No. _____

IN THE
Supreme Court of the United States

TECHNICAL EDUCATION SERVICES INC. d/b/a AVIATION INSTITUTE OF MAINTENANCE, *et al.*,
Petitioners,

v.

STEVEN PINKERTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

Thomas M. Lucas
Counsel of Record
JACKSON LEWIS P.C.
500 E. Main Street, Suite 800
Norfolk, Virginia 23510
(757) 648-1445
Thomas.Lucas@jacksonlewis.com

Counsel for Petitioners

QUESTION PRESENTED

Under the Federal Arbitration Act and this Court's decisions, parties have broad discretion to delegate threshold disputes of arbitrability, including the enforceability of the arbitration agreement giving rise to the arbitration, to an arbitrator.

The question presented is:

Whether a dispute over the collateral estoppel effect of a prior arbitration decision must be submitted to and decided by an arbitrator pursuant to the arbitration agreement's broad delegation provisions.

PARTIES TO THE PROCEEDING

Petitioners are Technical Education Services, Inc. d/b/a/ Aviation Institute of Maintenance, Adrian Rothrock, and Gerald Yagen, defendant-appellants below.

Respondent is Steven Pinkerton, plaintiff-appellee below.

RULE 29.6 STATEMENT

Petitioner Technical Education Services, Inc. is a privately held corporation and has no parent corporations, subsidiaries, or affiliates that have issued shares to the public.

STATEMENT OF RELATED CASES

- *Pinkerton v. Technical Education Services, Inc.*, No. SC98894, Supreme Court of Missouri. Order entered March 2, 2021.

- *Pinkerton v. Technical Education Services, Inc.*, No. WD83594, Missouri Court of Appeals, Western District, Division Four. Judgment entered November 24, 2020.

- *Pinkerton v. Technical Education Services, Inc.*, No. 1916-CV20843, Circuit Court of Jackson County, Missouri at Kansas City. Order entered February 11, 2020.

- *State ex rel. Steven Pinkerton v. Hon. Joel P. Fahnestock*, No. SC94822, Supreme Court of Missouri. Judgment entered October 31, 2017.

- *Pinkerton v. Technical Education Services, Inc.*, No. 1416-CV10007, Circuit Court of Jackson County, Missouri at Kansas City. Order entered February 2, 2015.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Technical Education Services, Inc. d/b/a Aviation Institute of Maintenance, Adrian Rothrock, and Gerald Yagen ("AIM") respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Missouri in this case.

OPINIONS BELOW

The March 2, 2021 *en banc* decision of the Supreme Court of Missouri (Docket No. SC98894) to deny AIM's application to transfer the matter from the Missouri Court of Appeals is unreported, but available at 2021 Mo. LEXIS 77, and is included in Appx. at 1a-2a. The November 24, 2020 panel opinion of the Missouri Court of Appeals (Docket No. WD83594) is also unreported, but available at 2020 Mo. App. LEXIS 1475, and is included in Appx. at 3a-29a. The February 11, 2020 decision of the Circuit Court of Jackson County, Missouri (Case No. 1916-CV20843) denying AIM's Motion to Compel Arbitration is unreported, but is included in Appx. at 30a-35a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257. In this case, the Supreme Court of Missouri denied review of the matter on appeal from the Missouri Court of Appeals on March 2, 2021. Thus, for purposes of jurisdiction under 28 U.S.C. § 1257, the opinion and order of the Missouri Court of Appeals is a final, appealable decision. *See Clark v.*

Pennsylvania, 128 U.S. 395, 396 (1888). Under this Court's Order dated March 19, 2020, the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. Accordingly, the deadline to file this petition is July 30, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Arbitration Act, 9 U.S.C. §§ 2–4. *See* Appx. at 109a-112a.

STATEMENT OF THE CASE

This case raises the issue of a court's power to decide threshold issues of arbitrability under the FAA where those issues have been clearly delegated by the parties to an arbitrator. Missouri state courts improperly held that, in the face of an agreement by the Parties to arbitrate all issues, including threshold issues of arbitrability such as collateral estoppel, such arbitrability issues were properly within the purview of the courts.

AIM owns and operates a private educational facility in Kansas City, Missouri. In 2009, Steven Pinkerton ("Pinkerton") emailed AIM to request information about enrolling in one of AIM's programs to become an aircraft mechanic. An admissions representative met with Pinkerton to tour the campus, after which Pinkerton submitted an application for admission to AIM's program. Pinkerton enrolled in

AIM's Aviation Maintenance Technical Engineer ("AMTE") Program, and executed a two-page Student Enrollment Agreement.

In signing the Student Enrollment Agreement, Pinkerton agreed to an arbitration agreement contained therein, which provides:

> **Arbitration Agreement:** I agree that any controversy, claim or dispute of any sort arising out of or relating to matters including, but not limited to: student admission, enrollment, financial obligations and status as a student, which cannot be first resolved by way of applicable internal dispute resolution practices and procedures, shall be submitted for arbitration, to be administered by the American Arbitration Association … in accordance with its commercial arbitration rules.[1] *See* Appx. at 3a.

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[1] As the Supreme Court of Missouri explained in *State ex rel. Pinkerton v. Fahnestock*, "[a]t the time the parties signed the underlying agreement, the 'Commercial Arbitration Rules with Supplementary Procedures for Consumer-Related Disputes' governed consumer arbitration disputes. The 'Supplementary Procedures for Consumer-Related Disputes' provided that the 'AAA's most current rules will be used when the arbitration is started.' In 2014, the AAA replaced the 'Supplementary Procedures for Consumer-Related Disputes' with 'Consumer Arbitration Rules.'" 531 S.W.3d 36, 40 n.2 (Mo. 2017). Those Rules state that "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." American

Nearly six months after his enrollment with AIM, Pinkerton executed a second Student Enrollment Agreement ("2010 Enrollment Agreement"), in which he again agreed to arbitrate any and all disputes related to his enrollment and course of study at AIM. *Id.*

Despite his agreement to arbitrate, Pinkerton filed a lawsuit in 2014 in the Circuit Court of Jackson County, Missouri (Case No. 1416-CV10007) (the "2014 Lawsuit") against AIM. *See* Appx. at 96a. In light of the arbitration agreements, AIM filed a motion to compel arbitration and stay the proceedings. *See id.*

The Circuit Court held that the arbitration agreement contained a valid, enforceable delegation provision and, therefore, threshold questions of arbitrability were delegated to an arbitrator. *Id.* at 108a. Pinkerton appealed, and the Supreme Court of Missouri held that the "arbitration agreement clearly and unmistakably evidences the Parties' intent to delegate threshold questions of arbitrability to the arbitrator," and sustained the Missouri Circuit Court's Order compelling arbitration. Appx. at 36a.

The Parties proceeded to arbitration, where the Arbitrator determined that the arbitration agreement was unenforceable, sending the Parties back to court. *Id.* at 32a. After the court granted

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Arbitration Association, Consumer Arbitration Rules, at 17 (2014).

AIM's motion to dismiss two of Pinkerton's causes of action, Pinkerton voluntarily dismissed the 2014 Lawsuit without prejudice. *Id.* at 32a-33a.

Three days after his voluntary dismissal, on July 26, 2019, Pinkerton filed the instant lawsuit against AIM (the "2019 Lawsuit"), asserting three of the same causes of action originally alleged in the 2014 Lawsuit. *See* Appx. at 32a. AIM filed a Motion to Dismiss or, in the Alternative, to Compel Arbitration and Stay the Proceedings pursuant to the parties' arbitration agreement. *See generally* Appx. at 30a-35a. In response, Pinkerton asserted that the Arbitrator's decision in the prior lawsuit was a final ruling on the *merits*, which precluded AIM from compelling arbitration. The trial court denied AIM's Motion to Compel and held that Defendants were collaterally estopped from compelling arbitration. *Id.* at 33a-34a.

AIM appealed to the Missouri Court of Appeals. *See* Appx. at 3a-29a. On appeal, AIM argued that under the FAA and this Court's precedent, the issue of any collateral estoppel effect of the prior arbitration decision must be submitted to the arbitrator for decision. *Id.* at 9a. The Court of Appeals affirmed the trial court's order, concluding that AIM was estopped from compelling arbitration in light of an Arbitrator's prior determination. *See generally* Appx. at 3a-29a. AIM petitioned the Supreme Court of Missouri to accept transfer of the matter to that court for review, but the Supreme Court of Missouri denied that petition. Appx. at 1a.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I. The Missouri Court of Appeals' Determination Contravenes the FAA and the Decisions of This Court.

Under the Federal Arbitration Act ("FAA"), the decision to arbitrate disputes is strictly a matter of contract between parties. 9 U.S.C. § 2. Indeed, where parties have properly agreed to submit their disputes to an arbitrator, a court must stay its proceedings in the matter and compel arbitration upon motion of one of the parties. *Id.* § 3. Courts have no discretion under the FAA to deny a motion to compel arbitration where the parties have agreed to submit the dispute at hand to arbitration. *Id.*; *see also Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

This Court has made clear that "parties can agree to arbitrate 'gateway' questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy" by way of a delegation clause. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010); *see also Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019). This Court has also noted that questions of arbitrability include "prerequisites such as time limits, notice, laches, *estoppel*, and other conditions precedent to an obligation to arbitrate." *Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 85 (2002) (quoting Revised Uniform Ar-

bitration Act of 2000 § 6, comment 2) (emphasis added). Such issues are those which the parties would ordinarily expect a court to decide. *Id.* at 84. Collateral estoppel is one such issue, but one which the parties delegated in their contract to an arbitrator for decision.

In this case, the Parties agreed to delegate any threshold questions of arbitrability to an arbitrator by incorporating the AAA Commercial Rules into their arbitration agreements. As this Court has stated, threshold questions of arbitrability include claims of estoppel, and the FAA obligates the Missouri trial court to compel arbitration. The question of whether a previous arbitrator's decision on a preliminary issue, not a final decision on the merits, in a prior lawsuit operates to foreclose arbitration is one for an arbitrator, not the trial court. The Missouri Court of Appeals therefore erred when it affirmed the trial court's order denying AIM's motion to compel arbitration.

This Court should grant this petition and issue a writ of certiorari to correct the error of the Missouri courts. This case presents an opportunity for this Court to clarify the contours of the FAA's mandate, and make clear that where the parties' agreement stipulates that they intend to arbitrate threshold issues of arbitrability, the trial court is divested of jurisdiction to decide such issues. This Court should grant this Petition to clarify that, pursuant to the FAA, where the parties have agreed to do so, a preliminary issue of collateral estoppel must be submitted to an arbitrator for determination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment of the Missouri Court of Appeals should be reversed.

Respectfully submitted,

Thomas M. Lucas
Counsel of Record
JACKSON LEWIS P.C.
500 E. Main Street, Suite 800
Norfolk, Virginia 23510
(757) 648-1445
thomas.lucas@jacksonlewis.com

Counsel for Petitioners

APPENDIX

APPENDIX A — DENIAL OF REVIEW OF THE SUPREME COURT OF MISSOURI, DATED MARCH 2, 2021

SUPREME COURT OF MISSOURI
En Banc

SC98894
WD83594

January Session, 2021

STEVEN PINKERTON,

Respondent,

vs.

TECHNICAL EDUCATION SERVICES, INC.,

Appellant.

Now at this day, on consideration of the Appellants' application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Betsy AuBuchon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2021, and on the 2nd day of March, 2021, in the above-entitled cause.

Appendix A

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court, at my office in the City of Jefferson, this 2nd day of March, 2021.

/s/_____, Clerk

/s/_____, Deputy Clerk

APPENDIX B — OPINION OF THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT, DIVISION FOUR, FILED NOVEMBER 24, 2020

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT
DIVISION FOUR

DOCKET NUMBER WD83594

STEVEN PINKERTON,

Respondent,

v.

TECHNICAL EDUCATION SERVICES, INC.,

Appellant.

November 24, 2020, Decided
November 24, 2020, Opinion Filed

Appeal from the Circuit Court of Jackson County, Missouri. The Honorable Patrick W. Campbell, Judge.

Before Division Four: Cynthia L. Martin, Chief Judge, Presiding, Karen King Mitchell, Judge and Anthony Rex Gabbert, Judge

Technical Education Services Inc., an affiliate of Aviation Institute of Maintenance, et al., ("AIM"), appeals the trial court's order denying AIM's motion to dismiss,

or in the alternative, to compel arbitration.[1] AIM asserts three points on appeal challenging the trial court's determination that AIM is collaterally estopped from seeking to compel arbitration. We affirm the trial court's order.

Factual and Procedural Background

AIM, a Virginia-based corporation, operates aviation maintenance trade schools throughout the United States, one of which is located in Kansas City, Missouri. In 2009, Steven Pinkerton ("Pinkerton") enrolled at AIM's Kansas City, Missouri trade school. In doing so, he signed an enrollment agreement which included an arbitration provision that provided as follows:

> **Arbitration Agreement:** I agree that any controversy, claim or dispute of any sort arising out of or relating to matters including, but not limited to: student admission, enrollment, financial obligations and status as a student, which cannot be first resolved by way of applicable internal dispute resolution practices and procedures, shall be submitted for arbitration, to be administered by the American Arbitration Association located within Virginia Beach, Virginia, in accordance with its commercial arbitration rules. All fees and expenses of arbitration shall be shared

1. An order denying a motion to compel arbitration is appealable under section 435.440.

> equally and any award rendered in favor of a student will be limited to the total amount paid to the School by the student. Any award or determination rendered by the arbitrator(s) shall be final and entered as a judgment by a court of competent jurisdiction.

Six months later, Pinkerton signed a new enrollment agreement when he switched to a different program within AIM's school. The new enrollment agreement contained the same arbitration provision.

In 2014, Pinkerton filed a lawsuit in the Circuit Court of Jackson County, Missouri, against AIM; Adrian Rothrock, an admissions representative; and W. Gerald Yagen, the school's owner, alleging the school engaged in deception, misrepresentation, and fraud. AIM moved to dismiss the suit, or in the alternative, to compel arbitration and stay the proceedings. AIM contended that the arbitration provision required delegation to an arbitrator of all threshold arbitrability disputes, including whether the arbitration clause is enforceable. The trial court granted AIM's motion to compel arbitration, concluding that the arbitration provision required delegation of threshold arbitrability disputes to an arbitrator, including Pinkerton's contention that the arbitration provision was unenforceable because it was unconscionable.

Pinkerton sought a writ of prohibition from the Missouri Supreme Court to require the trial court to overrule the motion to compel arbitration because he had raised issues involving the validity and enforceability of

the arbitration provision that could not be delegated to an arbitrator for determination. *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 39-40 (Mo. banc 2017). The Supreme Court found that "[t]he arbitration agreement clearly and unmistakably evidence[d] the parties' intent to delegate threshold issues of arbitrability to the arbitrator," and that the trial court properly sustained AIM's motion to compel arbitration. *Id.* at 53. The Supreme Court thus ordered the parties to proceed to arbitration. *Id.*

Pinkerton's lawsuit proceeded to arbitration. Pinkerton and AIM jointly selected the Honorable Gary Oxenhandler to serve as the arbitrator. On November 15, 2018, Judge Oxenhandler issued an arbitrator's decision denoted as a "judgment" which ruled that:

> Arbitration is supposed to be a fair process, a process that affords all parties the process they are due. Such is not the case here. For the reasons stated above, the Arbitrator finds the Arbitration Agreement unconscionable and unenforceable. This case is remanded to the Courts for appropriate action. Arbitration dismissed.

Pinkerton filed the arbitrator's decision with the trial court as an attachment to a motion to lift the stay of proceedings imposed when arbitration had been compelled. AIM did not oppose lifting the stay, and did not challenge the arbitration decision. The trial court granted Pinkerton's motion, lifted its stay, and the parties resumed litigation of Pinkerton's lawsuit in the trial court.

Appendix B

On July 23, 2019, Pinkerton voluntarily dismissed his lawsuit without prejudice pursuant to Rule 67.02.[2] Three days later, Pinkerton re-filed his lawsuit, naming the same parties and asserting the same causes of action as had been asserted in his original lawsuit filed in 2014.

AIM once again moved to dismiss, or alternatively, to compel arbitration and stay the proceedings. AIM argued that the arbitration provision in the enrollment agreement was enforceable and that any challenges to enforceability of the provision had been delegated to the arbitrator for determination. Pinkerton argued that AIM was collaterally estopped from seeking to compel arbitration because an arbitrator had already found the arbitration provision to be unconscionable and unenforceable. AIM argued it was not collaterally estopped from seeking to compel arbitration because the arbitrator's decision was not a final judgment, and because Pinkerton's voluntary dismissal of the 2014 lawsuit "wipe[d] the slate clean," negating any preclusive effect of the arbitrator's decision.

The trial court denied AIM's motion to compel arbitration. The trial judge found that for purposes of collateral estoppel, the pertinent issue was whether the arbitration provision was enforceable, and that "[t]he prior action resulted in a final, valid judgment on *that* issue" when the arbitrator issued his decision. The trial court

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2. All Rule references are to *Missouri Court Rules, Volume I -- State 2019* unless otherwise noted. Rule 67.02 permits the plaintiff in a lawsuit to voluntarily dismiss his or her lawsuit without prejudice, without order of the court, prior to the swearing of a jury in a jury tried matter, or before the introduction of evidence at trial in a court tried matter.

also found that Pinkerton had established the remaining elements of collateral estoppel. Thus, the trial court concluded that AIM was collaterally estopped from seeking to compel arbitration because the arbitration provision had been determined to be unenforceable. The trial court also concluded that Pinkerton's voluntary dismissal of the 2014 lawsuit did not negate the preclusive effect of the "valid final judgment regarding the enforceability of the arbitration provision."

AIM appeals.

Standard of Review

"We review the circuit court's denial of a motion to compel arbitration *de novo*." *Fogelsong v. Joe Machens Auto. Group Inc.*, 600 S.W.3d 288, 293 (Mo. App. W.D. 2020) (citing *Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 113 (Mo. banc 2018). "Upon such review, we must first determine whether a valid arbitration agreement exists." *Sniezek v. Kansas City Chiefs Football Club*, 402 S.W.3d 580, 583 (Mo. App. W.D. 2013) (citing *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006). If the trial court's ruling on the motion to compel arbitration includes "factual findings that bear on the existence, scope, or revocability of the arbitration agreement, then we will affirm the factual findings if they are supported by substantial evidence and are not against the weight of the evidence." *Id.* (citing *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 736 (Mo. App. W.D. 2011). The party asserting the existence of a valid and enforceable contract to arbitrate bears the burden of proving that proposition. *Id.*

Appendix B

Analysis

AIM raises three points on appeal challenging the trial court's conclusion that AIM was collaterally estopped from seeking to compel arbitration. In its first point, AIM argues that the trial court committed legal error because collateral estoppel is an issue of arbitrability which had been delegated to the arbitrator for determination. AIM's second point asserts that even if the trial court properly determined the issue of collateral estoppel instead of referring that matter to arbitration, the trial court erred because the arbitrator's decision was not a final judgment on the merits. In its third point, AIM claims that the trial court erred in concluding that Pinkerton's voluntary dismissal of the 2014 lawsuit did not negate the preclusive effect, if any, of the arbitrator's decision. We address the points in turn.

