ORIGINAL

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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	
Plaintiff,	**CIVIL ACTION NO. 3-01CV0619-P**
v.	
HOOTERS ARLINGTON VENTURE I. a Texas Partnership; TWI IV Inc.; TEXAS WINGS INC. d/b/a HOOTERS RESTAURANT	
Defendants.	

PLAINTIFF EEOC'S BRIEF IN SUPPORT OF ITS RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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COMES NOW the Plaintiff Equal Employment Opportunity Commission (hereafter "the Commission" or "EEOC") and files this Brief in Support of its Response to Defendant's Motion to Dismiss and would show the Court as follows:

INTRODUCTION

The Equal Employment Opportunity Commission ("Commission") is the agency charged with the enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), and other federal anti-discrimination statutes. This case raises important issues concerning the enforceability of agreements that, under the guise of establishing an arbitration procedure, strip an employee of the substantive protections of Title VII. By its Motion, Hooters Arlington Venture I, a Texas Partnership; TWI IV, Inc; and Texas Wings, Inc. d/b/a Hooters Restaurant, hereinafter collectively referred to as "Hooters" seeks to enforce an arbitration provision that was contained in

agreements entered into with four of its former employees: Nicole Brennan Gaffney, Nicole Cleveland, Robyn Purvis McGehee and Lisa Ramirez Thornton, hereinafter the "Intervenors" or "aggrieved individuals."

EEOC objects to the Defendants' Motion to Dismiss because the "arbitration agreements" are contrary to the protections and provisions of Title VII and public policy and are, therefore, unenforceable. Specifically, the agreements do not provide an adequate forum for the vindication of the aggrieved individuals' statutory causes of action. Further, the "arbitration agreements" strip the Intervenors of the remedial protections of Title VII, imposing severe restrictions on the award of back pay, front pay, compensatory damages, punitive damages, attorney's fees, and injunctive relief. The agreements also give Hooters complete control over the selection of the arbitration panel and permit Hooters to dictate unilaterally the terms of the arbitration procedure and to alter those terms at its whim. If Hooters' position is upheld, an employer could compromise the substantive protections of Title VII by forcing employees to agree in advance to an arbitration procedure that does not adequately protect Title VII rights or else suffer adverse employment consequences.

STATEMENT OF THE ISSUES

1. Whether the "arbitration agreements" between Intervenors and Hooters achieve an impermissible prospective waiver of Intervenors' Title VII rights by stripping Intervenors of the remedial protections of Title VII and establishing a forum that is systematically biased in Hooters' favor.

2. Whether Intervenors knowingly agreed to waive their right to the substantive protections of Title VII where the arbitration rules that stripped Intervenors of those protections were not made available to Intervenors at the time they executed the "arbitration agreements."

3. Whether the "arbitration agreements" are enforceable, notwithstanding the severance provision contained in the agreements, given the suspect nature of the severance provision, the gross deficiencies in the arbitration procedures established under the agreements, and the myriad of confusing, inconsistent, and inappropriate provisions contained in the arbitration rules incorporated in the agreements.

THE ARBITRATION AGREEMENTS ARE INVALID AND UNENFORCEABLE

A. The Arbitration Agreements Achieve an Impermissible Prospective Waiver of Intervenors' Title VII Rights

It has long been recognized that private suits are an integral part of Title VII's enforcement scheme. "[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices." Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974). Congress designed the remedial measures in Title VII to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975). The award of full relief under Title VII serves not only to compensate the victim of discrimination, but to vindicate the broader public interest by deterring future violations of the statute. See id. at 417-18, 421; see also McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 357-59 (1995) (stressing that the enforcement objectives of the anti-discrimination statutes "are furthered when even a single employee establishes that an employer has discriminated against him or her").

