IN THE SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY, OHIO

GUSTAVUS, LLC	)	**CASE NO. CA 024899**
	)	
Plaintiff-Appellant,	)	**Trial Court Case No. 11 CV 03993**
	)	
-VS-	)	**REGULAR CALENDAR**
	)	
EAGLE INVESTMENTS, *et al.*,	)	
	)	
Defendants-Appellees.	)	

BRIEF OF APPELLANT

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First Assignment of Error

The Trial Court erred in granting Defendants Eagle Investments, William Heidenreich, Robert Heidenreich, and Joseph Balogh's Motion to Compel Arbitration where (1) the Arbitration Clause of the Contract is unenforceable because it violates public policy by hindering the purpose of the Ohio Corrupt Activity Act, and (2) the Arbitration Clause of the Contract is unenforceable because it sets out the rules for arbitration in vague terms that are inconsistent with Ohio law.

ISSUES PRESENTED FOR REVIEW

1. Whether the Trial Court erred in holding that the public policy defense asserted by Gustavus, LCC was preempted by the Federal Arbitration Act, where the asserted defense is a general contract defense that exists for the revocation of any contract. (First Assignment of Error)

2. Whether the Trial Court erred by enforcing the Arbitration Clause of the Contract where the Clause violates public policy by hindering the purpose of the Ohio Corrupt Activity Act. (First Assignment of Error)

3. Whether the Trial Court erred by enforcing the Arbitration Clause of the Contract where the Clause sets out rules for arbitration in vague terms that are inconsistent with Ohio law. (First Assignment of Error)

STATEMENT OF THE CASE

The Complaint in this case was filed on June 3, 2011. See Trial Court Docket. Service was perfected on all Defendants on or before June 20, 2011. *Id.*

On July 1, 2011, Defendants Sperry Van Ness Commercial Real Estate and Douglass Broomhall filed an Answer to the Complaint, and a Cross Claim against Defendants Eagle Investments, William Heidenreich, Joseph Balogh, Robert Heidenreich, Mak Gregor Management, and the Unknown Owners and Operators of Mak Gregor Management. *Id.*

On July 5, 2011, Defendants Mak Gregor Management, and the Unknown Owners and Operators of Mak Gregor Management filed an Answer to the Complaint. *Id.* On August 4, 2011, Defendants Mak Gregor Management, and the Unknown Owners and Operators of Mak Gregor Management filed an Answer to the Cross Claim of Defendants Sperry Van Ness Commercial Real Estate and Douglass Broomhall. *Id.*

Also on July 5, 2011, Defendants Eagle Investments, William Heidenreich, Robert Heidenreich, and Joseph Balogh filed a Motion to Compel Arbitration and Stay Action. *Id.* Plaintiff Gustavus, LLC filed a Memorandum in Opposition on July 12, 2011. *Id.* Defendants Eagle Investments, William Heidenreich, Robert Heidenreich, and Joseph Balogh filed a Reply in Support of the Motion on July 26, 2011. *Id.* Plaintiff Gustavus, LLC filed a Surreply in Opposition to the Motion on July 27, 2011. *Id.* Defendants Eagle Investments, William Heidenreich, Robert Heidenreich, and Joseph Balogh filed a Surreply in Support of the Motion on August 3, 2011. *Id.*

On August 10, Defendants Sperry Van Ness Commercial Real Estate and Douglass Broomhall filed a Memorandum Contra to the Motion, asserting that they were not parties to the agreement and should not be compelled to arbitrate. *Id.* Defendants Eagle

Investments, William Heidenreich, Robert Heidenreich, and Joseph Balogh filed a Reply Memorandum in Response to Defendants Sperry Van Ness Commercial Real Estate and Douglas Broomhall's Memorandum Contra to the Motion to Compel Arbitration. *Id.*

On October 14, 2011, the Trial Court filed its Decision, Entry, and Order Sustaining Defendant Eagle Investments' Motion to Compel Arbitration and Stay the Case Pending Arbitration. *Id.* The Trial Court concluded that:

> The arbitration provision in this case is * * * sufficiently definite as to its essential terms because the parties to the arbitration agreement are clearly defined, and the subject matter – the arbitration of disputes arising from the contract – is set forth with sufficient certainty concerning the provision's scope and how the arbitration will be conducted. This conclusion will require the arbitrator, assuming the issue is raised, to resolve any questions concerning the scope and method of discovery and how the arbitration will be conducted.

Trial Court's Decision, Entry, and Order Sustaining Defendant Eagle Investments' Motion to Compel Arbitration and Stay the Case Pending Arbitration, at 8.

