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 BRIEF IN 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) and file this, their Brief in Reply to Defendants' Motion to Dismiss, and to show that Defendants' Motion to Dismiss should be denied as Defendants' conduct in drafting, obtaining and in attempting to enforce an arbitration agreement violates Defendants' duty of good faith and is against public policy, and in support thereof would respectfully show this honorable Court as follows:

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1. INTERVENORS deny Defendants' assertion that this Court lacks jurisdiction over INTERVENORS or the subject matter of their claims. INTERVENORS have asserted claims based upon violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* over which this Court clearly has jurisdiction.

2. Likewise, INTERVENORS deny Defendants' assertion that INTERVENORS have failed to state claims upon which relief can be granted by this Court.

GROUNDS FOR DENYING DEFENDANTS' MOTION TO DISMISS

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

1. Defendants have materially breached the arbitration agreement;
2. 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;
3. Intervenor LISA RAMIREZ now known as LISA THORNTON did not sign an Agreement to Arbitrate Employment-Related Disputes;
4. There are no valid arbitration agreements or contracts because:
   A. There was no meeting of the minds;
   B. The arbitration clauses are vague and ambiguous;
   C. The arbitration agreements were not supported by valuable consideration;
   D. The arbitration agreements do not comply with §171.001 of the Tex.Civ.Prac.& Rem.Code Ann. (Vernons Supp.2001) because
      1. INTERVENORS did not have advice of counsel;
      2. The arbitration agreements are not signed by counsel to both parties; and
      3. The arbitration agreements are unconscionable adhesion contracts;
5. 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
6. Equitable considerations require the arbitration agreements be voided because they violate public policy; and
7. It is not feasible to reform the agreements to arbitrate by severing the illegal or

conflicting clauses.

4. INTERVENORS incorporate by reference the Affidavits attached to their Reply to Defendants' Motion to Dismiss as if set forth verbatim herein.

5. INTERVENORS request this Court:

1. Take notice of the findings and evidence in the Phillips case and to reach the same conclusions as the Court in Phillips:
2. Find Defendants have substantially and materially breached the arbitration agreements to the extent such agreements even exist;
3. Find Defendants have breached their duty of good faith in drafting, obtaining and in attempting to compel arbitration in this matter because the arbitration agreements to the extent they exist are unconscionable; and
4. Deny Defendants' Motion to Dismiss (or more accurately phrased Motion to Compel Arbitration).
5. 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.

6. As will be detailed throughout this 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).

7. It is shocking that Defendants would unabashedly continue to breach their duties of good faith after Hooter's illegal tactics and strategies were exposed and struck down by other Courts. It should be noted that Defendants' Motion to Dismiss mentions nothing of the holdings or findings of the Court in the Phillips case.

JURISDICTION

8. When one party denies he is bound by an arbitration agreement, the trial court must summarily determine whether an agreement to arbitrate exists between the parties. Perry v. Thomas, 482 U.S. 483, 489, 107 S.Ct. 2520, 2525, 96 L.Ed. 2d 426 (1987); Tex.Civ.Prac.& Rem.Code Ann. §171.021 (Vernon Supp.2001); Southwest Tex. Pathology Assocs., L.L.P. v. Roosth, 27 S.W.3d 1, 3 (Tex.App.–San Antonio 200, pet. denied). A court called upon to determine if arbitration should be compelled under the FAA must determine:

1. Whether the parties agreed to arbitrate, and if so;
2. Whether the scope of the agreement encompasses the asserted claims.

Chelsea Square Textiles, Inc. v. Bombay Dyeing and Manufacturing Co., 189 F.3d 289, 294 (2nd Cir. 1999); see also Leander Cut Stone Co. v. Brazos Masonry, Inc., 987 S.W.2d 638, 640 (Tex.App.–Waco 1999, no writ). A court may summarily decide whether to compel arbitration on the basis of affidavit, pleadings, discovery and stipulations. Jack B. Anglin Co., Inc. v. Tipps, 842 S.W.2d 266, 269 (Tex. 1992).

