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

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

LAWS AND STATUTES

STATEMENT OF FACTS

Plaintiff/Respondent Lewis Soars worked as an hourly at-will support staff for Defendant/Appellant Easter Seals, providing community living aid to individuals with developmental disabilities. (L.F. 36 – 39). Plaintiff/Respondent was born on December 1, 1992. (L.F. 012).

Charity Twine was Plaintiff/Respondent's manager. (L.F. 012). At the outset of Plaintiff's at-will employment, Defendants forced Plaintiff to sign a document purporting to waive Plaintiff's right to redress in Court for employment-related disputes. (L.F. 20; 36 – 39). Defendant Easter Seals admits that Plaintiff/Respondent signed the disputed agreement as a condition of his employment, on the promise that he would not be hired unless the document was signed.[1] (L.F. 102 – 104). Indeed, Easter Seals "requires" its employees to sign the agreement. (L.F. 102).

Defendants terminated Plaintiff a short time after he reported that other employees were smoking marijuana at work. (L.F. 012). He was treated differently by his supervisor Charity Twine on the basis of his race, Caucasian. (L.F. 012). After filing a Charge of Discrimination and receiving a right to sue letter, Plaintiff filed this action in the St. Charles County Circuit Court for discrimination based on race under the Missouri Human Rights Act ("MHRA") as well as for wrongful termination in violation of Missouri public policy. (L.F. 005 – L.F. 014). Importantly, Plaintiff filed separate counts

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1 "…this Arbitration Agreement is a *necessary* condition for my initial or continued employment with Easter Seals-Midwest." (*emphasis added*) (L.F. 102 – 104).

against Twine and Easter Seals. (L.F. 005 – 014).

Plaintiff served Defendants with discovery requests and set depositions. (L.F. 004). Only then did Defendants produce the disputed agreement, incorrectly contending that Plaintiff must arbitrate these disputes, and that any decision about the formation of the disputed agreement should be delegated to an arbitrator. (L.F. 003).

The disputed agreement fails under Missouri law as discussed herein.

POINTS RELIED ON

I. **The trial court correctly denied Appellant's Motion to Compel Arbitration because the purported delegation clause does not meet the elements of a valid contract under Missouri law, lacks consideration, lacks mutuality of obligation, does not delegate to the arbitrator to determine the arbitrability of the claims most likely to be utilized by the Appellants, does not delegate Defendant Charity Twine's claims to the arbitrator, and is unconscionable**

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

Jimenez v. Cintas Corp, 475 S.W.3d 679 (Mo. App. E.D. 2015)

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

Clemmons v. Kansas City Chiefs Football Club, Inc., 397 S.W.3d 503 (Mo. App. W.D. 2013)

II. **The trial court correctly denied the Appellants Motion to Compel Arbitration because there was no meeting of the minds and no consideration for the purported agreement in that Plaintiff was an at-**

will employee, the purported arbitration agreement does not contain mutual obligations, and Plaintiff has treated Defendant Twine separately for purpose of this lawsuit

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

Jimenez v. Cintas Corp, 475 S.W.3d 679 (Mo. App. E.D. 2015)

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

Clemmons v. Kansas City Chiefs Football Club, Inc., 397 S.W.3d 503 (Mo. App. W.D. 2013)

III. **For the reasons already discussed, the purported agreement including the disputed delegation clause is/are unsconscionable**

Jimenez v. Cintas Corp, 475 S.W.3d 679 (Mo. App. E.D. 2015)

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

IV. **If questions remain about the formation of this purported agreement and delegation clause, this Court should order an evidentiary hearing**

Kunzie v. Jack-In-The-Box, 330 S.W.3d 476, 480 (Mo. App. E.D. 2010)

ARGUMENT

Standard of Review

"Whether a dispute is subject to arbitration is reviewed *de novo.*" Johnson v. Vatterott Educational Centers, Inc., 2013 WL 5525742 *1 (Mo. App. W.D. October 8, 2013).

I. The trial court correctly denied Appellant's Motion to Compel Arbitration because the purported delegation clause does not meet the elements of a valid contract under Missouri law, lacks consideration, lacks mutuality of obligation, does not delegate to the arbitrator to determine the arbitrability of the claims most likely to be utilized by the Appellants, does not delegate Defendant Charity Twine's claims to the arbitrator, and is unconscionable

The sole issue is whether the Appellant's Motion to Compel Arbitration was correctly denied. As the party seeking to enforce the purported agreement, Appellants bear the burden of establishing that an enforceable agreement exists, that the claim falls within the plan, and that the agreement is conscionable. Whitworth v. McBride & Son Homes, Inc., 344 S.W.3d 730, 737 (Mo. App. W.D. 2011).