With respect to the argument that the Arbitration Clause was unenforceable because it violated public policy, the Trial Court rejected the argument. Despite lengthy briefing on the subject, the Trial Court summarily rejected the argument in one paragraph. The Trial Court's full discussion of the issue was as follows:

> Gustavus, finally, argues that the arbitration provision is unenforceable because allowing arbitration will thwart the public policy embodied by the OCAA. Acceptance of this argument would be akin to the position taken by the lower courts in *AT&T v. Concepcion* that the arbitration provision disallowing class actions was, under California's *Discover Bank* rule, unconscionable. Accepting Gustavus' argument would, as in *AT&T v. Concepcion*, act as an obstacle to the accomplishment of Congress' objectives and would, accordingly, be preempted by the FAA. This argument against arbitration is, accordingly, rejected.

Trial Court's Decision, Entry, and Order Sustaining Defendant Eagle Investments' Motion to Compel Arbitration and Stay the Case Pending Arbitration, at 8.

STATEMENT OF THE FACTS

At issue in this case is whether Defendants Eagle Investments, William Heidenreich, Robert Heidenreich, and Joseph Balogh (hereinafter collectively "Defendant Eagle Investments") breached its Contract with Plaintiff Gustavus, LLC. Plaintiff Gustavus, LLC alleged that this breach occurred when, among other things, Defendant Eagle failed to deliver real property conforming to various averments, which were in fact fraudulent misrepresentations, made to Plaintiff Gustavus, LLC concerning the property. Also at issue in this case is whether through this pattern of fraud, Defendants Eagle, Mak Gregor Management, Inc., the Unknown Owners and Operators of Mak Gregor Management, Sperry Van Ness, and Douglas Broomhall violated the Ohio Corrupt Activity Act ("OCAA").

The Complaint in this case, filed June 3, 2011, alleges that Defendant Eagle, along with Defendants Mak Gregor Management, Inc., the Unknown Owners and Operators of Mak Gregor Management, Sperry Van Ness, and Douglas Broomhall (1) breached the contract with Plaintiff Gustavus, LLC, (2) made fraudulent representations to Plaintiff Gustavus, LLC, (3) violated the Ohio Corrupt Activity Act, and (4) were involved in a civil conspiracy to deceive Plaintiff Gustavus, LLC into purchasing the Premises at an inflated price. See Complaint, at p. 7-8, 15. The Complaint also alleges that Defendant Eagle was unjustly enriched and is liable for conversion. *Id.*, at 15-16.

The Complaint demands judgment against all Defendants in this case in the form of contract damages, tort damages, triple damages pursuant to R.C. 2923.34(E), divestiture of Defendants' interest in any enterprise or real property pursuant to R.C. 2923.34(B)(1), reasonable restrictions upon the Defendant's future activities or investments pursuant to R.C. 2923.34(B)(2), attorney fees pursuant to R.C.2923.34(F), punitive damages, attorney fees

pursuant to common law, statutory interest, and any other relief deemed just and equitable. *Id.*, at 16. With respect to Defendant Eagle Investments, the Complaint demands judgment in the form of a full rescission of the Purchase Agreement, including an Order requiring Defendant Eagle Investments to purchase the Premises from Plaintiff Gustavus, LLC for the same sum identified in the Purchase Agreement, as well as contract damages and interest. *Id.*

The Arbitration Clause of the Contract provides, in the pertinent part of section (30)(b), that:

> (1) ANY DISPUTE OR CLAIM BETWEEN BUYER AND SELLER ARISING FROM THIS AGREEMENT OR THE TRANSACTION CONTEMPLATED HEREIN SHALL BE SETTLED BY BINDING ARBITRATION UNDER THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. JUDGMENT ON THE AWARD RENDERED BY THE ABITRATOR(S) MAY BE ENTERED IN ANY COURT HAVING JURISDICTION. FILING A COURT ACTION TO OBTAIN PROVISIONAL REMEDIES SHALL NOT CONSTITUTE A WAIVER OF THIS PROVISION.
>
> (2) THE ARBITRATOR(S) SHALL BE A RETIRED JUDGE OR ANY ATTORNEY WITH AT LEAST TEN (10) YEARS OF COMMERCIAL REAL ESTATE LAW EXPERIENCE. THE ARBITRATION SHALL BE DECIDED IN ACCORDANCE WITH SUBSTANTIVE OHIO LAW. THE PARTIES SHALL HAVE THE RIGHT TO CONDUCT DISCOVERY IN ACCORDANCE WITH OHIO CODE OF CIVIL PROCEDURE SECTION 1283.05 AND TO THE SAME EXTENT AS IN A CIVIL ACTION. THE ARBITRATION SHALL OTHERWISE BE CONDUCTED IN ACCORDANCE WITH TITLE 9, PART III, OHIO CODE OF CIVIL PROCEDURE. THIS AGREEMENT TO ARBITRATE SHALL BE INTERPRETED IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT.