Point One: Because the arbitrator's decision controls whether an arbitration agreement exists between Pinkerton and AIM, the trial court properly determined the collateral estoppel effect of the arbitrator's decision

It is uncontested that the arbitration provision AIM now seeks to enforce was determined by an arbitrator to be unenforceable in connection with Pinkerton's 2014 lawsuit. In other words, an arbitrator previously determined that no valid arbitration agreement exists between the parties because the arbitration provision was unconscionable. "Arbitration is a matter of contract under the Federal Arbitration Act (FAA)." *Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 114 (Mo. banc 2018) (citing *AT&T*

Mobility, LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). "'[A] party cannot be required to arbitrate a dispute that it has not agreed to arbitrate[,]' and arbitration will only be compelled where 'a valid arbitration agreement exists . . . .'" *Hughes v. Ancestry.com*, 580 S.W.3d 42, 47 (Mo. App. W.D. 2019) (quoting *NutraPet Sys., LLC v. Proviera Biotech, LLC*, 542 S.W.3d 410, 413-14 (Mo. App. W.D. 2017).

As such, the ultimate issue we must resolve is the preclusive effect of the arbitrator's decision that no valid arbitration agreement exists between Pinkerton and AIM. However, the initial issue we must resolve is who, as between an arbitrator and the trial court, was required to determine the preclusive effect of the arbitrator's decision. AIM views the preclusive effect of the arbitrator's decision as an issue of enforceability of an arbitration agreement that must be determined by an arbitrator based on the arbitration agreement's delegation language. *See Pinkerton*, 531 S.W.3d at 53. Pinkerton contends that the trial court was required to determine the preclusive effect of the arbitrator's decision because a trial court must first determine that an agreement to arbitrate exists before it can delegate matters regarding enforceability of the agreement to an arbitrator for determination. *See Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 440 (Mo. banc 2020) ("[T]he circuit court cannot delegate [a] matter to an arbitrator whose very existence depends upon an agreement."). We conclude that *Theroff* controls the resolution of this dispute, and that because the preclusive effect of the arbitrator's decision will control whether an arbitration agreement exists, the trial court properly

determined whether AIM was collaterally estopped by the arbitrator's decision.

In *Theroff*, the Supreme Court held that in the absence of an agreement to arbitrate, a delegation provision is not effective. *Id.* at 439-40. The Court was reviewing a trial court's refusal to compel arbitration where the party opposing arbitration, who was blind, denied affixing her digital signature to documents at the time she was hired, and alleged that the employer's representative did so without her assent, as the nature of the documents were not explained to her. *Id.* at 435. Though it was uncontested that the documents included an arbitration provision, whether the employee assented to the arbitration provision by affixing her digital signature was contested. *Id.* at 437. The Court framed the issue before it as one of first impression, and noted that "[u]nlike the standard scenario in which there is no dispute about whether a party signed an arbitration agreement, when a party disputes signing, the court must first decide the existence of an agreement to arbitrate." *Id.* (citing *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 854 (11th Cir. 1992) (noting that the trial court must determine in first instance whether an agreement to arbitrate exists where signature is contested) (abrogated on other grounds by *Larsen v. Citibank FSB*, 871 F.3d 1295, 1303 n.1 (11th Cir. 2017)). Noting that Theroff challenged the existence of *any* agreement to arbitrate, the Supreme Court concluded that because the "existence of the agreement to arbitrate is a prerequisite to compelling arbitration," the trial court properly determined this issue. *Id.* at 439.

The decision in *Theroff* was not unanimous. In one dissenting opinion, a minority of the court held that a controversy over signature is a contract formation issue that must be referred to the arbitrator in the presence of an unchallenged delegation provision in the arbitration agreement. *Id.* at 442-46 (Powell, J., dissenting). In a separate dissent, a minority of the court wrote separately to emphasize that assent to a contract, whether challenged based on signature or otherwise, is always a contract formation issue, and that the delegation provision in Theroff's arbitration agreement expressly delegated to an arbitrator disputes involving contract formation. *Id.* at 446-48 (Fischer, J., dissenting). We believe, however, that the circumstances in this case are even more compelling than those in *Theroff*. Here, an arbitrator determined that the arbitration provision included in the enrollment agreement Pinkerton signed was not enforceable, and thus that no valid agreement to arbitrate existed. If the arbitrator's decision binds AIM, then there exists no valid arbitration agreement to enforce, including the agreement's delegation provision. Consistent with *Theroff*, where the very existence of an arbitration agreement is challenged, it is for the trial court to make that determination and not an arbitrator. In fact, this result is compelled by section 435.355.1 which provides that:

> On application of a party showing an agreement described in section 435.350, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, ***but if the opposing party denies the existence of the agreement to arbitrate, the court shall***

> ***proceed summarily to the determination of the issue so raised . . . .***

(Emphasis added.)

AIM disregards *Theroff*, and insists that the preclusive effect of the arbitrator's decision had to be determined by the arbitrator. AIM relies on *Melnuk v. Hillman*, a recent opinion which held, as a matter of first impression, that an arbitrator, rather than the trial court, was required to decide the collateral estoppel effect of a previous arbitration award on a second arbitration demand. 593 S.W.3d 674, 681 (Mo. App. E.D. 2020). But AIM's reliance on *Melnuk* is misplaced. *Melnuk* did not hold that the collateral estoppel effect of a prior arbitration decision must always be determined by an arbitrator in the face of a second arbitration demand. More importantly, *Melnuk* did not involve a scenario where the collateral estoppel effect of an earlier arbitration decision was central to determining whether an arbitration agreement even exists.

In *Melnuk*, the owners of a limited liability company entered into a buy-sell agreement where Hillman agreed to purchase Melnuk's 50% interest. *Id.* at 676. The buy-sell agreement and the operating agreement for the limited liability company each contained an arbitration provision. *Id.* at 677. The buy-sell agreement contemplated that Hillman would give Melnuk a promissory note for a portion of the purchase price, and that the note balance could be adjusted by subsequent contingent liabilities. *Id.* at 676. One such liability involved amounts paid to key employees

pursuant to a phantom option plan in the event of any change of control of ownership. *Id.* The "change of control" provision in the phantom option plan was modified after the buy-sell agreement was entered into from "greater than fifty percent" to "fifty percent or more." *Id.* at 676-77. As a result, nearly $300,000 was paid out by Hillman to key employees, and Hillman notified Melnuk that the balance Hillman owed on the promissory note was being correspondingly reduced. *Id.* at 677. Melnuk disagreed with the adjustment, and claimed he had not signed the amendment to the phantom option plan modifying the definition of "change of control." *Id.*

Hillman initiated an arbitration proceeding seeking a declaratory judgment that the "change of control" contingent liability adjustments were valid under the buy sell agreement. *Id.* at 677-78. Melnuk denied the validity of the change of control adjustments, and also asserted counterclaims seeking upward adjustments of the promissory note balance for reasons unrelated to the change of control payments. *Id.* at 678. The arbitrator entered an arbitration award which stated that the issues presented in the arbitration were "ten potential adjustments" of the principal amount owed by Hillman to Melnuk on the promissory note. *Id.* The arbitrator concluded that the moneys paid to key employees "met the contractual definition of a contingent liability adjustment" in the promissory note, resulting in a reduction of the amount due on the note. *Id.* However, the arbitrator expressly noted in the award that no opinion was being expressed as to whether Melnuk might have a claim for breach of fiduciary duty or some other cause of action

relating to improper modification of the "change of control provision," and noted that such claims were "beyond the scope of this arbitration." *Id.*

The arbitrator's award was confirmed in early 2018. *Id.* Almost a year later, Melnuk filed a lawsuit seeking damages from Hillman on theories of breach of fiduciary duty, fraud, and conspiracy arising out of the alleged unauthorized amendment of the "change of control" provision in the phantom option plan. *Id.* Hillman moved to compel arbitration. *Id.* Melnuk argued the earlier arbitration award determined that his claims were beyond the scope of the arbitration clauses in the parties' operating and buy/sell agreements. *Id.* at 678-79. Neither party contested the existence of an arbitration agreement. The only issue was whether the scope of the arbitration agreement had been resolved by the earlier arbitrator's decision.

The trial court denied Hillman's motion to compel arbitration. *Id.* at 679. On appeal, the Eastern District characterized the dispute between the parties as whether Hillman was collaterally estopped by the arbitration award to compel a second arbitration. *Id.* Specifically, the parties disputed whether the arbitrability of Melnuk's damage claims had been decided by the first arbitration award, and whether an arbitrator or the court should determine this issue. *Id.* at 680.

The Eastern District noted that determining whether an arbitrator or a court should "determine[] the collateral estoppel effect of a prior arbitration award . . . is an issue

of first impression." *Id.* After analyzing federal decisions relevant to the issue, the court concluded that "[a]n arbitrator must decide whether Hillman is collaterally estopped by the [earlier arbitration award] from compelling arbitration of Melnuk's claims for damages ***not because the parties agreed to submit threshold questions of arbitrability to an arbitrator*** but because evaluating Melnuk's collateral estoppel defense is a 'procedural question[] which grow[s] out of the dispute and bear[s] on its final disposition.'" *Id.* at 682 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84-85, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)) (emphasis added).

Melnuk thus cannot be read as urged by AIM for the proposition that an affirmative defense raising the collateral estoppel effect of an earlier arbitration award must always be referred for determination by an arbitrator pursuant to a delegation provision. In fact, *Melnuk* expressly dispels this conclusion. At best, *Melnuk* simply holds that "the merits of an argument challenging the scope of the issues resolved in a prior arbitration award 'must be presented to and resolved by [a] . . . second arbitration proceeding.'" *Id.* at 681 (quoting *W & T Travel Servs., LLC v. Priority One Servs., Inc.*, 69 F. Supp. 3d 158, 171 (D.D.C. 2014)).

Here, there is no dispute regarding the scope of the issues resolved by the prior arbitration award. The parties agree that the prior arbitration award determined the enforceability of the arbitration provision in the enrollment agreement by concluding the provision was unenforceable because it was unconscionable. The exact

same issue is now framed by Pinkerton's opposition to AIM's motion to compel arbitration in Pinkerton's re-filed case.[3] *Melnuk* is therefore of no assistance to AIM as it did not address whether an arbitration agreement exists. Instead, because the trial court first had to determine that an arbitration agreement existed before it could compel arbitration in Pinkerton's refiled case, the trial court did not err in determining the collateral estoppel effect of the arbitrator's decision on that very issue.

AIM's first point on appeal is denied.

Point Two: The arbitrator's decision was a judgment on the merits

AIM next argues that even if the trial court properly determined the preclusive effect of the prior arbitration decision instead of referring that issue to an arbitrator, the trial court erroneously found the arbitrator's decision collaterally estopped AIM because the arbitrator's decision was not a judgment on the merits.

"'Collateral estoppel, or issue preclusion, is used to preclude the relitigation of an issue that already has been decided in a different cause of action.'" *Matter of Invenergy Transmission LLC*, 604 S.W.3d 634, 639 (Mo. App. W.D. 2020) (quoting *Brown v. Carnahan*, 370 S.W.3d 637, 658 (Mo. banc 2012). Four elements must be shown in order to give a prior adjudication preclusive effect:

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3. In its second point on appeal, AIM concedes that the issue is the enforceability of the arbitration agreement.

> (1) the issue decided in the prior action was identical to the issue presented in the later action; (2) the prior action resulted in a judgment on the merits;[4] (3) the party against whom estoppel is asserted was a party or was in privity with a party to the prior action; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action.

U-Haul Company of Missouri v. Carter, 567 S.W.3d 680, 684 (Mo. App. W.D. 2019) (citing *James v. Paul*, 49 S.W.3d 678, 682 (Mo. banc 2001). AIM concedes that only the second element, whether the prior adjudication resulted in a judgment on the merits, is at issue in this case.[5]

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4. Some Missouri cases add the word "final" before the word judgment in describing this element. *See, e.g., Fischer ex rel. Scarborough v. Fischer*, 34 S.W.3d 263, 265 (Mo. App. W.D. 2000). As we explain, however, inclusion of the word "final" is immaterial. What matters is whether a determination that is binding on the parties has been made on an issue--not whether the determination is "final" as in final for purposes of appeal.

5. We agree that the trial court correctly concluded that the remaining three elements for collateral estoppel have been established. The issue decided in the arbitration proceeding was enforceability of the arbitration agreement, and this is the identical issue presented to us. Further, the parties are identical, and AIM had a full and fair opportunity to litigate the issue in arbitration. Therefore, we analyze whether the prior arbitration resulted in a judgment on the merits.

Appendix B

"'For the purposes of collateral estoppel, an arbitration award may constitute a final judgment on the merits.'" *Melnuk*, 593 S.W.3d at 680 (quoting *Graybar Elec. Co., Inc. v. Federal Ins. Co.*, 567 F. Supp. 2d 1116, 1123 (E.D. Mo. 2008). AIM acknowledges this point, but asserts that the arbitrator's decision was not a "merits" decision, and thus cannot constitute a judgment on the merits for purposes of collateral estoppel. AIM relies on *State v. Purvis* to contend that the arbitrator merely decided where Pinkerton's dispute should be litigated, and was thus not a judgment on the merits because it was a "judgment rendered upon some preliminary or merely technical point, or by default, and without trial." 739 S.W.2d 589, 591 (Mo. App. S.D. 1987).

Purvis is readily distinguishable. In *Purvis*, the Southern District concluded that the State was not collaterally estopped to prove probable cause in a driving while intoxicated case even though an administrative hearing officer determined in a related license suspension proceeding that there was "no evidence in [the] file on probable cause." *Id.* at 590-91. The Southern District concluded that the administrative hearing officer's decision was ambiguous, as it could not be determined whether the hearing officer weighed evidence to find, on the merits, that probable cause was not established, or instead concluded that probable cause was not demonstrated because a statutory requirement relevant only to administrative suspension proceedings had not been satisfied. *Id.* Because it was impossible to say that in making a probable cause finding, the hearing officer relied on anything "other than the preliminary and technical

basis of deficiencies in the arresting officer's report," the court declined to treat the hearing officer's decision as a judgment on the merits. *Id.* at 591.

In stark contrast, the arbitrator's decision entered in connection with Pinkerton's 2014 lawsuit was plainly a determination on the merits regarding the enforceability of the parties' arbitration agreement. The arbitrator dismissed the arbitration proceeding after finding there was no valid arbitration agreement to enforce because the agreement was unconscionable. This was not a preliminary or technical determination, but a substantive determination on an ultimate issue that AIM insisted be heard by an arbitrator. *Purvis* is of no assistance to AIM.[6]

AIM next argues that even if the arbitrator's decision was on the merits, it was not a judgment. AIM relies on *State ex rel. Henderson v. Asel*, where our Supreme Court addressed what constitutes a judgment, and held that "a judgment is a legally enforceable judicial order that fully resolves at least one claim in a lawsuit and establishes all the rights and liabilities of the parties with respect to that claim." 566 S.W.3d 596, 598 (Mo. banc 2019). AIM argues

6. AIM also relies on *Med. Shoppe Int'l, Inc. v. J-Pral Corp.*, 662 S.W.2d 263, 275 (Mo. App. E.D. 1983), as additional support for the proposition attributed to *Purvis*. AIM's reliance is misplaced. *Medicine Shoppe Int'l* simply concluded that J-Pral Corporation was not collaterally estopped from raising the issue of personal jurisdiction because, when the trial court dismissed Medicine Shoppe's petition for want of personal jurisdiction, "no decision on the merits" on the issue of personal jurisdiction had yet been entered by the arbitration tribunal. *Id.*

that the arbitrator's decision was not a judicial order, and therefore cannot be a "judgment" on the merits. AIM's argument disregards authority for the proposition that an arbitration award may constitute a judgment on the merits for purposes of collateral estoppel. *See Melnuk*, 593 S.W.3d at 680. Moreover, while *Henderson* refers to a judgment as a "judicial order," it did so in the context of addressing when a judgment is appealable. 566 S.W.3d at 598-99. *Henderson* did not address what constitutes a judgment for purposes of collateral estoppel, and cannot be read to limit "judgments" for that purpose to judicial orders.[7]

Finally, AIM argues that other courts have ruled that "a decision on a motion to compel arbitration is not a final judgment on the merits that gives rise to collateral estoppel." *Pearson v. P.F. Chang's Bistro, Inc.*, No. 13-cv-2009-JLS, 2015 U.S. Dist. LEXIS 184157, 2015 WL 12910914, at *4 n.4 (S.D. Cal. Feb. 23, 2015); *Lotsoff v. Wells Fargo Bank*, No. 18-cv-02033-AJB-JLB, 2019 U.S. Dist. LEXIS 169373, 2019 WL 4747667, at *4 (S.D. Cal. Sept. 30, 2019). Neither case is binding on this court. *Fogelsong*, 600 S.W.3d at 295 n.3 ("This Court is not bound

7. AIM also relies on our Supreme Court's conclusion that an order sustaining partial summary judgment on only some issues in a case, including issues of arbitrability and consideration, "was not a final judgment" for purposes of appeal. *Sanford v. CenturyTel of Mo., LLC*, 490 S.W.3d 717, 719 (Mo. banc 2016). However, as with *Henderson*, a discussion of when judgments are appealable cannot be fairly read to either contemplate, or be controlling on, the issue of what constitutes a judgment on the merits for purposes of collateral estoppel.

by the decisions of federal district courts.") (citing *Godat v. Mercantile Bank of Nw. Cty.*, 884 S.W.2d 1, 4 n.1 (Mo. App. E.D. 1994)). In any event, both decisions are readily distinguishable. Though *Pearson* noted in a footnote that a state court's order denying a defendant's motion to compel arbitration was not a "final judgment on the merits" supporting collateral estoppel in the same plaintiff's later filed federal court action, there is no basis from this vague reference to determine the basis for the state court's order, and more importantly, whether the order found there to be no valid arbitration agreement in existence. 2015 U.S. Dist. LEXIS 184157, 2015 WL 12910914, at *4 n.4. And though *Lotsoff* rejected a plaintiff's argument that the defendant was collaterally estopped to compel arbitration where the same arbitration provision had been declared unenforceable, it is plain that the "enforceability" determination was not only made in another case involving different parties, but as well that the determination was not yet final and was being appealed. 2019 U.S. Dist. LEXIS 169373, 2019 WL 4747667, at *4.

