the Arbitration Agreement and that Respondent accepted the offer by executing the Arbitration Agreement on October 19, 2015. (LF 38-39, 103-04; App. A5, A69-70). Respondent does not refute this contention, and he did not submit any affidavit to the trial court to dispute that an offer or acceptance occurred.

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

Respondent devotes a great deal of time to arguments regarding consideration that Appellants are simply not asserting. Appellants do not argue that consideration may be

found in Appellant ESMW's offer to employ Respondent on an at-will basis. Rather, the mutual promise between Respondent and ESMW to waive their rights to a jury trial and arbitrate their employment-related claims against each other establishes consideration. (LF 103; App. A69). *Baker*, 450 S.W.3d at 776; *see, e.g. Hewitt*, 461 S.W.3d at 808-09; *McIntosh*, 48 S.W.3d at 89; *Thomas v. Fiserv Sols.*, No. 4:16 CV 2157 CEJ, 2017 U.S. Dist. LEXIS 63311 (E.D. Mo. Apr. 26, 2017); *Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 U.S. Dist. LEXIS 51797, *3-4 (E.D. Mo. Apr. 5, 2017); *Franklin v. Cracker Barrel Old Country Store*, 4:17-CV-00289 (JMB) (E.D. Mo. Apr. 12, 2017). Respondent does not dispute that mutual agreements to arbitrate claims can supply valid consideration; however, he contends that the mutual obligations at issue here are illusory. Respondent's theory of what constitutes an illusory promise is well off the mark, and unavailing for the reasons stated *infra.*

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

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).

Respondent erroneously claims that the mutual obligations are illusory, contending that Appellants reserved for themselves the right to bring into court the most likely claims it would have against Respondent. Specifically, Respondent reasons that the mutual obligations are illusory merely because the Arbitration Agreement excludes "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). In *American Laminates, Inc. v. J.S. Latta Co.*, 980 S.W.2d 12, 23 (Mo. Ct. App. 1998), this Court explained, "Retaining the right to cancel a contract or to avoid one's promise is an unenforceable, illusory promise." Thus, a contract is illusory only when one party is permitted to modify the agreement such that the party could relieve itself of its promises. *Baker*, 450 S.W.3d at 776-77; *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 442 (Mo. Ct. App. 2010).

Respondent relies on *Jimenez v. Cintas Corp.*, 475 S.W.3d 679 (Mo. Ct. App. 2015) and deceptively asserts that the court "invalidated a very similar provision within a very similar purported agreement." Although both arbitration agreements contain language excluding claims for injunctive relief, that is where the similarities end. In *Jimenez*, the arbitration agreement was held illusory because of language that is not contained within the Arbitration Agreement at issue, *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 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). Significantly, the court in *Jimenez* also reasoned,

> 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 that 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 offending language is absent from Respondent's Arbitration Agreement. In *Jimenez*, the agreement to arbitrate was illusory because Cintas could seek redress in the courts by simply joining any claim to its non-compete claim. The Arbitration Agreement at issue here does not contain this language and the parties are bound to arbitrate their employment-related disputes against each other.

There is no question that the excluded claims apply to all parties and that the mutual promises are identical on their face. However, *even if* Respondent wants to claim that in effect only Appellants benefit from this exclusion, his argument nevertheless fails. Respondent conveniently disregards the controlling authority from the Missouri Supreme Court in *Eaton v. CMH Homes, Inc.*, which stands for the proposition that although consideration can be found in mutual promises, there is no requirement that the parties' promises be identical. 461 S.W.3d 426, 434 (Mo. 2015).

Further, Respondent also ignores the fact that 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 and to exclude others. *AT&T Mobility LLC*

v. Concepcion, 536 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 Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017); *Perry v. Thomas*, 482 U.S. 483, 493, n.9 (1987).

Moreover, Respondent has no basis for his contention that the claims Appellant ESMW is most likely to have are for injunctions. To the contrary, there are countless other possible 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, etc. Further, 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, defamation, invasion of privacy, false light, tortious interference in Respondent seeking new employment, or for the prevention of disclosure of confidential information, such as medical or financial information that Appellant ESMW may have of Respondent.

Here, Appellant ESMW's agreement to arbitrate its 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.

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

Whether the Arbitration Agreement is "applicable" to Respondent's claims is itself arbitrable, and the Court therefore must compel arbitration even if there is a dispute over that issue. *Rent-A-Center*, *supra.* In any event, a dispute must be submitted to arbitration if there is a valid agreement to arbitrate and the dispute falls within the scope of the agreement. *Swain v. Auto Servs.*, 128 S.W.3d 103, 107 (Mo. Ct. App. 2003); *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir. 2001).

