State ex rel. Hewitt v. Kerr

Supreme Court of Missouri
461 S.W.3d 798 (2015)

RUSSELL, C.J., BRECKENRIDGE AND DRAPER, JJ., concur; STITH, J., concurs in part and dissents in part in separate opinion filed; TEITELMAN, J., concurs in part and dissents in part in separate opinion filed; FISCHER, J., dissents in separate opinion filed, in which WILSON, J., concurs; WILSON, J., dissents in separate opinion filed.

PER CURIAM

A former employee of the St. Louis Rams Partnership, Todd Hewitt, seeks a writ of mandamus requiring the circuit court to vacate its order compelling arbitration of his claim of age discrimination against the St. Louis Rams Partnership and three of its affiliates. Five judges find that a writ of mandamus is the appropriate mechanism to review whether the trial court erred in sustaining a motion to compel arbitration. Four judges find that Mr. Hewitt's employment contract contained a valid and enforceable arbitration clause that required him to arbitrate disputes, including his statutory claims, against the Rams. Four judges also find that the National Football League's dispute resolution procedural guidelines setting out the essential terms of arbitration were not referenced in Mr. Hewitt's employment contract and, therefore, were not incorporated into his contract. Four judges further find that the terms of the contract designating the NFL commissioner, an employee of the team owners, as the sole arbitrator with unfettered discretion to establish the rules for arbitration are unconscionable and, therefore, unenforceable. Four judges find that Missouri's uniform arbitration act provides a mechanism to imply the terms missing from the arbitration agreement and provides the rules for appointing an arbitrator to replace the NFL commissioner. Accordingly, four judges issue a permanent writ of mandamus directing the trial court to vacate its order granting the motion to compel arbitration and, instead, issue an order compelling arbitration wherein the trial court appoints a neutral arbitrator, implies the specific terms of arbitration from applicable statues in Missouri's uniform arbitration act, and directs the parties to proceed with arbitration.

I. Factual and Procedural Background

[Starting as a summer equipment department employee for the Rams during college, Mr. Hewitt joined the organization full time in 1978 and was promoted to equipment manager in 1985. He held that position until early 2011. Hewitt entered into a number of employment contracts with the Rams during the more than 40 years he was employed by the team. Relevant here is a contract signed in November 2008 covering the 2009-2010 and 2010-2011 NFL seasons.] Like many of his prior employment contracts, this contract contained an arbitration clause that stated:

> Hewitt agrees to abide by and to be legally bound by the Constitution and By-Laws and Rules and Regulations of the National Football League and by the decisions of the Commissioner of the National Football League, which shall be final, binding, conclusive and unappealable. The Rams and Hewitt also severally and mutually promise and agree that in any dispute which may arise between them, the matter in dispute shall be referred to the Commissioner of the National Football League for decision and after due notice and hearing, at which both parties may appear, the decision of said Commissioner shall be final, binding, conclusive and unappealable, and the Rams and Hewitt severally and jointly hereby release the Commissioner and waive every claim each or both have or may have against the Commissioner and/or the National Football League, and against every director,

partner, officer, and stockholder of every Club in the National Football League, for all claims and demands whatsoever arising out of or in connection with any decision of the Commissioner of the National Football League.

The constitution and bylaws of the NFL further provided that "[t]he Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate."

In January 2011, then head coach Steve Spagnuolo notified Mr. Hewitt that his employment contract would not be renewed. At that time, Mr. Hewitt was 54 years old. In May 2012, Mr. Hewitt filed suit in the St. Louis County circuit court against the St. Louis Rams Partnership and three affiliated companies .... alleging age discrimination in violation of the Missouri Human Rights Act (MHRA), section 213.010 *et seq.*