10. Arbitration is a contractual proceeding by which the parties, in order to obtain a speedy and inexpensive final disposition of disputed matters, consent to submit the controversy to arbitrators for determination. Porter & Clements, L.L.P. v. Stone, 935 S.W.2d 217, 221 (Tex.App.–Houston [1st Dist.] 1996, no writ). Arbitration is a creature of contract and a clause requiring arbitration is interpreted under contract principles. Tenet Healthcare Ltd. v. Cooper, 960 S.W.2d 386, 388 (Tex.App.–Houston [14th Dist.] 1998, writ dism'd w.o.j.).

11. Both the Federal Arbitration Act and the Texas Arbitration Act provide that a contract to submit to arbitration is valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (2000); Tex.Civ.Prac. & Rem.Code Ann.

§171.001 (Vernon Supp. 2001); Tenet Healthcare, 960 S.W.2d at 388. Such grounds could include fraud, waiver, unconscionability, or that the dispute was not within the scope of he agreement. Prudential Sec. Inc. v. Marshall, 909 S.W. 2d 896, 900 (Tex. 1995); Tex.Civ.Prac. & Rem.Code. Ann. §171.022 (Vernons Supp. 2001). However, the grounds for revocation must relate specifically to the arbitration clause. Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979). Clearly, issues of procedural unconscionability relating to the actual making of or the inducement of the arbitration agreement are subject to judicial review. In re Oakwood Mobile Homes, Inc., 987 S.W.2d 571,575 n.3 (Tex. 1999).

BURDEN OF PROOF

12. A party seeking to compel arbitration must first establish his right to that remedy under a contract, that is, to establish a valid arbitration agreement exists.. City of Alamo v. Garcia, 878 S.W.2d 664, 665 (Tex.App.–Corpus Christi 1994, no writ). While both Texas and Federal law favor arbitration, a court may not order arbitration in the absence of a valid arbitration agreement. Tenet Healthcare, 960 S.W.2d at 388; Belmont Constructors, Inc. v. Lyondell Petrochemical Co., 896 S.W. 2d 352, 356-357 (Tex.App.–Houston [1st Dist.] 1995). Under the substantive inquiry the Court looks to see that a valid arbitration agreement exists between the parties considering the making and the performance of the arbitration agreement and that the specific dispute falls with in the substantive scope of the agreement. Glass v. Kidder Peabody & Co., Inc., 114 F.3d 446 (4th Cir. 1997).

13. Whether an agreement imposes a duty on the parties to arbitrate a dispute is a matter of contract interpretation and, thus, a question of law for the court. Tenet Healthcare, 960 S.W.2d at 388. The question of whether a valid arbitration agreement between each INTERVENOR and

Defendants is determined by the substantive contract law of Texas. Tenet Healthcare, 960 S.W.2d at 388.

BASIC PRINCIPLES OF CONTRACT LAW

14. Under the substantive contract law of Texas, parties enter into a binding contract when the following elements exist:

A. An offer is made;
B. An acceptance in strict compliance with the terms of the offer is made;
C. There is a meeting of the minds;
D. Each party consents to the terms;
E. Execution and delivery of the contract with the intent that it be mutual and binding; and
F. Valuable consideration has been paid by each party to the contract.

Buxani v. Nussbaum, 940 S.W. 2d 350, 352 (Tex.App.–San Antonio 1977, no writ); McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 477 – El Paso 1997, no writ); Copeland v. Alsobrook, 3 S.W.3d 598, 604 (Tex.App. – San Antonio, 1999 writ denied).

15. In addition, if the agreement to arbitrate is governed by the Texas Arbitration Act and involves an agreement to arbitrate a claim for personal injury, there are additional requirements imposed in order to form a valid arbitration agreement. Those requirements include:

1. Both parties must have sought advice of counsel;
2. Both parties must agree in writing to submit the dispute to arbitration;
3. Both parties must have counsel sign the written agreement to arbitrate; and
4. The agreement or contract must not have been unconscionable at the time it was made.

Tex.Civ.Prac & Rem.Code Ann. §171.001 (Vernon Supp. 2001).

THERE WAS NO MEETING OF THE MINDS

16. INTERVENORS contend they did not knowingly and voluntarily enter into an arbitration agreement and that there was no meeting of the minds on arbitration.