In this case, the "arbitration agreement" that is the subject of Defendant's Motion has already been ruled to be unenforceable and invalid because of the unfair provisions contained in the

agreement and the rules.[1] (Exhibits 1-4). Hooters of America, Inc., v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999)("The Hooters rules when taken as a whole are 'so one-sided that their only possible purpose is to undermine the neutrality of the proceeding.'") The Hooters arbitration rules require the Intervenors to provide the company notice of their claims at the outset, including the nature of their claims (Rule 6-22(a)(1)); the specific acts or omissions which form the bases of their claims (Rule 6-22(a)(2)); the dates of specific acts (Rule 6-22(a)(3)); a list of all persons with knowledge of facts underlying their claims with a brief description of the facts known by each (Rule 6-22(a)(5)), and a description of the relief sought, among other requirements (Rule 6-22(a)(6)). Hooters, on the other hand, is not required to file any responsive pleadings or to notice its defenses. Neither is Hooters required to furnish the Intervenors with a list of all fact witnesses and a brief summary of the facts known to each. Id.

The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decision-maker. Rule 8. Id. Each employee is allowed to select one arbitrator. Rule 8-1(b). Hooters also selects one arbitrator. Rule 8-1(a). Then, Hooters' arbitrator and the employee's arbitrator select the third arbitrator from Hooters' hand-picked list of "Approved Arbitrators." Rule 8-1(c). The Arbitration Panel resolves a dispute by a majority vote of two. Rule 8-8. This gives Hooters complete control over the entire three-member panel and places no limits whatsoever on whom Hooters can put on the list. Hooters of America, Inc., v. Phillips, 173 F.3d 933, 939 (4th Cir. 1999). The rules do not even prohibit Hooters from placing its managers themselves or

[1] Notably, the Intervenors were not provided with the arbitration "rules" at the time they were required to sign the "arbitration agreements." The arbitration rules are provided to employees only upon written request.

others with fiduciary or familial relations with the company on the list of arbitrators. Id. Nothing in the rules restricts Hooters from punishing arbitrators who rule against them by removing them from the list. Id. "Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision-maker would be a surprising result." Id.

Additionally, the proceeding itself is not fair. Id. Hooters may expand the scope of arbitration to any matter, "whether related or not to the employee's claim." The employee cannot raise "any matter not included in the Notice of Claim." Rules 4-2, 8-9. Id. Pity the unrepresented employee who has no experience in drafting all-encompassing causes of action perfectly the first time around. Similarly, Hooters is permitted to move for summary dismissal of employee claims before a hearing is held, whereas the employee is not permitted to seek summary judgment. Rule 14-4. Only Hooters, not the employee, may record the arbitration hearing. Rule 18-1. Hooters also has the right to bring suit in court to vacate or modify an arbitral award when it can show, by a preponderance of the evidence, that the panel exceeded its authority. Rule 21-4. The employee has no such right. And in fact, the panel has been neutered before it even begins its work. It has no power to modify Hooter's policies or the arbitration rules (written by Hooters). Rule 8-9(1). It cannot assume any powers not expressly given it by Hooters. Rule 8-9(2). It has no power to make Hooters show "just cause" why it fired or disciplined an employee. Rule 8-9(4).

Additionally, the rules provide that Hooters, upon 30 days notice, may cancel the agreement to arbitrate. Rule 23-1. The employee has no such right. Hooters also reserves the right to modify the rules, "in whole or in part...from time to time, without notice. Rule 24-1. "Nothing in the rules even prohibits Hooters from changing the rules in the middle of an arbitration proceeding." Hooters of America, Inc., v. Phillips, 173 F.3d 933, 939 (4th Cir. 1999).

Quoting the court in Hooters, supra: "If by odd chance the unfairness of these rules were not apparent on their face, leading arbitration experts have decried their one-sidedness." Id. Examples of comments about the Hooters arbitration rules, the precise rules that are before this court, are as follows: "Rules so deviate from due process standards that the [American Arbitration Association] would refuse to arbitrate under [them]." (George Friedman, senior vice president of the American Arbitration Association) Id.; "This is without a doubt the most unfair arbitration program I have ever encountered." (Lewis Maltby, member of the Board of Directors of the American Arbitration Association); "[I]t would be hard to imagine a more unfair method of selecting a panel of arbitrators," Hooters arbitration system is "[D]eficient to the point of illegitimacy" and "so one sided, it is hard to believe that it was even intended to be fair." See amicus curiae briefs filed by the National Academy of Mediators and the Society of Professionals in Dispute Resolution in Hooters of America, Inc., v. Phillips, 173 F.3d 933, 939 (4th Cir. 1999). It is clear, then, that Hooters has created a "sham system unworthy even of the name of arbitration." Id. at 940. Hooters took on a contractual duty to establish an arbitration system whereby disputes are fairly resolved by an impartial third party. Id. Based upon the same arbitration rules and system, the Fourth Circuit determined that Hooters had "completely failed in performing its contractual duties" and that based upon Hooters' breaches of the arbitration agreement and the parties desire not to be bound by it, the proper remedy was recission of the contract. Id.