The Rams moved to compel arbitration and to dismiss or stay the court proceedings, citing the arbitration provision of Mr. Hewitt's employment contract. ...
...
II. Standard of Review and Issuance of Writ of Mandamus
...
The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (2006), governs the applicability and enforceability of arbitration agreements in all contracts involving interstate commerce. ...
...
The Supreme Court further has held that the FAA applies even when, for example, an arbitration agreement is executed in a single state by residents of that state if one of the parties to the agreement engages in business in multiple states. [*Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 57 (2003)]. It is undisputed that the Rams operate in interstate commerce; the team, its players and employees, participate in away games and take in revenue in other states, and several of the defendant corporations named in this suit are incorporated in Delaware. Mr. Hewitt's employment contract to provide equipment managerial services to the team as it was engaged in interstate commerce brings the contract within the purview of the FAA.[4]

... This Court and the Supreme Court have found the contract defenses Mr. Hewitt raises fall under the FAA's aforementioned savings clause. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742 (2011); *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 515 (Mo. banc 2012). Mr. Hewitt has a clearly established right to arbitrate his claims using only those terms that are not unconscionable as determined using the general principles governing contract law in Missouri. *See Robinson*, 364 S.W.3d at 515.

Further, mandamus is an appropriate remedy when alternative remedies waste judicial resources or result in a burdensome delay, creating irreparable harm to the parties. *State ex rel. Sasnett v. Moorhouse*, 267 S.W.3d 717, 725 (Mo. App. 2008). If Mr. Hewitt is not bound to arbitrate under the terms of his contract, this Court can readily avoid this duplicative and unnecessary additional litigation through a writ of mandamus. ...

III. Arbitration Clause is Valid and Enforceable

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[4] The Missouri Uniform Arbitration Act (MUAA), section 435.350 *et seq.*, governs those arbitration matters not preempted by the FAA. This Court rejects Mr. Hewitt's argument that this matter is governed solely by the MUAA and not the FAA, but even were the FAA not applicable here, Missouri courts have recognized that the MUAA was "fashioned after the Federal Arbitration Act" and that "[t]he FAA and Missouri's Arbitration Act are substantially similar." *CPK/Kupper Parker Commc'ns, Inc. v. HGL/L. Gail Hart*, 51 S.W.3d 881, 883 (Mo. App. 2001).

...

A. The Court May Determine Whether the Arbitration Agreement is Valid

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If there is no valid arbitration clause, however, then there is no agreement to arbitrate, and the case may proceed in civil court. *See* 9 U.S.C. § 2. A court determines the validity of an arbitration agreement by applying state contract law principles. ... This provision means that, prior to referral to arbitration, a Missouri court can declare an arbitration agreement "unenforceable if a generally applicable contract defense, such as fraud, duress, or unconscionability, applie[s] to concerns raised about the agreement.[7]

...

According to the plain language in his contract with the Rams, Mr. Hewitt intended to be legally bound by the constitution and bylaws of the NFL, which provided that his disputes would be arbitrated.

B. Arbitration Clause is Supported by Valid Consideration

[The Court observed that the provision requires both Hewitt and the Rams to submit disputes to the NFL Commissioner for resolution, so there is adequate consideration.]

Indeed, the language of the arbitration agreement signed by Mr. Hewitt and the Rams distinguishes this case from the two cases cited by Mr. Hewitt in which arbitration agreements in NFL employment contracts were found to lack consideration. *Sniezek v. Kansas City Chiefs Football Club*, 402 S.W.3d 580 (Mo. App. 2013), and *Clemmons v. Kansas City Chiefs Football Club, Inc.*, 397 S.W.3d 503 (Mo. App. 2013). In those agreements, the employees alone promised to be bound by the constitution and bylaws of the NFL and to refer disputes to the commissioner for arbitration. ...

C. No Procedural Unconscionability

Mr. Hewitt contends the agreement should not be enforced because the conditions under which he renewed his employment contract were unconscionable. Specifically, he asserts the contract was presented "in a hurried way without any discussion of [the contract's] terms." This argument is undermined by Mr. Hewitt's own long, more than 40 year tenure as a Rams employee, during which time the trial court found he had signed many employment contracts containing arbitration provisions substantially similar to this one. ...