Additionally, the Arbitration Clause provides in section (30)(b)(4) that:

> NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY A NEUTRAL ARBITRATION AS PROVIDED BY OHIO LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN COURT OR JURY TRIAL, AND ARE GIVING UP MOST OF YOUR RIGHTS OF APPEAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND

APPEAL, UNLESS SUCH RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION NOTWITHSTANDING THIS WAIVER OF RIGHTS TO DISCOVERY, IN ANY CASE IN WHICH BROKER SUES FOR AN UNPAID COMMISSION, BROKER SHALL BE ENTITLED TO THE PRODUCTION OF ALL NONPRIVILEGED DOCUMENTS DEMANDED OR SUBPOENAED BY BROKER FROM BUYER AND SELLER, OR ANY THIRD PARTY TO THE ARBITRATION.

ARGUMENT

This Honorable Court should reverse the Trial Court's Decision, Entry, and Order Sustaining Defendant Eagle Investments' Motion to Compel Arbitration and Stay the Case Pending Arbitration and remand the case for further proceedings because (1) general contract public policy defenses are not preempted by the Federal Arbitration Act ("FAA"), (2) the Arbitration Clause of the Contract violates public policy by hindering the result that the Ohio Corrupt Activity Act seeks to bring about, and (3) the Arbitration Clause of the Contract sets out rules for arbitration in vague terms that are inconsistent with Ohio law.

A. Standard of Review

Although appeals from motions to stay pending arbitration are typically reviewed under an abuse of discretion standard, the de novo standard of review is the appropriate standard where the appeal is based upon a question of law. *Morris v. Morris* (10th Dist.), 2010 Ohio 4750, ¶15. "A trial court's decision granting or denying a stay of proceedings pending arbitration is * * * subject to de novo review on appeal with respect to issues of law, which commonly will predominate because such cases generally turn on issues of contractual interpretation or statutory application." *The Dispatch Printing Co. v. Recovery Limited Partnership* (10th Dist.), 2011 Ohio 80, ¶17, quoting *Morris v. Morris* (10th Dist.), 2010 Ohio 4750.

Additionally, this Court has held that "the issue of whether a valid arbitration agreement exists requires us to interpret the meaning and construction of the contract between the parties, which is a question of law that we review de novo." *Cohen v. G/C Contracting Corp.* (2nd Dist.) 2007 Ohio 4888, ¶20.

B. The Trial Court erred in holding that the public policy defense asserted by Gustavus, LLC was preempted by the FAA, where the asserted defense was a general contract defense that exists for the revocation of any contract.

The Arbitration Clause is not enforceable under the FAA because it violated public policy where it purports to limit statutorily-created remedies. 9 U.S.C. §2 clearly states that arbitration provisions are subject to revocation "upon such grounds as exist at law or in equity for the revocation of any contract." The Supreme Court of the United States has noted that "the text of § 2 declares that state law may be applied if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Doctor's Assocs. v. Casarotto* (1996), 517 U.S. 681, 686-87, 116 S.Ct. 1652 (internal quotation and omitted). The Supreme Court of the United States has also stated that "[a]t least since *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), we have recognized the phrase 'state law' to include common law as well as statutes and regulations." *Cipollone v. Liggett Group* (1992), 505 U.S. 504, 522, 112 S. Ct. 2608. As such, so long as the state law does not specifically target arbitration clauses, it is not preempted by the FAA. The Court then held that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Id.*, at 687. The Court has also held that:

> The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and

> applicable legal precedents. Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Hurd v. Hodge (1948), 334 U.S. 24, 35-36, 68 S.Ct. 847.

Federal courts have recognized that public policy is one such generally applicable contract defense that may invalidate arbitration clauses. See *International Underwriters AG v. Triple I: International Investments, Inc.* (11th Cir. 2008), 533 F.3d 1342, 1344, quoting *Telecom Italia, SpA v. Wholesale Telecom Corp.* (11th Cir. 2001), 248 F.3d 1109, 1114 ("***Absent some violation of public policy***, a federal court must refer to arbitration any controversies covered by the provisions of an arbitration clause." Emphasis added). See also *Cange v. Stotler and Company, Inc.* (7th Cir. 1987), 826 F.2d 581, n. 11 ("an arbitration clause which operated as a prospective waiver of a substantive statutory right could violate public policy and be unenforceable. * * * [P]rospective waivers of statutory rights tend to encourage violations of the law by notifying the wrongdoer in advance that he or she can act with impunity; therefore prospective waivers uniquely can violate public policy.")