We conclude that the arbitrator's decision finding the arbitration provision in the enrollment agreement to be unenforceable was a judgment on the merits. This conclusion is supported by *Cooper v. Yellow Freight System, Inc.*, 589 S.W.2d 643, 645 (Mo. App. E.D. 1979), and by *Pratt v. Purcell Tire & Rubber Co.*, 846 S.W.2d 230, 233 (Mo. App. E.D. 1993), both of which expressly addressed the preclusive effect of a previous arbitrator's decision, and both of which concluded that "where there has been a final and binding arbitration between the parties," the facts determined in the arbitration proceeding may not

be relitigated. *Pratt*, 846 S.W.2d at 233 (citing *Cooper*, 589 S.W.2d at 645).

In *Cooper*, a trucking company terminated a driver for reckless driving resulting in an accident, and an arbitration proceeding sustained the termination on the same grounds. 589 S.W.2d at 644. The driver then filed suit, alleging, *inter alia*, that the reason provided for his termination was false because he did not drive recklessly resulting in an accident. *Id.* The Eastern District affirmed the trial court's grant of summary judgment for the defendant because the issue of whether or not the driver drove recklessly, was "the identical issue litigated by the two parties" in arbitration, and collateral estopped therefore barred the driver from relitigating the issue. *Id.* at 645 ("[i]f the procedure used to settle the dispute is one of the party's own choosing, as it was here, and was a final and binding arbitration between the parties, the courts may not relitigate facts determined in the arbitration proceeding.")

Similarly, in *Pratt*, a mechanic alleged, in both an arbitration proceeding and in a suit for damages, that his former employer denied his reinstatement in retaliation after he filed a workers' compensation claim. 846 S.W.2d at 230. The issue presented to the arbitrator was whether the employer had unjustly refused to allow the mechanic to return to work. *Id.* at 232. The arbitrator found that the employer had not acted in a discriminatory manner. *Id.* The Eastern District affirmed the trial court's subsequent grant of summary judgment in the employer's favor on the grounds that collateral estoppel precluded relitigating the

reason for the employer's refusal to reinstate the mechanic because the same issue had already been litigated by the parties in a final and binding arbitration proceeding. *Id.* at 233 (citing *Cooper*, 589 S.W.2d at 645).

Cooper and *Pratt* thus hold that when a specific issue has been litigated in an arbitration proceeding, and where the arbitrator's decision expressly resolves that issue, the parties are collaterally estopped from relitigating the same issue in a subsequent proceeding. Not surprisingly, the Eastern District in *Melnuk* acknowledged this precedent, and differentiated the circumstances in *Melnuk* (where the scope of what was determined in a prior arbitration was contested) from the circumstances in *Cooper* and *Pratt*, thus reinforcing that "a party is barred from asserting a claim identically presented and determined in a prior arbitration proceeding." 593 S.W.3d at 682 (citing *Cooper*, 589 S.W.2d at 645; *Pratt*, 846 S.W.2d at 233).

Here, AIM moved to compel arbitration in Pinkerton's 2014 lawsuit. In response, Pinkerton generally challenged the validity of the arbitration agreement and specifically challenged the validity of the delegation provision. Our Supreme Court found the arbitration agreement to "clearly and unmistakably evidence the parties' intent to delegate threshold issues of arbitrability to the arbitrator." *Pinkerton*, 531 S.W.3d at 53. The Court thus ordered the parties to proceed to arbitration, after concluding that the delegation provision was valid and enforceable under the FAA "'leaving any challenge to the validity of the [a]greement as a whole,' or to the other provisions within

the arbitration agreement, 'for the arbitrator.'" *Id.* at 52-53 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)). The parties thereafter agreed upon an arbitrator, and that arbitrator subsequently issued a written decision, denominated a judgment, which finally concluded that the arbitration agreement was unconscionable and unenforceable, requiring dismissal of the arbitration proceeding. AIM did not challenge the arbitrator's determination, and did not oppose Pinkerton's filing of the arbitrator's decision with the trial court in connection with a request to lift the stay of proceedings. The arbitrator's decision finally resolved the issue of enforceability of the arbitration agreement, and constitutes a judgment on the merits with respect to that issue. The trial court properly concluded that AIM is collaterally estopped to relitigate that issue in Pinkerton's re-filed lawsuit.

Point two on appeal is denied.

Point Three: Pinkerton's voluntary dismissal of his 2014 lawsuit without prejudice did not vacate the arbitrator's decision

Finally, AIM contends that even if the trial court properly concluded that the arbitrator's decision was a judgment on the merits, when Pinkerton voluntarily dismissed the 2014 lawsuit, his action "wiped the slate clean" as if Pinkerton never brought the 2014 lawsuit, and thus vacated the arbitrator's decision.

AIM relies on *Williams v. Southern Union Co.*, 364 S.W.3d 228, 235 (Mo. App. W.D. 2011). In *Williams*, the trial court partially sustained a defendant's motion to dismiss two of the plaintiff's claims. *Id.* at 230. The plaintiff subsequently dismissed the lawsuit without prejudice pursuant to Rule 67.02, and then refiled the suit, reasserting the previously dismissed claims. *Id.* at 230-31. We found that the plaintiff was not collaterally estopped to reassert the previously dismissed claims because her voluntary dismissal of the initial lawsuit "wiped the slate clean," as if the suit had never been filed. *Id.* at 234-35. Central to this holding, however, is the fact that pursuant to Rule 74.01(b):

> [A]ny order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form or decision is subject to revision at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties.

Thus, our reference to "wiping the slate clean" in connection with the plaintiff's voluntary dismissal of the initial lawsuit without prejudice pursuant to Rule 67.02 simply acknowledged that interlocutory rulings by a trial court have no preclusive effect in a refiled lawsuit because they did not yet have a preclusive effect in the initial lawsuit.[8]

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8. AIM similarly relies on *Lewis v. Department of Social Services*, 61 S.W.3d 248, 256 n.4 (Mo. App. W.D. 2001). In *Lewis*, our

In contrast, the arbitration compelled by AIM in Pinkerton's 2014 lawsuit was a distinct and independent proceeding. It resulted in a final decision that resolved all issues before the arbitrator by virtue of the arbitrator's conclusion that the arbitration agreement was unenforceable. The arbitrator's decision was final, and was not subject to revision by the trial court. *See Cornerstone Propane, L.P. v. Precision Investments, L.L.C.*, 126 S.W.3d 419, 423-24 (Mo. App. S.D. 2004) (quoting *R.L. Hulett & Co. v. Barth*, 884 S.W.2d 309, 311 (Mo. App. E.D. 1994) ("[a]n arbitration award . . . finally concludes and binds the parties on the merits of all matters properly within the scope of the award, both as to law and facts, and the courts will have no inquiry as to whether the determination thereon was right or wrong, for the purposes of interfering with the award."). Moreover, AIM did not challenge the

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court evaluated potential error in the modification of a child support award, rather than collateral estoppel; however, in a footnote, our court explained that:

> [a]lthough the order of the probate judge is contained in the record and reference is made to the order, this court notes that the findings contained therein are not binding on . . . this court. The collateral estoppel doctrine prohibits relitigation of an issue only if, *inter alia*, there has been a final judgment on the merits. *Fischer ex rel. Scarborough v. Fischer*, 34 S.W.3d 263, 264 (Mo. App. 2000). Since Mr. Lewis voluntarily dismissed his motion for modification of visitation and child support prior to final adjudication, the order of the probate judge does not constitute a final judgment on the merits.

Id. As with *Williams*, the court's comments merely recognize that interlocutory rulings by a trial court do not have preclusive effect because they remain subject to change.

arbitrator's decision. Pinkerton's motion to lift the stay of proceedings attached the arbitrator's decision. Though Pinkerton's motion was not expressly titled as a motion to confirm the arbitrator's decision, the motion's success depended on recognition of the arbitration award as final and binding, as the trial court could not otherwise have lifted the stay and proceeded with Pinkerton's lawsuit. *See Pinkerton*, 531 S.W.3d at 53. (ordering the parties to arbitrate Pinkerton's lawsuit, including Pinkerton's claims regarding enforceability of the arbitration agreement). AIM could have challenged the arbitrator's decision by moving to vacate or modify the decision as authorized by 9 U.S.C. section 9 pursuant to one of the limited grounds described in 9 U.S.C. sections 10 and 11. AIM did not do so, leaving the trial court with no authority but to abide by the arbitrator's decision. *See, e.g., Lobel Fin. Inc. v. Bothel*, 570 S.W.3d 87, 91 (Mo. App. W.D. 2018) (observing that a trial court has no authority but to confirm an arbitration award unless the award is vacated or modified or corrected as provided by 9 U.S.C. sections 10 and 11); *Cargill v. Poeppelmeyer*, 328 S.W.3d 774, 776 (Mo. App. S.D. 2010) (holding that a "court must confirm [an arbitration] award unless the opposing party moves to vacate or modify the award," and that "the party challenging an arbitration award has the burden of demonstrating that the award is not valid.").

Pinkerton's subsequent decision to voluntarily dismiss his lawsuit without prejudice did not operate to vacate the arbitrator's decision fully and finally resolving the arbitration proceeding. AIM's argument to the contrary suggests a party has the power to unilaterally vacate an

arbitrator's final decision by voluntarily dismissing related litigation. There is no authority for that proposition, which would frustrate the primary purpose of arbitration to efficiently reach a final and binding decision. *See Decker v. Kamil*, 100 S.W.3d 115, 117 (Mo. App. E.D. 2003).

The trial court did not err in concluding that Pinkerton's voluntary dismissal without prejudice pursuant to Rule 67.02 did not "wipe the slate clean" of the arbitrator's final decision regarding the enforceability of the arbitration agreement.

Point Three on appeal is denied.

Conclusion

The trial court's order refusing to compel arbitration is affirmed.

/s/ Cynthia L. Martin
Cynthia L. Martin, Judge

All concur

APPENDIX C — OPINION OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY, DATED FEBRUARY 11, 2020

IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI AT KANSAS CITY

Case No. 1916-CV20843
Division 10

STEVEN PINKERTON,

Plaintiff,

v.

TECHNICAL EDUCATION SERVICES, INC.,

Defendant.

ORDER DENYING MOTION TO DISMISS AND MOTION TO COMPEL ARBITRATION

On this 11th day of February, 2020, the Court considers Defendants' Motion to Dismiss, or in the Alternative, to Compel Arbitration and to Stay this Proceeding, and Suggestions in Support filed October 7, 2019; Plaintiffs Brief in Opposition filed October 17, 2019; Defendants' Reply Memorandum in Support filed October 22, 2019; and Plaintiffs Sur-Reply in Opposition. After having reviewed the pleadings, considered the evidence, and heard the arguments of counsel, the Court finds as follows:

1. Defendants' Motion and Suggestions in Support allege that Plaintiff signed a Student Enrollment Agreement

with the Aviation Maintenance Technical Engineer Program with Technical Education Services Inc. d/b/a Aviation Institute of Maintenance ("AIM") on September 8, 2009. On March 24, 2009 Plaintiff renegotiated the terms of his Student Enrollment Agreement and executed a second Student Enrollment Agreement with AIM. Both of these Student Enrollment Agreements contained an arbitration agreement as follows:

> **Arbitration Agreement:** I agree that any controversy, claim or dispute of any sort arising out of or relating to matters including, but not limited to: student admission, enrollment, financial obligations and status as a student, which cannot be first resolved by way of applicable internal dispute resolution practices and procedures, shall be submitted for arbitration, to be administered by the American Arbitration Association located within Virginia Beach, Virginia, in accordance with its commercial arbitration rules. All fees and expenses of arbitration shall be shared equally and any award rendered in favor of a student will be limited to the total amount paid to the School by the student. Any award of determination rendered by the arbitration(s) shall be final and entered as a judgment by a court of competent jurisdiction.

2. Subsequent to signing both Student Enrollment Agreements, Plaintiff filed a lawsuit in 2014 in the Circuit Court of Jackson County, Missouri, Case No. 1416-CV10007 "against the school, Mr. Rothrock, and

the School's owner, W. Gerald Yagen, alleging the school had engaged in fraud, misrepresentation, and deception related to the School's graduation and job placement rates, starting salaries, and the costs and benefits of its educational programs." *State ex rel. Pinkerton v. Fahnestock,* 531 S.W.3d 36, 40 (Mo. 2017). The Defendants moved to dismiss, or in the alternative, to compel arbitration and stay the proceedings. *Id.* Upon review of Defendants' Motion to Dismiss, the Circuit Court held that the delegation provision was enforceable, and the issue of whether the arbitration agreement was unconscionable is left to the arbitrator. *Id.* On appeal to the Supreme Court of Missouri, the Court sustained the Circuit Court's Order compelling the Parties to arbitrate. *Id.* at 53.

3. After delivering an opinion on the matter, Hon. Gary Oxenhandler, whom was agreed to by both parties, provided a Judgment dated November 15, 2018, ruling that the Arbitration Agreement was "unconscionable and unenforceable", and as such "[t]his ease is remanded to the Courts for appropriate action." Subsequent to Hon. Gary Oxenhandler's decision, on December 3, 2018, Plaintiff filed Hon. Gary Oxenhandler's decision as an exhibit to his motion to lift the stay in Case No. 1416-CV10007. The stay was lifted in that case, and the parties proceeded in Circuit Court until July, 2019.

4. On July 23, 2019, the Plaintiff filed a Notice of Dismissal in *Steven Pinkerton v. Technical Education Services, Inc. d/b/a Aviation Institute of Maintenance, et al.,* Case No. 1416-CV10007. On July 26, 2019, the Plaintiff filed the present lawsuit against the same individuals and asserted the same causes of action as his lawsuit filed in 2014.

5. Defendants are asking the Court to enter an order dismissing this matter, or in the alternative compelling Plaintiff to arbitrate his claims in this case. In Case No. 1416-CV10007, the parties were ordered to arbitrate, and the issue regarding the enforceability of the arbitration clause was left to the arbitrator to decide. Per the Judgment on November 15, 2018, the enforceability of the arbitration clause was decided by the arbitrator. "Arbitration is supposed to be a fair process, a process that affords all parties the process they are due. Such is not the case here ... the Arbitrator finds the Arbitration Agreement **unconscionable and unenforceable.** This case is remanded to the Courts for appropriate action. Arbitration dismissed." (emphasis added).

6. Defendants allege that the judgment entered by the Arbitrator in Case No. 1416-CV10007 was not a judgment on the merits, thus collateral estoppel does not apply in this present case. "Collateral estoppel operates to prevent a party or its privies from relitigating facts or questions at issue between the same parties which have been previously adjudicated upon the merits." *Pratt v. Purcell Tire and Rubber Co. Inc.,* 846 S.W.2d 230, 232 (Mo. App. E.D. 1993).

> "Collateral estoppel is appropriate when: (1) the issue sought to be precluded is identical to the issue previously decided; (2) the prior action resulted in a final adjudication on the merits; (3) the party sought to be estopped was either a party or in privity with a party to the prior action; and (4) the party sought to be estopped

> was given a full and fair opportunity to be heard on the issue in the prior action." *Wellons, Inc. v. T.E. Ibberson Co.,* 869 F.2d 1166, 1168 (8th Cir. 1989).

"[W]hen an issue of ultimate fact has once been determined by a valid judgment, that issue cannot again be litigated between the same parties in future litigation." *Pratt,* 846 S.W.2d at 233. Here, the issue is whether the arbitration provision is enforceable, which was a previously decided issue in Case No. 1416-CV10007. The prior action resulted in a final, valid judgment on *that* issue on November 15, 2018; the parties are exactly the same in both cases; and the party sought to be estopped was given a full and fair opportunity to be heard on *that* issue in the prior action.

7. Defendants also allege that a voluntary dismissal wipes the slate clean, and since Plaintiff voluntarily dismissed his claims in the first suit, it is as if the first suit had never been brought. Even though Case No. 1416-CV10007 was voluntarily dismissed, there was a final judgment ruling that the same arbitration provision as the present case was unenforceable. Thus, the voluntary dismissal does not "wipe the slate clean" on a valid final judgment regarding the enforceability of the arbitration provision.

WHEREFORE, for the reasons stated above, the Court DENIES Defendants' Motion to Stay Proceedings and Compel Arbitration.

IT IS SO ORDERED.

Appendix C

February 11, 2020
Date

/s/ PATRICK WILLIAM CAMPBELL
HONORABLE PATRICK WILLIAM CAMPBELL

APPENDIX D — OPINION OF THE SUPREME COURT OF MISSOURI, FILED OCTOBER 31, 2017

SUPREME COURT OF MISSOURI
En Banc

No. SC94822

STATE *ex rel.* STEVEN PINKERTON,

Relator,

v.

THE HONORABLE JOEL P. FAHNESTOCK,

Respondent.

October 31, 2017, Opinion Issued

ORIGINAL PROCEEDING IN PROHIBITION

Steven Pinkerton seeks a writ of mandamus or, in the alternative, a writ of prohibition requiring the circuit court to overrule the motion to compel arbitration filed by Aviation Institute of Maintenance (the school). In the alternative, Mr. Pinkerton seeks a writ of mandamus requiring the circuit court to enforce discovery and allow him to file additional opposition to the school's motion to compel arbitration. Mr. Pinkerton contends the circuit court improperly sustained the school's motion to compel arbitration because: (1) the school's incorporation of the delegation provision into the arbitration agreement by reference to the American Arbitration Association's

commercial rules was not clear and unmistakable evidence the parties intended to arbitrate threshold questions of arbitrability; (2) issues regarding the formation of the arbitration agreement cannot be delegated to an arbitrator; and (3) he specifically challenged the validity and enforceability of the delegation provision.

This Court issued a preliminary writ and now holds the incorporation of the American Arbitration Association (AAA) rules into the arbitration agreement provided clear and unmistakable evidence the parties intended to delegate threshold issues of arbitrability to the arbitrator. Mr. Pinkerton's only specific challenge to the delegation provision — that it would be unconscionable to delegate a determination of unconscionability to a person with a direct financial interest in the outcome — was without merit, and he did not otherwise specifically challenge the validity or enforceability of the delegation provision. Accordingly, the circuit court properly sustained the school's motion to compel arbitration, stayed the case, and ordered the parties to arbitrate threshold issues of arbitrability. The preliminary writ is quashed.

Factual and Procedural Background

In 2009, Mr. Pinkerton e-mailed the school and requested information about becoming an aircraft technician.[1] In response, Adrian Rothrock, an admissions representative, scheduled an appointment at the school's

1. The school is the Missouri affiliate of Technical Education Services, Inc., a Virginia-based corporation operating aviation maintenance schools throughout the United States.