17. It is basic contract law that thee must be a meeting of the minds between the parties to the

agreement before an enforceable contract exists. Zurich Ins. Co. v. Bass, 443 S.W.2d 371, 374 (Tex.Civ.App.– Dallas 1969, no writ). No contract exists if one party intends to make an agreement and the other party does not intend to make an agreement. Charlie Thomas Courtesy Ford, Inc. v. Sid Murray Agency, 517 S.W2d 869, 875 (Tex.Civ.App.–Corpus Christi 1974, writ ref'd n.r.e). In the case at hand, it is clear that not only did INTERVENORS not understand the terms or conditions of the alleged arbitration agreements, they did not have the opportunity to discover the terms prior to executing the documents which Defendants contend created enforceable arbitration agreements. Further, there is no evidence there was any discussion regarding any of the terms or conditions of arbitration prior to INTERVENORS' executing the documents in question. Although the document entitled Agreement to Arbitrate Employment-Related Disputes gives a procedure for obtaining a copy of the Rules, this language is merely self-serving language since the Rules since Defendants' agents required INTERVENORS to sign the documents without even the opportunity to obtain copies of the Rules first. Absent even an opportunity to discover the nature of the terms or conditions of the agreement prior to signing the documents, there could be no meeting of the minds.

THE ARBITRATION CLAUSES ARE AMBIGUOUS

18. Further, because Defendants deliberately withheld the terms and conditions of the arbitration agreement and because Defendants retained the right to unilaterally cancel or modify the terms of the agreement without notice to INTERVENORS, the arbitration agreements asserted by Defendants are so vague and ambiguous that a meeting of the minds was not possible. Whether a contract is ambiguous is a question of law for the court. R&P Enterprises v. LaGuarta, Gavrel & Kirk, 596 S.W.2d 517, 518-19 (Tex. 1980);. A contract is ambiguous when

the application of pertinent rules of interpretation results in genuine uncertainty about which one of two or meanings is proper. R&P Enterprises, 596 S.W.2d at 519 (Tex. 1980); Universal C.I.T. Credit Corp v. Daniel, 150 Tex. 513, 517, 243 S.W.2d 154, 157 (1951). Therefore the arbitration agreement or clauses are unenforceable.

THERE WAS NO VOLUNTARY OR KNOWING WAIVER OF RIGHTS

19. 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. Gonzalez v. County of Hidalgo, 489 F.2d 1043, 1046-47 (5th Cir. 1973); Puentes v. United Parcel Service, Inc. 86 F.3d 196, 198 (11 Cir. 1996); Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 65 F.3d 562, 571 (7th Cir. 1995). The leading case on point in the context of arbitrations is Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994) which held:

> Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and relate state statutes.

20. The Ninth Circuit has also held that an employer's unilateral promulgation of mandatory arbitration provisions in an employee handbook do not constitute a "knowing" waiver even if the employee has acknowledge receipt of the handbook and agreed in writing to read and to understand it. Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997). Further, the Supreme Court has held that an employee could not forfeit substantive rights under Title VII absent a voluntary and knowing waiver. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51-52

n. 15, 94 S. Ct. 1011, 39 L.Ed. 2d 147 (1974).

21. The Court has not reached the issue of the standard applicable to the waiver of the right to litigate one's Title VII claims in federal court. Gibson v. Neighborhood Health Clinics, 121 F.3d 1126, 1129 (7th cir. 1997). In dicta, the Court in Gilmer stated that in agreeing to arbitrate a federal claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial forum. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 111 S.Ct.1647, 114 L.Ed. 2d 26 (1991). Further, the Gilmer Court approved the arbitration based on the assumption that the party agreeing to arbitrate "does not forgo substantive rights afforded by the statute."

22. Thus, even if this Court were to find INTERVENORS knowingly and voluntarily waived their substantive rights, INTERVENORS move this Court to deny Defendants' Motion to compel arbitration because such waiver, at least in the context of a predispute arbitration agreement, is not valid as a matter of law. As in the Phillips case, it is incumbent upon Defendants to show such waiver was made knowingly and voluntarily. Further, as in the Phillips case, Defendants cannot meet their burden because they failed or refused to provide INTERVENORS with a copy of the Rules.

THE ARBITRATION CLAUSES ARE NOT SUPPORTED WITH VALID CONSIDERATION

23. The arbitration agreements which Defendants are attempting to enforce are not valid because they were not supported by consideration and are subject to recission. Radford v. Snyder Nat'l Farm Loan Ass'n, 121 S.W.2d 478, 480 (Tex.Civ.App.–Austin, 1938, no writ).