Mr. Hewitt also argues that the take-it-or-leave-it basis of the agreement makes it an adhesion contract. He concedes, however, that he did not attempt to negotiate the terms of his contract, except on one occasion as to an earlier contract for which he provides no further information as to his success or failure. Mr. Hewitt's conclusory allegations that he was unable to alter the terms of his contract and that there was disparity in the parties' bargaining power do not prove themselves, nor would they make the agreement unconscionable. ...

[The Court observed that, after the US Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), upholding an agreement to arbitrate in the fine print of mobile phone consumer contracts, "a court should not invalidate an arbitration agreement in a consumer contract simply because it

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[7] While the ultimate issue simply is whether a contract or a term of the contract is unconscionable, in making this determination, Missouri courts examine both the procedural aspects of contract formation and the substantive provisions of the contract. *Vincent*, 194 S.W.3d at 858. "Procedural unconscionability deals with the formalities of making the contract, while substantive unconscionability deals with the terms of the contract itself." *Id.* "Procedural unconscionability focuses on such things as high pressure sales tactics, unreadable fine print, or misrepresentation among other unfair issues in the contract formation process" while "[s]ubstantive unconscionability means an undue harshness in the contract terms." *Id.*

is contained in a contract of adhesion or because the parties had unequal bargaining power, as these are hallmarks of modern consumer contracts generally."] ... Mr. Hewitt does not allege that he "was coerced or defrauded into agreeing to the arbitration clause," particularly after decades of signing such agreements. He further offers no other explanation of why the disparity in bargaining power should invalidate the contract in the absence of evidence that the Rams abused their power.

...

IV. Terms of Arbitration

...

In its order compelling arbitration, the trial court found that the NFL dispute resolution procedural guidelines governed the arbitration procedure and that both parties were bound by the guidelines. Mr. Hewitt acknowledges that the arbitration provision clearly states he will be bound by "the Constitution and By-Laws and Rules and Regulations" of the NFL but contends he did not have sufficient information to make him aware of the full provisions of his employment contract because it does not directly mention the guidelines or attach them. Similarly, Mr. Hewitt asserts that the reference to the commissioner's authority to interpret and establish policy does not reference the terms found in the guidelines with any amount of specificity that would enable him to assent to these terms. Mr. Hewitt stated in his affidavit that he did not know of the existence of the guidelines until the Rams sought to compel him to arbitrate his age discrimination claim.

[Missouri precedents hold that terms not explicit in a contract may be incorporated into the contract by reference, but that the intent to incorporate must be clear. 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." *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs.*, 204 S.W.3d 183, 196 (Mo. App. 2006).]

A. Guidelines Not Incorporated Into Contract

The guidelines were not referenced in Mr. Hewitt's employment contract, nor were they clearly referenced in the constitution and bylaws. Mr. Hewitt's employment contract only refers to "Rules and Regulations of the National Football League." This reference does not identify the guidelines in such a way that Mr. Hewitt could ascertain them beyond doubt. 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. Though

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[*] [**Ed note:** In a subsequent case, *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36 (2017), a divided (4:2) Missouri Supreme Court held valid a contract that incorporated by reference the rules and regulations of the American Arbitration Association. The majority distinguished this case: "Unlike the guidelines in *Hewitt,* the AAA commercial arbitration 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."]

Mr. Hewitt agreed to arbitrate disputes against the Rams, the specific terms of arbitration are, therefore, unenforceable.[9]

B. Arbitration Terms Implied from Statute

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When an arbitration agreement is valid, but specific provisions are silent or unconscionable, the failure of the terms is remedied by implying the terms from statutes within the Missouri Uniform Arbitration Act (MUAA), section 435.350 *et seq.*...