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

Respondent's Petition seeks damages against Appellants for alleged discrimination based on race under the Missouri Human Rights Act and wrongful discharge, which plainly fall within the Arbitration Agreement's scope. (LF 5-10; 103-104). Respondent does not dispute that the Arbitration Agreement covers claims for race discrimination and wrongful termination, however, he contends that his claims against Appellant Twine are not covered because she is not a signatory on the Arbitration Agreement.

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

Respondent argues that the Arbitration Agreement in inapplicable to his claims against Appellant Twine, reasoning the Arbitration Agreement lacks mutual obligations because it contains no promises with regard to cases that other employees have against

Respondent. Respondent cites no authority for this proposition and blatantly disregards Appellants' controlling precedent demonstrating the multiple avenues in which Appellant Twine may enforce the Arbitration Agreement, even as a non-signatory.

Respondent wrongfully accuses Appellants of trying to "hoodwink" the Court by retroactively linking the arbitration agreement signed by Appellant Twine to Respondent's Arbitration Agreement, rather than showing that the Arbitration Agreement requires arbitration of Respondent's claims against Appellant Twine on its face. Although Appellant Twine did sign an identical arbitration agreement in which she expressly bound herself to arbitration, Appellants are not trying to incorporate Twine's arbitration agreement into Respondent's or rely on it to determine arbitrability of Respondent's claim against Twine. To the contrary, Respondent's Arbitration Agreement mandates arbitration of his claims against Twine on its face. Specifically, Respondent expressly agrees to binding arbitration for "any such claims against Easter Seals-Midwest **and/or its current or former employees.**" (LF 103; App. A69). As Appellant Twine is a "current or former employee" of ESMW, the Arbitration explicitly covers Respondent's claims against Appellant Twine – without reference to a separate agreement. (LF 39 and 103.) To suggest that Appellants were required to have every single current and former employee of ESMW (a number that would be in the thousands) sign Respondent's Arbitration Agreement for it to be enforceable is absurd and unsupported both legally and logically. Such a rule would render contracts meaningless.

Respondent's contention that Appellants "cannot point to anything other than a separate purported contract" is refuted by the Arbitration Agreement itself, which expressly covers claims against current or former employees, including Twine, and also by the multiple avenues by which Twine may enforce the Arbitration Agreement even as a non-signatory.

For example, Respondent blatantly ignores Appellants' argument and controlling authority establishing that Appellant Twine (as a non-signatory) can enforce the Arbitration Agreement against Respondent because of her employment with ESMW, as exemplified in *Finnie v. H & R Block Fin. Advisors, Inc.*, 307 Fed. App'x. 19, 21 (8th Cir. 2009) and *CD Partners v. Grizzle*, 424 F.3d 795, 798-800 (8th Cir. 2005). In *Finnie*, the court held that the 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. *Id.* at 21. Similarly, in *CD Partners*, the court also held that the relationship of a non-signatory, individually-sued principal to his company was sufficiently close to permit the principal to enforce the arbitration agreement between the plaintiff and the company. *Id.* at 798-800. Respondent has failed to acknowledge or distinguish these illustrative cases.

Additionally, Respondent agrees with the proposition that a signatory plaintiff cannot avoid enforcement of an arbitration agreement when the plaintiff treats signatory

and non-signatory defendants as a "single unit." *Hewitt*, 461 S.W.3d at 814-15. However, he unpersuasively contends that Respondent did not treat Appellants as a single unit, despite the allegations in his Petition clearly demonstrating otherwise. Although Respondent has separate counts for Appellant Twine and Appellant ESMW, the allegations are virtually identical; the race discrimination count against Appellant Twine incorporates all of the allegations of the race discrimination count against Appellant ESMW by reference; and, like in *Hewitt*, the allegations frequently refer to "defendants" as a single unit rather than each defendant individually. (LF 05-010). For example, in Count I, which alleges race discrimination against ESMW, Respondent avers, "Defendants discriminated against Plaintiff because of his race, Caucasian; Defendants treated Plaintiff differently than similarly-situated African-American employees; Defendants permanently suspended Plaintiff…; Easter Seals is vicariously liable for the actions of its supervisors through respondiat (sic) superior." (LF 06-07). Likewise, in Count II, which alleges race discrimination against Twine, Respondent incorporates all previous allegations and further alleges that: "Plaintiff's race was a contributing factor in defendants' decision to permanently suspend Plaintiff; Defendants discriminated against Plaintiff because of his race, as described above." (LF 07-08). As in *Hewitt*, where the court noted that the plaintiff, "[a]lleges that each is responsible for the single act of firing him due to age while he was under contract," the Respondent here also alleges that both ESMW and Twine were each responsible for discriminating against him and permanently suspending him. *Hewitt*, 461 S.W.3d at 815; (LF 06-08). Respondent treats ESMW and

Twine as a single unit with respect to his race discrimination claims, which are premised upon identical facts.