Kansas City campus. Soon thereafter, Mr. Pinkerton met with Mr. Rothrock and received a tour of the school and a packet of information. A few weeks later, Mr. Pinkerton visited the school for a second time and submitted an application for admission. Four days later, he returned to the school to sign the two-page enrollment agreement for the aviation maintenance technical engineer program.

The enrollment agreement listed information about the program's duration, graduation requirements, tuition and fees, scheduling, and its policies regarding cancellation, termination, withdrawal, and refunds. The enrollment agreement also included an arbitration agreement. The arbitration agreement was about three-fourths from the top of the enrollment agreement's first page. The heading "Arbitration Agreement" was in bold face type, and the terms of the arbitration agreement were in the same type size as the remainder of the enrollment agreement. The arbitration agreement provided:

> I agree that any controversy, claim or dispute of any sort arising out of or relating to matters including, but not limited to: student admission, enrollment, financial obligations and status as a student, which cannot be first resolved by way of applicable internal dispute resolution practices and procedures, shall be submitted for arbitration, to be administered by the American Arbitration Association located within Virginia Beach, Virginia, in accordance with its commercial arbitration rules. All fees and expenses of arbitration shall be shared

> equally and any award rendered in favor of a student will be limited to the total amount paid to the School by the student. Any award or determination rendered by the arbitrator(s) shall be final and entered as a judgment by a court of competent jurisdiction.

Mr. Pinkerton did not receive a copy of the AAA commercial rules.[2]

Rule R-7 of the commercial rules defined the scope of the arbitrator's "jurisdiction." It read, in relevant part:

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

Mr. Pinkerton signed the enrollment agreement and received a copy. An admissions representative and another school official also signed the agreement.

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2. At the time the parties signed the underlying agreement, the "Commercial Arbitration Rules with Supplementary Procedures for Consumer-Related Disputes" governed consumer arbitration disputes. The "Supplementary Procedures for Consumer-Related Disputes" provided that the "AAA's most current rules will be used when the arbitration is started." In 2014, the AAA replaced the "Supplementary Procedures for Consumer-Related Disputes" with "Consumer Arbitration Rules." The consumer rules contain the same jurisdiction clause as the commercial rules.

Appendix D

On September 28, 2009, Mr. Pinkerton began attending classes. Almost six months later, he requested to switch from the school's 100-week aviation maintenance technical engineer program to a shorter 80-week aviation technician program. The enrollment agreement he signed for the aviation technician program was dated March 24, 2010, and contained a change in the credit hours required for graduation, the cost of books per semester, the total length of the program, and the estimated total student cost per quarter. Otherwise, the enrollment agreement for the aviation technician program included the same information as the enrollment agreement for the aviation maintenance technical engineer program as well as the same arbitration agreement.[3]

In 2011, Mr. Pinkerton graduated from the school as the valedictorian of the night program. Having fulfilled the graduation requirements, he received a certificate of aviation maintenance, which entitled him to take the federal aviation administration examinations to become an airline mechanic. He took both required examinations and received his temporary airman certificate from the federal aviation administration in 2012. Despite having obtained his certification, Mr. Pinkerton alleges he cannot find employment in the aviation field.

In 2014, Mr. Pinkerton filed a lawsuit against the school, Mr. Rothrock, and the school's owner, W. Gerald Yagen, alleging the school engaged in fraud, misrepresentation,

3. Because the two enrollment agreements contained the same arbitration agreement, they will be referred to as the singular "enrollment agreement" throughout the remainder of the opinion.

and deception related to the school's graduation and job placement rates, starting salaries, and the costs and benefits of its educational programs. The lawsuit included claims for violations of the Missouri Merchandising Practices Act, fraudulent misrepresentation, negligent misrepresentation, money had and received, and unjust enrichment.

The school moved to dismiss, or in the alternative, to compel arbitration and stay the proceedings, citing the arbitration agreement in the enrollment agreement requiring Mr. Pinkerton to arbitrate "any controversy, claim or dispute." The school further contended the arbitration agreement delegated threshold arbitrability disputes, such as whether an arbitration clause is enforceable or its applicability to the dispute at issue, to the arbitrator by incorporating by reference the AAA's jurisdictional rule into the arbitration agreement. The school requested the circuit court enforce this delegation provision if Mr. Pinkerton challenged the arbitration agreement. The school also filed a motion to stay discovery and all other pending pretrial proceedings.

In response, Mr. Pinkerton filed his preliminary opposition to the school's motion to compel arbitration and the school's motion to stay discovery. Mr. Pinkerton argued the threshold issue of the existence of an enforceable arbitration agreement cannot be delegated to an arbitrator but, instead, is always a decision for the court. He also filed a motion to stay briefing and ruling on the motion to compel arbitration until the parties could conduct discovery related to the arbitration agreement.

The circuit court sustained Mr. Pinkerton's motion to stay briefing and ruling on the motion to compel arbitration and allowed the parties 90 days to conduct discovery limited to "the issue of whether an arbitration contract was formed and the scope of any arbitration contract."

The school subsequently renewed its motion to compel arbitration, contending Mr. Pinkerton had not specifically challenged the delegation provision but challenged only the arbitration agreement as a whole. In response, Mr. Pinkerton argued he had challenged the existence of the delegation provision by challenging the existence of any arbitration agreement — including any agreement to delegate issues of arbitrability — in his preliminary opposition. Mr. Pinkerton also contended, for the first time, that the delegation provision was not clearly and unmistakably incorporated into the arbitration agreement, that both the arbitration agreement and the delegation provision lacked consideration, and that the delegation provision was unconscionable.

After conducting a hearing on the matter, the circuit court sustained the school's motion to compel arbitration.[4] The circuit court concluded the delegation provision was enforceable because Mr. Pinkerton did not challenge the delegation provision specifically. The circuit court further held the provision provided for delegation of the gateway question of whether the parties agreed to arbitrate and, therefore, the issue of whether the arbitration agreement

4. In accordance with section 435.355.4, RSMo 2000, the circuit court denied the school's motion to dismiss and held the case was properly stayed.

was unconscionable is left to the arbitrator per the clear and unmistakable intent of the parties expressed by the incorporation of the AAA rules into the agreement.

Mr. Pinkerton petitions this Court for a writ of mandamus or prohibition, requesting the Court order the circuit court to overrule the school's motion to compel arbitration or, in the alternative, order the circuit court to enforce discovery and allow Mr. Pinkerton to file additional opposition to the school's motion to compel arbitration. This Court issued a preliminary writ of prohibition. Mo. Const. art. V, sec. 4.

Standard of Review

This Court has the authority to "issue and determine original remedial writs." *Id.* Writs of prohibition or mandamus are appropriate mechanisms to challenge whether a motion to compel arbitration was improperly sustained. *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798, 805 (Mo. banc 2015); *see also State ex rel. Union Pac. R.R. Co. v. David*, 331 S.W.3d 666, 666 (Mo. banc 2011). This Court reviews *de novo* the legal issue of "[w]hether a valid, enforceable arbitration agreement exists." *Union Pac.*, 331 S.W.3d at 667.

Analysis

Mr. Pinkerton contends the circuit court erred in sustaining the school's motion to compel arbitration. He asserts the school's incorporation of the AAA commercial rules into the arbitration agreement did not "clearly and

unmistakably" express the parties' intent to delegate threshold issues of arbitrability to an arbitrator. He further contends the circuit court improperly ordered arbitration because only a court, not an arbitrator, can decide whether an arbitration agreement was formed. Lastly, Mr. Pinkerton argues the circuit court erred in finding he did not specifically challenge the delegation provision's validity and enforceability.

The Delegation Provision

The circuit court determined the arbitration agreement contained an enforceable delegation provision delegating issues of arbitrability to the arbitrator. Mr. Pinkerton contends his signature on the enrollment agreement was not evidence he agreed to delegate threshold issues of arbitrability to the arbitrator because the delegation provision was not included as part of the arbitration agreement but was instead incorporated by reference to the AAA commercial rules. Mr. Pinkerton argues that incorporating a delegation provision by reference does not meet the "clear and unmistakable" standard required to show the parties intended an arbitrator to decide issues of arbitrability.

Generally, any silence or ambiguity "concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (internal quotation omitted). Issues will, therefore, typically "be deemed arbitrable unless it is clear that the arbitration clause has not included them." *First*

Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 945, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (internal quotations omitted). This has been referred to as the "presumption of arbitrability." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 300, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010).

This presumption of arbitrability, however, is reversed when considering whether a court or an arbitrator should decide threshold questions of arbitrability. *First Options*, 514 U.S. at 944-45. Disputes about arbitrability include those "questions such as whether the parties are bound by a given arbitration clause, or whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." *BG Grp. PLC v. Republic of Arg.*, 134 S. Ct. 1198, 1206, 188 L. Ed. 2d 220 (2014) (internal quotations omitted). Disputes over the formation of the parties' arbitration agreement and its enforceability or applicability to the dispute at issue have been considered threshold issues of arbitrability. *Id.* at 1206-07. When considering whether parties have intended to delegate threshold questions of arbitrability to an arbitrator, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clea[r] and unmistakabl[e] evidence that they did so." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010) (internal quotation omitted) (alteration in original). This "'clear and unmistakable' requirement . . . pertains to the parties' manifestation of intent" that issues of arbitrability be decided by the arbitrator instead of the court. *Id.* at 69 n.1 (emphasis omitted).

Appendix D

The United States Supreme Court has addressed why different standards are necessary when considering "whether a particular merits-related dispute is arbitrable" versus "who (primarily) should decide arbitrability." *First Options*, 514 U.S. at 944-45 (emphasis omitted). The Supreme Court explained:

> [T]his difference in treatment [between whether a particular merits-related dispute is arbitrable or who (primarily) should decide arbitrability] is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And given the law's permissive policies in respect to arbitration, one can understand why the law would insist upon clarity before concluding that the parties did not want to arbitrate a related matter. On the other hand, the former question — the who (primarily) should decide arbitrability question — is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might

> too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Id. at 945 (internal quotations and citations omitted) (emphasis omitted).

Mr. Pinkerton interprets the "clear and unmistakable" standard to prohibit the delegation provision from being incorporated by reference into an arbitration agreement. He contends that no clear and unmistakable evidence exists of the parties' mutual assent to the delegation provision unless the delegation provision is expressly written into an arbitration agreement. Mr. Pinkerton incorrectly assumes that a contract is silent or ambiguous about who should decide arbitrability if the delegation provision is incorporated into an arbitration agreement by reference.

While the Supreme Court has referred to the "clear and unmistakable" standard as a "heightened standard," *First Options* explains it is "heightened" insofar as it is a higher standard than the "presumption of arbitrability" standard applied when interpreting "silence" or "ambiguity" related to the scope of arbitration provisions. *Rent-A-Ctr.*, 561 U.S. at 69 n.1. The Supreme Court has not held the "clear and unmistakable" standard is heightened in relation to generally applicable principles of contract interpretation.

Interpretation of a written contract is a question of law. *Webbe v. Keel*, 369 S.W.3d 755, 756 (Mo. App. 2012).

In Missouri, "the primary rule of contract interpretation is that courts seek to determine the parties' intent and give effect to it." *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. banc 2013). "The intention of the parties is to be gleaned from the four corners of the contract." *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co.*, 75 S.W.3d 247, 260 (Mo. banc 2002). Each clause "must be read in the context of the entire contract, and interpretations that render provisions meaningless should be avoided." *McGuire v. Lindsay*, 496 S.W.3d 599, 607 (Mo. App. 2016). This Court determines the parties' intent as "expressed by the plain and ordinary meaning of the language of the contract." *Chochorowski*, 404 S.W.3d at 226. "When the language of a contract is clear and unambiguous, the intent of the parties will be gathered from the contract alone, and a court will not resort to a construction where the intent of the parties is expressed in clear and unambiguous language." *Id.* at 226-27. "It is only where the contract is ambiguous and not clear that resort to extrinsic evidence is proper to resolve the ambiguity." *J. E. Hathman, Inc. v. Sigma Alpha Epsilon Club*, 491 S.W.2d 261, 264 (Mo. banc 1973).

Missouri further recognizes that "matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in haec verba." *Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n.5 (Mo. banc 2003). Generally, "[t]erms not explicit in a contract may be incorporated into the contract by reference" so long as the "intent to incorporate [is] clear." *Hewitt*, 461 S.W.3d at 810-11. "To incorporate terms from another document,

the contract must make [] clear reference to the document and describe[] it in such terms that its identity may be ascertained beyond a doubt." *Id.* Parties may, therefore, "incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement to which they are not parties, including a separate document which is unsigned." *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs.*, 204 S.W.3d 183, 196 (Mo. App. 2006). There is no requirement that an incorporated document be attached to the contract or provided to the parties prior to the execution of the contract.

Here, the parties' arbitration agreement specifically references the AAA's commercial arbitration rules. At the time Mr. Pinkerton signed the enrollment agreement, the AAA's "Commercial Arbitration Rules with Supplementary Procedures for Consumer-Related Disputes" governed all consumer arbitration disputes. The reference to the AAA's commercial rules in the arbitration agreement was not a mere passing reference to these rules; instead, it was a clear reference to an identifiable, ascertainable set of rules. Such a reference establishes the parties' intent to incorporate the AAA commercial arbitration rules into the enrollment agreement.

This finding is consistent with most federal circuit courts, which have concluded arbitration agreements containing similar language were sufficient to incorporate by reference the delegation provision in the AAA rules. For example, arbitration agreements stating disputes will be "settled by," "conducted by," and "determined by" arbitration "in accordance with" specific rules containing

a delegation provision have been held to have "clearly and unmistakably" incorporated the delegation provision into the arbitration agreement. *Brennan v. Opus Bank*, 796 F.3d 1125, 1129 (9th Cir. 2015) ("settled by"); *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 674 (5th Cir. 2012) ("conducted by"); *Fallo v. High — Tech Inst.*, 559 F.3d 874, 877-78 (8th Cir. 2009) ("settled by"); *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1373 (Fed. Cir. 2006) ("settled by"); *Terminix Int'l Co. v. Palmer Ranch LP*, 432 F.3d 1327, 1332 (11th Cir. 2005) ("conducted"); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) ("determined by").[5]

5. Only the Tenth Circuit has held an arbitration agreement that specifically referenced the AAA commercial arbitration rules did not clearly and unmistakably delegate "whether an arbitration agreement exists or what the scope of the agreement is" to an arbitrator. *Riley Mfg. Co., Inc. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998). *Riley*, however, was decided before *Rent-A-Center* and did not consider whether the AAA commercial arbitration rules were incorporated by reference into the arbitration agreement. Instead, the Tenth Circuit held that, although the arbitration clause in the contract was broadly written, there was "no hint in the text of the clause or elsewhere in the contract that the parties expressed a specific intent to submit to an arbitrator the question whether an agreement to arbitrate exists or remained in existence after the Settlement Agreement." *Id.* at 780. Accordingly, it is unclear whether the parties raised the issue of incorporation of the AAA rules' delegation provision. *See also Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 229-30 (3d Cir. 2012) (not discussing whether the contract's incorporation of the AAA rules required delegation of threshold issues of arbitrability to an arbitrator).

The dissenting opinion attempts to differentiate these federal cases on the basis that all but one involved sophisticated parties, not a mere consumer such as Mr. Pinkerton.[6] But in doing so, the dissenting opinion ignores longstanding Missouri contract principles and, instead, advocates for adoption of a standard that would have far-reaching consequences beyond interpretation of arbitration agreements.

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6. The dissenting opinion relies on *50 Plus Pharmacy v. Choice Pharmacy Systems, LLC*, 463 S.W.3d 457 (Mo. App. 2015), and *Dolly v. Concorde Career Colleges, Inc.*, 2017 Mo. App. LEXIS 988, 2017 WL 4363863 (Mo. App. Oct. 3, 2017), for the proposition that a mere reference to the AAA commercial rules does not establish the parties clearly and unmistakable intended to delegate threshold issues of arbitrability. But *50 Plus Pharmacy* is factually distinguishable in that: (1) the contract at issue specifically stated the parties consented to litigate any disputes arising out of the contract in courts located in Missouri and did not contain an arbitration provision; and (2) although the agreement containing the arbitration agreement was incorporated into the contract by reference, the arbitration agreement related to the narrow topic of escrow claims, which were not at issue in the case. 463 S.W.3d at 461. Moreover, the court of appeals in *Dolly* disregarded the arbitration provision's reference to the AAA rules by reasoning that although "the language in the relevant AAA Rules might be clear and unmistakable, that language is not recited in the agreement signed by the Students." 2017 Mo. App. LEXIS 988, 2017 WL 4363863, at *3. Such an analysis ignores the principle that "matters incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in haec verba." *Dunn Indus. Grp.*, 112 S.W.3d at 435 n.5. Accordingly, to the extent *50 Plus Pharmacy* and *Dolly* hold that incorporation by reference of the AAA rules is insufficient to establish the parties intended to delegate threshold issues of arbitrability, they should no longer be followed.

Appendix D

The dissenting opinion asserts whether Mr. Pinkerton intended to incorporate the AAA rules is a factual question that should be put to the parties' proof. But for purposes of contract interpretation, the intent of the parties is a question of law to be determined from the four corners of the contract. *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 846 (Mo. banc 2012). It is only when an ambiguity arises and cannot be resolved within the four corners of the contract that "the parties' intent can be determined by use of parol evidence." *Id.* Only then does the parties' intent become "a factual issue to be resolved by the finder of fact." *Id.*

The dissenting opinion recognizes these principles but contends this Court must look at the "context" of an agreement — including who signed it and the nature of the agreement — to determine ambiguity. More specifically, the dissenting opinion asserts that the unsophisticated nature of a party is key to the determination of ambiguity and that "when a consumer contract purports to incorporate by reference another writing, the court should determine whether the parties actually know and understand the provisions to be included."

But the dissenting opinion is mischaracterizing the general proposition that "ambiguity depends on context" to conclude "context" means consideration of the parties' circumstances and whether they actually know and understand the incorporated provision. Such a subjective standard is not what this Court means by considering the "context" of an agreement. Rather, "context" means the reading of the agreement as a whole to determine whether

an ambiguity exists. *J. E. Hathman*, 491 S.W.2d at 264; *see also Purcell Tire & Rubber Co., v. Exec. Beechcraft, Inc.*, 59 S.W.3d 505, 510 (Mo. banc 2001) ("Contract language is not interpreted in a vacuum, but by reference to the contract as a whole.").

Furthermore, while the dissenting opinion cites to cases that mention the sophistication of the parties, such cases do not support the subjective "context" standard advocated for by the dissenting opinion. Instead, such cases address specific contract provisions or clauses — such as exculpatory clauses, indemnity clauses, forum selection clauses, and jury trial waivers — that impose additional requirements for a specific provision or clause to be enforceable.