Aside from the reasons set forth above for recission of the agreements, there are other, serious, grounds on which the arbitration agreements at issue cannot be upheld. First, the agreements take away from the Intervenors those rights that are essential to the effective enforcement of their statutory causes of action. The arbitration rules (referenced in the agreements) limit the

award of punitive damages to an amount of up to one year of "gross cash compensation." Rule 19-5. In the case of Intervenors, this would be an amount far below the statutory cap that would apply under Title VII to an employer of Hooters' size. See 42 U.S.C. § 1981a(b) (authorizing the award of compensatory and punitive damages of up to $300,000 in the case of Title VII disparate treatment claims against employers with more than 500 employees). Hooters also limits its exposure to punitive damages to those instances of "wilful" conduct only. Not only is "wilful" not defined, it is not the correct standard for the award of punitive damages. If this issue were presented to a jury, the correct standard would be whether Hooters' acts "were done with malice or with reckless indifference to the federally protected rights" of the Intervenors. Kolstad v. American Dental Association, 119 S.Ct. 2118, 2124 (1999). The rules also impose limitations on the award of back and front pay, beyond those appropriate under Title VII, while, unbelievably, making no mention at all of the award of compensatory damages. Cf. 42 U.S.C. § 1981a(b) (authorizing the award of compensatory damages in the case of Title VII disparate treatment claims). Hooters does not specify whether it uses the correct, quarterly method of calculating back pay. Rule 19-3. It does not appear that they do. Id. Also, Hooters seeks to impermissibly limit its exposure to back pay damages by expedient disregard for the collateral source rule. Hooters' definition of back pay is "back pay...less unemployment, retirement and disability benefits..." Rule 19-1(a). Under the "collateral source rule," as defined by the courts, defendants may not benefit from payments made to the plaintiff by third parties such as unemployment compensation. Guthrie v. J.C. Penney Co., Inc., 803 F.2d 202, 209 (5th Cir. 1986); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 736 (5th Cir. 1977). Similarly, social security and pension benefits have been held not deductible from back pay entitlement. Maxfield v. Sinclair Intl., 766 F.2d 788, 793-94 (3rd Cir. 1985), cert. denied, 106 S.Ct.

796 (1986); Dominguez v. Tom James Co., 113 F.3d 1188 (llth Cir. 1997). Permitting an employer in a civil rights case to benefit from other sources of income such as unemployment compensation and worker's compensation undercuts the deterrence function of Title VII. Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160, 1170-7l, (6th Cir. 1996).

While Title VII guarantees attorney's fees to a prevailing plaintiff, the arbitration rules purport to make payment of attorney's fees optional, and then only if determined to be "reasonable." Rule 19-1(b). The rules immunize Hooters' employment policies from meaningful redress in the arbitral forum. The rules preclude the arbitration panel from enjoining "any policy of the Company" and require that any finding of liability take into account "the Company's policies or procedures, including, without limitation, management directives." Rule 13-1.

The rules eliminate meaningful discovery opportunities, generally limiting the employee to the taking of one deposition of a company representative. Rule 10-4. This is in sharp contrast to the broad discovery rights available in federal court. See, e.g., Fed.R.Civ.P. 26; see also Gilmer, 500 U.S. at 31 (stressing that discovery procedures in the arbitral forum must be sufficient to provide individuals with a "fair opportunity" to prove their claims). Hooters decides the nature and extent of available discovery. Rule 10-2. Hooters has the power to deny a discovery request if Hooters deems a request is not the "most expeditious and cost-effective manner possible," or not "relevant" or that the employee does not "have a substantial, demonstrable need" for the information. Id. The rules also provide Hooters with complete control over the order of presentation of evidence at the hearing. Hooters gets to present its evidence as to the claim or claims first. Rule 12-1. Hooters has retained for itself the exclusive right to determine which witnesses can be sequestered and which ones cannot. Rule 13-5. No formal rules of evidence apply except for the attorney-client privilege

and the work product doctrine. Rule 14-2. These exceptions little benefit the unrepresented employee.