Respondent fails to even address Appellants' third basis for non-signatories to enforce arbitration agreements. Specifically, 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 U.S. Dist. LEXIS 167064, *14 (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."). Respondent's claims against Twine and ESMW are inextricably intertwined, which is further evidenced by the fact that Respondent's claim against ESMW is premised upon Twine's actions via respondeat superior.

Fourth, Appellant Twine is a third-party beneficiary to the Arbitration Agreement who may enforce the Arbitration Agreement against Respondent. *See 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…); *See, e.g. Torres*, 781 F.3d at 963 (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*, 4:17-CV-00289 (enforcing arbitration agreement in employment context between employee and non-signatory supervisor). Again, Respondent failed to address or distinguish these cases.

Finally, in a last ditch effort to support his position, Respondent incorrectly proclaims that the Arbitration Agreement is no different from those being struck down by Missouri courts, and lists five distinguishable cases without providing any analysis. Respondent's reliance on these cases is misplaced.

For example, in *Jimenez v. Cintas Corp.*, as discussed above, the court held the agreement to arbitrate was illusory because Cintas was exempted from arbitrating disputes concerning the non-compete provisions, and Jimenez was not. *Id.*, at 687. The court further held that the agreement to arbitrate was illusory because Cintas could seek redress in the courts by simply joining any claim to its non-compete claim. Here, the Arbitration Agreement does not contain the language that the *Jimenez* court held determined the mutual promises illusory, and further, the plain language of the Arbitration Agreement mutually obligates the parties to arbitrate their disputes against each other.

In Respondent's cited case of *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 25 (Mo. Ct. App. 2008), the arbitration agreement was held illusory because it stated that Hallmark "may at its sole discretion modify or discontinue the [arbitration program] at any time." The court characterized the agreement as "allow[ing] Hallmark a total and complete escape from any and all commitments at any time." *Id.* Further, the plaintiff did not even sign the arbitration agreement. Unlike in *Morrow*, here it is undisputed that Respondent signed the Arbitration Agreement and that it does not contain language permitting Appellants to unilaterally modify the arbitration agreement at their sole discretion. Notably, the court in *Morrow* stated, "There is nothing that would preclude the possibility of an employer and its employees from entering into an enforceable agreement to arbitrate claims, including statutory claims." *Id.* at 22.

In *Marzette v. Anheuser-Busch, Inc.*, 371 S.W. 3d 49, 52 (Mo. Ct. App. 2012), the court invalidated the arbitration agreement on the grounds that A-B's willingness to consider plaintiff for employment did not constitute adequate consideration. *Id.* There, only the employee applicant was required to submit his claims to arbitration. *Id.* at 53. In contrast, here, it is the parties' mutual agreement to arbitrate employment-related disputes against each other that supplies the consideration, *not* Respondent's at-will employment.

In *Whitworth v. McBride & Sons Homes, Inc.*, 344 S.W.3d 730 (Mo. Ct. App. 2011), the court held that the combination of an arbitration agreement and a handbook did not establish an offer and acceptance to enter into a binding arbitration agreement. *Id.* at 739. Further, the court also invalidated the agreement for lack of consideration because

the handbook stated it could be "revised or changed from time to time with or without prior notice as the Company deems appropriate and advisable," *Id.* at 742. These grounds for invalidation are inapplicable to Respondent's Arbitration Agreement, which was not combined with a handbook and which cannot be unilaterally modified at Appellants' discretion.

Kunzie v. Jack-in-the-Box, Inc., 330 S.W.3d 476 (Mo. Ct. App. 2010) is also distinguishable because there, Kunzie filed an affidavit claiming the signature on the arbitration agreement was not his, that his name was misspelled, and that the Arbitration Agreement incorrectly listed his social security number. There, the court remanded the case to the trial court for an evidentiary hearing to render factual determinations as to whether Kunzie, through his words and/or conduct, unequivocally and objectively signaled an intention to be bound to the Arbitration Agreement. *Id.* at 486. Here, Respondent has not alleged or produced any evidence disputing that he signed the Arbitration Agreement. *Kunzie* also proclaimed, "Nothing precludes the possibility of an employer and its employee from entering into an enforceable agreement to arbitrate claims, so long as the agreement exhibits the essential elements Missouri requires of a valid contract." *Kunzie*, at 480.