In *Graham Oil Co. v. Arco Products Co.* (9th Cir. 1994), 43 F.3d 1244, the court discussed the implications of arbitration clauses that have the effect of negating a statutory remedy, which in that case was the Petroleum Marketing Practices Act. After acknowledging that statutory claims may be submitted to arbitration, the court stated that this in no way suggests that a party may be forced "to surrender the statutorily-mandated rights and benefits that Congress intended them to possess." *Id.*, at 1247. The court continued, observing that:

> If franchisees could be compelled to surrender their statutorily-mandated protections as a condition of obtaining franchise agreements, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections. In effect, the franchisors could simply continue their earlier practice of presenting prospective franchisees with contracts of adhesion that deny them

> the rights and benefits afforded by Congress. In that way, the PMPA would quickly be nullified.

Id. Among the protections identified by the court as being forfeited if the arbitration clause was enforced was the ability to recover exemplary damages and the statutorily mandated right to collect reasonable attorneys fees. *Id.*, at 1247-48. The court then held that the arbitration clause was invalid, and that a court must decide the merits of the case. *Id.*, at 1249.

As the court in *Eagle v. Fred Martin Motor Co.* (9th Dist. 2004), 157 Ohio App.3d 150, 809 N.E.2d 1161 observed, "the United States Supreme Court has noted that statutory claims may be arbitrated so long as the claimant 'effectively may vindicate [his or her] statutory cause of action' through arbitration." *Id.*, at 162, quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991), 500 U.S. 20, 28, 111 S.Ct. 1647 (brackets in original).

As will be more fully demonstrated below, state law in Ohio provides that any contract term that violates public policy is void and unenforceable. See *Bd. of Ed. of the City School Dist. of the City of Cincinnati v. Conners* (1st Dist.), 2011 Ohio 1084, ¶6. A contract term violates public policy where the contract term brings about a result a statute seeks to prevent, or hinders a result a statute seeks to bring about. See *Eagle, supra,* at 178. In other words, a contract term violates public policy if it would prevent a claimant from vindicating a statutory cause of action.

This Court has previously addressed this issue of public policy and arbitration clauses in the case of *Hawkins v. O'Brien* (2nd Dist), 2009 Ohio 60. There, this Court considered whether an arbitration clause violated public policy where it limited a plaintiff's ability to proceed as a private attorney general or through a class action, rights that were bestowed by the Ohio Consumer Sales Practices Act. *Id.*, at ¶29. This Court also noted that such an argument invoked R.C. 2711.01(A) and 9 U.S.C. §2. *Id.*, at ¶17. Although this Court

did affirm the stay pending arbitration in that case, it did so because the private attorney general and class action authority bestowed by the statute were procedural in nature. As such, the arbitration clause in that case "preserves the statutory substantive rights and remedies Hawkins sought in the action he commenced." *Id.*, at ¶34.

Applied to the Ohio Corrupt Activity Act ("OCAA") claim of the Complaint, the Arbitration Clause restricts the remedies available under the OCAA, where it does not allow for (1) reasonable restrictions to be placed on the Defendants' future activities and investments, (2) treble damages, and (3) mandatory attorney fees. In this way, the Arbitration Clause is similar to the arbitration clause held to be invalid in *Graham Oil Co.*, 43 F.3d 1244. The Arbitration Clause is also distinguishable from the arbitration clause in *Hawkins*, because here, the Arbitration Clause prohibits the statutory substantive rights and remedies Plaintiff Gustavus, LLC sought in the Complaint. The remedies available through arbitration in this case depart significantly from the remedies available under the OCAA, as will be more thoroughly described below.

As such, the Arbitration Clause would defeat the purpose of the OCAA by limiting the scope of the remedies available and by decreasing the level of accountability the Defendants can be held to, and therefore in violation of public policy. Where the Arbitration Clause is invalid and unenforceable under Ohio's generally applicable contract law, it is not enforceable under the FAA.

C. The Trial Court erred by enforcing the Arbitration Clause of the Contract where the Arbitration Clause violates public policy by hindering the purpose of the Ohio Corrupt Activity Act.