Another serious problem with Hooters' arbitration rules is that the employee, in addition to paying a filing fee of $135.00 (Rule 16-1), must split one-half of the expenses of the arbitration or one week of gross compensation, including bonuses, commissions and related cash compensation, whichever is less. Rule 16-2(a)(b). In Perez v. Globe Airport, 2001 WL 649497 (11th Cir. 2001), the Eleventh Circuit held that an arbitration agreement was not enforceable because the costs of arbitration were split between the employer and the employee. Because of this provision, Ms. Perez did not have to go to arbitration and instead was allowed to proceed in court.

Rule 9-1 mandates that the venue and place of hearing will be at Hooters' principal place of business in Cobb County, Georgia. Rule 9-2 provides that an employee may request to have the hearing held in his/her city of employment, but no criteria for granting or denying this request are enumerated. Hooters and the hand-picked Arbitration Panel choose the hearing date. Rule 9-3. No provision is made in the event the employee has a conflict.

Another chilling effect of the procedure is that the hand-picked Arbitration Panel can award Hooters its attorney's fees, costs and expenses if it determines that the employee's complaint was frivolous. Rule 20-1. In all of these ways, rights essential to the Intervenors' ehforcement of their statutory causes of action are abridged.

Finally, and most fundamentally, the rules allow Hooters, and only Hooters, to select the pool from which arbitrators are chosen. Rule 8-1. The result is not a neutral forum. An employee cannot effectively "vindicate [his or her] statutory cause of action in the arbitral forum," Gilmer, 500 U.S. at 28, when the employer has complete "'control over the source of the list of arbitrators.'" See

Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145, 150 (1968) (stating that the FAA does not "authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another"); Rosenberg, 1998 WL 81907, *17 (stating that "norms and standards of arbitral impartiality" require that "both parties to a dispute must have an equal right to control the appointment of the arbitral panel"). Significantly, the agreements achieve their divestiture of these statutory protections through a prospective waiver. Intervenors did not enter into the agreements pursuant to any bona fide dispute then in existence. They entered into the agreements before any dispute arose. The agreements bind Intervenors to an advance waiver of substantive statutory rights that, by definition, cannot be considered knowing and voluntary. Such a waiver is, as a matter of federal law, unenforceable.[2] Hooters of America, Inc. v. Phillips, 39 F.Supp.2d 582,612 (D. South Carolina 1998).

"[T]he fact that [individuals] may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced . . . to surrender the statutorily-mandated rights and benefits that Congress intended them to possess." Graham Oil Co. v. Arco Prods. Co., 43 F.3d 1244, 1247 (9th Cir.), cert. denied, 116 S. Ct. 275 (1995). While an individual might be able to agree in advance to "substitute one legitimate dispute resolution forum for another," she cannot be required to forgo rights "important to the effectuation of [a statute's] policies." Id. 1247-48 (denying

[2] The district court did not rely upon the federal policy against prospective waivers in denying enforcement of the arbitration agreements. The court, instead, invoked the state contract law doctrines of "unconscionability" and "public policy." Hooters at 613-614. Elsewhere, however, the court recognized that the federal standard for a "knowing and voluntary" waiver would apply to the waiver of "substantive statutory rights" under the arbitration agreements. Id. at 612. It is precisely that federal standard that prohibits the prospective waiver of the substantive protections of a federal statute.

enforcement of an arbitration agreement that deprived an entity of its statutory right to "exemplary" damages). The recovery of full relief is an essential part of Title VII's enforcement scheme.[3] So, too, is the availability of a neutral forum in which to vindicate an employee's statutory cause of action. An employer cannot, under the guise of an "arbitration" agreement, strip an individual of rights that are critical to the effective enforcement of a federal statutory scheme.