24. Consideration for a valid contract between an employer and an at-will employee like that

with INTERVENORS cannot depend on continued employment because such a promise is illusory. Light v. Centel Cellular Co., 883 S.W.2d 642, 644-45 (Tex. 1994). The promise of continued employment fails to bind the employer despite language in the agreement requiring both parties to submit their claims to arbitration the employer always retains the option of discontinuing employment in lieu of performance and retains a unilateral ability to abolish or modify the agreement without prior notice to INTERVENORS. Therefore, when illusory promises are all that support a purported bilateral contract, there is no contract. Light, 883 S.W.2d 644-45. Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168, 171 (Tex. 1987).

25. Texas is an employment at will state. Thus, INTERVENORS' employment was terminable at any time by either party, with or without cause, absent an express agreement to the contrary. Fed. Express Corp.. Dutschmann, 846 S.W.2d 282, 283 (Tex. 1993). Because Defendants are contending the INTERVENORS' employment at-will status was modified to require arbitration of their claims, Defendants have the burden to establish the modification. Hathaway v. General Mills, Inc. 711 S.W.2d 227, 229 (Tex. 1986).

26. As in Tenet Healthcare, because of the employment at-will doctrine, Defendants could have fired each INTERVENOR the very moment any agreement to arbitrate was signed. Thus, as in Tenet Healthcare, the arbitration clauses are unenforceable because each Intervenor was an at-will employee, there was no contact between the parties (all that existed between the parties was the illusory promise of at-will employment). Tenet Healthcare, 960 S.W.2d at 389.

27. In the present case as in Tenet Healthcare and J.M. Davidson, Inc. v. Webster, 2001 WL 587037 (Tex.App.–Corpus Christi 2001) the Court should refuse to compel arbitration because INTERVENORS were at-will employees; because Defendants reserved the right to unilaterally

abolish or modify its policy without prior notice and because INTERVENORS were compelled to sign the agreement after their employment had begun and because Defendants gave no consideration for the purported arbitration agreements. Tenet Healthcare, 960 S.W.2d at 388; Davidson, 2001 WL 587037.

28. In addition, INTERVENORS contend that none of the arbitration clauses found in the employment applications signed by each INTERVENOR constitutes valid consideration sufficient to form a binding arbitration agreement. Clearly, nothing in the employment application claims to extend any type of consideration in exchange for the agreement to be bound by the Company's ADR Agreement. Further, there is no evidence that any INTERVENOR was given anything of value in exchange for completing the employment application.

29. Because the arbitration clauses in the employment application are not supported by sufficient consideration to form a binding arbitration agreement, at a minimum, Defendants' motion to compel arbitration against INTERVENOR LISA RAMIREZ THORNTON must be denied because there is no evidence this INTERVENOR executed any other arbitration agreements.

30. For the reasons stated above, INTERVENORS contend that the document entitled Agreement to Arbitrate Employment-Related Disputes subsequently executed by INTERVENORS BRENNAN, CLEVELAND and PURVIS fails for want of consideration. Moreover, if this Court were to find the employment applications created a binding arbitration agreement supported by valid consideration, then the subsequently executed documents entitled Agreement to Arbitrate Employment-Related Disputes fails for want of consideration because Defendants gave no new consideration to form a binding agreement.

31. A separate analysis of whether the employment applications and whether the "Agreement to Arbitrate Employment-Related Disputes" is necessary because prior to INTERVENORS BRENNAN and PURVIS executing the document entitled "Agreement to Arbitrate Employment-Related Disputes," these Intervenors had already been sexually harassed and subjected to a hostile work environment. Thus, this Court must also decide if some, but not all, of the complained of conduct are covered by the arbitration clauses.

CONTROLLING LAW

32. In the event this Court determines that either the employment application or the "Agreement to Arbitrate Employment-Related Disputes" formed a binding arbitration agreement, then the Court must make a determination about whether the agreement(s) are to be interpreted under the Federal Arbitration Act (FAA) or the Texas Arbitration Act (TAA). As will be shown below, a separate analysis is necessary for each document.