For instance, in addressing exculpatory and indemnity clauses, this Court held limitations or shifts of liability in contracts are enforceable if the exculpatory or indemnity clause contains clear, unambiguous, unmistakable, and conspicuous language. *Alack v. Vic Tanny Intern. of Mo., Inc.*, 923 S.W.2d 330, 337-38 (Mo. banc 1996). In determining the clause's enforceability, this Court did not consider parol evidence as to the parties' subjective intent regarding the clause. Instead, the Court required the clause to include specific terms like "'negligence' or 'fault' or their equivalents" that would conspicuously shift the liability. *Id.* at 337. This Court subsequently held that requirement does not govern contracts when the parties are both sophisticated businesses. *Purcell Tire*, 59 S.W.3d at 509. But again, the parties' subjective intent was not examined. This Court simply recognized: "Sophisticated

businesses that negotiate at arm's length may limit liability without specifically mentioning 'negligence,' 'fault,' or an equivalent." *Id.* "Sophisticated parties have freedom of contract — even to make a bad bargain, or to relinquish fundamental rights." *Id.* at 508.

Similarly, in *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 497 (Mo. banc 1992), this Court adopted the majority rule that forum selection clauses will be enforced, so long as doing so is neither unfair or unreasonable. In considering whether to enforce the forum selection clause, this Court considered whether "the contract was entered into under circumstances that caused it to be adhesive" — that is, a contract "in which the parties have unequal standing in terms of bargaining power." *Id.* There was no consideration of whether the parties subjectively understood the forum selection clause. *Id.* Instead, this Court reasoned "the important factor is that the contract terms were generally arrived at under circumstances that cannot be described as 'adhesive.'" *Id.*

Finally, in *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d 624, 627 (Mo. banc 1997), this Court held that the parties' waiver of a right to a jury trial must be knowing and voluntary. But in doing so, this Court recognized that "more than contract law is involved." *Id.* And while the Court acknowledged "[t]he real concern with every case decision has been the relative bargaining powers of the parties," the analysis focused primarily on whether the written agreement contained "clear, unambiguous, unmistakable, and conspicuous language" such that a knowing and voluntary waiver of the right to a jury trial was evident. *Id.*

It follows that none of the cases considering the sophistication of the parties addresses arbitration agreements, and each case presents an exception to general principles of contract law. The United States Supreme Court has held arbitration can be limited only by application of principles of general contract law, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011), so this Court cannot make a rule specifically applicable to arbitration delegation clauses.

The dissenting opinion also relies on several federal district court cases — all from the Ninth Circuit — and a few state cases. This is because Missouri courts have never considered the sophistication of the contractual parties in determining the parties' intent with respect to arbitration agreements. Rather, Missouri courts apply the longstanding principle that a party's failure to read or understand the terms of a contract is not a defense to enforcement of those terms. *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 509 n.4 (Mo. banc 2012). Missouri contract law, therefore, generally does not support differential treatment for consumers for purposes of contract interpretation.

Finally, were this Court to adopt the dissenting opinion's approach, its impact would extend beyond interpretation of arbitration agreements. Arbitration agreements are placed "on an equal footing with other contracts, and courts will examine arbitration agreements in the same light as they would examine any contractual agreement." *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d

772, 776 (Mo. banc 2005). Therefore, this Court would have to consider the parties' sophistication in determining intent in all contracts.

Applying Missouri's general contract principles to this case, Mr. Pinkerton agreed the AAA commercial arbitration rules, which include a delegation provision, would govern arbitration disputes. By clearly referencing the AAA commercial arbitration rules, the parties expressed their intent to arbitrate any dispute under these rules, including the AAA's "jurisdiction" rule providing that the "[a]rbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Accordingly, the delegation provision clearly and unmistakably evidences the parties' intent to delegate threshold issues of arbitrability to the arbitrator.[7]

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7. The dissenting opinion argues that finding the parties incorporated the AAA commercial arbitration rules by reference conflicts with this Court's analysis in *Hewitt*, 461 S.W.3d at 811. *Hewitt*, however, is factually distinguishable from the present case. In *Hewitt*, an employment agreement contained an arbitration provision that incorporated the NFL's constitution and bylaws, which gave the commissioner complete authority to arbitrate and stated the commissioner shall, from time to time, establish procedures and policies with respect to the constitution and bylaws. *Id.* at 810. The constitution and bylaws did not reference the NFL dispute resolution guidelines. *Id.* Nevertheless, the trial court found the NFL dispute resolution guidelines governed the arbitration process. *Id.* This Court held the guidelines did not meet the requirements for incorporation by reference because the guidelines were not a separate, non-contemporaneous document described in terms such that their identity could be ascertained beyond a doubt. *Id.* at 811. Unlike the guidelines in *Hewitt*, the AAA commercial arbitration

Appendix D

Enforceability of the Delegation Provision

Upon finding the parties clearly and unmistakably intended to delegate threshold issues to the arbitrator, the circuit court concluded the delegation provision was enforceable and compelled arbitration. Mr. Pinkerton asserts the circuit court erroneously compelled arbitration because state and federal arbitration law require the circuit court to adjudicate the threshold question of whether an arbitration agreement was formed. But such an argument ignores the nature of his challenges to the arbitration agreement, the severability of the delegation provision, and his failure to specifically challenge the enforceability of such provision.

First, Mr. Pinkerton contends threshold issues of the formation of an arbitration agreement cannot be delegated to an arbitrator. Under the Federal Arbitration Act (FAA),[8] arbitration is solely a matter of contract. *AT & T*

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rules were specifically referenced in the enrollment agreement. Because the enrollment agreement specifically identified the rules, which Mr. Pinkerton could have ascertained beyond a doubt, there was no lack of certainty as to the arbitration terms referenced by the enrollment agreement.

8. Neither party contests that the FAA governs the arbitration agreement in the enrollment agreement. 9 U.S.C. §§ 1-16 (2006). The FAA governs the validity, irrevocability, and enforcement of agreements to arbitrate in contracts "evidencing a transaction involving commerce." 9 U.S.C. § 2. Because the school is a Virginia-based corporation operating aviation maintenance schools throughout the United States, its enrollment agreement with Mr. Pinkerton is a contract falling within the purview of the FAA. 9 U.S.C. § 1 (defining commerce as "commerce among the several States").

Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986). Accordingly, "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Id.* Parties "cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." *Id.* (internal quotations omitted). Therefore, because arbitration "is a matter of consent, not coercion," *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010), a court must be satisfied that the parties have "concluded" or formed an arbitration agreement before the court may order arbitration to proceed according to the terms of the agreement. *Granite Rock*, 561 U.S. at 299; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). Questions concerning whether an arbitration agreement was ever concluded are, therefore, "generally nonarbitral question[s]." *Granite Rock*, 561 U.S. at 296-97.

Nevertheless, Mr. Pinkerton does not challenge whether the arbitration agreement was formed or concluded. Instead, Mr. Pinkerton challenges the conscionability of such arbitration agreement. While this Court has held unconscionability is a state law defense to contract formation, *see Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 493 (Mo. banc 2012), conscionability is not an essential element of contract formation. As recognized by the Supreme Court, unconscionability is a "generally applicable contract defense[]" like fraud and duress. *Rent-A-Ctr.*, 561 U.S. at 68. As such, while unconscionability is a defense to contract formation and, therefore, a contract's

validity and enforceability, *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 432 (Mo. banc 2015), it is not an issue of whether a contract has ever been "concluded."[9] *See Buckeye*, 546 U.S. at 444 n.1.

Mr. Pinkerton's mischaracterization of the issue of unconscionability as a formation issue rather than enforceability has no impact on the resolution of this case, however, because both issues of formation and enforceability of arbitration clauses can be delegated to an arbitrator. Mr. Pinkerton does not cite any case law prohibiting issues of formation from being delegated to the arbitrator. Mr. Pinkerton relies on *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. banc 2014), for the proposition that formation issues can never be delegated to an arbitrator. In *Baker*, this Court held a delegation provision that provided the "arbitrator [would] resolve disputes 'relating to the applicability or enforceability' of the agreement" did not delegate issues of contract formation to the arbitrator. *Id.* at 774. *Baker*, however, does not state that issues related to contract formation can never be delegated to an arbitrator but only that the delegation provision at issue in *Baker* was limited to issues of "applicability" or "enforceability." In contrast, the delegation provision at issue here is broader than in *Baker*. It delegates to the arbitrator "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the

9. Issues as to whether a contract has been "concluded" include whether: a contract was signed by the obligor, a signor lacked authority to sign a contract to commit a principal, or a signor lacked the mental capacity to sign a contract. *Buckeye*, 546 U.S. at 444 n.1.

arbitration agreement or to the arbitrability of any claim or counterclaim."

Mr. Pinkerton also cites *Jimenez v. Cintas Corp.*, 475 S.W.3d 679, 683-84 (Mo. App. 2015), *Hopwood v. CitiFinancial, Inc.*, 429 S.W.3d 425, 427 (Mo. App. 2014), and *Bellemere v. Cable-Dahmer Chevrolet, Inc.*, 423 S.W.3d 267, 273 (Mo. App. 2013), for the proposition that courts cannot delegate formation issues to an arbitrator. These cases, however, involved no discussion of a delegation provision and, therefore, are distinguishable from the present case. Consequently, the circuit court did not err in concluding the challenges raised by Mr. Pinkerton could be delegated to an arbitrator.

Mr. Pinkerton further asserts the circuit court erroneously concluded the delegation provision was enforceable. As the circuit court reasoned, however, the delegation provision is a severable, antecedent agreement to arbitrate threshold issues Mr. Pinkerton failed to specifically challenge.

The FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. "The FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Rent-A-Ctr.*, 561 U.S. at 67 (internal citation omitted). But similar to other contracts, arbitration agreements "may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability." *Id.* at 68 (internal quotation omitted).

To invalidate an arbitration agreement a specific challenge must be made to the arbitration agreement, not to the contract as a whole. *Ellis v. JF Enters., LLC*, 482 S.W.3d 417, 423-24 (Mo. banc 2016). This "is because § 2 [of the FAA] states that a 'written provision' 'to settle by arbitration a controversy' is 'valid, irrevocable, and enforceable' without mention of the validity of the contract in which it is contained." *Rent-A-Ctr.*, 561 U.S. at 67 (emphasis omitted). Arbitration agreements, therefore, are severable. *Ellis*, 482 S.W.3d at 419. "This means that they are to be considered separate and apart from any underlying or contemporaneously related agreement." *Id.*

It is under this framework that the Supreme Court determined a delegation provision is an additional, severable agreement to arbitrate threshold issues that is valid and enforceable unless a specific challenge is levied against the delegation provision. *Rent-A-Ctr.*, 561 U.S. at 71. In *Rent-A-Center*, the defendant sought to compel arbitration. *Id.* at 65. The plaintiff asserted the arbitration agreement, as a whole, was unenforceable because it was unconscionable under state law. *Id.* at 66. In finding the controversy was subject to arbitration, the Supreme

Court focused on the delegation provision. *Id.* at 68-69. The Supreme Court explained: "The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Id.* at 68. "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the . . . court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 70. Such delegation provisions are valid under section 2 of the FAA "save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* (internal quotation omitted). Therefore, unless the plaintiff "challenged the delegation provision specifically, [the Supreme Court] must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the [a]greement as a whole for the arbitrator." *Id.* at 72. The Supreme Court then concluded the defendant was seeking to enforce the delegation provision and the plaintiff challenged the arbitration agreement as a whole and not the delegation provision specifically. *Id.* The delegation provision, therefore, was enforceable, and the gateway issues of arbitrability were delegated to the arbitrator. *Id.*

Similarly, in seeking to compel arbitration, the school sought enforcement of the incorporated delegation provision. The delegation provision, as an additional, antecedent agreement to arbitrate threshold issues, is valid and enforceable under the FAA unless specifically challenged by Mr. Pinkerton.

Appendix D

The only specific challenge Mr. Pinkerton raised before the circuit court as to the enforceability of the delegation provision was his contention the delegation provision was unconscionable on the sole ground that "[i]t would be unconscionable to delegate such a determination [of unconscionability] to a person with a direct financial interest in the outcome." Such a contention, however, is defeated by the Supreme Court's holding in *Rent-A-Center* that issues of unconscionability can be delegated to an arbitrator. 561 U.S. at 73-74. Mr. Pinkerton's challenge to the delegation provision, therefore, is without merit.

Although Mr. Pinkerton now claims, on appeal, he raised other challenges to the validity or enforcement of the delegation clause separate from his challenges to the arbitration agreement as a whole, he did not. Mr. Pinkerton's various challenges were to the arbitration agreement as a whole. For example, Mr. Pinkerton asserted "there was no meeting of the minds as to the arbitration clause" because "its terms are incomprehensible." Mr. Pinkerton also asserted the "print of the arbitration clause is too small as to be virtually unreadable" and the "arbitration clause is, both on its face and in practice, a model of unconscionability." While a party may challenge a delegation provision by arguing "common procedures as applied to the delegation provision rendered that provision unconscionable," *id.* at 74 (emphasis omitted), Mr. Pinkerton did not direct his challenges specifically to the delegation provision. Instead, he argued the "incomprehensible" terms and the print rendered the entire arbitration clause invalid and the entire arbitration clause was unconscionable. These are challenges to the

arbitration agreement as a whole, not to the delegation provision specifically.

Additionally, Mr. Pinkerton asserts the arbitration agreement is unconscionable because the "clause purports to require the parties to share arbitration expenses equally, in contravention of even the AAA's own express rules requiring the business in any consumer dispute . . . to bear substantially all arbitration costs." Mr. Pinkerton contends this conflict between the fee sharing provision in the arbitration agreement and the AAA's rules makes the entire "clause" unconscionable. This too is not a specific challenge to the delegation provision.[10]

Mr. Pinkerton also asserts the arbitration clause "facially and in practice unilaterally imposes arbitration on only one party — the student" and "no student has ever . . . been allowed to opt out of the arbitration provision." Because both the school and Mr. Pinkerton are required to submit threshold questions of arbitrability to the arbitrator, these challenges could only refer to the arbitration provision defining the scope of arbitrable claims. Likewise, Mr. Pinkerton contended that this

10. Moreover, Mr. Pinkerton did not raise this specific challenge in his pleadings before the circuit court. In his opposition to the defendants' motion to stay the circuit court's September 8 order, Mr. Pinkerton lists the general factors of unconscionability, stating: "Each of these factors supports a finding of unconscionability with regard to the arbitration agreements and delegation provisions utilized by Defendants in their Enrollment Agreements." No specific challenge to the fee sharing provision of the arbitration agreement was made in his pleadings before the circuit court. *See* Rule 84.13(a).

"arbitration clause is facially incomprehensible as to what claims would be covered by it" and, specifically, whether "the arbitration clause . . . applies to a claim by a student against [the school] for fraud." Again, such contentions apply only to the arbitration provision that defines the scope of claims that are arbitrable. Similarly, Mr. Pinkerton's contention that "the clause purports to limit students' remedies" also refers only to the arbitration of specific disputes arising out of "student admission, enrollment, financial obligations and status as a student" and not the arbitration of threshold issues of arbitrability. Accordingly, none of these challenges are directed specifically to the delegation provision.[11]

Although Mr. Pinkerton challenges the validity of the arbitration agreement as a whole, his only specific challenge to the delegation agreement — that it was unconscionable to delegate formation issues to an arbitrator — is without merit, and he did not otherwise direct any specific challenges to the delegation provision.[12]

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11. In his brief before this Court, Mr. Pinkerton also references arguments from his reply in support of his motion to stay briefing and his sur-reply in opposition to the defendants' motion to stay discovery. The circuit court overruled Mr. Pinkerton's motion for leave to file these documents; therefore, these arguments were not before the circuit court. Following the school's renewed motion to compel arbitration, Mr. Pinkerton filed opposition to the school's motion and had an opportunity to raise these additional arguments in the circuit court.

12. The dissenting opinion contends the record clearly shows Mr. Pinkerton specifically challenged the delegation provision and points to a motion he filed stating in capital letters that he "disputes the existence and enforceability of any agreement to delegate issues

This Court must, therefore, treat the delegation provision "as valid under § 2 [of the FAA], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the [a]greement as a whole," or to other provisions within the arbitration agreement, "for the arbitrator." *Id.* at 72. The circuit court, therefore, did not err in ordering the parties to arbitrate threshold issues of arbitrability. The preliminary writ of prohibition is quashed, and the case shall proceed to arbitration.

Conclusion

The arbitration agreement clearly and unmistakably evidences the parties' intent to delegate threshold issues of arbitrability to the arbitrator. Because Mr. Pinkerton's only specific challenge to the delegation provision — that it would be unconscionable to delegate a determination of unconscionability to a person with a direct financial interest in the outcome — is without merit, the delegation provision is valid and enforceable under the FAA. The circuit court, therefore, properly sustained the school's motion to compel arbitration, staying the case and ordering the parties to proceed to arbitration. The preliminary writ is quashed.[13]

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of arbitrability to an arbitrator." What the dissenting opinion ignores is that Mr. Pinkerton then proceeded to challenge the arbitration agreement as a whole. Again, a delegation provision is a severable agreement that is enforceable unless a specific challenge is levied against the provision. *Rent-A-Ctr.*, 561 U.S. at 71. Therefore, despite his contentions to the contrary, Mr. Pinkerton failed to levy a direct challenge to the delegation provision.

13. In the alternative, Mr. Pinkerton seeks a writ of mandamus requiring the circuit court to enforce discovery and allow him to file

/s/
PATRICIA BRECKENRIDGE, JUDGE

Fischer, C.J., Wilson and Russell, JJ., concur;
Stith, J., dissents in separate opinion filed;
Draper, J., concurs in opinion of Stith, J.
Powell, J., not participating.

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additional opposition to the school's motion to compel arbitration. In support of his alternative theory, Mr. Pinkerton asserts: "If this Court finds the record is not yet sufficient to deny the motions to compel arbitration, [he] should be afforded the remainder of the arbitration-related discovery he seeks, and an opportunity to adduce all the relevant evidence and his arguments." Because this Court does not find the record to be insufficient, this Court rejects Mr. Pinkerton's alternative grounds for a writ of mandamus.

Appendix D

DISSENTING OPINION

I dissent.

The United States Supreme Court has held, "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally ... should apply ordinary state-law principles that govern the formation of contracts." *First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)*. But the Supreme Court added an important qualification "applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability *unless there is 'clea[r] and unmistakabl[e]' evidence* that they did so." *Id.* (emphasis added); *accord Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 68, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)*. Therefore, the record must provide "clear and unmistakable" evidence the parties intended to delegate questions of arbitrability to the arbitrator.