The Arbitration Clause of the Contract is unenforceable because it violates the public policy set forth in the OCAA. Contract terms that violate public policy may not be

enforced by Ohio courts. See *Bd. of Ed. of the City School Dist. of the City of Cincinnati v. Conners* (1st Dist.), 2011 Ohio 1084, ¶6. "Public policy" means the following:

> Public policy is the community common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like. Again, public policy is that principle of law which holds that *no one can lawfully do that which has a tendency to be injurious to the public or against the public good. Accordingly, contracts which bring about results which the law seeks to prevent are unenforceable as against public policy.* Moreover, actual injury is never required to be shown; it is the tendency to the prejudice of the public's good which vitiates contractual relations.

Eagle, supra at 175, quoting *King v. King* (1900), 63 Ohio St. 363, 372, 59 N.E. 111, emphasis added.

Nearly 200 years ago, the Supreme Court of Ohio explained that "the right of making contracts at pleasure is a personal privilege of great value, and ought not to be slightly restrained; but it must be restrained where contracts are attempted against the public law, general policy, or public justice." *Key v. Vattier* (1823), 1 Ohio 132 147; see also *Lamont Bldg. Co. v. Court* (1946), 147 Ohio St. 183, 184-185, 70 N.E.2d 447 *John Hancock Mut. Life Ins. Co. v. Hicks* (10th Dist. 1931), 43 Ohio App. 242, 247, 183 N.E. 93. The Supreme Court of Ohio still holds fast to this principle, observing that "[l]iberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare. * * * [T]he public welfare is safeguarded, not only by Constitutions, statutes, and judicial decisions, but by sound and substantial public policies underlying all of them." *J.F. v. D.B.* (2007), 116 Ohio St.3d 363, 364, 879 N.E.2d 740, citing *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Kinney* (1916), 95 Ohio St. 64, 115 N.E. 505 (Note also, that the three dissenting justices in *J.F.* displayed the desire to nullify contract terms against public polices as broad as "safeguarding children." (Cupp, dissenting)).

The reason for this power to nullify contract terms is illuminating: *the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.* In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements. See *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.* (1987), 484 U.S. 29, 108 S.Ct. 364, citing *W.R. Grace & Co. v. Rubber Workers* (1983), 461 U.S. 757, 766, 103 S.Ct. 2177, 2183; *Hurd v. Hodge* (1948), 334 U.S. 24, 34-35, 68 S.Ct. 847, 852-853; *McMullen v. Hoffman* (1899), 174 U.S. 639, 654-655, 19 S.Ct. 839, 845; *Twin City Pipe Line Co. v. Harding Glass Co.* (1931), 283 U.S. 353, 356-358, 51 S.Ct. 476, 477-478. This reasoning appears particularly relevant to a scenario where an agreement would purport to negate statutory remedies that were created by the General Assembly to deter persons from engaging in patterns of corrupt activities.

i. A contract term that hinders the purpose of a statute is void.

Contract terms are void by public policy when they hinder or impede a result that a statute seeks to bring about. Ohio courts have commonly applied public policy in a myriad of contexts. In the process, Ohio's courts have articulated somewhat differently-worded tests to describe when a contract term is void by public policy. In *Grange Mut. Cas. Co. v. Lindsey* (1986), 22 Ohio St.3d 153, 489 N.E.2d 281 the Supreme Court of Ohio found a contract term void by public policy because it was "in derogation of the public policy and purpose of a statute." *Id.*, at 155. See also *State Farm Mutual Insurance Co. v. Grace* (2009) 123 Ohio St.3d 471, 476, 918 N.E.2d 135 (recognizing that later legislation superseded the result in *Grange*).

In *Eagle v. Fred Martin Motor Co.*, the court found a contract term to violate public policy because it was "injurious to the interests of the State." *Eagle, supra,* at 178. More

specifically, the court ruled that a confidential arbitration agreement for a dispute covered by the Consumer Sales Practices Act ("CSPA") was against public policy. *Id.* The court determined that, by enacting the CSPA, the General Assembly intended to "help[] society become aware of unfair business acts and practices." *Id.* The court concluded that "[b]ecause Fred Martin's arbitration clause * * * does not recognize the right to proceed through a class action or as a private attorney general in arbitration, the arbitration clause as drafted clearly invades the policy considerations of the CSPA. Such a contract clause is injurious to the interests of the State, is against public policy, and accordingly cannot, and will not, be enforced." *Id.*

The *Eagle* Court articulated several further guideposts for Ohio courts to rely upon when assessing a contractual term against public policy: the court, drawing upon past Ohio cases, reasoned that the particular contract term before it was void because it (1) impeded functions set forth in Ohio law; (2) brought about a result that Ohio law sought to prevent; and (3) directly hindered the purpose of an Ohio statute. *Id.* (voiding a contract term for "impeding the remedial function of the CSPA," because it "brings about a result that the CSPA seeks to prevent," and because it "directly hinders the consumer protection purposes of the CSPA," citing *Crye v. Smolak,* 110 Ohio App.3d 504, 512, 674 N.E.2d 779 and *Thomas v. Sun Furniture and Appliance Co.,* 61 Ohio App.2d 78, 81, 399 N.E.2d 567). However, the *Eagle* Court did not hold that CSPA claims, *per se*, would not be subject to arbitration. Specifically, the *Eagle* Court held that "Ms. Eagle's CSPA claim is not properly referable to arbitration *because the clause as written* violates the CSPA." *Id.*, at 181. In other words, it was not the fact that an arbitration clause existed that violated public policy, it was that the specific language of the arbitration clause violated public policy.