PRE-EMPTION

33 The FAA applies to all suits in state or federal court when the dispute concerns a contract evidencing a transaction involving interstate commerce. 9 U.S.C. §§2; Allied -Bruce Terminix Co. Dobson, 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed. 753 (1995); see also Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269-70 (Tex. 1992). The FAA requires the transaction in fact involve interstate commerce. Cantella & Co. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996). The burden to establish that the transaction involves interstate commerce is on the party seeking to compel arbitration. Phillips Petroleum Co. v. Marathon Oil Co., 794 F.2d 1080, 1082 (5th Cir. 1986) (per curiam). In the case at hand, there is no evidence or contention the transaction involves interstate commerce.

34 Further, the parties may agree the FAA will be used to interpret and to enforce arbitration agreements. Although INTERVENORS dispute they agreed to arbitrate their disputes, there is a clause contained within the "Agreement to Arbitrate Employment-Related Disputes" which reads:

> This agreement is to be interpreted and enforced under the provisions of the Federal Arbitration Act.

However, there is no such similar language found within the employment application under which Defendants are also attempting to compel arbitration.

35. Therefore, this Court's determination regarding the validity and enforceability of the arbitration clauses in both the employment application and in the "Agreement to Arbitrate Employment-Related Disputes" is a critical step in the analysis. As noted above, if this Court finds the arbitration clauses in the employment application fail for want of consideration, then the Court must deny Defendants' motion to compel INTERVENOR LISA RAMIREZ THORNTON to arbitrate her disputes. On the other hand, if the Court finds the employment application is supported by sufficient, legal consideration, then the Court must determine whether the employment application complies with the TAA since the transaction does not affect interstate commerce and since nothing in the agreement reflects a desire to have the FAA control its interpretation and enforceability. As will be shown below, the employment application does not comply with the TAA, therefore Court must deny Defendants' motion to compel INTERVENOR LISA RAMIREZ THORNTON to arbitrate her disputes.

36. Further, if the Court has found as INTERVENORS contend the "Agreement to Arbitrate Employment-Related Disputes" fails for want of consideration, then the Court must also deny

Defendants' motions to compel INTERVENORS BRENNAN, PURVIS and CLEVELAND to arbitrate their disputes since the only other basis for an arbitration agreement with these INTERVENORS would be the language in the employment application.

TEXAS ARBITRATION ACT

37. If the agreement to arbitrate is governed by the TAA and involves an agreement to arbitrate a claim for person injuries, there are additional requirements imposed in order to form a valid agreement. Those requirements include:

1. Both parties must have sought advice of counsel;
2. Both parties must agree in writing to submit the dispute to arbitration;
3. Both parties must have counsel sign the written agreement to arbitrate; and
4. The agreement must not have been made in an unconscionable manner.

See Tex.Civ.Prac. & Rem.Code Ann. §171.001 (Vernons Supp. 2001).

38. There is no doubt but that INTERVENORS are asserting claims for personal injury in this matter. Further, there is no dispute that none of the INTERVENORS had advice of counsel prior to signing the documents in question. Further, there is no evidence that counsel for either party signed the documents in question. Therefore, regardless of whether the Court finds the arbitration clause to be unconscionable at the time of the making of the agreements, to the extent the Court finds any of the INTERVENORS claims are governed by the TAA, the Court must refuse to enforce the agreements.

THE ARBITRATION CLAUSES ARE UNCONSCIONABLE

39. 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. See Hooters of America, Inc. v.

Phillips, 173 F.3d 933 (6th Cir. 1999) for an exhaustive discussion and list of the numerous provisions of the Defendants' arbitration scheme which are unconscionable and fail to provide even minimal due process protections to INTERVENORS which are incorporated herein by reference.

40. At a minimum, the arbitration agreement must be fundamentally fair in order to be enforceable. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 145, 148, 89 S.Ct. 337, 21 L.Ed. 301 (1968). An employee cannot be required as a condition of employment to waive access to a neutral forum in which statutory employment discrimination claims may be heard. Gilmer, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed. 2d 26 (1991). In Commonwealth Coatings Corp, 393 145, 148, 89 S.Ct. 337, 21 L.Ed. 301 (1968), the Court held that courts should be even more scrupulous to safeguard the impartiality of arbitrators than judges because arbitrators are completely free to decide the law and to determine the facts and are not subject to appellate review.