Courts have held that an individual may be required to arbitrate a statutory claim of discrimination, pursuant to a pre-dispute agreement, only if the arbitration arrangement established under the agreement provides the individual with a *neutral* (emphasis added) forum in which to vindicate the full array of remedial protections provided under the statute at issue. The lead circuit court decision on this point is Cole v. Burns Int'l Security Servs., 105 F.3d 1465 (D.C. Cir. 1997). Cole involved a claim of race discrimination under Title VII. The defendant argued that the plaintiff was required to arbitrate his Title VII claim because he had signed an arbitration agreement as a condition of his employment. The D.C. Circuit agreed that the arbitration agreement at issue was enforceable but, based on a careful reading of Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), imposed significant restraints on the enforceability of agreements that require arbitration of Title VII claims as a condition of employment. The court specifically ruled that, to be enforceable under Gilmer, such agreements must, at a minimum, establish an "arbitration arrangement" that: "(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5)

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3 Punitive damages, in particular, are an integral part of the statute's "substantive" protections, giving rise to an independent "cause of action" on behalf of the plaintiff. See Landgraf v. USI Film Prods., 511 U.S. 244, 280-86 (1994).

does not require employees to pay either unreasonable costs or any arbitrator's fees or expenses as a condition of access to the arbitration forum." Id. at 1482. The court stressed that the Supreme Court's decision in Gilmer "cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes." Id. See also Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054, 1060-62 (11th Cir. 1998) (Cox & Tjoflat, J.J.) (stressing that the arbitrability of Title VII claims "rests on the assumption that the arbitration clause permits relief equivalent to court remedies;" arbitration clause is not enforceable when it has provisions "that defeat the remedial purpose of the statute"); Trumbull v. Century Marketing Corp., 1998 WL 400511, at *5 (N.D. Ohio July 7, 1998) (holding that a "compulsory arbitration agreement" is not enforceable where the agreement purports "to limit a plaintiff's remedies under Title VII").

Hooters' basic stance in its Motion to Dismiss is to posit abstract principles concerning the enforceability of arbitration agreements. (Defs' Motion to Dismiss ¶¶ 2-3). Hooters cites Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1985) for the proposition that the U.S. Supreme Court requires rigorous enforcement of arbitration agreements. (Defs' Motion to Dismiss ¶ 2). The facts and holding in Dean Witter are inapposite to the case at bar. Dean Witter is a securities suit between a private individual and a corporation wherein the individual complains of improper trading of his account. The case is about the maintenance of separate proceedings in state court versus federal court and the inexpediency of bifurcating jurisdiction in the securities sector. The Court held that under the Arbitration Act, 9 U.S.C.S. § 2, courts were required to enforce the bargain of the parties to arbitrate even where the result would be the possibly inefficient maintenance of separate proceedings in different forums. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 225 (1985).

The Supreme Court's decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 626 (1985) comports with the Commission's position. In Mitsubishi, the Court held that for a court to order arbitration of a statutory claim, the arbitration must be compatible with the remedial scheme of the federal statute at issue and that by a party's agreement to arbitrate, that party does not forgo the substantive rights afforded by the statute. Id. at 628. The remedies and substantive rights afforded by Title VII versus Hooters' arbitration agreements are completely different and incompatible.

Hooters' reliance on Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) to buttress its position is especially misplaced in light of their narrow and one-sided arbitration agreements. The Supreme Court in Gilmer made clear that arbitration is appropriate only "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," thereby ensuring that "the statute will continue to serve both its remedial and deterrent functions." 500 U.S. at 28. There is no conceivable way a prospective litigant can vindicate his or her statutory rights assured by Title VII under the constraints imposed by Hooters' procedure (no compensatory damages, incorrect back pay methodology, stark limitations on punitive damages and attorney's fees, one-sided discovery and a stacked arbitration panel, among other reasons).

Likewise, Defendants rely on Alford v. Dean Witter Reynolds, Inc, 939 F2d. 229 (5th Cir. 1991) for the sweeping proposition that dismissal of a case is not precluded if the court concludes that all of the claims presented are subject to arbitration. (Defs' Motion to Dismiss ¶ 5). This is a "glass is half full – glass is half empty" argument. In Alford, the Fifth Circuit merely held that Title VII claims can be subject to arbitration. Id. at 230. The court did not hold that Title VII claims can be subjected to arbitration without limitation.