As noted above, this Court has previously addressed this issue of public policy and arbitration clauses in the case of *Hawkins v. O'Brien* (2nd Dist), 2009 Ohio 60. There, this Court considered whether an arbitration clause violated public policy where it limited a plaintiff's ability to proceed as a private attorney general or through a class action, rights that were bestowed by the Ohio Consumer Sales Practices Act. *Id.*, at ¶29. Although this Court held that the trial court properly stayed the litigation until arbitration was held, it so held because "nothing in the arbitration clause denies Hawkins any of the substantive rights conferred on him by CSPA and the Federal Fair Debt Collection Practices Act ("FDCPA") which his claims for relief invoke." *Id.*, at ¶33. This Court continued, holding that:

> [t]he arbitration clause in the present case preserves the statutory substantive rights and remedies Hawkins sought in the action he commenced. Therefore, and because no showing has been made that those statutory rights and remedies are not arbitrable, the arbitration clause in the contract between Hawkins and Kentucky Check is enforceable.

Id., at ¶34. As such, *Hawkins* recognized that an arbitration clause that fails to preserve statutory substantive rights and remedies violates public policy and is unenforceable.

More recently, the court in *Bd. of Ed. of the City School Dist. of the City of Cincinnati v. Conners* used public policy to void a contract term, where "rather than bringing about a result that the state has sought to prevent, the [contract term] acts to prevent a result that the state seeks to facilitate." 2011 Ohio 1084, at ¶8. There, the contract term was a deed restriction prohibiting a school building sold at auction from being used as a school. *Id.*, at ¶4. The court found that the deed restriction sought to prevent the result the State intended to facilitate through the public policy, expressed in R.C. 3313.41, in favor of making classroom space available to charter schools. *Id.*, at ¶8,9. The court then concluded that "the deed

restriction that sought to prevent the use of the property for educational purposes was void as against this clear policy." *Id.*, at ¶9.

Finally, even broader articulations of when a contract term is void by public policy can be found in earlier Ohio decisions. In *Dixon v. Van Sweringen Co.* (1929), 121 Ohio St. 56, 166 N.E. 887, the Supreme Court of Ohio explained that a contract term is void when it "violate[s] some statute, or be contrary to judicial decision, or against public health, morals, safety or welfare, or in some form be injurious to the public good." *Id.*, syllabus at 2. In *Key v. Vattier*, the Supreme Court of Ohio voided a term because it was "against the public law, general policy, or public justice." *Key, supra*, at 147. See also *Lamont Bldg. Co., supra*, at 184-185; *John Hancock Mut. Life Ins. Co., supra*, at 247.

Amongst all of these slightly differing rules is a common denominator that this Court should employ: a contract term is void by public policy, and therefore unenforceable, when it seeks to suppress, hinder, or impede a result that an Ohio statute seeks to create. In this instance, the Arbitration Clause seeks to suppress the remedies created in the OCAA.

ii. The Arbitration Clause is void due to Ohio's public policy in favor of tougher and more comprehensive remedies against those engaged in a pattern of corrupt activities.

"Ohio's Corrupt Activity Act, * * * is patterned after the federal RICO Act and statutes passed by other states. In enacting the federal RICO Act, Congress found that 'organized crime continues to grow' in part 'because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.'" *State v. Siferd* (3rd Dist. 2002), 151 Ohio App.3d 103, 115, 783 N.E.2d 591 (internal citations omitted). The Supreme Court of Ohio has noted that "the Ohio General Assembly unanimously passed the Ohio RICO Act in 1985." *State v. Schlosser* (1997), 79 Ohio St.3d 329, 333, 681 N.E.2d 911 (internal citations

omitted). The Court also noted that "Senator Eugene Watts, the statute's Senate sponsor, described the Ohio RICO Act as 'the toughest and most comprehensive [RICO] Act in the nation' * * *. These comments indicate an intent to impose the greatest level of accountability, *i.e.*, strict liability." *Id.* Furthermore, the Court held that "[o]ffenses under RICO, R.C. 2923.32, are *mala prohibita, i.e., the acts are made unlawful for the good of the public welfare* * * *." *Id.* (emphasis added). Although the history of the OCAA addresses the government's power, the Ohio General Assembly granted the power to pursue violations of the OCAA to individuals, in addition to the government's enforcement powers. See R.C. 2923.34(A).