Appellants cannot meet their burden. The purported delegation clause is not valid because it is not supported by consideration, lacks mutuality of obligation, does not delegate to the arbitrator the arbitrability of the claims most likely to be utilized by Appellants, fails to delegate the arbitrability of Defendant Charity Twine's claims against Respondent to an arbitrator, and is unconscionable.

When presented with a motion to compel arbitration, Missouri Courts conduct a three-step analysis. First, the court must determine whether a valid arbitration agreement, i.e. enforceable contract, exists. Clemmons v. Kansas City Chiefs Football Club, Inc., 397 S.W.3d 503, 505 (Mo. App. W.D. 2013); Whitworth, 344 S.W.3d at 736; Frye v. Speedway Chevrolet Cadillac, 321 S.W.3d 429, 434 (Mo. App. W.D. 2010); Kunzie v. Jack-In-The-Box, 330 S.W.3d 476, 480 (Mo. App. E.D. 2010). In making this determination, the court must apply Missouri rules of contract law. Clemmons, 397 S.W.3d 506; Frye, 321 S.W.3d at 435; Kunzie, 330 S.W.3d at 480. Second, if the court determines that a valid contract to arbitrate exists, then the court must determine whether the dispute falls within the scope of the agreement. Clemmons, 397 S.W.3d 505; Whitworth, 344 S.W.3d at 736; Frye, 321 S.W.3d at 434; Kunzie, 330 S.W.3d at 480.

Third, if the first two inquiries are answered in the affirmative, the court must determine whether the agreement is subject to revocation under contract principles, including whether the agreement is unconscionable (either procedurally or substantively). Clemmons, 397 S.W.3d 506; Whitworth, 344 S.W.3d at 736; Frye, 321 S.W.3d at 445.

Here, Appellants claim that an arbitrator – and not the Circuit Court – should have determined all issues with regard to the disputed clause and disputed agreement. The disputed delegation clause, however, fails under Missouri Supreme Court law because there is no consideration and no mutuality of obligation. Baker v. Bristol Care, Inc., 450 S.W.3d 770 (Mo. 2014); Jimenez v. Cintas Corp, 475 S.W.3d 679 (Mo. App. E.D. 2015). Plaintiff's at-will employment cannot be consideration for a purported delegation clause,

and as explained below, the lack of mutual obligations renders the promises made illusory.

"Arbitration is a matter of contract, and parties will be compelled to arbitrate their claims only if the arbitration agreement satisfies the essential elements of a valid contract." Marzette v. Anheuser-Busch, Inc., 371 S.W.3d 49, 52 (Mo. App. E.D. 2012). "Although the Federal Arbitration Act is to be applied when enforcing a contract that invokes its provisions, 'Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate.'" Jimenez v. Cintas Corp, 475 S.W.3d 679 (Mo. App. E.D. 2015), *citing* State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 856 (Mo. Banc 2006). In other words, while agreements to arbitrate may be favored, both the Federal and Missouri Acts **require "the presence of a legally enforceable contract to arbitrate" under Missouri law before an individual may be compelled to arbitrate**. Whitworth, 344 S.W.3d at 737 n.8 (Emphasis added). The party seeking to compel arbitration has the burden of proving the existence of a validly formed contract. Whitworth, 344 S.W.3d 730, at 737. The FAA does not apply to this purported delegation clause because the clause is invalid, and the FAA only applies to valid contracts.

"The essential elements of any contract, including one for arbitration, are offer, acceptance, and bargained for consideration." Johnson v. McDonnel Douglas Corp., 745 S.W.2d 661, 662 (Mo. Banc 1988). 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." Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15, 25 (Mo. App. 2008).

Employment at-will fails as consideration in an employment arbitration context. Jimenez v. Cintas Corp, 475 S.W.3d 679 (Mo. App. E.D., 2015).

Accordingly, where no other consideration is found, Missouri courts scrutinize whether the obligations are, in fact, mutual. See, eg, Greene v. Alliance Automotive, Inc., 435 S.W.3d 646 (Mo. App. W.D. 2014). Mutuality of obligation means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other. Thus, no party is bound unless all are bound. Sumners v. Service Vending Co., 102 S.W.3d 37, 41 (Mo. Ct. App. 2003). A contract that purports to exchange mutual promises will be construed to lack legal consideration if one party retains the unilateral right to reject arbitration. Baker v. Bristol Care, Inc., 450 S.W.3d 770 (Mo. 2014).

