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

NICOLLE BRENNAN GAFFNEY, NICOLE CLEVELAND, ROBYN PURVIS MCGEHEE, and LISA RAMIREZ THORNTON Plaintiffs, v. HOOTERS ARLINGTON VENTURE I, a Texas Partnership; TWI IV Inc.; TEXAS WINGS INC. d/b/a HOOTERS RESTAURANT Defendants.	§ CIVIL ACTION NO. 3-01CV0619-P § § § § § § § § § § § § § § § §

INTERVENORS' REPLY TO DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

COME NOW, INTERVENORS NICOLLE BRENNAN GAFFNEY, NICOLE CLEVELAND, ROBYN PURVIS MCGEHEE, and LISA RAMIREZ THORNTON (hereafter INTERVENORS)INTERVENORS in the above entitled and numbered cause, and file this, their Reply to Defendants' Motion to Dismiss, and to show that Defendants' Motion to Dismiss should be denied, and in support thereof would respectfully show this honorable Court as follows:

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GROUNDS FOR DENYING DEFENDANTS' MOTION TO DISMISS

1. Further, INTERVENORS assert that there is no valid arbitration agreement because:

   A. Defendants have materially breached the arbitration agreement;
   B. Defendants have breached their duty of good faith in drafting, obtaining and attempting to enforce an arbitration agreement which Defendants know to be patently unfair and which other Courts have found to be unconscionable and a sham;
   C. Intervenor LISA RAMIREZ now known as LISA THORNTON did not sign an Agreement to Arbitrate Employment-Related Disputes;
   D. There are no valid arbitration agreements or contracts because:
      1. There was no meeting of the minds;
      2. The arbitration clauses are vague and ambiguous;
      3. The arbitration agreements were not supported by valuable consideration;
      4. The arbitration agreements do not comply with §171.001 of the Tex.Civ.Prac.& Rem.Code Ann. (Vernons Supp.2001) because
         A. INTERVENORS did not have advice of counsel;
         B. The arbitration agreements are not signed by counsel to both parties; and
         C. The arbitration agreements are unconscionable adhesion contracts;
   E. The claims of Intervenor NICOLE BRENNAN now known as NICOLE GAFFNEY and the claims of Intervenor ROBYN PURVIS now known as ROBYN MEGEHEE arose prior to their signing the Agreement to Arbitrate Employment-Related Disputes; and
   F. Equitable considerations require the arbitration agreements be voided because they violate public policy; and
   G. It is not feasible to reform the agreements to arbitrate by severing the illegal or conflicting clauses.

2. As will be detailed throughout the Brief and as is shown in the Response, Hooters is requesting this Court to uphold an arbitration agreement which the Sixth Circuit previous denounced as among other findings of the Court as being "illegitimate," a "sham," and:

> By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution. This we refuse to do. Hooters of America, Inc. v. Phillips, 173 F.3d 933,(6th Cir. 1999).

3. INTERVENORS request this Court to take notice of the testimony from various arbitration experts and weight given to this testimony by the Court in the Phillips case since the matters involve the same Defendant and the same arbitration policies, rules and schemes. Specifically, INTERVENORS request this Court to take notice of the testimony of the Court's account of George Nicolau, President of the National Academy of Arbitrators testimony that Hooter's Rules "fall far short of the Protocol standards, that they are not fair to employees and do not afford adequate procedural protections, and in contravention of the Protocol, do not afford employees the substantive rights to which they are entitled by law."

4. Further, INTERVENORS request this Court take notice of the Sixth Circuits account of the testimony of Lewis L. Maltby, a member of the Board of Directors of the American Arbitration Association testified Hooter's Rules "fail to provide even minimally acceptable due process to employees. This is without a doubt the most unfair arbitration program I have ever encountered."

5. Likewise, INTERVENORS request this Court take notice of Professor Dennis Nolan conclusion that the Hooters Rules "do not satisfy the minimum requirements of a fair arbitration system" as well as the testimony from George Friedman, senior vice president of the American Arbitration Association (AAA), that the system established by the Hooters rules so deviated from minimum due process standards that the Association would refuse to arbitrate under those rules.

6. Further, INTERVENORS request this Court take notice of the amicus briefs filed with the Court in the Phillips's case which the Court noted as commenting that the Hooters rules "violate fundamental concepts of fairness... and the integrity of the arbitration process." Further, the Society of Professions in Dispute Resolution noted that "it would be hard to imagine a more

unfair method of selecting a panel of arbitrators" and then characterized the Hooters system as "deficient to the point of illegitimacy" and "so one sided, it is hard to believe that it was even intended to be fair."