Finally, *Greene v. Alliance Automotive, Inc.*, 435 S.W.3d 646 (Mo. Ct. App. 2014) is inapposite as well. There, the court invalidated the arbitration agreement for lack of consideration, reasoning that appellants interpreted the anti-waiver provision as meaning that they could exercise their primary remedy of self-help repossession without waiving

arbitration of other disputes; thus, the agreement itself allowed appellants to unilaterally divest itself of the promise to arbitrate. *Id.* at 654. Here, there is no provision which allows Appellants to unilaterally divest themselves of the promise to arbitrate.

Respondent disregards Appellants' controlling legal precedent, and instead, relies upon inapposite case law which fails to support his position. For the foregoing reasons, and those stated in Appellants' initial brief, Respondent entered into a valid agreement to arbitrate his claims against Appellants.

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. 2015) (quoting *Concepcion*, 536 U.S. at 336). Disputes over "enforceability" of the Arbitration Agreement were delegated to the arbitrator, and thus the courts may not address that issue. Regardless, in the instant case, Respondent has failed to show that any legitimate grounds existed for the revocation of the Arbitration Agreement.

A. The Arbitration Agreement is Not Unconscionable.

Respondent's arguments regarding unconscionability are unpersuasive. Missouri law is clear that unconscionability requires more than Respondent's unsupported assertions that the parties had unequal bargaining power, that the terms were allegedly non-negotiable, and the Arbitration Agreement adopts arbitration rules. As the Missouri Supreme Court stated in *Hewitt*, "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. 2012)). Rather, 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*, 461 S.W.3d at 432 (citations omitted). "Unconscionability guards against one-sided contracts, oppression, and unfair surprise." *Id; Torres v. Simpatico, Inc.*, 781 F.3d at 969; *Franklin v. Cracker Barrel Old Country Store*, 4:17-CV-00289 (JMB) (E.D. Mo. Apr. 12, 2017).

Respondent failed to address, much less distinguish, the following plethora of controlling case law cited by Appellants rejecting his argument that an arbitration agreement is unconscionable in the employment context based upon the adhesive nature of the agreement or unequal bargaining power: *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."); *Lyster v.*

Ryan's Family Steak Houses, Inc., 239 F.3d at 947 (upholding enforcement of arbitration agreement between employer and employee, rejecting employee's argument that the arbitration agreement was an unconscionable adhesion contract); *Strain v. Murphy Oil USA, Inc.*, 2016 U.S. Dist. LEXIS 15467 at *3, 14-16 (W.D. Mo. Feb. 9, 2016) (upholding enforcement of arbitration agreement that was non-negotiable, a condition of employment, and presented on a take-it-or–leave-it basis to an hourly employee); *Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 U.S. Dist. LEXIS 51797, *4-5 (E.D. Mo. Apr. 5, 2017) (upholding enforcement of arbitration agreement between employer and employee, rejecting employee's argument that the arbitration agreement was unconscionable due to unequal bargaining power); *Franklin*, 4:17-CV-00289 (enforcing arbitration agreement between employer and employee).

Further, Respondent's hyperbolic, bare proclamation, unsupported by any admissible 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*, 561 U.S. at 75-76; *Circuit City Stores, Inc.,* 532 U.S. at 119; *Gilmer*, 500 U.S. at 32-33; *Hewitt*, 461 S.W.3d at 822; *Dotson*, 472 S.W.3d at 601; *McIntosh.,* 48 S.W.3d at 87; *Young*, 891 S.W.2d at 845; *Boogher* , 825 S.W.2d at 30; *Patterson,* 113 F.3d at 837; *Humphries v. SSM Health Care Corp.*, No. 4:17 CV 786 RWS, 2017 U.S. Dist. LEXIS

51797 (E.D. Mo. Apr. 5, 2017); *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."). Again, Respondent failed to distinguish these cases, and in fact, even the cases cited by Respondent explicitly state, "There is nothing that would preclude the possibility of an employer and its employees from entering into an enforceable agreement to arbitrate claims, including statutory claims." *Morrow*, at 22. And, "Nothing precludes the possibility of an employer and its employee from entering into an enforceable agreement to arbitrate claims, so long as the agreement exhibits the essential elements Missouri requires of a valid contract." *Kunzie*, at 480.