41. Courts have held that arbitration clauses such as the Defendants' arbitration scheme which require the party with lesser bargaining power to arbitrate its claims but reserves the rights to litigate the claims of the party with the greater power are unconscionable. Iwen v. U.S. West Direct, 293 Mont. 512, 977 P.2d 989 (1999); Arnold v. United Companies Lending Corp., 204 W. Va. 229, 511 S.E.2d 854 (1998); Ramirez v. Circuit City Stores, Inc., 90 Cal.Rptr 2d 916 (Cal.App.1999), review granted 94 Cal.Rptr.2d 1, 995 P.2d 137 (Cal. 2000).

42. In addition to the reasons set forth by the Phillips' Court, the arbitration clauses in the employment application are even more unconscionable because the language is not conspicuous. Tex.Bus.& Com.Code Ann. §1.201(1) (Vernon Supp. 2001); see also Cantell & Co. v. Goodwin,

924 S.W.2d 943, 944 (Tex. 1996).

43. Whether a contract or a provision of a contract is unconscionable is a question of law. A contract or a provision of a contract is unconscionable if "no man in his sense and not under delusion would make on the one hand, and ... no honest and fair man would accept on the other." Hume v. United States, 132 U.S. 406, 411, 10 S.Ct. 134, 33 L.Ed. 393 (1889); Blount v. Westinghouse Credit Corp., 432 S.W.2d 549, 554 (Tex.Civ.App.–Dallas 1968, no writ). Unconscionability is measured at the making of the contract, and the test is whether the terms are so extreme as to appear unconscionable according to the mores and business practices of the time and place. Williams v. Walker-Thomas Furniture Co. 350 F.2d 445, 450 (D.C. Cir. 1965).

44. When deciding whether a contractual provision such as the arbitration clause is unconscionable, a court must consider the entire atmosphere in which the agreement was made. Southwestern Bell Telephone Co. v.DeLanney, 809 S.W.2d 493, 498 (Tex. 1991) The Court must look at the bargaining process the parties went through and must evaluate the fairness of a contractual provision in controversy by determining whether there are legitimate commercial reasons that justify its inclusion as part of the agreement. Id. at 499. Although unconscionability is a question of law, the Court is entitled to hear evidence on the issue. Wade v. Austin, 524 S.W. 2d 79, 85 (Tex.Civ.App.–Texarkana 1975, no writ). The evidence presented by INTERVENORS clearly demonstrates the unconscionable manner in which Defendants' procured the INTERVENORS' signatures on the documents in question.

45. The Fourth Circuit has also isolated six factors to be held to the determination of whether a contract or its provisions are unconscionable:

1. The nature of the injuries suffered by the party sought to be held to the contract;

2. Whether the party is a substantial business concern;
3. Disparity in the parties' bargaining power;
4. The parties' relative sophistications;
5. Whether there is an element of surprise in the contract's terms; and
6. The conspicuousness of the terms.

Carlson v. General Motors Corp., 883 F.2d 287 (4th Cir. 1989). Under any analysis, the Defendants' arbitration clauses and agreements are unconscionable. In considering these factors, it cannot be stated strongly enough that Defendants' conduct was a deliberate and knowing effort designed to take advantage of INTERVENORS lack of experience and knowledge as is noted in the affidavits incorporated herein.

CONTRACTS OF ADHESION

46. Further, this Court should refuse to enforce the arbitration agreements and clauses because, to the extent they constitute a contract, if at all, they are contracts of adhesion. A contract of adhesion is generally thought of as a standard form contract offered on a "take-it-or-leave-it basis, with its terms being nonnegotiable. Wingard v. Exxon, 819 F.Supp. 497, 503 (D.S.C. 1992). For a contract of adhesion to be stricken, there must be a showing of unfairness, undue oppression or unconscionability. Threlkeld & Co. v. Metallgesellschaft, Ltd., 923 F.2d 245, 248 (2d Cir. 1991). As in the Phillips case, this Court should find the arbitration clauses and agreements unconscionable because of the material reductions in INTERVENORS substantitive rights and the numerous one-sided provisions of the arbitration agreement.