Pursuant to R.C. 2923.34(E), a plaintiff has a cause of action for treble damages. These treble damages "may include, but are not limited to, competitive injury and injury distinct from the injury inflicted by corrupt activity." R.C. 2923.34(E). Treble damages "have a compensatory side, serving remedial purposes *in addition to punitive objectives*." *Cook Cty. v. United States ex rel. Chandler* (2003), 538 U.S. 119, 130, 123 S.Ct. 1239, citing *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614, 635-636, 105 S. Ct. 3346, emphasis added. In *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless* (2007), 113 Ohio St.3d 394, 865 N.E.2d 1275, the Supreme Court of Ohio held that a statute that compensates an injured party with treble damages and that does not preclude that State from seeking additional penalties is a statute that "was designed to augment enforcement of the law and to deter violations through penalties rather than to simply compensate [injured parties] for violations." *Id.*, at 399, citing *Lahke v. Cincinnati Bell, Inc.* (1981), 1 Ohio App.3d 114, 117, 439 N.E.2d 928. Similarly, R.C. 2923.34(L) provides that "[t]he application of any civil remedy under this section shall not preclude the application of any criminal remedy or criminal forfeiture under section 2923.32 of the Revised Code or any other provision of law * * *."

In addition to awarding treble damages pursuant to R.C. 2923.34(E), a court could "[r]equire the divestiture of the defendant's interest in any enterprise or in any real property," R.C. 2923.34(B)(1), and "[i]mpose reasonable restrictions upon the future activities or investments of any defendant in the action * * *." R.C. 2923.34(B)(2). Furthermore, R.C. 2923.34(F) provides that "[i]n a civil action in which the plaintiff prevails under division (B) or (E) of this section, the plaintiff shall recover reasonable attorney fees in the trial and appellate courts."

As noted above, the remedies available through arbitration depart significantly from the remedies available under the OCAA. The Arbitration Clause of the Contract provides that the arbitration is to be conducted under the Commercial Arbitration Rules of the American Arbitration Association. See Section 30(b)(1) of the Contract, attached to the Complaint as Exhibit A. Pursuant to Rule 43(a) of the American Arbitration Association's Commercial Arbitration Rules, "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable *and within the scope of the agreement of the parties*, including, but not limited to, specific performance of a contract." Emphasis added. Pursuant to Rule 43(d)(ii), the arbitrator *may* award attorney fees.

When comparing the remedies that are available in a court proceeding and in arbitration, it becomes clear that arbitration lacks several of the OCAA remedies, and as such, arbitration cannot fulfill the remedial and punitive goals of the OCAA. By not allowing reasonable restrictions to be placed on the Defendants' future activities and investments, arbitration would hinder the OCAA's purpose of protecting the public from similar conduct in the future. By not allowing treble damages through the Arbitration Rule limiting relief to remedies within the scope of the agreement of the parties, arbitration would hinder the OCAA's

purpose of augmenting enforcement of R.C. 2923.32 and deterring such violations through penalties, rather than simply compensatory damages. Moreover, although the American Arbitration Association's Commercial Arbitration Rules give an arbitrator discretion to award attorney fees if the plaintiff prevails, the OCAA *mandates* that the attorney fees be awarded if the plaintiff prevails. See *Bergman v. Monarch Constr. Co.* (2010), Ohio St.3d 534, 539, 925 N.E.2d 116, quoting *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834, paragraph one of the syllabus. ("A basic rule of statutory construction is that 'shall' is 'construed as mandatory unless there appears a clear and unequivocal legislative intent' otherwise.")

This case is similar to *Eagle*, in that the arbitration clause at issue in *Eagle* prohibited the award of statutory remedies authorized by the CSPA. *Eagle, supra*, at 176. The remedies sought in the Complaint in this case would be unavailable if this case were arbitrated rather than tried in the Trial Court, thereby hindering the purpose of the OCAA. Arbitration would defeat the purpose of the Ohio Corrupt Activity by once again limiting the scope of the remedies available, and by decreasing the level of accountability the Defendants can be held to.

The stark differences in remedies available through an action in the Trial Court compared with the remedies available in arbitration demonstrates that the Arbitration Clause of the Contract would suppress, hinder, and impede the result the OCAA sought to bring about. For these reasons, the Arbitration Clause is void by public policy and therefore unenforceable. Therefore, this Court should reverse the Decision of the Trial Court, and remand the case for a trial on the merits.