(a) **The disputed clause lacks mutual obligations because defendant does not agree to have the arbitrability of it's most likely claims against Respondent to be determined by an arbitrator (the delegation clause applies solely to the claims Plaintiff/Respondent is most likely to bring against Appellants)**

Defendant excludes for itself exactly what it would consider its most important tool, the ability to obtain injunctive or equitable relief for things such as "disclosure of confidential or privileged information, unauthorized use of trade secrets, or ejectment." The delegation clause does not apply to these particular categories of cases, which only

Defendant would ever bring.[2] That reservation alone tells this Court all it needs to know about the validity of the disputed clause.

Plaintiff, as an hourly earner for a care facility, would never have a reason to obtain an injunction against Defendant. (L.F. 012). Plaintiff has no "trade secrets," has nothing to "eject" the Defendants from, and has no causes of action or possible causes of action regarding "confidential information." This promise, therefore, is illusory because it exempts all of Defendant's likely claims against Plaintiff from the delegation clause.

Defendants claim that Plaintiff may have some kind of "likeness" claim against Defendants, or some kind of claim based on confidential information. Defendants' claims fail the laugh test, and Defendants certainly have brought no evidence to suggest that this may be the case.

Meanwhile, Defendant Easter Seals – as a provider of services to developmentally diabled individuals – is the party with "trade secrets" to protect, is the party with

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[2] Appellants disingenuously announce that the disputed agreement exempts certain claims that only an employee could bring: worker's compensation and unemployment claims. Appellants know that worker's compensation claims and unemployment claims cannot be arbitrated in Missouri, and so this Court should treat Appellants' argument for what it is: misleading. RSMO 288.070.1 – 288.070.11 (unemployment determinations must be made by the division); RSMo 287.390 (worker's compensation rights cannot be waived, and settlements must be approved by the division or commission).

"confidential information" to protect, and is the party who would use "ejectment" as a remedy. (L.F. 020). Defendants have not agreed to have the arbitrability of injunctive relief for these claims to be determined by an arbitrator, and Plaintiff could never need such relief.

Indeed, in Jiminez v. Cintas Corp., 475 S.W.3d 679 (Mo. App. E.D., 2015), the Court invalidated a very similar provision within a very similar purported agreement. The Plaintiff argued that Cintas did not, in practice, agree to arbitrate all of its claims against Plaintiff. The Court frowned on Cintas' reservation from the agreement to arbitrate the claims it was most likely to bring, stating that: "Where the practical effect of an arbitration agreement binds only one of the parties to arbitration, it lacks mutuality of promise, and is devoid of consideration." Id.

It is this last statement that links the Cintas case with this matter. Here, the delegation clause in actuality only applies to claims that Plaintiff may have against the Defendants, and so the clause is entirely one-sided, and the promises are certainly not mutual. Defendant Easter-Seals carved out an exception for its own interest, and has therefore not given up anything of value. Defendants have not agreed to have the arbitrability of its most likely claims decided by an arbitrator. Defendants' appeal must therefore fail. Id.

(b) The disputed delegation clause lacks mutual obligations because it contains no promises with regard to cases that other employees have against Plaintiff/Respondent

Employment at-will is not consideration. Baker v. Bristol Care, Inc., 450 S.W.3d 770 (Mo. 2014). Defendants/Appellants nonetheless contend that the disputed delegation clause applies to "all parties," including Plaintiff's claims against individual Defendant Charity Twine. Defendants/Appellants contend that the disputed clause is applicable to every claim against every other employee in the entire organization – EVER (except, as noted above, for the claims that Defendants/Appellants are most like to have against Plaintiff, such as injunctive relief). Defendants/Appellants claim that every other employee or former employee in the entire organization would be obligated to the disputed delegation clause, with regard to claims against Plaintiff.

However, the disputed clause does not contain mutual promises between Plaintiff and any other employee at Easter Seals. The disputed clause does not obligate any other employee to arbitrate claims against Plaintiff. The disputed clause does not obligate any other employee to have the arbitrability of their claims against Plaintiff be decided by an arbitrator. As a result, mutual obligations have not been created and the clause fails under Missouri law. Id.