The majority fails to give meaning to this high standard of proof when it holds "clear and unmistakable" evidence of such intent is irrebuttably provided based solely on the fact Mr. Pinkerton signed a contract referencing the American Arbitration Association's rules of arbitration and one of the unattached commercial AAA rules at that time delegated issues of arbitrability to an arbitrator. Regardless of whether this is a valid conclusion for commercial or sophisticated parties — as numerous federal courts have held — Mr. Pinkerton undeniably is

an unsophisticated consumer, and only one of the cases on which the majority relies involved an unsophisticated party.

Despite the majority's refusal to so recognize, Missouri historically has required greater specificity and protection for consumer contracts purporting to waive the consumer's litigation rights — including the right to jury trial, forum selection clauses, and waiver of negligence clauses — than it has for such provisions in a contract between sophisticated parties. Rather than presuming the consumer understands the contract, the courts look to the record to determine whether the waiver is valid on a case-by-case basis.

Applying these principles here, it is error to find the contract's mere incorporation of the unattached and undescribed AAA rules would have unambiguously signaled to an unsophisticated consumer that an arbitrator rather than a judge would determine whether the arbitration provision itself was valid. The contract's reference to the AAA rules is but one fact among many the courts must consider in determining the factual issue of whether the parties "clearly and unmistakably" intended to delegate the arbitrability issue to the arbitrator.

I. THE CONTRACT DID NOT UNAMBIGUOUSLY DELEGATE THE ISSUE OF CONTRACT FORMATION TO THE ARBITRATOR

I agree with the majority that the intention of the parties as to the meaning of a contract becomes a factual

issue requiring a court to resort to parol evidence only when an ambiguity arises and "cannot be resolved within the four corners of the contract." *Whelan Sec. Co. v. Kennebrew, 379 S.W.3d 835, 846 (Mo. banc 2012).* When the contract is ambiguous, however, the law is well-settled that the issue of intent is a factual question as to which parol evidence is admissible. *Id.*

While Missouri law provides that matters incorporated by reference into a contract "are as much a part of the contract as if they had been set out in the contract," *Dunn Indus. Grp., Inc. v. City of Sugar Creek, 112 S.W.3d 421, 435 n.5 (Mo. banc 2003)* (citations omitted), Missouri law also is well-settled that "[m]ere reference" to another agreement in the primary contract "is insufficient to establish that [a party] bound itself to the" other agreement, *id. at 436*. The party must specifically incorporate by reference the secondary agreement to be bound to it by contract principles. *Id. at 436 n.5*. Parties can incorporate a separate document only if "the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt." *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc., 204 S.W.3d 183, 196 (Mo. App. 2006).*

This Court recently applied these rules in the arbitration context in *State ex rel. Hewitt v. Kerr, 461 S.W.3d 798, 811 (Mo. banc 2015). Hewitt* held a vague or indefinite incorporation by reference of arbitration rules may make the contract ambiguous, and in such a case the contract will be construed against the drafter. *Id.* In *Hewitt*, the employment contract said it incorporated

"Rules and Regulations of the National Football League." *Id. at 803*. Those rules in turn incorporated arbitration guidelines of the NFL. *Id. at 804*. This Court concluded the guidelines nonetheless were not binding on Mr. Hewitt because the "guidelines were not referenced in Mr. Hewitt's employment contract, nor were they clearly referenced in the constitution and bylaws. ... Th[e contract] reference does not identify the guidelines in such a way that Mr. Hewitt could ascertain them beyond doubt." *Id. at 811. Hewitt* continued:

> At best, under the terms of the constitution and bylaws, Mr. Hewitt agreed to arbitrate by undefined terms that the commissioner would establish. But these terms also lack certainty; Mr. Hewitt had no way to identify these terms and had no way to know that the NFL intended the guidelines to govern arbitration proceedings. *Given the ambiguity of any terms actually referenced, Mr. Hewitt could not assent to them.*
>
> *Moreover, Mr. Hewitt did not bear the burden to seek out an unknown document not clearly identified in his employment contract or the constitution and bylaws.* Though the NFL and the Rams may have intended to incorporate the guidelines into the constitution and bylaws and the employment contract, respectively, it is a well-settled rule that "[i]f ambiguous, [a contract] will be construed against the drafter." *Triarch Indus., Inc. v. Crabtree*, 158 S.W.3d

> 772, 776 (Mo. banc 2005). *The Rams had the burden to incorporate the terms in such a way that Mr. Hewitt could manifest his consent. Having failed to do so, Mr. Hewitt did not assent to the essential terms of arbitration found in the guidelines.*

Id. (emphasis added).

While the majority says that no Missouri arbitration case has looked at the context of an agreement to arbitrate in determining its ambiguity, *Hewitt* did just that. In determining whether the contract was ambiguous, *Hewitt* did not merely note that the Rams contract said it incorporated another matter and conclude this fact alone unambiguously made the incorporated matter a part of the contract. Instead, it looked at the terms, looked at the rules incorporated, determined the incorporated rules were not clear as to where to find the guidelines they in turn incorporated, and determined the contract, therefore, was ambiguous and must be interpreted against the drafter. *Id.*

Even more directly on point is *50 Plus Pharmacy v. Choice Pharmacy Systems, LLC, 463 S.W.3d 457 (Mo. App. 2015).* Missouri law long has provided, "Whether a dispute is covered by an arbitration clause is relegated to the courts as a matter of law and is to be determined from the contract entered into by the parties." *Greenwood v. Sherfield, 895 S.W.2d 169, 174 (Mo. App. 1995). 50 Plus Pharmacy* recognized "there is a significant difference between the question of *who* should decide arbitrability

versus *whether* arbitration should be compelled." 463 S.W.3d at 460. While "the latter question ... operates under a [presumption of arbitrability], the former ... operates under a principle wherein the law reverses the presumption." *Id.* (citations omitted). In Missouri, therefore, "unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 461 (citations omitted).

The Missouri Court of Appeals recently followed *50 Plus Pharmacy* in *Dolly v. Concorde Career Colleges, Inc., 2017 Mo. App. LEXIS 988, 2017 WL 4363863, at *3 (Mo. App. Oct. 3, 2017). Dolly* involved a dispute over an arbitration provision in an enrollment agreement between a small college and its students. *2017 Mo. App. LEXIS 988, [WL] at *1.* The enrollment agreement incorporated the AAA rules by reference, and the college argued this was sufficient evidence of the parties' intent to delegate arbitrability of their dispute to the arbitrator. *2017 Mo. App. LEXIS 988, [WL] at *2.* The appellate court disagreed, however, noting, "While parties may agree to arbitrate ... questions of arbitrability ... that would normally be for the court[,] there must be clear and unmistakable evidence of such [an] agreement." *Id.* (internal quotations omitted). The appellate court specified that, "While the language in the relevant AAA Rules might be clear and unmistakable, that language is not recited in the agreement signed by the Students" and a "general reference to the AAA Rules in an arbitration provision is not sufficient to establish an agreement to delegate [arbitrability]." *2017 Mo. App. LEXIS 988, [WL] at *3.*

The question of who the parties are and what parties in their situation would understand the contract to mean also has been recognized by other states in determining whether a delegation clause in an arbitration agreement is ambiguous. As the Supreme Court of Kentucky noted in *Dixon v. Daymar Colleges Group, LLC, 483 S.W.3d 332 (Ky. 2015)*, "when a party raises a good-faith [formation] challenge to [an] arbitration agreement itself, that issue must be resolved before a court can say that [the party] clearly and unmistakably intended to *arbitrate* that very validity question." *Id. at 342, quoting, Rent-A-Center, 561 U.S. at 82* (Stevens, J., dissenting). In *Dixon*, a group of students argued an arbitration provision was not binding on them "because their signature was physically inscribed before the arbitration provision ... itself." *Id.*

While *Dixon* conceded "the delegation provision was clear," it noted "the language of the delegation provision is largely beside the point." *Id.* Instead, the decision confirmed "a trial court is tasked with determining whether there exists a 'valid, binding arbitration agreement' before it may order a case to arbitration." *Id. at 341, quoting, JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats, 424 S.W.3d 902, 907 (Ky. 2014). Dixon* found language that incorporated subsequent amendments inadequate to include the arbitration provision after the signature line on the reverse side of the page. *483 S.W.3d at 346; see also Walker v. Builddirect.Com Techs. Inc., 2015 OK 30, 349 P.3d 549, 551 (Okla. 2015)* (reciting general incorporation rules requiring "a contract must make clear reference to the extrinsic document to be incorporated, describe it in such terms that its identity and location

may be ascertained beyond doubt, and the parties to the agreement [must have] had knowledge of and assented to the incorporated provisions").

The majority does not formally disagree with these principles. But these principles are inconsistent with the majority's determination that the mere incorporation of AAA rules is inherently unambiguous. To so hold is error. The majority is required to look at the contract as a whole, including who signed it and the nature of the contract, and of the matters incorporated, before it can determine whether incorporation of the AAA rules "clearly and unmistakably" informed an unsophisticated party such as Mr. Pinkerton that he was delegating to an arbitrator the right to determine the validity of the arbitration clause itself.

In particular, the majority is required to consider the fact that this is a contract between a sophisticated business entity and a consumer. The majority suggests Missouri law just does not allow it to consider this fact unless it first finds the contract ambiguous, even though it is consideration of the unsophisticated nature of the plaintiff that is key to the determination of ambiguity in the first instance. Indeed, the majority even concedes Missouri does consider the sophistication of the parties when considering the validity of a waiver of the right to sue the other party for their own negligence. But, it says, that is an isolated exception, not relevant here. The majority is wrong on all counts.

Appendix D

Many Missouri cases, addressing a wide variety of issues and in a myriad of contexts, have stated that the sophistication of the parties properly is considered in determining an agreement's meaning and validity. These cases are part of a long history of Missouri cases recognizing that cases involving the giving up by an unsophisticated party of a litigation right requires more exacting scrutiny and consideration of the unsophisticated nature of the signer in determining whether a contract is unambiguous.

50 Plus Pharmacy specifically recognized "a general reference to 'the then Existing Commercial Arbitration Rules of the American Arbitration Association[']... [is] not the sort [of express delegation] addressed or contemplated by the *Rent-A-Center* court as dictating delegation of the gateway matter of the question of arbitrability to the arbitrator." *463 S.W.3d at 461*. This is, of course, the very question at issue in this case, and the same result should be reached. Similarly, *Dolly* held mere reference to the AAA rules "does not constitute 'clear and unmistakable' evidence of delegation to an arbitrator of disputes relating to formation and enforceability of the arbitration provision." *2017 Mo. App. LEXIS 988, 2017 WL 4363863, at *3*.

Perhaps the most well-known decision about whether the sophistication of the party determines the validity of the waiver is *Purcell Tire & Rubber Co. v. Executive Beechcraft, Inc., 59 S.W.3d 505 (Mo. banc 2001)*. This Court was tasked with determining whether an ambiguity existed in a contract between two "sophisticated

businesses, experienced in th[e] type of transaction." *Id. at 510-11*. In holding there was no ambiguity in the liability waiver at issue, this Court specifically held "*[a]mbiguity depends on context*" and "*[l]anguage that is ambiguous to an unsophisticated party may not be ambiguous to a sophisticated commercial entity*." *Id. at 510, citing, Alack v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330, 338 n.4 (Mo. banc 1996)* (emphasis added). It was only because of the contract's "commercial context," that *Purcell* held there was no ambiguity, repeatedly citing the fact the parties were "sophisticated businesses" in each instance. *59 S.W.3d at 509-11*.

The majority incorrectly suggests these cases have no application here and just mean more specific language must be used in to waive the seller's negligence. This misses the point. The reason more specific language must be used is that an unsophisticated purchaser would not understand the more general language was intended to waive negligence unless that fact were spelled out in the contract. The analogy is exact. Unsophisticated persons such as Mr. Pinkerton would not understand that incorporation of the AAA rules meant that an arbitrator would decide issues of arbitrability unless that fact were spelled out in the contract.

Moreover, *Purcell*'s recognition of the importance of whether a party is sophisticated is not, as the majority would suggest, an isolated instance. The principle the majority adopts — that a provision that would be clear to a sophisticated party may not be clear to an unsophisticated one — has been applied time and again to attempts to

get an unsophisticated consumer to contract to waive the right to sue for negligence.[14] Furthermore, the principle

14. In addition to *Purcell*, numerous other Missouri cases have followed the same rationale in the context of liability waivers. *See Village of Big Lake v. BNSF Ry. Co., 433 S.W.3d 460, 468 (Mo. App. 2014)* ("It is [] clear that a different standard applies to determine whether general exculpatory clauses or indemnity clauses can cover claims of future negligence depending on whether the parties to the contract are sophisticated businesses, experienced in this type of transaction.") (citations omitted); *National Info. Solutions, Inc. v. Cord Moving & Storage Co., 475 S.W.3d 690, 692 (Mo. App. 2015)* ("In general, for a party to effectively release itself from or limit liability for its own negligence, the language of the contract must be clear, unequivocal, conspicuous and include the word 'negligence' or its equivalent. But less precise language may be effective when the contract is negotiated at arm's-length between equally sophisticated commercial entities.") (citations omitted); *Lone Star Indus., Inc. v. Howell Trucking, Inc., 199 S.W.3d 900, 903 n.2 (Mo. App. 2006)* ("[C]ourts have drawn a distinction between contracts with consumers and contracts between businesses of equal power and sophistication."); *Caballero v. Stafford, 202 S.W.3d 683, 696 n.2 (Mo. App. 2006)* ("We do not ignore the principal [sic] that less precise language may be effective in agreements negotiated at arms length between equally sophisticated commercial entities."); *Milligan v. Chesterfield Vill. GP, LLC, 239 S.W.3d 613, 616 n.3 (Mo. App. 2007)* ("Sophisticated businesses that negotiate at arm's length may limit liability without specifically mentioning 'negligence,' 'fault,' or an equivalent."); *Easley v. Gray Wolf Invs., LLC, 340 S.W.3d 269, 273 (Mo. App. 2011)* (finding it "significant[]" that "the evidence established that [Appellant] was a relatively sophisticated party contracting at arm's length with [Respondent]"); *Monsanto Co. v. Gould Elecs., Inc., 965 S.W.2d 314, 316-17 (Mo. App. 1998)* ("Here, [Respondent] and [Appellant] are sophisticated commercial entities. [Respondent] agreed to indemnify [Appellant] from 'any and all liabilities ....' Such terms clearly and unequivocally provide for [Respondent] to indemnify [Appellant] against any and all claims.").

on which these cases are founded — that "ambiguity depends on context" and the sophistication of the parties — was stated by *Purcell* as a general concept, and this Court has recognized it as such. For example, *Utility Service & Maintenance, Inc. v. Noranda Aluminum, Inc., 163 S.W.3d 910, 913 (Mo. banc 2005)*, a case involving an indemnity provision in a contract between two "sophisticated commercial entities," said Missouri "has [and continues to] draw[] a distinction between contracts with consumers and contracts between businesses of equal power and sophistication." *Id., citing, Alack, 923 S.W.2d at 338 n.4*.

Similarly, numerous other Missouri cases have applied the principle that ambiguity depends on context and the sophistication of the consumer to other types of contract provisions that attempt to limit an unsophisticated party's rights. Importantly, this Court applied these principles to a contract purporting to waive the right to jury trial in *Malan Realty Investors, Inc. v. Harris, 953 S.W.2d 624 (Mo. banc 1997)*, stating the fundamental right to "a jury trial may be waived by contract .... However ... [there is a] real concern [in such situations regarding] the relative bargaining powers of the parties." *Id. at 627.* To determine the validity of a jury trial waiver, *Malan* took into account several factors, including the "disparity in bargaining power between the parties [and] the business acumen of the party opposing the waiver." *Id.*

Various federal courts similarly have applied *Purcell*'s analysis and principles, considering the sophistication of the parties in deciding whether fundamental rights may

be contractually waived. *See, e.g., Lift Truck Lease & Serv., Inc. v. Nissan Forklift Corp., N. Am., 2013 U.S. Dist. LEXIS 85183, 2013 WL 3092115, at *2 (E.D. Mo. June 18, 2013)* ("In Missouri, sophisticated parties may contract to relinquish fundamental rights[.]"); *Sports Capital Holdings (St. Louis), LLC v. Schindler Elevator Corp. & Kone, 2014 U.S. Dist. LEXIS 49624, 2014 WL 1400159, at *2 (E.D. Mo. Apr. 10, 2014)* (involving a dispute over an elevator maintenance contract and noting, "It is well-settled in Missouri that '[s]ophisticated parties have freedom of contract — even to make a bad bargain, or to relinquish fundamental rights'").

This Court has recognized the importance of the sophistication of the parties in considering the validity of a forum selection clause as well. In *High Life Sales Co. v. Brown-Forman Corp., 823 S.W.2d 493 (Mo. banc 1992)*, this Court noted, "Many courts have refused to enforce a forum selection clause on the grounds of unfairness if the contract was entered into under circumstances that caused it to be adhesive." *Id. at 497* (citations omitted). Based on this premise, this Court held the forum selection agreement "was not unfair [because] it was between two substantial and successful companies, drafted and agreed upon by their respective counsel following give-and-take negotiations on various provisions." *Id.*

Missouri cases similarly have considered the sophistication of the parties in determining the validity of the terms of a lease waiver provision in *Halls Ferry Investments, Inc. v. Smith, 985 S.W.2d 848, 853 (Mo. App. 1998)*, stating, "While the lease failed to state that no

such obligation existed, an ambiguity cannot be created by silence, especially when both parties are sophisticated bargainers." Likewise, Missouri courts have "long ... held that an ambiguity [in a contract generally] cannot be created by silence, especially when both parties are sophisticated bargainers." *Morelock-Ross Properties, Inc. v. English Vill. Not-for-Profit Sewer Corp., 308 S.W.3d 275, 280 (Mo. App. 2010)* (determining a contract for sewage collection services between sophisticated parties could not be rendered ambiguous on the grounds it failed to expressly mention how certain fees should be collected) (citations and quotations omitted).

These cases are not merely "exceptions" that can be ignored in determining the meaning of the arbitration clause. They are the rule in cases involving the validity under Missouri law of a waiver of rights by an unsophisticated consumer. When dealing with a contract in which the parties have such unequal bargaining power, the principle set out in *Purcell* that "ambiguity depends on context" and the sophistication of the party is not an exception to the general rule regarding interpretation, applicable (for some unexplained reason) only in the case of waivers of the right to sue for negligence. Indeed, it would make no sense to allow consideration of a party's sophistication in that context but no other. Rather, these are established principles of Missouri contract law, applicable to the many kinds of waivers of litigation rights contained in contracts between sophisticated and unsophisticated parties.