V. Appointment of the Commissioner as Sole Arbitrator is Unconscionable

Mr. Hewitt further contends the arbitration agreement is unconscionable because it designates the commissioner as the arbitrator of any disputes arising between Mr. Hewitt and the Rams. ...

[The contract states that Hewitt agreed to be bound by all NFL regulations, and these regulations provide that "The Commissioner shall have full, complete, and final jurisdiction and authority to arbitrate: .... (B) Any dispute between any player, coach, and/or other employee of any member of the League (or any combination thereof) and any member club or clubs"]

Mr. Hewitt argues that the commissioner cannot be neutral and unbiased in a dispute between an employee and a team's management because the commissioner is selected and his salary determined by the team owners....

...

A. Designation of NFL Commissioner as Arbitrator is Unconscionable

Based on the facts of the present case, the terms in the contract designating the commissioner, an employee of the team owners, as the sole arbitrator with unfettered discretion to establish the rules for arbitration are unconscionable and, therefore, unenforceable. [The Court cited its precedent in *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (2006), where it found unconscionable a provision in an arbitration contract between a home builder and home purchasers that designated the president of a home builders association as the sole selector of the arbitrator because it found the president of the home builders association was "an individual in a position of bias"]

In effect, then, the commissioner is required to arbitrate claims against his employers. ...

...

B. Replacement for Arbitrator Provided for by Statute

The unconscionability of the terms regarding the arbitrator does not invalidate the entire agreement to arbitrate. Instead, those unconscionable terms are replaced by the relevant provisions in the MUAA. The MUAA provides for substitution of a new arbitrator when the designated arbitrator is disqualified. Section 435.360. This provision may be used to appoint a substitute arbitrator.

VI. Arbitration Clause Encompasses Mr. Hewitt's Underlying Claim Against All Defendants

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A. Arbitration Clause Waives a Judicial Forum for Statutory Claims

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[9] Mr. Hewitt argues that a number of the rules of arbitration set out in the guidelines are unconscionable. Because Mr. Hewitt is not bound to arbitrate under the terms in the guidelines, this Court need not consider whether they are unconscionable.

Mr. Hewitt asserts he did not waive a judicial forum for his claim that he was fired in violation of the MHRA because the arbitration agreement language does not include statutory claims. He is incorrect. Under Missouri law, "[i]f a contract is unambiguous, the intent of the parties is to be discerned from the contract alone based on the plain and ordinary meaning of the language used." *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 846 (Mo. banc 2012) (internal quotations omitted). The agreement at issue here mandates arbitration of "any dispute which may arise" between Mr. Hewitt and the Rams. "Any dispute" plainly means any dispute, including Mr. Hewitt's statutory claims under the MHRA. Mr. Hewitt's efforts to characterize this language as too ambiguous to be inclusive of statutory claims are unavailing.[13]

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LAURA DENVIR STITH, JUDGE

I concur in the per curiam's holding in Section II that a writ of mandamus is the appropriate mechanism to review whether the trial court erred in sustaining the motion to compel arbitration, and with its holding in Section III that the arbitration agreement is valid. I dissent from the per curiam's holding in Section V.A. that the National Football League (NFL) commissioner is presumptively biased and in Section IV.A. that the NFL Dispute Resolution Guidelines have not been agreed to by the parties. ...

...

II. NFL COMMISSIONER SHOULD NOT BE FOUND PRESUMPTIVELY BIASED AND NFL DISPUTE RESOLUTION GUIDELINES ARE PROPER

...

A. The NFL Commissioner Should not be Disqualified in Advance of Arbitration

The per curiam holds in Section V.A. that the NFL commissioner is an employee of the various NFL teams and that, as a result, he inherently is not neutral and cannot serve as an unbiased arbitrator in a dispute between an employee and an NFL team. The per curiam is the first and only decision in the entire country to so hold based simply on the fact that the NFL commissioner is, well, the NFL commissioner.