By attaching a separate purported agreement – allegedly signed by Twine – along with dozens of other documents that are not referenced in the Disputed Agreement, Defendants claim that Twine's claims against Plaintiff are subject to the delegation clause in the Disputed Agreement, and are also subject to arbitration (thus attempting to back-door their way into a mutual promise). But the disputed delegation clause must contain mutual promises *on its face* to be enforceable in Missouri. Id. This is a pillar of contract law. Eveland v. Eveland, 156 S.W.3d 366 (Mo. App. E.D. 2004) (holding that "[w]here

the parties have expressed their final and complete agreement in writing and there is no ambiguity in the contract, the intent of the parties must be determined solely from the four corners of the contract itself.").

Indeed, the disputed agreement itself states that it is whole and no other documents or agreements may be considered: "Easter Seals-Midwest's Arbitration Agreement is complete within itself, and takes the place of any other verbal or written understanding regarding arbitration of any employee's claims, disputes or controversies with Easter Seals-Midwest." (L.F. 103 – 104).

Here, the disputed clause fails to mention Twine, or any/every other potential Defendant, including the CEO.[3] Those claims, then, are not subject to the delegation clause at issue in this case and are not subject to arbitration, and so there are no mutual promises. Id. Defendants cannot point to anything other than a separate purported contract which is not referenced anywhere in the disputed agreement at issue here.[4] Missouri Courts have refused to enforce arbitration agreements which rely upon other documents. Clemmons v. Kansas City Chiefs Football Club, Inc., 397 S.W.3d 503, at 507 (Mo. App. W.D. 2013).

Additionally, Respondent's claims in this case treat Defendants Easter Seals and

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3 Can this Court imagine a CEO, bargaining from a position of power, signing such an onerous and unconscionable document? Defendants have not produced such evidence.

4 Defendant also filed a self-serving affidavit. The witness has not been subject to cross examination. This Court should treat that affidavit for what it is worth – nothing.

Charity Twine separately. Respondent has filed a three count Petition: Count I for race discrimination against Easter Seals; Count II for race discrimination against Charity Twine; Count III for wrongful termination in violation of Missouri Public Policy against Easter Seals. (L.F. 004 - 014). Each separate count is addressed to a particular Defendant. Respondent could dismiss the race discrimination claim against Easter Seals (Count I) from his Petition, but Count II for race discrimination against Charity Twine would remain, unaffected. *See* State ex rel. Hewitt v. Kerr, 461 S.W.3d at 814-15. (Plaintiff there treated Defendants the same in the pleadings).

In short, this is not the same as in *Kerr*, where the Plaintiff there treated all defendants the same. Here, Plaintiff can dismiss one Defendant, and his claim(s) against the other Defendant would remain. As a result, Respondent is not treating the Defendants the same for purposes of litigation, but differently for purposes of arbitration. Id. This Court should therefore find that the delegation clause is without consideration, and lacks mutuality of obligation between the parties, including Twine.

Defendants want to have their cake and eat it too. They drafted this Agreement with the help of expensive lawyers, strong-armed a college-aged Plaintiff into signing it on the threat of being unemployed, and now want to apply the disputed agreement and disputed clause to anybody and everybody convenient to the Defendants.[5] (L.F. 012; 103

5 Except with regard to the only possible claims that Defendant might ever have against Plaintiff. Defendants have reserved the right to obtain injunctive and equitable relief in

– 104). The disputed agreement is "complete within itself" according to the disputed agreement's very terms, yet the Defendants attached dozens of pages of other documents in support of their Motion before the trial court, and this appeal. (L.F. 18 – 104). This is the definition of a lack of mutual obligations.

Because the delegation clause is subject to the same principles as all contracts in Missouri which use employment at-will as purported "consideration," there is no mutuality of obligation between the parties (including Twine) and the purported consideration is illusory. Defendants' reliance on Rent-A-Center is misplaced and operates against Defendants' arguments. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69-70 (2010). Although the Supreme Court in Rent-A-Center stated that delegation provisions are separate, antecedent agreements, the Court also stated that the agreement should be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." Id. In other words, delegation provisions are treated the same as every other contract in this employment at-will context, and are invalid without consideration/mutual obligations, and are invalid if they are unconscionable. Id.

Defendants attempt to hoodwink this Court by retroactively linking the agreement signed by Charity Twine to Plaintiff's disputed agreement. Defendants have not supported their burden of proof on this issue – do the executives of Defendant sign agreements to arbitrate? If the CEO of the company has a claim against Plaintiff, is

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court, and to sue in court for violations of trade secrets and confidential information – claims only Easter Seals-Midwest could ever bring against Plaintiff, and not vice versa.

he/she obligated to a delegation clause and to arbitration? A self-serving affidavit, along with the submission of dozens of documents which were not identified in the disputed agreement, hardly creates mutuality of obligation where none exists on the face of the document.