EQUITY REQUIRES THE ARBITRATION CLAUSES BE HELD VOID AGAINST PUBLIC POLICY

47. Further, as in the Phillips case, this Court should declare the arbitration clauses and agreements void against public policy. An agreement is unenforceable "if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the

agreement." Town of Newton v. Ramiro, 480 U.S. 386, 392, 107 S.Ct. 1187, 94 L.Ed. 2d 405 (1987). Because the Supreme Court has found that Congressional policy according the elimination of discrimation the highest priority the entire arbitration agreements should be found to be void as against public policy. Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed. 2d 147 (1974).

REFORMATION IS NOT FEASIBLE

48. 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.

49. The doctrine of severability is applied in situations where the original consideration of the contract is legal and incidental promises within the contract are found to be illegal. See Williams v. Williams, 569 S.W.2d 867, 871 (Tex.1978). In such a case, the invalid provisions may be severed and the valid portion of the agreement upheld. See Wicks v. Comves, 110 Tex. 532, 221 S.W. 938, 939 (1920); C.C. Slaughter Cattle Co. v. Potter County, 235 S.W. 295, 307 (Tex.Civ.App.--Amarillo 1921), aff'd, 254 S.W. 775 (Tex.Comm'n App.1923, judgmt adopted); cf. Smith v. Morton I.S.D., 85 S.W.2d 853, 858 (Tex.Civ.App.--Amarillo 1935, writ dism'd). However, when the severed portion is integral to the entire contract , a severability clause, standing alone, cannot save the contract. Budge v. Post, 544 F.Supp. 370, 382 (N.D.Tex.1982) (citing Patrizi v. McAninch, 153 Tex. 389, 269 S.W.2d 343, 347-48 (1954)). Further, recission of the contract is not an available remedy if the breach is not minor or casual. Where as in the present case, the breach is material and defeats the object of the parties, recission is not available.

50. Although arbitration agreements are highly favored by the law and the courts, as

exemplified by our recent opinion in In re Certain Underwriters at Lloyd's, 18 S.W.3d 867 (Tex.App.--Beaumont 2000) original proceeding [mand. denied], there is a danger in enforcing such agreements carte blanche in the employer/employee non-subscriber context. Under certain circumstances, public policy alone would preclude such enforcement. See Reyes v. Storage & Processors, Inc., 995 S.W.2d 722 (Tex.App.-San Antonio 1999, pet. denied).

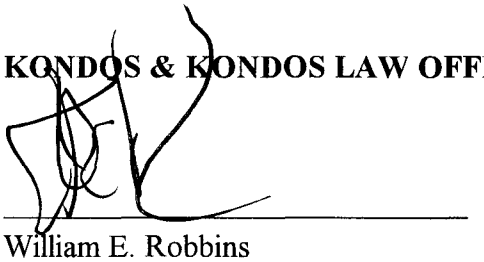
51. Recission of a contract is available in cases where, even in the absence of fraud or a duty to disclose information to the other party, such as where the one party knows the other party would consider the undisclosed facts to be material. Smith v. National Resort Communities, Inc., 585 S.W.2d 655, 658 (Tex. 1979) - citing Restatement, Second, Torts §551, comment (b). When the particular circumstances impose a duty to speak and the party remains silent, the silence is equivalent to a false representation. Spoljaric v. Percival Tours, Inc., 708 S.W.2d 432, 435 (Tex. 1986). A duty to disclose may arise from a partial disclosure that gives an incomplete and deceptive impression, since although one may not be required to speak, one may not convey a false impression by the disclosure of some facts and the concealment of others. Southeastern Financial v. United Merchants & Mfgs., 701 F.2d 565, 566 (5th cir. 1983). Non-disclosure may support a fraud claim when one party is uniquely knowledgeable about the subject matter of the transaction, so that the other party does not have an equal opportunity to discover the facts. Moore & Moore Drilling Co. v. White, 345 S.W.2d 550, 555 (Tex.Civ.App.– Dallas 1961, writ ref'd n.r.e.). Because all contracts have a duty of good faith, INTERVENORS contend Defendants had a duty to disclose the overwhelmingly one-sided nature of Defendants' arbitration agreement.

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,

KONDOS & KONDOS LAW OFFICES



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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' Brief in 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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