7. Considering the egregious nature of Hooter's conduct, it is not surprising that both the Trial Court and the Court of Appeals found that Hooter's arbitration agreement was unconscionable and was "utterly lacking in the rudiments of even-handedness" and was void against public policy and were so one-sided that their only possible purpose is to undermine the neutrality of the proceeding and Hooters materially breached the arbitration agreement and by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith violated its contractual obligations of good faith. Hooter's breach is by no means insubstantial; its performance under the contract was so egregious that the result was hardly recognizable as arbitration at all and therefore the Court cancelled the arbitration agreement and denied Hooter's lawsuit to compel arbitration.

8. This Court can see that the problems the Phillips Court had with Defendants' arbitration policies and rules are the same problems that INTERVENORS have with Defendants' policies and rules. Defendants' Rules for arbitration may:

1. Limit INTERVENORS' ability to recover compensatory damages;
2. Limit INTERVENORS' ability to recover backpay;
3. Limit INTERVENORS' ability to recover frontpay;
4. Limit INTERVENORS' ability to recover punitive damages;
5. Limit INTERVENORS' ability to recover attorneys fees to only those cases where INTERVENORS prove that Defendants are acting frivolous or in bad faith as opposed to those cases where attorneys fees are recoverable by law;
6. Limit INTERVENORS' ability to pursue an injunction on any policy or procedure of Defendants but which would not limit Defendants' ability to pursue injunctions against INTERVENORS;

7. Increase or alter INTERVENORS' burden of proof in this case from the standards set forth in the law;
8. Permit Defendants to control who is selected as the arbitrator;
9. Permit Defendants to require arbitrators to follow only the laws Defendants decide they wants to follow;
10. Limit INTERVENORS' ability to conduct discovery and depositions;
11. Require INTERVENORS' to disclose their witnesses and to summarize each witness' testimony, but which would not require Defendants to do the same;
12. Permit Defendants to avoid having to respond to INTERVENORS' complaint so that INTERVENORS can be advised of Defendants' position;
13. Require INTERVENORS' to treat my witnesses differently than the manner in which Defendants can treat their witnesses;
14. Limit INTERVENORS' ability to have an official record of the arbitration proceeding but which would permit Defendants to make such a decision;
15. Limit INTERVENORS' ability to appeal the arbitration result by controlling the decision on whether a record of the proceeding is made;
16. Permit Defendants to change the Rules of arbitration without notice and without any consideration to INTERVENORS as Defendants see fit;
17. Permit Defendants the right to appeal the arbitration result if the arbitrator exceeds his remedial authority, but which would not give INTERVENORS the same right;
18. Prohibit INTERVENORS from having a jury trial if a dispute arose between Defendants and INTERVENORS;
19. Limit INTERVENORS' rights of due process;
20. Permit Defendants to changes the rules of the arbitration process with or without notice to INTERVENORS and with or without INTERVENORS' consent; or
21. Permit Defendants to gain an unfair advantage in the lawsuit because Defendants have acted in a manner designed to take advantage of INTERVENORS' lack of experience and knowledge.

THERE WAS NO MEETING OF THE MINDS

9. Because arbitration is a creature of contract law, Defendants must establish a valid contract to arbitrate these disputes exists. As is detailed in the Brief and the evidence attached hereto, there was no valid contract because there was no meeting of the minds sufficient to form a binding arbitration agreement with any of the INTERVENORS.

10. There could be no meeting of the minds because Defendants never disclosed the terms or conditions of the arbitration scheme they are trying to compel. Further, as is the evidence shows, INTERVENORS never had an opportunity to discover the terms and conditions of the Defendants' arbitration scheme prior to signing the documents in question. Further, even after the documents were signed, Defendants eliminated INTERVENORS ability to discover the terms of the Defendants' arbitration scheme by maintaining control over not only the terms, but also all information which would permit INTERVENORS to know how to obtain a copy of the documents. Further, because Defendants retained the unilateral ability to cancel or to modify the rules without prior notice to INTERVENORS, there could be no meeting of the minds. As is evident not only from the Phillips case, it is clear that not even management team members with Hooter's had any understanding of meaning of the Company's ADR Agreement.

11. Further, as is shown in the Affidavits of Nicole Gaffney (paragraphs 42-45) and Lisa Thornton (paragraphs 42-44) even persons who were entrusted with the obligation to train new employees were not provided with information, materials, training or education concerning the Company's ADR Agreement. As a result, there was no and could be no dissemination of information to Hooter's employees in general or to INTERVENORS concerning the arbitration agreement, rules, polices, procedures, terms or conditions Defendants are now attempting to impose on INTERVENORS. Defendants restricted access to the information so closely that neither party could or did understand the terms of the arbitration agreement Defendants are seeking to compel.

THERE WAS NO VOLUNTARY OR KNOWING WAIVER OF RIGHTS

12. Moreover, before INTERVENORS could waive such important substantive rights as Defendants are attempting to assert, if such waiver is even permitted, it must be shown that INTERVENORS "knowingly and voluntarily" waived their substantive rights.