The Federal Arbitration Act (FAA) does not contain a provision authorizing advance disqualification of an arbitrator for inherent bias. The FAA instead provides for judicial vacation of an arbitration award "where there was evident partiality or corruption in the arbitrators." *9 U.S.C. § 10(a)(2)*. The MUAA similarly provides that "the court shall vacate an award where: ... There was evident partiality by an arbitrator appointed as a neutral ...." *§ 435.405.1(2)*. These provisions by their nature require that the arbitration occur first, and review for evident bias or partiality occur later in court. They entitle Mr. Hewitt to seek judicial review of any arbitration award *if* he believes the commissioner or his designee shows evident bias or partiality in considering his employment discrimination claim.

This review is adequate to protect the parties to an arbitration in all but cases in which actual bias or an actual conflict of interest is shown before the fact. ... Here, however, Mr. Hewitt concedes that he has not alleged or shown actual bias, and no evidence of actual bias was presented. Instead, he asks that this

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[13] The primary case cited by Mr. Hewitt is a Massachusetts case that is distinguishable both on the facts and on the governing law. In *Warfield v. Beth Israel Deaconess Medical Center., Inc.*, the Massachusetts court stated that Massachusetts law requires that an agreement to arbitrate statutory claims must be "clear and unmistakable." 454 Mass. 390, 910 N.E.2d 317, 325 (Mass. 2009), *abrogated on other grounds, Joule, Inc. v. Simmons*, 459 Mass. 88, 944 N.E.2d 143, 150 n.9 (Mass. 2011). The court found the term "arising out of or in connection with [the employment agreement] or its negotiations" to be ambiguous and, ultimately, determined that the employee's sex discrimination claim was not covered by the arbitration clause. *Id.* at 327-28. The language at issue in the instant case is distinguishable and is unambiguous. It, therefore, is enforceable under Missouri law. The other cases Mr. Hewitt cites for this proposition concern waiver requirements under collective bargaining agreements — a separate strand of legal precedent and one not directly applicable here.

Court simply assume that no NFL commissioner could be unbiased and to disqualify the NFL commissioner under the common law bar on unconscionability. The per curiam accepts Mr. Hewitt's invitation to so hold. I believe this is error.

A comparison of the facts of this case to those in the case relied on by the per curiam, *Vincent*, provides a good example of why disqualification in advance is not required here. In *Vincent*, the president of a home building company who also was president of the local home builders' association was designated as the sole selector of the arbitrator in any dispute between a home builder and a home purchaser. This Court found an actual conflict of interest and, therefore, inherent bias on those facts because, as the president of the home builders' association, he was "an individual in a position of bias." *Id. at 859*. The per curiam says that the NFL commissioner similarly is an individual in a position of bias because he is an "employee" of the NFL teams. That analogy is too simplistic.

The person who selected the arbitrator in *Vincent* was the president of a home builders' association. The person selected as arbitrator under the arbitration clause at issue here is not the president of the Rams, however, or of any other NFL team. He is the NFL commissioner. Not only is the NFL commissioner not the owner of the Rams or another NFL team, the NFL commissioner does not exclusively represent the interests of the team owners. He is hired and employed by the NFL, not by the owners individually or collectively. Unlike the president of an association made up of and representing only home builders, here the NFL commissioner is required by the NFL rules to be "a person of unquestioned integrity," and section 8.2 of the NFL constitution requires that the commissioner "shall have no financial interest, direct or indirect, in any professional sport." Further, the NFL commissioner is required to serve as arbitrator *between* NFL teams as well as between employees and between NFL owners and their players or other employees. This specifically includes disputes in which the NFL commissioner is required to take a position adverse to one or more owners, such as in disputes among two or more owners of the same team or among the owners of different teams. *NFL Const. § 8.3*. Neither the owner of the Rams nor the owner of any other team can have the NFL commissioner fired for not coming to the decision the owner wished. Two-thirds of the members of the NFL must vote to fire the commissioner and select a successor. *NFL Const. § 8.1*.