The case upon which Respondent relies, *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo. 2012) is clearly distinguishable, as it mandated that the consumer submit all claims to binding arbitration but allowed the title company to forgo arbitration and pursue relief through judicial or self-help repossession. *Id.* at 494. In contrast, here, the terms of the Arbitration Agreement are not unduly harsh or one-sided. Under the Arbitration Agreement, Respondent and ESMW 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, particularly where any allegedly harsh terms apply to claims brought by both the company and employee.

On page 17 of his brief, Respondent cites multiple cases in which the Missouri Court of Appeals denied enforcement of arbitration clauses "on a variety of factual issues particular to each case." However, here, Respondent filed no affidavit in support of his position and cannot rely on the unsworn averments of his pleadings to create a fact issue. *Martin v. City of Washington*, 848 S.W.2d 487, 492-93 (Mo. 1993). The undisputed factual record resoundingly establishes that 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. Respondent has presented no 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. Respondent did not offer any evidence, in the form of an affidavit or otherwise, that the Arbitration Agreement is unconscionable, and as such, any factual allegations that he could claim regarding unconscionability were unsupported and must be disregarded.

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

Respondent does not address any of Appellants' arguments in response to his alternative contention that Appellants' waived their right to arbitrate Respondent's

claims. Mindful of Rule 84.04(g)'s admonition that Appellants shall not reargue points in their reply briefs that were covered in their opening briefs, Appellants will not reargue their points with respect to Respondent's waiver argument, apart from briefly reiterating that: 1) 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 and Respondent was not prejudiced (LF 2-4); 2) Respondent's allegation that Appellants waived arbitration by failing to enforce the Arbitration Agreement during the EEOC's and the MCHR's administrative processing of his claims fails as a matter of law because Appellants could not have precluded Respondent from processing his claim administratively; and 3) the Arbitration Agreement provides for the interplay between administrative filings and arbitration by expressly anticipating that an employee may choose to proceed directly to arbitration or, as here, proceed first in the administrative forum *and then to arbitration*. (LF 104; App. A70). Accordingly, Respondent's contention that Appellants waived their right to arbitrate resoundingly fails.

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.

Respondent does not dispute that if a term or provision of the Arbitration Agreement is unconscionable or unenforceable, it should be severed from the Arbitration Agreement and the remainder of the Arbitration Agreement should still be enforced.

Eaton, 461 S.W.3d at 436-37. 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. *Id.* Thus, the court should apply the severability clause in the event that Respondent's attack on the delegation clause, or any other provision, is given credence. The parties, by agreeing to the severability clause, clearly expressed their desire to avoid such a draconian result. (LF 104; App. A70).

D. Respondent is not Entitled to an Evidentiary Hearing.

In the last paragraph of his brief, Respondent requests, for the first time, an evidentiary hearing on the authenticity of the documents provided and the alleged formation of the Arbitration Agreement, if this Court does not entirely affirm the trial court's denial of the Motion to Compel Arbitration. Respondent's request should be denied because: 1) he has failed to set forth reasons which warrant the evidentiary hearing; 2) fails to identify what evidence he intends to produce at an evidentiary hearing or explain why it could not have been presented through documentary evidence and affidavits attached to his Response in Opposition to Defendants' Motion to Compel Arbitration; 3) Appellants have presented ample, authenticated documentary evidence for consideration by this Court, obviating the need for testimony or an evidentiary hearing; 4) Respondent has not challenged the authenticity of the documentary evidence submitted by Appellants; and 5) Respondent has not cited any legal authority supporting his entitlement to an evidentiary hearing.

Respondent had the opportunity to present any additional evidence before the lower court in opposing the Motion to Compel Arbitration, but failed to do so. It is as if a party contesting the grant of summary judgment on appeal asks the appellate court to remand the case so he can present additional evidence to oppose the motion which he should have presented in the first place. The Court has before it ample, reliable and uncontested evidence to determine whether Respondent entered into a valid, enforceable agreement to arbitrate his claims against Appellants.

IV. CONCLUSION

For the foregoing reasons, the Circuit Court erred in denying Appellants' Motion to Compel Arbitration. Because Respondent 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: September 26, 2017

CERTIFICATE OF COMPLIANCE

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Appellants states that this Appellants' Reply Brief complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Response to Respondent's Version of Facts and concluding with the last sentence before the signature block, this Appellants' Brief contains 7,712 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 this Appellants' Reply Brief includes the information required by Missouri Supreme Court Rule 55.03. This Appellants' Reply Brief has been scanned for viruses, and it is virus-free.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 28th day of September, 2017, the foregoing 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