For these reasons, when, as here, the issue is the validity of an unsophisticated consumer's waiver of litigation rights, Missouri's consistent rule has been to consider the lack of sophistication of one of the parties in determining how that party would interpret the waiver. This is the only way to treat an arbitration clause the same as other contract clauses are treated under Missouri law, which the majority concedes is required by the Federal Arbitration Act (FAA). The waiver of the right to have a judge determine the issue of arbitrability, like the a waiver of the right to sue for negligence, the right to jury trial, and the right to select one's forum, should be considered "in context" and in light of the relative sophistication of the parties. Indeed, it must be considered in the same way as are other comparable contractual waivers in Missouri. *See Rent-A-Ctr., 561 U.S. at 68; Brewer v. Mo. Title Loans, 364 S.W.3d 486, 497 (Mo. banc 2012)* (arbitration provisions are required to be treated the same as, and subject to the same defenses as, other contract provisions).

The majority does not cite any contrary Missouri cases. Instead, it relies on a number of United States court of appeals cases. While most of those cases do hold incorporation of the AAA rules unambiguously waives the right to have a court determine arbitrability, those cases do not govern here for numerous reasons.

First, the FAA leaves the question of who should decide contract formation issues to the parties to determine by contract; it does not require that these issues be delegated to the arbitrator. Second, as noted earlier, the FAA requires arbitration clauses be treated

the same as other comparable contract provisions in the state. *Rent-A-Ctr., 561 U.S. at 68-69*. In this case, that means the arbitration clause should be governed by the same principles of incorporation by reference, context, and the sophistication of the consumer as are other contractual waiver provisions, for these are general principles of Missouri contract law. For that reason, it does not matter if under federal law the AAA incorporation provision would be considered unambiguous; this is a matter of state law. *See State v. Storey, 901 S.W.2d 886, 900 (Mo. banc 1995)* (federal interpretation of Missouri law is not binding on Missouri courts); *Brewer, 364 S.W.3d at 492* ("[Federal law] permits state courts to apply state law defenses to the formation for the particular contract at issue on a case-by-case basis.").

Third, and even more importantly, all of the federal cases addressing delegation of the arbitrability issue by incorporation of the AAA rules except *Fallo v. High-Tech Institute, 559 F.3d 874 (8th Cir. 2009)*, involve a sophisticated business entity or executive.[15] As noted in *Brennan v. Opus Bank, 796 F.3d 1125, 1130-31 (9th Cir. 2015)*, the rest of these federal cases simply do not address

15. *See Petrofac, Inc. v. DynMcDermott Petroleum Operations Co., 687 F.3d 671, 673-74 (5th Cir. 2012)* (dispute between a subcontracting corporation against the general contractor company); *Qualcomm Inc. v. Nokia Corp., 466 F.3d 1366, 1368 (Fed. Cir. 2006)* (patent infringement dispute between telecommunication corporations); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1329 (11th Cir. 2005)* (dispute between limited partnerships arising from 20 extermination service contracts); *Contec Corp. v. Remote Solution Co., 398 F.3d 205, 207 (2d Cir. 2005)* (indemnification dispute between electronics corporations).

whether delegation by incorporation would apply in a consumer case or one involving an unsophisticated party. Neither do any of these cases suggest the FAA requires them to find that incorporation of the AAA rules is sufficient to delegate the issue of arbitrability. Delegation of arbitrability is simply an inference they have drawn in the sophisticated business transactions presented to them. *Id. Brennan* said it would apply such a presumption to the sophisticated entities in that case, but it expressly left unresolved the question of whether "incorporation of the AAA rules can be clear and unmistakable evidence of delegation of arbitrarily where one party is an unsophisticated consumer." *Ingalls v. Spotify USA, Inc., 2016 U.S. Dist. LEXIS 157384, 2016 WL 6679561, at *3 (N.D. Cal. Nov. 14, 2016); see also Quilloin v. Tenet HealthSystem Phila., Inc., 673 F.3d 221 (3d Cir. 2012)* (refusing to find delegation of questions of arbitrability in case in which contract said AAA rules governed).

The unsophisticated consumer issue has been directly determined in numerous district court cases in the Ninth Circuit. Even prior to *Brennan*, the district court in *Tompkins v. 23andMe, Inc., 2014 U.S. Dist. LEXIS 88068, 2014 WL 2903752, at *11 (N.D. Cal. June 25, 2014)*, held incorporation by reference of the AAA rules is just one factor in determining whether the parties intended to delegate the arbitrability decision to the arbitrator. *Tompkins* concluded "incorporation of the AAA rules does not necessarily amount to 'clear and unmistakable' evidence of delegation, particularly when the party asked to accept the agreement is a consumer." *Id.* The court subsequently refused to extend the presumption used in

cases between sophisticated commercial parties to cases involving consumers if the arbitration agreement itself "lacks an express delegation provision on its face, so a consumer would have to look up the AAA rules to find [the delegation provision]."[16] *Id.*

Since *Brennan*, "Every district court decision in [the Ninth Circuit] to address the question ... has [followed the *Tompkins* approach and] held that incorporation of the AAA rules was insufficient to establish delegation in consumer contracts involving at least one unsophisticated party." *Ingalls, 2016 U.S. Dist. LEXIS 157384, 2016 WL 6679561, at *3; Money Mailer, LLC v. Brewer, 2016 U.S. Dist. LEXIS 47928, 2016 WL 1393492, at *2 (W.D. Wash. Apr. 8, 2016); Galilea, LLC v. AGCS Marine Ins. Co., 2016 U.S. Dist. LEXIS 45866, 2016 WL 1328920, at *3 (D. Mont. Apr. 5, 2016); Vargas v. Delivery Outsourcing, LLC, 2016 U.S. Dist. LEXIS 32634, 2016 WL 946112, at *8 (N.D. Cal. Mar. 14, 2016); Aviles v. Quik Pick Express, LLC, 2015 U.S. Dist. LEXIS 174960, 2015 WL 9810998, at *6 (C.D. Cal. Dec. 3, 2015); Meadows v. Dickey's Barbecue Rests., Inc., 144 F. Supp. 3d 1069, 1078 (N.D. Cal. 2015).*

For example, in *Meadows*, after noting "an inquiry about whether the parties clearly and unmistakably delegated arbitrability by incorporation should first

16. While the court in *Zenelaj v. Handybook Inc., 82 F. Supp. 3d 968, 974 (N.D. Cal. 2015)*, said *Tompkins* did not base its holding on the fact it was a consumer case, *Tompkins* certainly treated the matter as a fact question requiring consideration of the consumer's lack of sophistication and bargaining power. Prior to *Brennan*, however, the *Zenelaj* decision had caused a circuit split on this issue.

consider the position of those parties," the court concluded it is "much less reasonable" to find "'clear and unmistakable' evidence of delegation" for an "inexperienced individual, untrained in the law," such as a restaurant franchisee, than it is for "a large corporation ... or a sophisticated attorney." *144 F. Supp. 3d at 1078*.

Similarly, in *Aviles*, a truck driver filed suit against the defendant trucking company, which moved to compel arbitration. *2015 U.S. Dist. LEXIS 174960, 2015 WL 9810998, at *1*. Even though the plaintiff was "an independent contractor who operates his own trucking business," the court deemed him an unsophisticated party because he was "untrained in the law" and it was "doubtful that [he] actually understood the import of [the bolded delegation clause's] terms." *2015 U.S. Dist. LEXIS 174960, [WL] at *6*. Based on the plaintiff's unsophisticated status, the court found there could not be clear and unmistakable intent to delegate. *Id.*

Again, in *Vargas*, an "unsophisticated luggage delivery driver" signed an arbitration agreement that included a delegation provision incorporating the AAA rules "without an opportunity to review the documents or consult with an attorney." *2016 U.S. Dist. LEXIS 32634, 2016 WL 946112, at *8*. The court found the plaintiff's status as an "unsophisticated" party to be dispositive and held the delegation clause to be invalid because "incorporation of AAA's rules does not evidence a 'clear and unmistakable' intent to delegate disputes involving unsophisticated employees." *2016 U.S. Dist. LEXIS 32634, [WL] at *7.*

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In *Galilea*, the court held the plaintiffs, who had formed an LLC for the purpose of owning a boat, were "individual[s] not well-versed in arbitration law" and, therefore, "unlikely to be aware that the AAA rules provide for the arbitrator to determine his own jurisdiction." *2016 U.S. Dist. LEXIS 45866, 2016 WL 1328920, at *3*. The court itself then determined arbitrability because the plaintiffs were not "sophisticated part[ies] for [arbitration] purposes." *Id.*

Finally, in *Money Mailer*, the court held incorporation of the AAA rules did not "show a 'clear and unmistakable' intent to delegate questions of arbitrability" when the bound party was a "small business owner ... [with] no legal experience." *2016 U.S. Dist. LEXIS 47928, 2016 WL 1393492, at *2*.

The middle district of Alabama in *Palmer v. Infosys Technologies Ltd., Inc., 832 F.Supp.2d 1341 (M.D. Ala. 2013)*, similarly refused to hold mere incorporation of the AAA rules into an arbitration provision constitutes a clear and unmistakable agreement to delegate the issue of arbitrability. This is particularly true when the relevant state law provides such issues are to be resolved by the court, as *Palmer* found was the case in California and as is the case in Missouri for the reasons already noted in cases involving unsophisticated consumers. *Id. at 1344*.

The single United States court of appeals case on which the majority relies involving a consumer, *Fallo*, simply assumed the incorporation rule applied in the consumer context before it, without recognizing the cases it relied

on were commercial cases. *559 F.3d at 878-79*. Further, while *Fallo* says it affirmed delegation of arbitrability to the arbitrator, it then proceeded to interpret delegation as including only the question of what claims were subject to arbitration, for it went on to consider the merits of Fallo's unconscionability challenge rather than leaving that issue to the arbitrator. *Id. Fallo* has been further limited by the Eighth Circuit's decision in *Nebraska Machinery Co. v. Cargotec Solutions, LLC, 762 F.3d 737, 741 n.2 (8th Cir. 2014)*, which said the question of the existence of an agreement to arbitrate is for the court.

Far more persuasive is the decision by the Montana Supreme Court in *Global Client Solutions v. Ossello, 2016 MT 50, 382 Mont. 345, 367 P.3d 361 (Mont. 2016)*, that, like the federal district court cases just discussed, rejected the idea there is a "'general rule' that incorporation of the AAA rules into an arbitration clause constitutes an agreement to arbitrate arbitrability." *Id. at 369*. Noting the only cases finding otherwise "almost exclusively involve[d] arbitration disputes between sophisticated parties in commercial settings," *Ossello* refused to find the parties had agreed to arbitrate arbitrability, noting "the AAA rules [were] not part of the record and neither the DAA nor [the creditor's] arguments specify which of the multiple sets of commercial or consumer AAA rules [were] supposedly incorporated [into the contract]." *Id.* While here, as the majority notes, attorneys for both parties located the relevant AAA rules and attached them to their motions, the question is not what sophisticated legal minds can figure out today about the AAA rules but rather what a student such as Mr. Pinkerton understood

at the time. As in *Ossello*, the AAA rules were neither attached nor explained at the only time that is relevant in determining Mr. Pinkerton's intent.

In *Morgan v. Sanford Brown Institute, 225 N.J. 289, 137 A.3d 1168 (N.J. 2016)*, the Supreme Court of New Jersey held an arbitration delegation provision in an enrollment agreement between student-plaintiffs and a college that said it was to be administered according to AAA rules was unenforceable because it "did not clearly and unmistakably" show intent to "delegate arbitrability." *Id. 1182*. The contract in question was written "in nine-point font" and included a "more than 750-word arbitration clause set forth in thirty-five unbroken lines." *Id. at 1181*. The court noted, "The meaning of arbitration is not self-evident to the average consumer." *Id. at 1180*. It concluded, therefore, that such a provision could not be enforceable unless it "explain[ed] in some broad or general way that arbitration is a substitute for the right to seek relief in our court system." *Id. at 1179*.

The majority just waves off these cases by saying they are not consistent with Missouri law. But for all of the reasons already discussed, they are indeed consistent with Missouri law's recognition that the sophistication of the signer affects the determination whether a contract waiver is ambiguous. It is the majority that is incorrectly treating an arbitration clause differently than it treats other contractual attempts to waive the litigation rights of an unsophisticated consumer.

Under these settled principles of Missouri law, while a consumer signing a student enrollment form including an arbitration agreement may understand the right to sue over certain types of claims in court are being waived, that does not apprise the student that the validity of the waiver itself will be determined by the arbitrator rather than by a court. Just as *Purcell* and the other cited cases recognized that use of general language about waivers might be insufficient in a consumer context involving an unsophisticated party, so here use of general incorporation by reference language should not be sufficient to constitute irrebuttable proof of an intent to delegate arbitrability. Indeed, the concerns expressed in those cases have even greater application because the United States Supreme Court has held the party seeking to require arbitration has the burden of proving by "clear and unmistakable" evidence that the other party intended to delegate arbitrability to the arbitrator.

At a minimum, this is a question of fact that should be put to the parties' proof, not decided by an irrebuttable presumption. As *Alack* stated, "our law on such an important point cannot be so out of step with the understanding of our citizens." *923 S.W.2d at 337.* This Court should recognize a generally applicable principle of Missouri contract law that when a consumer contract purports to incorporate by reference another writing, the court should determine whether the parties actually know and understand the provisions to be included.

Applying these principles here, Mr. Pinkerton was a young, non-college educated student who was trying to

go to school to learn how to repair aircraft engines. The school he attended is a large for-profit corporation. The school did not provide Mr. Pinkerton with a copy of the AAA rules. Nothing in the contract explains the content of the AAA rules even generally, nor does the contract explain where and how to find them. The contract does not explain that, while the referenced rules were called "commercial" rules at that time, they nonetheless applied to consumers like Mr. Pinkerton and precluded him from having a court decide whether the agreement or the delegation provision was enforceable or binding. An average consumer might well presume the rules are simply that: rules governing the procedural aspects of arbitration, not "rules" that actually take away the consumer's rights. Certainly nothing in the contract mentioned delegation of arbitration decisions to an arbitrator. It is not surprising that both Mr. Pinkerton and the school's agent testified they had no idea what the AAA rules contained and no idea what they required the arbitrator or the court to decide. Neither said they understood the rules delegated to an arbitrator the arbitrability issue itself.

On these facts, a trial court certainly could find Mr. Pinkerton did not "clearly and unmistakably" intend to delegate arbitrability to an arbitrator. This Court should remand the case for a factual determination whether Mr. Pinkerton actually knew and understood what the provisions of the AAA rules were, where he could find them, and whether, as a matter of fact, he clearly and unmistakably showed an intent to delegate arbitrability issues to an arbitrator.

II. MR. PINKERTON SPECIFICALLY CHALLENGED THE DELEGATION PROVISION

The majority notes the Supreme Court has held that to challenge the delegation of arbitrability, a party has to have challenged the provision specifically. The majority then states Mr. Pinkerton failed to do so in the trial court.[17] The latter statement is factually incorrect. The record clearly shows Mr. Pinkerton argued — in opposition to the motion to refer the matter to arbitration — that the arbitration agreement, including the delegation clause, was invalid. Indeed, in his suggestions in opposition to the defendant's renewed motion to compel arbitration, in response to the school's claim he had not raised the issue specifically, Mr. Pinkerton used capital letters for emphasis in stating he did raise the issue and repeated he "disputes the existence and enforceability of any agreement to delegate issues of arbitrability to an arbitrator." He similarly argues in this Court that the putative delegation provision does "not delegate any threshold issues to an arbitrator." This issue was preserved.

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17. The Supreme Court recognizes two types of challenges to the validity of arbitration: "One type challenges specifically the validity of the agreement to arbitrate. ... The other challenges the contract as a whole ...." *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)*. A challenge to a delegation provision within an arbitration agreement must be made to that provision specifically as distinct from a challenge to the arbitration agreement as a whole. *Rent-A-Ctr., 561 U.S. at 70-72*.

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III. UNCONSCIONABILITY IS A CONTRACT FORMATION ISSUE

While the majority recognizes "this Court has held that unconscionability is a state law defense to contract formation," the majority nonetheless unnecessarily creates uncertainty by suggesting it is not sure why this is the case because "conscionability is not an essential element of contract formation. As such, while unconscionability is a defense to contract formation and, therefore, a contract's validity and enforceability, it is not an issue of whether a contract has ever been concluded." *Slip op. at *20* (citations and quotation omitted).

This dicta interprets the term "contract formation" more narrowly than does the Supreme Court. Indeed, as this Court explained in *Brewer v. Missouri Title Loans, 364 S.W.3d at 492 n.3*:

> While Missouri courts traditionally have discussed unconscionability under the lens of *procedural* unconscionability and *substantive* unconscionability, *Concepcion* instead dictates a review that limits the discussion to whether state law defenses such as unconscionability impact the *formation* of a contract. ... Accordingly, the analysis in this Court's ruling today — as well as this Court's ruling in *Robinson v. Title Lenders, Inc.*, — no longer focuses on a discussion of procedural unconscionability or substantive unconscionability, but instead is limited to a discussion of facts relating to unconscionability impacting the formation of the contract.

(Citations and quotation omitted.)

In other words, the unconscionability of the terms of a contract may be such that it negates the formation of the contract at all, or the unconscionability may instead impact enforcement of particular terms or of the contract as a whole. *Robinson* pointed out the former type of unconscionability in formation is exemplified by "procedural" unconscionability such as "high pressure sales tactics, unreadable fine print, or misrepresentation among other unfair issues in the contract formation process." *Robinson v. Title Lenders, Inc., 364 S.W.3d 505, 508 n.2 (Mo. banc 2012), quoting, State ex rel. Vincent v. Schneider, 194 S.W.3d 853, 858 (Mo. banc 2006). Brewer* advised that in cases otherwise subject to arbitration, "Future decisions by Missouri's courts addressing unconscionability likewise shall limit review of the defense of unconscionability to the context of its relevance to contract formation." *364 S.W.3d at 493 n.3.*

The Supreme Court has recognized unconscionability may affect contract formation or may be an issue of contract enforcement.[18] The same reasoning applies to

18. *E.g., Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 304 n.9, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010)* ("The parties' dispute about the [contract]'s ratification date presents a formation question in the sense above, and is therefore not on all fours with, for example, the formation disputes we referenced in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444, n. 1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), which concerned whether, not when, an agreement to arbitrate was 'concluded.'"); *Buckeye, 546 U.S. at 444 n.1* ("The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee

other defenses such as duress or fraud. *Brewer* and relevant Supreme Court cases recognize duress as a defense against formation, but lack of duress is not an essential element of contract formation. *Baker v. Bristol Care, Inc., 450 S.W.3d 770, 782 (Mo. 2014)* ("[A] contract is *voidable* due to ... duress ... but such [a] defense [has] nothing to do with contract formation. In fact, [duress] defenses assume a contract was formed.") (citations omitted). It does not follow that a party alleging duress is not raising a contract formation challenge. The same is true of fraud.