D. The Trial Court erred by enforcing the Arbitration Clause of the Contract where the Arbitration Clause sets out rules for arbitration in vague terms that are inconsistent with Ohio law.

As a general rule, courts may invalidate arbitration provisions "upon grounds that exist at law or in equity for the revocation of any contract." R.C. 2711.01(A). Therefore, before sending a dispute to an arbitrator, "the trial court must make a determination as to the validity of the arbitration clause." *Harrison v. Toyota Motor Sales, U.S.A., Inc.* (9th Dist.), 2002 Ohio 1642, citing *Reynolds v. Lapos Constr., Inc.* (May 30, 2001), Lorain County App. No. 01CA0077810, unreported, at *4. When determining the validity of the arbitration provision, the court will only examine the arbitration clause itself, and the circumstances of its formation. *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 501, 692 N.E.2d 574.

A general rule of contract interpretation is that courts may attempt to interpret vague or ambiguous contract terms in a manner that is consistent with the intent of the parties, if that intent may be ascertained. However, when an arbitration provision is involved, trial courts are "not warranted in sending the case into uncharted waters." *Harrison, supra.* This means an arbitration provision should clearly spell out the terms and conditions of arbitration and contain specific details surrounding the arbitration process. *Id.*

The arbitration provision in the present case fails in its attempt to set forth the terms and conditions of how arbitration is to be conducted in two ways. First, the provision sets out discovery guidelines that are impossible to interpret under Ohio law. In Paragraph 2, the arbitration provision states that discovery is to be conducted pursuant to "Ohio Code of Civil Procedure section 1283.05 and to the same extent as in a civil action." However, there is no legal authority known as the Ohio Code of Civil Procedure, and there is no Ohio Revised Code

Section that corresponds to 1283.05. Paragraph 2 becomes even more vexing when read in conjunction the following sentence, which is found in Paragraph 4 of the arbitration provision:

> "By initialing in the space below you are giving up your judicial rights of discovery and appeal, unless such rights are specifically included in the 'Arbitration of Disputes' provision, notwithstanding this waiver of rights to discovery."

There is no section of the agreement labeled "Arbitration of Disputes" included in any material that was considered to be part of the purchase agreement. So the rights that may or may not be included in that provision are unknown, and yet, according to the terms of the agreement, these rights are highly material. Additionally, the arbitration provision Defendants seek to rely on provides for discovery to be conducted under a non-existent "Ohio Code of Civil Procedure," but then goes on to limit discovery in Paragraph 4 to only the rights set out in the non-existent code section 1283.05.

The second way that the arbitration provision fails to set forth details on how arbitration should be conducted is by, again, referencing a non-existent section of a non-existent "Ohio Code of Civil Procedure." In Paragraph 2, the provision states that "[t]he arbitration shall otherwise be conducted in accordance with Title 9, Part III, Ohio Code of Civil Procedure." The arbitration provision therefore sets another limitation on how arbitration should be conducted, but, again, the limitation the provision is seeking to apply cannot be determined with any reasonable certainty.

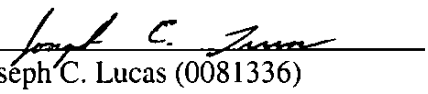
The arbitration provision in the present case contains terms that reference Ohio codes and code sections that do not actually exist, making it impossible to reasonably ascertain the parties' intent in setting the parameters and rules for arbitration. Not only does this provision have vague and confusing content, but it is also self-contradicting on several counts. The Arbitration Clause is a clause that is literally unsusceptible to any rational interpretation, and

belies the fact that it was a boilerplate provision. As a result, because the Arbitration Clause cannot be reasonably interpreted to reflect the parties' intent, and because enforcing the Arbitration Clause would result in these parties being sent into uncharted waters, the Decision of the Trial Court should be reversed, and the case remanded for a trial on the merits.

CONCLUSION

For the foregoing reasons, this Honorable Court should reverse the Trial Court's Decision, Entry, and Order Sustaining Defendant Eagle Investments' Motion to Compel Arbitration and Stay the Case Pending Arbitration and remand the case for further proceedings because (1) public policy defenses are not preempted by the FAA, (2) the Arbitration Clause of the Contract violates public policy by hindering the result the Ohio Corrupt Activity Act seeks to bring about, and (3) the Arbitration Clause of the Contract sets out rules for arbitration in vague terms that are inconsistent with Ohio law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served upon the parties listed below by ordinary mail this 29th day of December, 2011

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