Since the disputed delegation clause does not mention or reference Twine – or any other purported agreement or any other specific employee or former employee – there are no mutual obligations. Nothing in the disputed agreement or disputed clause links any claims Twine may have against Plaintiff to arbitration. Nothing requires Twine's claims against Plaintiff to be subject to the disputed delegation clause. This disputed clause and disputed agreement are no different than those being struck down as a matter of routine by Missouri courts. Jimenez v. Cintas Corp, 475 S.W.3d 679 (Mo. App. E.D., January 13, 2015); Morrow v. Hallmark Cards, Inc., 273 S.W.3d 15, 25 (Mo. App. 2008); Marzette v. Anheuser-Busch, Inc., 371 S.W.3d 49, 52 (Mo. App. E.D. 2012); Whitworth v. McBride & Sons Homes, Inc., 344 S.W.3d 730, at 737 (Mo. App. W.D. 2011); Kunzie v. Jack-in-the-Box, Inc., 330 S.W.3d 476 (Mo. App. E.D. 2010); Greene v. Alliance Automotive, Inc., 435 S.W.3d 646 (Mo. App. W.D. 2014).

(c) The disputed delegation clause is unsconscionable because of unequal bargaining power, no consideration, Appellants have the right to not seek arbitration, Appellants reserve their most likely lawsuits from arbitration and delegation, and there was no meeting of the minds

Missouri Courts have identified a number of factual categories indicating unconscionability. Brewer v. Missouri Title Loans, 364 S.W.3d 486 (Mo. 2012). For

example, unequal bargaining positions indicate a deficiency in the making of a contract. Id. at 489 n.1. (citing Whitney v. Alltel Commc'ns, Inc., 173 S.W.3d 300, 308 (Mo. App. 2005); *See also* State ex. rel. Hewitt v. Kerr, 461 S.W.3d 798 (Mo. Banc. 2015). Unconscionability is defined as 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 (Mo 2015). Unconscionability doctrine guards against one-sided contracts, oppression, and unfair surprise. Id. Courts also consider whether the terms of an arbitration agreement are unduly harsh. Id. This is a fact-specific inquiry focusing on whether the terms are so one-sided as to oppress or unfairly surprise an innocent party or which reflect the overall imbalance in the rights and obligations imposed by the contract at issue. Id. The unsconscionability of the contract is inextricably linked with the process of contract formation because it is at formation that a party is required to agree to the objectively unreasonable terms. Brewer, 364 S.W.3d at 493.

Brewer examined whether an arbitration agreement was unconscionable. The case was brought by a consumer under the Missouri Merchandising Practices Act. Based on the one-sided nature of the agreement, the court found the agreement unconscionable. The agreement was non-negotiable and the terms were one-sided. Brewer, 364 S.W.3d at 493. The agreement mandated that the customer submit all claims to binding arbitration but allowed the title company to forego arbitration and pursue relief through judicial or self-help repossession. Brewer, 364 S.W.3d at 494.

Brewer is factually similar to the case at bar. Here, without discovery into the purported formation of the disputed delegation clause, there is ample evidence to prove that the purported delegation clause was non-negotiable. For instance, the Disputed Agreement states that signing the document is a "necessary condition" to employment. (L.F. Page 102 – 104). Thus, Plaintiff was presented with a choice: sign the agreement or starve. Further, Plaintiff was a college-aged individual at the time of the purported agreement. (L.F. 012). He was an hourly earner in a position entitled: "Community Living Instructor." (L.F. 037 – 039). Defendant Easter Seals-Midwest is a large Missouri corporation with substantial assets, employees, resources, and attorneys. If it is assumed that Plaintiff signed the document, it is obviously because he knew he would not be hired if he refused (see the arbitration agreement stating that signing is a "necessary condition" of employment). This is not the same kind of equal footing that an employee with forty years experience might receive. *See* Kerr, *supra.*

By presenting this disputed agreement to the Court, Defendants concede the non-negotiability and adhesive nature of the disputed delegation clause. Plaintiff had no choice but to sign; the other option was the chow line.[6] Defendants admit that

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6 For a 2015 article from the New York Times discussing the background and rise of arbitration agreements and their benefits to corporations, see L.F. 127 – 150. Arbitration agreements in the employment context permit corporations to purchase their own version of "justice."

Plaintiff/Respondent would not have been hired without the signature. (L.F. 37 – 39; 102 – 104).