The NFL commissioner's position, therefore, is far more removed from the Rams and their ownership than was the home builders' association president who was to select the arbitrator in *Vincent*. Moreover, unlike in *Vincent*, this Court has before it examples of prior cases in which the NFL commissioner has been selected as arbitrator, and in *none* has he been found to be inherently biased. In fact, in each case in which his disqualification has been sought solely on the basis of his position as NFL commissioner, that request for disqualification has been denied — until now. Actual bias or a conflict of interest always has been required.[4]

Mr. Hewitt concedes in his brief and at argument that the NFL commissioner might be able to be fair as to players or others with superior bargaining power personally or by dint of their union membership. But, Mr. Hewitt says, because he does not have the benefit of such resources, bias should be presumed for him and other non-player, non-union employees.

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[4] *Morris v. New York Football Giants, Inc., 150 Misc. 2d 271, 575 N.Y.S.2d 1013, 1016-17 (N.Y. Sup. Ct. 1991)*, held that the then-commissioner [Paul Tagliabue] was deprived of "the necessary neutrality to arbitrate these claims" because he had previously served as chief outside counsel for the NFL and its members and, in that capacity in a prior case, had advocated a position directly at odds with that advanced by the players in the dispute at issue. Again, the court's decision was based on evidence of actual bias. It bears repeating that Mr. Hewitt has to this point offered no evidence of actual bias here.

There are at least two problems with this argument. First, the existence or absence of inherent bias is a separate question from that of an employee's bargaining power; while bargaining power may help keep existing bias in check, the arbitrator is either inherently biased or he is not. No case cited supports the adoption of the two-tiered bias analysis Mr. Hewitt proposes.

Second, even were the Court to agree that a two-tiered approach might be proper when a plaintiff showed that arbitrators of the type designated had shown bias in the past as to the group of employees of which the plaintiff was a part, it would be a factual question, and there was no such showing here. Mr. Hewitt has offered only speculation. Mr. Hewitt cites no evidence of the current NFL commissioner's bias against employees and cites no legal authority for his claim that this or any other sports commissioner is inherently biased or has exhibited bias based solely on the commissioner's position as commissioner. I reject a presumption of bias.

I find much more persuasive the cases from other jurisdictions that have specifically rejected similar pre-award claims of potential bias on the part of an NFL commissioner. In *Alexander v. Minnesota Vikings Football Club LLC, 649 N.W.2d 464, 467 (Minn. Ct. App. 2002)*, the Minnesota court of appeals declined to find the commissioner to be a biased arbitrator prior to the issuance of an arbitration award, observing at the outset that "the FAA does not expressly provide for the pre-award removal of an arbitrator." ...

When a party agreeing to arbitration is fully aware at the time of contract formation of the identity of the arbitrator and his relationship with the other party (as Mr. Hewitt was fully aware through the current contract and from many earlier contracts that the NFL commissioner would serve as arbitrator of any dispute arising between him and the Rams), [other courts] determined he can "hardly object" to the enforcement of the arbitration agreement "according to its terms." *see also Hojnowski v. Buffalo Bills, Inc., 995 F. Supp. 2d 232, 239 (W.D.N.Y. 2014)* ([compelling] arbitration over objections that the NFL commissioner's inherent bias rendered the arbitration agreement unconscionable).

...

B. NFL Dispute Resolution Guidelines

I also disagree with the per curiam's holding in Section IV.A. that the arbitration agreement fails to incorporate or adequately identify the essential terms of arbitration. ...

...

The per curiam cites not a single case holding that an agreement to arbitrate must include or attach a copy of the arbitration rules to be a valid and complete agreement to arbitrate. ...

It was on a similar basis that the United States District Court for the Western District of New York rejected a similar argument in *Hojnowski. 995 F. Supp. 2d at 236-38*. ...