Hooters also seeks solace in the holding of Marsh v. First USA Bank, N.A., 103 F.Supp.2d. 909 (N. D. Texas- Dallas Division), another commercial banking case. The facts are again inapposite. Nonetheless, Marsh is instructive. In Marsh, Judge Maloney observed that arbitration agreements, to be enforceable, must be otherwise valid under general principles of contract law. Id at 914. Though the arbitration agreement before Judge Maloney was "not so lopsided in the Defendant's favor as to be oppressive or prejudicial...and [did] not present an opportunity for one party to gain an unfair advantage over the other in arbitration," clearly the court analyzed the agreement subject to these criteria. Id at 920. The Hooters arbitration agreements are highly lopsided, prejudicial and oppressive, making the present case distinguishable from Marsh. The court in Marsh also noted that individuals are free to "contractually waive their rights as they see fit," but such waivers are "subject to public policy considerations..." Id. at 921. Most important, Judge Maloney reaffirmed the fundamental holding in Gilmer, 500 U.S. at 28, that prospective litigants must be able to "vindicate" [his or her] statutory cause of action in the arbitral forum. Id. at 924.

The arbitration rules incorporated into the agreements signed by the Intervenors deprive employees of the remedial protections of Title VII. The rules, on their face, erect a one-sided arbitration procedure. Since arbitration is a matter of contract, an arbitrator would have to adhere to the terms of the rules as written, making the submission of a Title VII claim to arbitration a futile act. An arbitration agreement is not enforceable where the agreement, on its face, deprives a Title VII claimant "of the types of relief that would otherwise be available in court." Cole, 105 F.3d at 1482; see also Paladino, 134 F.3d at 1062 (stating that where an arbitration agreement expressly restricts the recovery of relief available under Title VII, the agreement is unenforceable as an initial matter; a Title VII plaintiff should not have to "repair to a judicial forum," after-the-fact, to recover

the Title VII remedies denied under the arbitration agreement).

Important public policy considerations mandate denying enforcement of an arbitration agreement in cases of this nature. Confronted with such a draconian procedure, many employees will be deterred from bringing claims, thereby undermining the enforcement objectives of Title VII. Those employees who take up the challenge face the prospect of litigating their claims twice -- once in the arbitral forum, under Hooters' one-sided rules, and once in district court, where the court will be asked to repair the damage caused by an unfair system. To this, add the possibility that Hooters may seek its attorney's fees and costs from the non-prevailing challenger. The represented challenger will be twice-saddled with some or all of his or her attorney's fees. This is not a procedural outcome contemplated by either Title VII or the FAA. Hooters should not be allowed the use the ruse of an arbitration agreement to erect a barrier to the assertion of Title VII rights. In Gilmer, the Supreme Court rejected a broad challenge to the arbitration procedures maintained by the securities industry. The Court, however, did not give a blanket endorsement to all arbitration procedures, nor to the principle of mandatory arbitration in general. See Gilmer, 500 U.S. at 31 (stating only that there had been no showing "in this case" that the arbitration procedures were inadequate). Indeed, Gilmer invited fact-based challenges to the inadequacies of arbitration procedures, stating that the enforceability issue was "best left for resolution in specific cases." Id. at 33. As Gilmer makes clear, there is some point at which a permissible agreement to substitute an arbitral forum for a judicial forum transforms into an impermissible prospective waiver of the remedial protections of a federal statute. That point has been reached here. This Court should hold that the arbitration agreements signed by Intervenors are unenforceable as a matter of federal policy.