Finally, like Brewer, the delegation clause here reserves Appellants' most likely claims from delegation to an arbitrator. Again, Defendants' reservation of the claims it is most likely to have against Plaintiff – "disclosure of confidential or privileged information, unauthorized use of trade secrets, or ejectment" – also renders the delegation clause unconscionable. This is the definition of "one-sided." Brewer, 364 S.W.3d at 494.

The disputed clause is also unconscionable because, as elaborated above, Defendant "may" choose to enforce the agreement. That permissive language alone should invalidate the disputed clause.

Since Brewer was decided in 2012, the Missouri Court of Appeals has routinely affirmed trial court decisions denying enforcement of arbitration clauses on a variety of factual issues particular to each case. TXR, LLC v. Stricker, 440 S.W.3d 541 (Mo. App. S.D. 2014); Greene v. Alliance Automotive, Inc., 435 S.W.3d 646 (Mo. App. W.D. 2014); Baier v. Darden Restaurants, 420 S.W.3d 733 (Mo. App. W.D. 2014); Jay Wolfe Used Cars of Blue Springs v. Jackson, 428 S.W.3d 683 (Mo. App. W.D. 2014); Hopwood v. Citifinancial, Inc., 429 S.W.3d 425 (Mo. App. W.D. 2013); Bellemere v. Cable-Dahmer Chevrolet, Inc., 423 S.W.3d 267 (Mo. App. W.D. 2013); Gemini Capital Group, LLC v. Tripp, 445 S.W.3d 583 (Mo. App. S.D. 2013); Riley v. Lucas Lofts Investors, LLC, 412 S.W.3d 735 (Mo. App. E.D. 2013); Johnson v. Vatterott Educational Centers, Inc., 410 S.W.3d 735 (Mo. App. W.D. 2013); Clemmons v. Kansas City Chiefs Football Club, Inc.,

397 S.W.3d 503 (Mo. App. W.D. 2013); Jones v. Paradies, 380 S.W.3d 13 (Mo. App. E.D.); Marzette v. Anheuser-Busch, Inc., 371 S.W.3d 49 (Mo. App. E.D. 2012).

Defendants also spend a lot of time arguing that delegation clauses are automatically enforceable. However, Defendants' citations to cases are misleading. *Springleaf* involved a consumer arbitration clause and dealt primarily with waiver. Springleaf Financial Services, Inc., v. Shull, 500 S.W.3d 276 (Mo. Ct. App. 2016). However, nothing in *Springleaf* mandates that the disputed delegation clause be enforced here. Id. (holding that when a party seeking to compel arbitration relies on a delegation provision, the court must enforce that provision if it clearly and unmistakably provides authority for an arbitrator to determine arbitrability of issues, **unless the opposing party directly challenges the enforceability of the delegation provision itself." (emphasis added)**). In *Springleaf*, the Plaintiff challenged the arbitration agreement as a whole, but failed to challenge the delegation clause. Id. The Court's hands were tied in *Springleaf* for that reason. Here, however, Respondent Lewis Soars challenged the validity of the delegation clause with the trial court and does so here.

Dotson, similarly, does not stand for the proposition that delegation clauses in the employment context are automatically valid – that case was also decided upon the absence of a challenge to the delegation clause. Dotson v. Dillard's, Inc., 472 S.W.3d 599 (2015). In that case, as the Court noted, the Respondent had failed to challenge the delegation clause itself, and so the Court's hands were also tied. Id. This case presents the opposite situation.

Finally, *Rent-A-Center* simply holds that a delegation clause must be scrutinized

under state law with regard to issues of validity. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 69-70 (2010). Because, the FAA only applies to valid contracts, and the delegation clause here is invalid, *Rent-A-Center* does not apply.

Appellants have failed to carry the burden of showing an enforceable delegation provision. Without consideration, mutual obligations, and with Appellant exempting all of the lawsuits they most likely would have against Respondent Soars from the delegation provision, this Court should uphold the trial Court's correct denial of Appellants' Motion to Compel Arbitration.

II. **The trial court correctly denied the Appellants Motion to Compel Arbitration because there was no meeting of the minds and no consideration for the purported agreement in that Plaintiff was an at-will employee, the purported arbitration agreement does not contain mutual obligations, the purported agreement is illusory, Plaintiff has treated Defendant Twine separately for purpose of this lawsuit, and the purported agreement as a whole is unconscionable**

(a) The disputed agreement contains no consideration, no mutuality of obligation, is illusory, and is unconscionable

These opinions set out the following general rules applicable to motions to compel arbitration:

- A signature acknowledging the existence of and/or agreement to an agreement to arbitrate does not constitute consideration to support an agreement to arbitrate. *See* Whitworth, 344 S.W.3d at 741; Frye, 321 S.W.3d at 438-439.