For these reasons, I dissent from the majority's holding that Mr. Pinkerton did not preserve the issue of delegation, its questioning of the fact that unconscionability has been recognized as an issue of contract formation, and its holding that, in a consumer case such as this, the mere reference to incorporation of the AAA rules, without their attachment and without specifically referencing the incorporation of the delegation provision, is unambiguous. I believe the language would be ambiguous to an unsophisticated party if the Court does as *Purcell* requires and considers the context and the parties' relative sophistication. The case should be remanded for determination of the factual question whether an unsophisticated student such as Mr. Pinkerton clearly and unmistakably intended to delegate the issue of arbitrability to the arbitrator.

/s/
LAURA DENVIR STITH, JUDGE

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was ever concluded."). *Buckeye* went on to list several examples of formation questions, including "whether [a party] ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent." *546 U.S. at 444 n.1* (citations omitted).

APPENDIX E — OPINION OF THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY, DATED FEBRUARY 2, 2015

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

STEVEN PINKERTON,

Plaintiff, et al.,

v.

TECHNICAL EDUCATION SRVCS INC D/B/A AVIATION INST. OF MAINT.

Defendant, et al.

Case No. 1416-CV10007
Division 9

ORDER/JUDGMENT

Pending before the Court is Defendants' Motion To Dismiss, Or In The Alternative, To Compel Arbitration And To Stay This Proceeding; Defendants' Motion To Stay This Court's September 8, 2014 Order And Renewed Motion To Compel Arbitration; Plaintiff's Motion To Enforce Discovery; and Plaintiff's Motion For Enlargement Of Time To Complete Arbitration-Related Discovery. For the following reasons, Defendants' Motion To Dismiss, Or In The Alternative, To Compel Arbitration And To Stay This Proceeding is granted in part and denied in part;

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Defendants' Motion To Stay This Court's September 8, 2014 Order And Renewed Motion To Compel Arbitration is granted; Plaintiff's Motion To Enforce Discovery and Plaintiff's Motion For Enlargement Of Time To Complete Arbitration-Related Discovery are denied as moot.

BACKGROUND

April 30, 2014, Plaintiff Steven Pinkerton ("Pinkerton") filed a Petition against Technical Education Services Inc. d/b/a Aviation Institute of Maintenance ("AIM"), Adrian Rothrock ("Rothrock"), and W. Gerald Yagen ("Yagen") (collectively "Defendants") alleging Defendants deceived Pinkerton into attending AIM and benefited from Pinkerton's enrollment at AIM. Pinkerton advances causes of action for Violations of the Missouri Merchandising Practices Act, Fraudulent Misrepresentation, Negligent Misrepresentation, Money Had and Received, and Unjust Enrichment against Defendants arising out of transactions between Defendants and Pinkerton surrounding Pinkerton signing the Aviation Maintenance Technical Engineer Student Enrollment Agreements ("Enrollment Agreements") on September 8, 2009.[1] Pinkerton alleges that Defendants should be held jointly and severally liable because Rothrock was acting within the course and scope of his employment with AIM and Yagen operates AIM with other Yagen-owned enterprises, all with common control and without compliance with corporate formalities so as to pierce the corporate veil.

1. Pinkerton signed a second Enrollment Agreement on March 24, 2010 which was identical to the Enrollment Agreement signed on September 8, 2009.

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On June 19, 2014 Defendants filed a Motion To Dismiss, Or In The Alternative, To Compel Arbitration And To Stay This Proceeding asking the Court to enforce the arbitration agreements within the Enrollment Agreements signed by Pinkerton. Defendants argue Pinkerton signed enforceable arbitration agreements which provide jurisdiction over these claims, and the existence, scope, or validity of the arbitration agreements, to an arbitrator. Pinkerton filed suggestions in opposition to the enforcement of the arbitration agreements on June 30, 2014 contending that: a) the issue of whether the parties entered into an enforceable arbitration agreement is for the Court to decide, b) even if the arbitration agreement is enforceable, the Court may not dismiss the case, c) Yagen and Rothrock are not parties to the arbitration agreement and cannot enforce the arbitration agreement, and d) no enforceable agreement was ever formed.

Defendants filed a Motion To Stay This Court's September 8, 2014 Order and Renewed Motion To Compel Arbitration on November 4, 2014 asking the Court to stay its September 8, 2014 Order permitting limited discovery and to compel arbitration because the arbitration agreements provide a clear and unmistakable expression of the parties' intent to leave any question of validity or existence to an arbitrator. Defendants further state Pinkerton never challenged the delegation provisions of the arbitration agreements which reserves this gateway question to an arbitrator. On November 14, 2014, Pinkerton filed suggestions in opposition to Defendants' Motion arguing that no Missouri Supreme Court Rule sanctions the use of a motion for reconsideration and that

Pinkerton disputes the existence and enforceability of any agreement to delegate issues of arbitrability to an arbitrator.

ANALYSIS

I. THE DELEGATION PROVISION OF THE ARBITRATION AGREEMENTS IS ENFORCEABLE

Defendants first argue Pinkerton signed enforceable arbitration agreements that cover Pinkerton's claims and any challenge to the enforceability of the arbitration agreements must be decided by an arbitrator. Pinkerton contends that the enforceability of the arbitration agreements should be decided by a court and not an arbitrator because an enforceable arbitration agreement was never formed. Further, Pinkerton contends that the delegation provision fails because the incorporation of the American Arbitration Association ("AAA") Rules is not clear and unmistakable.[2]

The parties do not dispute that the arbitration agreements are governed by the Federal Arbitration Act

2. The absence of any mention of inadequacy of consideration or unconcsionability as it relates to the delegation provision in Pinkerton's complaint and initial opposition makes clear that Pinkerton's position in his opposition filed on November 14, 2014 that the delegation provision is unconscionable and fails for lack of consideration was not Pinkerton's true contention against compelling arbitration.

("FAA")[3] Under the FAA, the determination of whether a valid arbitration agreement exists is presumptively left to the courts, but the "parties may eliminate that presumption by providing clear and unmistakable language to the contrary." *AT&T Techs. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649; *Koch v. Compucredit Corp.,* 543 F.3d 460,463 (8th Cir. 2008). "[P]arties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, W, Inc. v. Jackson,* 561 U.S. 63, 68-69 (2010).

An arbitration provision that incorporates the AAA Rules provides "a clear and unmistakable expression of the parties' intent to reserve the question of arbitrability for the arbitrator and not the court." *Fallo v. High-Tech Institute,* 559 F.3d 874, 878 (8th Cir. 2009). The majority of circuits agree with this interpretation. *See United States ex ref. Beauchamp & Shepherd v. Academi Training Ctr.,* 2013 U.S. Dist. LEXIS 46433, at 27* (E.D. Va. 2013). In order to incorporate the AAA rules, courts have held that the arbitration agreement needs to contain mandatory language regarding the use of AAA rules and that the

3. Section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24 (1983). Under the FAA "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id.; see also Netco, Inc. v. Dunn,* 194 S.W.3d 353, 360 (Mo. 2006). In examining an arbitration agreement, this Court must do so with this overriding policy in mind.

use of the phrase "in accordance with" or "conducted by" provides sufficient incorporating language. *Sys. Research & Applications Corp. v. Rohde & Schwarz Fed. Sys.*, 840 F. Supp. 2d 935, 943-44 (E.D. Va. 2012).[4]

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4. For specific examples of language held to have incorporated AAA rules, see *Fallo,* 559 F.3d at 877 ("The arbitration provision in the enrollment agreement states that disputes arising out of the enrollment agreement *shall be* settled by arbitration *in accordance with* the Commercial Rules of the [AAA]."") (emphasis added); *Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship,* 432 F.3d 1327, 1332 (11th Cir. 2005) (all three arbitration clauses at issue provided that "arbitration *shall be* conducted *in accordance with* the Commercial Arbitration Rules then in force of the [AAA]"') *rev'd on other grounds,* 280 F. App'x 829 (11th Cir. 2008); *Qualcomm Inc. v. Nokia Corp.,* 466 F.3d 1366, 1368 (Fed. Cir. 2006) (arbitration clause *"dictates* that any such dispute '*shall be* settled by arbitration *in accordance with* the arbitration rules of the [AAA]'") (emphasis added); *Contec Corp. v. Remote Solution Co.,* 398 F.3d 205, 208 (2nd Cir. 2005) (arbitration clause read: "[i]n the event the parties are unable to arrive at a resolution, such controversy *shall be* determined by arbitration ... *in accordance with* the Commercial Arbitration Rules of the [AAA]") (emphasis added); *Citifinancial, Inc. v. Newton,* 359 F. Supp. 2d 545, 549 (U.S. Dist. Miss. 2005) (arbitration clause provided that "any Claim ... *shall be* resolved by binding arbitration *in accordance with* ... the Expedited procedures of the Commercial Arbitration Rules of the [AAA]") (first emphasis added); *Bayer Cropscience, Inc. v. Limagrain Genetics C01p.,* 2004 U.S. Dist. LEXIS 25070, at *4 (N.D. Ill. 2004) (arbitration clause provided that "[t]he arbitration *shall be* conducted ... *in accordance with* the prevailing commercial arbitration rules of the [AAA]") (emphasis added); *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.,* 2001 U.S. Dist. LEXIS 21482, at 21 *(S.D. Fla. 2001) ("It is undisputed here that the relevant arbitration provisions of the Agreement *mandate* that any arbitration *shall be conducted by* the AAA under its auspices.") (emphasis added), *aff'd on other grounds,* 312 F.3d 1349 (11th Cir. 2002).

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The relevant portion of the arbitration agreements found in the Enrollment Agreements at issue here read as follows:

> I agree that any controversy, claim, or dispute of any sort arising out of or relating to matters including, but not limited to: student admission, enrollment, financial obligations and status as a student, which cannot be first resolved by way of applicable internal dispute resolution practices and procedures, shall be submitted for arbitration, to be administered by the American Arbitration Association located within Virginia Beach, Virginia, in accordance with its commercial arbitration rules.

The clear and unmistakable language in the arbitration agreements here incorporate the AAA Rules. The language includes the use of the mandatory language "shall be" and the proper incorporating language of "in accordance with." Thus the AAA Rules govern the arbitration agreement and as such provide evidence of the parties' intent to follow the AAA Rules.

Further, AAA Rule 7 outlines the arbitrator's jurisdiction as "including any objections with respect to the existence, scope or validity of the arbitration agreement" and specifies that "[a] party must object to the jurisdiction of the arbitrator ...." AAA R-7(a),(c). The incorporation of AAA Rule 7 is a clear and unmistakable expression of the parties' intent to reserve the gateway question of whether the parties agreed to arbitrate for the arbitrator to decide.

"An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the ... court to enforce, and the [FAA] operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center v. Jackson,* 561 U.S. at 70. Section 2 of the FAA designates arbitration provisions severable from a contract as a whole and, further, provisions delegating gateway issues to the arbitrator are severable from general arbitration provisions. *Id.* at 70-71. Accordingly, "unless [the party opposing arbitration has] challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 72.

In *Jackson,* the arbitration agreement as a whole was challenged as unconscionable, but the opponent of enforcement failed to specifically challenge the delegation provision. *Id.* at 72-73. The Supreme Court held that, absent a specific challenge to the delegation provision, any determination as to the conscionability of the arbitration agreement as a whole must be left to the arbitrator. *Id.* at 72; *United States ex rel. Beauchamp & Shepherd,* 2013 U.S. Dist. LEXIS 46433, at 25-26* (U.S. Dist. Va. 2013) (finding that the unconscionability challenge to the validity of an arbitration agreement did not alter the conclusion that incorporation of AAA rules delegating arbitrability to the arbitrator was clear and unmistakable and a stay pending completion of arbitration proceedings was required, as the delegation provision had not been specifically attacked as unconscionable or otherwise invalid).

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In a recent decision, the Western District of Missouri implemented the specific challenge requirement set forth in *Jackson. Johnson v. Rent-A-Center,* 2014 Mo. App. LEXIS 1227, *9-13 (Mo. Ct. App. Nov. 4, 2014). The Court in *Johnson* found that the delegation provision must be challenged specifically in order to submit the question to a court stating "[i]n other words, [e]ven when a litigant has specifically challenged the validity of an agreement to arbitrate he must submit that challenge *to the arbitrator* unless he has lodged an objection to the particular line in the agreement that purports to assign such challenges to the arbitrator- the so-called 'delegation clause.'" *Johnson,* 2014 Mo. App. LEXIS 1227, at *10 (Mo. Ct. App. Nov. 4, 2014) *quoting Rent-A-Center v. Jackson,* 561 U.S. at 76 (Stevens, J., dissenting) (emphasis in original). The opinion was withdrawn because the respondent passed away prior to the issuance of the Court's Order, but the opinion is predictive of future delegation provision enforcement issues.

In Pinkerton's Preliminary Suggestions In Opposition To Defendants' Motion To Dismiss Or To Compel Arbitration, Pinkerton states that the arbitration agreement is unenforceable and disputes that any enforceable arbitration agreement was formed. Pinkerton does not challenge the delegation provision specifically.[5]

5. In Pinkerton's June 30,2014 Motion To Stay Briefing And Ruling On Defendant's Motion To Dismiss Or To Compel Arbitration, which was granted by this Court on September 8, 2014, Pinkerton challenges the arbitration as unconscionable. However, the Motion contains no specific challenge to the delegation provision of the agreement.

Since no challenge was lodged against the delegation provision specifically, the provision is enforceable. The provision provides for the delegation of the gateway question of whether the patties agreed to arbitrate. Thus, the issue of whether the arbitration agreement was unconscionable is left to an arbitrator per the "clear and unmistakable" intent of the parties expressed by the incorporation of the AAA Rules into the Arbitration Agreement.

II. THE CASE IS PROPERLY STAYED AND NOT DISMISSED

Defendants request dismissal of the case, but, in their pleadings, the Defendants state the Court should stay the case pending arbitration. Pinkerton also argues that even if the arbitration agreement is enforceable, the court may only stay the case and not dismiss it. Missouri Revised Statute§ 435.255.4 provides that "[a]ny action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or application therefor has been made under this section ...." § 435.355.4 R.S.Mo. When arbitration is compelled, "the proper course of action for the trial court ... is to stay the action pending arbitration" rather than dismissal. *Hewitt v. St. Louis Rams P'ship,* 409 S.W.3d 572, 574 (Mo. Ct. App. 2013). Since arbitration is compelled in this case, the case is stayed in this Court pending arbitration.

III. DEFENDANTS YAGEN AND ROTHROCK CAN ENFORCE THE ARBITRATION AGREEMENT

Pinkerton contends that Yagen and Rothrock cannot enforce the arbitration agreement as they are not signatories of the arbitration agreement. A nonsignatory to an arbitration agreement may compel a signatory to arbitrate under the theory that a plaintiff/signatory is estopped from refusing to arbitrate. *Netco, Inc. v. Dunn,* 194 S.W.3d 353, 361 (Mo. 2006). The estoppel theory may be applied "in cases where the defendant/non-signatory was an ... alter ego of a signatory." *Id.; see Nitor Distrib., Inc. v. Dunn,* 194 S.W.3d 339, 348 (Mo. 2006) (recognizing that a nonsignatory that is being sued as an alter-ego/piercing the corporate veil may utilize an arbitration agreement); *see also Arthur Andersen LLP v. Carlisle,* 556 U.S. 624 (2009) (finding that a contract may be enforced by or against nonparties to the contract through traditional principles of state law such as piercing the corporate veil, alter ego, waiver, and estoppel).

Pinkerton contends that Yagen is "not protected by the corporate veil" and is "therefore jointly and severally liable for the conduct alleged herein." Pl.'s Pet. 3-4. Yagen, a nonsignatory, is being sued as an alter ego of AIM, a signatory. As such, Pinkerton may be compelled to arbitrate by Yagen, and Pinkerton is estopped from refusing to arbitrate with Yagen. *Netco, Inc.,* 194 S.W.3d 353, 361 (Mo. 2006).

A nonsignatory may also enforce an arbitration agreement when "the relationship between the signatory

and nonsignatory defendants is sufficiently close that only by permitting the nonsignatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided." *Kohner Props. v. SPCP Group VI, LLC,* 408 S.W.3d 336, 344, (Mo. Ct. App. 2013) quoting *CD Partners, LLC v. Grizzle,* 424 F.3d 795 (8th Cir. 2005). A signatory and nonsignatory are sufficiently close under an "alternative estoppel theory when the relationship of persons, wrongs and issues involved is a close one." *CD Partners, LLC,* 424 F.3d at 799; *Dunn Indus. Group, Inc. v. City of Sugar Creek,* 112 S.W.3d 421, (Mo. 2003) ("[S]ignatories to contracts containing an arbitration agreement [are] estopped from avoiding arbitration with nonsignatories when the issues the nonsignatories [are] seeking to resolve in arbitration [are] intertwined with the agreement signed by the signatory.")

Pinkerton contends that Rothrock is unable to enforce the arbitration agreement as a non signatory to the agreement. Pinkerton, however, is suing Rothrock in his capacity as an employee of AIM. Pl.'s Pet. 3. The claims against Rothrock are the same claims asserted against Yagen and AIM. The issues involved with the claims against Rothrock will be very similar, if not identical, to the issues involved with the claims against Yagen and AIM. Furthermore, Rothrock, Yagen, and AIM are entwined due to the shared goals and motivations for their actions. Nonsignatory Rothrock is sufficiently close to AIM and Yagen that by not permitting Rothrock to invoke the arbitration agreement, the arbitration agreement will be eviscerated as the suit against Rothrock will be identical to the suits against AIM and Yagen.

Appendix E

CONCLUSION

Therefore, for the reasons stated above, It is hereby

ORDERED Defendants' Motion To Dismiss, Or In The Alternative, To Compel Arbitration And To Stay This Proceeding is granted in part and denied in part. It is further

ORDERED Defendants' Motion To Stay This Court's September 8, 2014 Order And Renewed Motion To Compel Arbitration is granted. It is further

ORDERED Plaintiff's Motion To Enforce Discovery and Plaintiff's Motion For Enlargement Of Time To Complete Arbitration-Related Discovery are denied as moot. It is further

ORDERED this case is stayed pending arbitration and is set for a Status Review Conference on May 22, 2015, at 9:30 a.m.

02-Feb-2015
DATE

/s/
JOEL P. FAHNESTOCK, JUDGE

APPENDIX F — STATUTORY PROVISIONS INVOLVED

FEDERAL ARBITRATION ACT

9 U.S.C. § 2

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

Appendix F

9 U.S.C. § 3

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Appendix F

9 U.S.C. § 4

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue,

and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.