B. Intervenors Did Not Knowingly Agree To Waive Their Title VII Rights

An alternative reason for denying enforcement of the arbitration agreements signed by Intervenors is that Intervenors did not knowingly agree to waive the Title VII protections forfeited under Hooters' arbitration rules. Arbitration is "a matter of contract." AT & T Technologies, Inc. v. Communications Workers of America, Inc., 475 U.S. 643, 648 (1986). Because a party to a contract is "not bound by a meaning unless he has reason to know of it," Restatement (Second) of Contracts 200, comment b (1979), employees "cannot be bound by an agreement to arbitrate employment discrimination claims unless they knowingly agreed to arbitrate such claims." Prudential Ins. Co. of America v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994), cert. denied, 116 S. Ct. 61 (1995). Federal law recognizes a heightened standard for a knowing waiver of a federal right. That standard requires that the agreement at issue be written in "clear, specific language" that expressly describes the statutory rights being waived. Coventry v. United States Steel Corp., 856 F.2d 514, 516, 524 (3d Cir. 1988); see also Torrez v. Public Serv. Co. of New Mexico, Inc., 908 F.2d 687, 690 (10th Cir. 1990) (a waiver agreement must "specifically" mention "employment discrimination claims"); 29 U.S.C. § 626(f)(1)(B) (stating that, to be effective, any waiver of a right or claim under the ADEA must "specifically refer to rights or claims arising under this chapter"). Absent evidence that an employee has been specifically informed of the statutory rights being forfeited under an agreement, there is no enforceable waiver.

There is a strong argument that the heightened standard for a knowing waiver of a federal right applies to agreements that require the arbitration of Title VII claims. When an employee enters into an agreement that mandates the arbitration of Title VII claims, the employee waives the "comprehensive statutory rights, [judicial] remedies and procedural protections prescribed in Title VII." Prudential Ins. Co. of America v. Lai, 42 F.3d 1299, 1304 (9th Cir. 1994), cert. denied, 116 S.

Ct 61 (1995). One of those procedural protections is the right to a trial by jury. See 42 U.S.C. § 1981a(c) (providing for a right to a jury trial in those Title VII cases in which the claimant seeks compensatory and punitive damages). This Court has recognized that because the right to a jury trial has constitutional dimensions, the right can be waived by contract only if the waiver is "knowingly and intentionally" made. Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986). Where the waiver of the right is claimed "under a contract executed before litigation is contemplated," the "party seeking enforcement of the waiver must prove that consent was both voluntary and informed." Id. at 833; see also Gilmer, 895 F.2d at 200 (stating that prospective waivers of procedural rights under the anti-discrimination statutes "must be examined to determine whether they were knowing and voluntary"). Following this line of analysis, courts have insisted upon a heightened standard of clarity before enforcing agreements that purport to require the arbitration of Title VII claims. See Paladino, 134 F.3d at 1057-60 (holding that an arbitration agreement was unenforceable with respect to the employee's Title VII claim because the agreement did not make clear that it applied to discrimination claims); Ramirez-De-Arellano v. American Airlines, Inc., 133 F.3d 89, 91 n.2 (1st Cir. 1997) (stating that a waiver of an individual's right to bring a statutory claim in federal court "must at least be express: the choice must be explicitly presented to the employee and the employee must explicitly agree to waive the specific right in question"); Lai, 42 F.3d at 1303-05 (refusing to enforce an agreement to arbitrate Title VII claims where the employee was not made aware of the specific arbitration rules and procedures that applied under the agreement); Trumbull, 1998 WL 400511, at **3-4 (refusing to compel arbitration of the plaintiff's Title VII claim where the purported waiver of the plaintiff's right to a jury trial, implicit in the provision, was not "knowing" and "clear"); Berger v. Cantor Fitzgerald Sec., 942 F. Supp. 963, 967 (S.D.N.Y. 1996) (arbitration agreement not

enforceable unless the agreement "expressly define[s] the types of employment disputes subject to arbitration").

In Hooters of America, Inc. v. Phillips, 39 F.Supp.2d 582,606 (D. South Carolina 1998), the district court did not hold that the heightened federal standard for a knowing waiver of a federal right applies in all cases involving an agreement to arbitrate Title VII claims. The court ruled, instead, that the heightened standard applied in that case because the arbitration agreements achieved a waiver of Phillips' "substantive statutory rights." Id. The court's ruling on this point is plainly correct. The law has long recognized that where the substantive protections of a federal statute are at issue, any agreement that purports to waive those rights must be examined with a critical eye to ensure that the waiver was made with specific knowledge of the rights being compromised. While one can debate whether such a standard should apply when the only rights being affected under an agreement are procedural in nature, the standard certainly applies where, as here, the agreement purports to waive the remedial protections of a federal statute.