- The offer of or continuation of at will employment does not constitute consideration to support an agreement to arbitrate. *See* Clemmons, 397 S.W.3d at 507-508; Sniezek, 402 S.W.3d at 585; Marzette, 371 S.W.3d at 52-53; Katz, 347 S.W.3d at 538; Whitworth, 344 S.W.3d at 741; Frye, 321 S.W.3d at 438-39; Morrow, 273 S.W.3d at 26-27.
- Continuation of at will employment does not constitute an employee's assent to the terms of an arbitration plan. *See* Kunzie, 330 S.W.3d at 484-486; Katz, 347 S.W.3d at 538.
- Unequivocal acceptance of an arbitration plan requires more than the mere continuation of at will employment. *See* Katz, 347 S.W.3d at 545.
- While an agreement to arbitrate in an at-will employment relationship *may* be considered a term or condition of employment, any such agreement ends when the employment relationship ends. *See* Clemmons, 397 S.W.3d at 508; Sniezek v. Kansas City Chiefs Football Club, 402 S.W.3d 580, 586 (Mo. App. W.D. 2013); Morrow, 273 S.W.3d at 26.
- An employee's general knowledge of the existence of an arbitration plan without knowledge of the details or specific terms of the plan, does not constitute acceptance or meeting of the minds. *See* Marzette, 371 S.W.3d at 53; Katz, 347 S.W.3d at 545-546.

- An employer's promise to abide by the terms of the arbitration agreement is rendered illusory when the employer reserves the right to unilaterally modify or terminate the arbitration plan. *See* Whitworth, 344 S.W.3d at 742.
- No mutual promises exist if the employer reserves the right to unilaterally enforce, modify or terminate the arbitration plan. *See* Whitworth, 344 S.W.3d at 742; Frye, 321 S.W.3d at 442-444; Morrow, 273 S.W.3d at 25.

For the same reasons the delegation clause fails, the agreement as a whole must fail too. The fact that Appellants seek to apply the agreement to an infinite number of past, present and future employees, further demonstrates the lack of mutual obligations and unconscionability. Charity Twine cannot enforce the purported agreement because she has been treated separately by Respondent for purposes of litigation and arbitration and is not mentioned anywhere in the purported agreement. (L.F 004 – 014). Further, because the arbitration agreement states that it is a "necessary condition" of employment, the agreement terminated with Respondent's employment relationship. Clemmons, 397 S.W.3d at 508 (holding that an arbitration agreement that is a condition of employment ends upon the termination of employment). And with Appellant's reservation from arbitration of the claims it has deemed most important to it's own interests, there can be no doubt that this agreement was not mutual or conscionable. Brewer, 364 S.W.3d at 494; Baker v. Bristol Care, Inc., 450 S.W.3d 770 (Mo. 2014).

The arbitration agreement as a whole is unconscionable for the same reasons described above in Point I, and for the following reasons. With respect for some of the

rules for arbitration that Defendant seeks to apply, they are unfair.[7] For example, under the arbitration "National Rules for the Resolution of Employment Disputes," rule 30 states that "the arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary." (L.F. 176). This is obviously troubling because there is a whole body of law with respect to similar discrimination accusations of an employer and whether that information can be used as evidence. Cox v. Kansas City Chiefs Football Club, Inc., 473 S.W.3d 107 (Mo.

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7 Not a single rule from the "National Rules for the Resolution of Employment Disputes" discussed in the disputed agreement is attached to the disputed agreement, or to Defendant's Motion. All that is listed is the website, www.adr.org. The navigation of the website and finding the correct rules is a difficult endeavor, even for a lawyer. There is no telling what kind of burden is placed on Plaintiff – a college-aged individual with no legal training– seeking to understand the agreement that he must sign or else be fired. It is not the burden of the employee to seek out an unknown document. *See* State ex. Rel. Hewitt, 461 S.W.3d 798 (Mo. Banc. 2015). To incorporate terms from another document, a contract must make clear reference to the document and describe it in such terms that its identity may be ascertained beyond a doubt. Id. Defendants claim that a copy was available from the Human Resources Director – an advantage that Plaintiff, as an illegally terminated employee, could not enjoy when he was fired. Moreover, the rules were not provided to Plaintiff when Defendants forced him to sign the disputed agreement.