Hojnowski rejected the argument that the validity of an arbitration agreement requires that the parties be provided with copies of the arbitration rules or that the particular set of rules must be expressly identified in the agreement, noting no case had been cited requiring that the parties be given a copy of the relevant rules when they were otherwise accessible.[5] *Id. at 237*. Rather, the federal court found: "[B]ecause Hojnowski was fully aware any dispute would be arbitrated before the NFL Commissioner, and because that tribunal clearly had an established set of rules governing arbitration procedure, those rules (which Hojnowski does not argue were inaccessible) were sufficiently incorporated into the agreement and knowledge thereof can be imputed to Hojnowski." *Id. at 237-38.*

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[5] I agree with the *Hojnowski* court's admonishment that it is "prudent to explicitly refer to, or even include in the contract itself the specific rules that would govern any arbitration proceeding." *995 F. Supp. 2d at 238*. Under the facts and circumstances of the present case, however, the reference was legally not inadequate.

... Mr. Hewitt does not claim that he thought a different set of rules were being referred to or which would govern. This is not a case in which a signatory to an agreement asked to see what rules governed or was misled into believing that the arbitration would be governed by some rules other than the guidelines. This case is about Mr. Hewitt and whether he was unable to determine what rules governed the arbitration, not about how arbitration agreements could best be drafted. It made no difference to his conduct that the contract specifically mentioned the NFL "Constitution and By-laws and Rules and Regulations" without specifically referring to the guidelines themselves. Mr. Hewitt never inquired about what arbitration rules governed or indicated he did not know where they could be found. Mr. Hewitt agreed to arbitration under the NFL rules, and the only place that the NFL sets out the rules governing arbitration are in the guidelines adopted under the rules.

The only reason Mr. Hewitt may not have known what the guidelines said or where they were, despite having signed a similar contract with similar terms for up to 40 years, is due not to an indefiniteness of the contract but to his own unique lack of curiosity. ...

The trial court thereby held that, as a matter of fact, Mr. Hewitt had sufficient opportunity to determine the rules but chose not to do so. Consequently, he is bound by them. ...

RICHARD B. TEITELMAN, JUDGE

I concur with the per curiam opinion to the extent it holds that mandamus is an appropriate remedy, that the NFL dispute resolution guidelines were not incorporated into Hewitt's contract, and that designating the NFL commissioner as the arbitrator is unconscionable. I respectfully dissent from the per curiam opinion to the extent it holds that Hewitt should be compelled to arbitrate the underlying dispute. The per curiam opinion holds that the arbitration agreement is enforceable even though the essential terms of the alleged agreement as set forth in the NFL dispute resolution guidelines (guidelines) were never incorporated into Hewitt's employment contract. The net result is that Hewitt is forced to arbitrate even though the bedrock necessity of an enforceable contract — mutual agreement to the essential terms — is absent in this case. This Court should issue a writ of mandamus to prevent the trial court from compelling arbitration pursuant to an unenforceable arbitration agreement.

...

Although Missouri law predicates the enforceability of a contract on mutual assent to the essential terms, Hewitt's contract with the Rams includes not one single essential term of the alleged arbitration agreement. While the contract provides that the NFL commissioner would arbitrate any dispute, this provision is, as the per curiam opinion holds, unconscionable and unenforceable. What is left then, is literally nothing more than an agreement to "arbitrate" with absolutely no further indication of how, when or under what circumstances any arbitration would be conducted. This alleged arbitration agreement is as unenforceable as a "contract" in which A agrees to "pay" B some undefined sum of money for some undefined reason. If the Rams, a sophisticated multi-million dollar franchise in a multi-billion dollar league, wanted to ensure an unquestionably valid arbitration agreement, the guidelines could have simply been included or, in five words or less, expressly referenced and incorporated into Hewitt's employment contract.

...

ZEL M. FISCHER, JUDGE [The opinions of Judges Fischer and Wilson, dissenting on the use of the write of mandamus, omitted].