Judged in this light, the arbitration agreements signed by Intervenors fall short of securing a knowing waiver of Intervenors' Title VII rights. Intervenors entered into the agreements with Hooters knowing that they were agreeing to submit employment-related claims to arbitration. (Exhibit 3). Intervenors, however, did not know that they were agreeing to do so in a forum that stripped Intervenors of the substantive protections of Title VII. Intervenors were not aware of this fact because the arbitration rules that achieved this result were not made available to Intervenors at the time they signed the agreements. In fact, the rules (Exhibit 2) were available only upon "written request of the employee," ¶ 2, "Agreement," TEXAS WINGS INC. dba HOOTERS AGREEMENT TO ARBITRATE EMPLOYMENT-RELATED DISPUTES (Exhibit 4), a procedure designed, quite

clearly, to make it more difficult for employees to gain access to the rules. On this record, Hooters cannot meet its burden of showing that Intervenors' consent to the arbitral regime imposed by Hooters was "knowin[g] and intentiona[l]." Leasing Serv. Corp., 804 F.2d at 832.

C. The Arbitration Agreements Cannot Be Rendered Enforceable By Severing the Offensive Provisions of Hooters' Arbitration Rules

Assuming that the arbitration agreements are unenforceable as written, the remaining question

is whether the improper provisions of the arbitration rules can be severed from the agreements, thus leaving an enforceable agreement intact. The agreement itself contains a severance provision. See ¶ 3, "Miscellaneous," TEXAS WINGS INC. dba HOOTERS AGREEMENT TO ARBITRATE EMPLOYMENT-RELATED DISPUTES. (Exhibit 4). That provision states that "[i]f any provision of this Agreement or the Rules is declared void, or otherwise unenforceable," Hooters is "permitted a reasonable opportunity to unilaterally amend this Agreement or the Rules to legally effect the ability of the Employee and the Company to arbitrate Claims." Para. 3, Id. This is a preposterous provision, typical of the one-sided nature of Hooters' arbitration rules. As the district court noted, the severance provision in this case "is unique." Hooters of America v. Phillips, 39 F.Supp.2d 582, 625 (D. South Carolina 1998). The provision purports to give Hooters "one more chance," or another opportunity to unilaterally revise its agreement and rules to comply with the law." Id. The law does not provide employers with "another chance" to reform their [deficient] policies and procedures" and thereby avoid judicial sanction for their conduct. Id. At bottom, the severance provision suffers from the same defect that infects the arbitral procedure as a whole -- it impermissibly skews the procedure in Hooters' favor. Because the severance provision is part of an

"integrated scheme to contravene public policy," the provision cannot be given effect. Graham Oil, 43 F.3d at 1249 (quoting E. Allan Farnsworth, Farnsworth on Contracts § 5.8, at 70 (1990)).

Indeed, it is doubtful whether severance is even possible in this case, given the sheer number of confusing, inconsistent, and inappropriate provisions in the arbitration rules. The purpose of severance is to remove an isolated provision from an otherwise valid agreement, thereby preserving the essence of the agreement. Severance is not permissible when the offensive provisions are an "integrated part of the contract." Graham Oil, 43 F.3d at 1248. In this case, the force of the arbitration agreement is contained in Hooters' arbitration rules. The rules, in some cases, are inconsistent. See Hooters of America v. Phillips, 39 F.Supp.2d 582, 626-7 (D. South Carolina 1998) (citing to three examples of contradictory provisions). In others, they are confusing, if not incomprehensible, leaving to a court the impossible task of reconstructing the agreement in a way that would preserve the intent of the parties, while ensuring that the agreements comport with the legal standards for a valid arbitration agreement. See id. This is not a case in which one term of an arbitration agreement has failed. This is a case in which there are multiple one-sided, unconscionable provisions incorporated in the arbitration agreement. The district court properly held that under the circumstances of this case, severance of the inappropriate provisions of the arbitration rules is not feasible because "striving to locate an enforceable arbitration agreement from the few non-offensive provisions of the Hooters Rules simply rewards Hooters for its unconscionable conduct in compiling such Rules." Id. at 627.

CONCLUSION

The arbitration agreements signed by Intervenors are unenforceable under federal law and

principles of contract law generally. This Court should rescind the agreements and deny Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing has been served on counsel of record for the Defendants at the address below via U.S. mail on this the 3rd day of August, 2001.

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