Banc. 2015). The above rule means that the arbitrator can completely forsake that whole body of law.

When the adhesive nature of the contract, lack of bargaining power, whimsical rules that render Plaintiff/Respondents' rights under the Missouri Human Rights Act practically meaningless, and overly burdensome nature are considered, this Court should find both the disputed delegation clause and the agreement to arbitrate unsconscionable. Adding to the irony of the situation is that Defendant threw in the line – obviously false – that Plaintiff was "afforded an opportunity to consult with an attorney of my choice before signing this document." (L.F. 103 – 104). That sentence itself is an acknowledgement that Plaintiff needed a lawyer prior to signing away all of his rights against any employee ever at East Seals-Midwest. However, Defendants concede that Plaintiff was forced to sign the document on the day of his orientation; thus, he was not provided with the opportunity to consult with a lawyer at all. (L.F. 36 – 39). This is another example of the unsconscionable nature of the disputed clause and disputed agreement.

Here, Plaintiff filed this lawsuit in state court because he believes he has that right. There was no meeting of the minds with regard to the purported agreement, and as a result, there was no acceptance by Plaintiff. See Kunzie v. Jack-in-the-Box, Inc., 330 S.W.3d 476 (Mo. App. E.D. 2010). This Court is aware of the difficult economic times, especially for those without money and means, and understands that somebody who is desperate for a job is in no position to bargain their rights away. Plaintiff had the reasonable expectation of having his claims heard in a court of law, and this purported

arbitration agreement, which lacks consideration and mutual obligations, and is unsconscionable, cannot legally operate to deprive Plaintiff of his right to be heard in court.

(b) Defendants/Respondents waived their right to arbitrate

If, *in the alternative and without conceding the point*, this Court believes the disputed agreement or disputed clause may be valid, the disputed agreement has been waived. A party may waive a valid arbitration agreement. Major Cadillac, Inc., v. Gen. Motors Corp, 280 S.W.3d 717, 721 (Mo. App. W.D. 2009). A party waives its right to arbitrate if it (1) Had knowledge of the existing right to arbitrate; (2) acted inconsistently with that right, and (3) prejudiced the party opposing arbitration. Frye v. Speedway Chevrolet Cadillac, 321 S.W.3d 429 (Mo. App. W.D. 2009).

Here, Defendants obviously knew about but failed to raise the issue of an arbitration agreement during Plaintiff's charge of discrimination with the EEOC/MCHR. Defendants permitted Plaintiff to file suit. Plaintiff suffered prejudice by filing a Petition and by drafting and serving discovery. Id. The result is that Defendants have waived any right to arbitrate.

III. For the reasons already discussed, the purported agreement including the disputed delegation clause is/are unsconscionable

Plaintiff restates and incorporates the above Points I and II in response to Appellants' Points Relied On III.

IV. In the alternative, if this Court does not entirely affirm the trial court's denial of the Motion to Compel Arbitration, Plaintiff/Respondent requests

an evidentiary hearing on the authenticity of the documents provided and the alleged formation of this purported agreement

Defendant's self-serving affidavit and attachment of dozens of pages that are not referenced in the disputed agreement do not authenticate any such evidence. If this Court is inclined to overturn the trial Court's order denying arbitration, Plaintiff requests an evidentiary hearing. Kunzie v. Jack-in-the-Box, Inc., 330 S.W.3d 476 (Mo. App. E.D. 2010).

CONCLUSION

For the reasons stated herein, Defendant's purported delegation clause and purported agreement fail. This Court should affirm the trial court's denial of Defendant/Appellants' Motion to Compel Arbitration.

DATED: SEPTEMBER 11, 2017

Respectfully submitted,

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Certificate of Compliance

In compliance with Missouri Supreme Court Rule 84.06(c), counsel for Respondent certifies that this brief complies with the provisions of Missouri Supreme Court Rule 84.06(b), in that beginning with the Statement of Facts (there is no jurisdictional statement) and concluding with the last sentence before the signature block, this Respondent's brief contains 5,993 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 Respondent's brief includes the information require by Missouri Supreme Court Rule 55.03. This Respondent's Brief has been scanned for viruses, and is virus-free.

Certificate of Service

The undersigned certifies that on September 11, 2017, the foregoing was delivered through the Missouri electronic filing system to the following: Chad Reis, Attorney for Appellants, 211 N. Broadway, Suite 1500, St. Louis, Mo 63102.

/s/Bret Kleefuss