THE ARBITRATION CLAUSES ARE AMBIGUOUS

13. Further, there could be no meeting of the minds to arbitrate these disputes or to arbitrate in the manner being sought by Defendants because Defendants retained the unilateral ability to cancel or to modify the rules without prior notice, the arbitration clauses are ambiguous and meaningless.

THE ARBITRATION CLAUSES ARE NOT SUPPORTED WITH VALID CONSIDERATION

14. As with any contract, the arbitration clauses or agreements can only be upheld if the agreements are supported by valid consideration. As is detailed in the Brief and evidence attached hereto, none of the alleged arbitration agreements are supported by valuable consideration. The employment applications do not even purport to offer consideration in exchange for an arbitration agreement. Further because each INTERVENOR was an at-will employee who could be terminated at any time by Defendants, the "Agreement to Arbitrate Employee-Related Disputes" is not supported by valid consideration. Any alleged consideration by Defendants was purely illusory.

15. Further, as the affidavit of NICOLE BRENNAN GAFFNEY (paragraphs 32-36), INTERVENORS were subjected to sexual harassment and a hostile work environment before they ever executed the document entitled "Agreement to Arbitrate Employment-Related Disputes."

CONTROLLING LAW

16. As the Brief and the evidence demonstrate, because there was no meeting of the minds and a lack of consideration, the arbitration agreements in question fail. If however, this Court were to determine that a contract exists with regard to either the arbitration clauses in the employment application or in the "Agreement to Arbitrate Employment-Related Disputes," INTERVENORS contend that the Texas Arbitration Act will govern how these arbitration clauses are to interpreted or enforced and the both arbitration clauses fail to comply with the requirements established by the Texas Arbitration Act. Therefore, the Court must refuse to enforce the arbitration clause.

UNCONSCIONABLE ADHESION CONTRACTS

17. As was found by the Phillips Court, Defendants' arbitration agreements are warped, illegitimate, a sham, unbelievably one-sided, patently unfair, and unconscionable. The Defendants' system of arbitration does not promote the federal policy of advancing alternative dispute resolution, to the contrary, it undermines the policy. At a minimum, the arbitration agreement must be fundamentally fair in order to be enforceable, but the Defendants' arbitration is so one-sided that the Court found that it is hard to imagine that Hooter's could have even intended it to be fair.

18. In considering the entire atmosphere in which the agreement was made, the evidence clearly shows Defendants made a number of deliberate and concerted efforts to impose its patently unfair arbitration scheme on INTERVENORS. Defendants intentionally took advantage of INTERVENORS lack of experience and knowledge in order to obtain the INTERVENORS' signatures on documents to impose an illegitimate arbitration scheme.

CONTRACTS OF ADHESION

19. Further, this Court should refuse to enforce the arbitration agreements and clauses because, to the extent they constitute a contract, if at all, the evidence shows these arbitration agreements are unconscionable contracts of adhesion. Defendants required INTERVENORS sign the documents on a "take-it-or-leave-it" basis as a condition of employment

EQUITY REQUIRES THE ARBITRATION CLAUSES BE HELD VOID AGAINST PUBLIC POLICY

20. Further, as in the Phillips case, this Court should declare the arbitration clauses and agreements void against public policy. The interest in enforcing the arbitration clauses is far outweighed by a public policy which prevents employers from imposing a system of arbitration which undermines Congressional intent to eliminate discrimination, sexual harassment and a hostile work environment.

REFORMATION IS NOT FEASIBLE

21. As the Phillips' Court noted, although the "Agreement to Arbitrate Employment-Related Disputes" contains a severance clause, it is not feasible to try to reform the arbitration clauses. Further, equitable considerations counsel against efforts to salvage the agreement. Further, recission of the contract is not an available remedy in this case because Defendants breached their duty of good faith to such a degree as to defeat the purpose of the arbitration agreement itself.

WHEREFORE, PREMISES CONSIDERED, INTERVENORS respectfully request this honorable Court to Deny Defendants' Motion to Dismiss (or more accurately phrased Motion to Compel Arbitration) and to permanently enjoin Defendants from attempting to enforce this

arbitration scheme on other current or former Hooter's employees because the entire scheme devised by Hooters is so one-sided, unfair, and biased in Hooter's favor that the entire arbitration scheme amounts to nothing more than a sham and should be found by this Court to be void as against public policy because it undermines rather than promotes the federal policy favoring alternative dispute resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 6 day of August, 2001, a true and correct copy of the above and foregoing Intervenors' Reply to Defendants' Motion to Dismiss has been sent via hand delivery to John B. Gessner and J. Paulo Flores, attorneys for Defendants at Gessner & Flores, P.C., 16910 Dallas Parkway, Suite 204, Dallas, Texas 75248; and to William C. Backhaus, Equal Employment Commission, Dallas District Office, 207 S. Houston Street, 3rd Floor, Dallas, Texas 75202.

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