ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION	§	
PLAINTIFF,	§	
VS.	§	3:01-CV-0619-P
HOOTERS ARLINGTON VENTURE I, a Texas Partnership; TWI IV, INC.; and TEXAS WINGS, INC. d/b/a HOOTERS RESTAURANT	§	
DEFENDANTS.	§	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS ORIGINAL COMPLAINT IN INTERVENTION

TO THE HONORABLE UNITED STATES
DISTRICT COURT JUDGE:

COME NOW, Hooters Arlington Venture I, TWI IV, Inc., and Texas Wings, Inc., Defendants in the above-entitled and -numbered cause, and file this, their Brief in Support of their Motion to Dismiss Original Complaint in Intervention, and in support thereof would respectfully show the Court as follows:

1. Defendants have affirmatively defended in this case under Fed. R. Civ. P. 12(b)(1) and (2) on the ground that this Court lacks jurisdiction over this suit based upon Intervenors' agreement to arbitrate employment related disputes with Defendants. Defendants, furthermore, have affirmatively defended under Fed. R. Civ. P. 12(b)(6) on the ground that Intervenors have failed to state a claim upon which this Court can grant relief, as they have contractually agreed to arbitrate employment related disputes with Defendants. Defendants have requested dismissal of this case on these grounds.

2. As established in the exhibits to Defendants' Motion to Dismiss and Original Answer to Complaint in Intervention, each of the Intervenors has contractually agreed to arbitrate any employment disputes between them and Defendants pursuant to the provisions of the Federal Arbitration Act. As this Court is well aware, since 1985 the United States Supreme Court has required that agreements to arbitrate be rigorously enforced. *See, e.g., Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

3. The Federal Arbitration Act is found at 9 U.S.C. §1, et seq.

> Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . 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. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . .

Id. at 24 - 25. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.* at 628.

4. In 1991, the United States Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *Gilmer* stood for the proposition that a claim under the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. §621, could be subjected to compulsory arbitration. "Following the Gilmer reasoning, most of the courts of appeal have

concluded that individual Title VII claims can be subjected to compulsory arbitration under employees' non-collective bargaining agreements to arbitrate pursuant to the FAA." *Williams v. Cigna Financial Advisors Inc.*, 197 F3d 752, 760 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000). The applicability of the Federal Arbitration Act was applied to Title VII claims by the Fifth Circuit as early as 1991, in *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991)(we now conclude that *Gilmer* requires us to reverse the district court and compel arbitration of Alford's Title VII claim).

5. The applicable case law overwhelmingly mandates that, as to the case at bar, dismissal of Intervenors' claims is proper.

Pursuant to § 3 of the FAA, the Court is required to stay proceedings once it determines that the issues raised in the complaint are referable to arbitration. *9 U.S.C. §3*. However, the stay requirement does not preclude dismissal of a case if the Court concludes that all of the claims presented are subject to arbitration. *Alford v. Dean Witter Reynolds, Inc.*, 975 S.W.2d 1161, 1164 (5th Cir. 1992). To maintain jurisdiction under such circumstances would serve no useful purpose. *Id., citing, Sea-Land Service, Inc. v. Sea-Land of P.R., Inc.*, 636 F. Supp. 750, 757 (D. Puerto Rico 1986). Because all of their claims fall within the arbitration provision, the Court believes that the claims of Plaintiffs should be dismissed.

Marsh v. First USA Bank, N.A., 103 F. Supp. 2d 909, 926 (N.D. Tex. 2000). The policy of dismissing Title VII claims subject to arbitration has been endorsed by the 5th Circuit Court of Appeals, as well as various district courts that have addressed this issue:

> Finally, Alford argues that the district court's dismissal with prejudice of her claims is contrary to the precise terms of Section 3 of the Federal Arbitration Act. Section 3 provides that when claims are properly referable to arbitration, that upon application of one of the parties, the court shall stay the trial of the action until the arbitration is complete. *9 U.S.C. §3*. As correctly asserted by Alford, a stay is mandatory upon a showing that the opposing party has commenced suit "upon any issue referable to arbitration under an agreement in writing for such arbitration...." Thus, the court may not deny a stay in such a situation. This rule, however, was not intended to limit dismissal of a case in the proper circumstances. The weight of authority clearly supports dismissal of the case when *all* of the issues raised in the district court must be submitted to arbitration. [Emphasis in original; cites omitted.]

Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992). In *Sea-Land Service, Inc. v. Sea-Land of Puerto Rico, Inc.*, 636 F. Supp. 750, 757-758 (D.C. Puerto Rico 1986), the trial court held:

> Although we understand that plaintiff's motion to compel arbitration must be granted, we do not believe the proper course is to stay the action pending arbitration. Given our ruling that all issues raised in this action are arbitrable and must be submitted to arbitration, retaining jurisdiction and staying the action will serve no purpose. . . . Since there are no live controversies before this court, the appropriate procedure is dismissal of the action, without prejudice."

The reasoning has been embraced in the following cases: *Sparling v. Hoffman Construction Co., Inc.*, 864 F.2d 635, 637-638 (9th Cir. 1988); *Hale v. First USA Bank, N.A.*, 2001 U.S. Dist. Lexis 8045 (S.D.N.Y. 2001); *McGill v. Rural/Metro Corp.*, 2001 U.S. Dist. Lexis 4833 (2001); and *Dancu v. Coopers & Lybrand*, 778 F. Supp. 832, 835 (E.D. Penn. 1991).

6. Clearly in the case at bar, as Intervenors' only claims relate to employment-related issues which pursuant to their agreements with Defendants must therefore be arbitrated, there is nothing left for this Court to adjudicate. As such, dismissal of the Complaint in Intervention is a proper use of this Court's resources.

WHEREFORE, PREMISES CONSIDERED, Defendants Hooters Arlington Venture I, TWI IV, Inc., and Texas Wings, Inc. respectfully pray that this Court dismiss the Intervention for lack of jurisdiction and/or for failure to state a claim upon which relief can be granted. Defendants further pray that they be granted such other and further relief, both at law and in equity, as is just and proper.

Respectfully submitted,

BY: _____
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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that on the 17th day of July, 2001, a true and correct copy of the above and foregoing Brief in Support of Defendants' Motion to Dismiss Original Complaint in Intervention has been sent via certified mail, return receipt requested to William E. Robbins, attorney for Intervenors, at Kondos & Kondos, 1595 North Central Expressway, Richardson, Texas 75080; and to William C. Backhaus, Equal Employment Commission, Dallas District Office, 207 S. Houston Street, 3rd Floor, Dallas, Texas 75202.

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John B. Gessner