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

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION	§	
VS.	§	3:01-CV-0619-P
HOOTERS ARLINGTON VENTURE I, et al	§	

DEFENDANTS' REPLY TO INTERVENORS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE UNITED STATES DISTRICT COURT JUDGE:

COME NOW, Hooters Arlington Venture I, TWI IV, Inc., and Texas Wings, Inc., Defendants in the above-entitled and -numbered case, and file this, their Reply to Intervenors' Reply [sic] to Defendants' Motion to Dismiss, and in support thereof would respectfully show the Court as follows:

1. Defendants filed with this Court their Motion to Dismiss and Original Answer to Original Complaint in Intervention (the "Motion to Dismiss") based upon the agreement by Nicolle Brennan Gaffney, Nicole Cleveland, Robyn Purvis McGehee and Lisa Ramirez Thornton to arbitrate:

> All disputes arising out of, or in any manner otherwise connected with or related to the hiring or employment of the Employee by the Company, including, without limitation, for any class or types of damages, including attorney's fees, and injunctive relief relating to any claim of discrimination, sexual harassment, retaliation, or wrongful discharge, whether arising under federal or state law by a statute, rule, regulation or common law (hereinafter referred to, jointly and severally, as the "Claims"), except those Claims relating to workers compensation claims, or non-pay employee benefits such as health benefits.

Intervenors Nicolle Brennan Gaffney, Nicole Cleveland, Robyn Purvis McGehee and Lisa Ramirez Thornton (hereinafter "Intervenors") filed a Reply (sic) to Defendants' Motion Dismiss, as well as a Brief in Reply to Defendants' Motion to Dismiss (collectively the "Response"). The Response first sets forth a veritable laundry list of alleged complaints, then requests the Court take note of *Hooters*

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of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999). Intervenors' arguments, while disjointed, are set forth as follows:

A. Basic Principles of Contract Law.
B. There was No Meeting of the Minds.
C. The Arbitration Clauses are Ambiguous.
D. There was No Voluntary or Knowing Waiver of Rights.
E. The Arbitration Clauses are not Supported by Valid Consideration.
F. Controlling Law/Pre-emption (sic)/Texas Arbitration Act.
G. The Arbitration Clauses are Unconscionable.
H. Contract of Adhesion
I. Equity Requires the Arbitration Clauses be Held Void Against Public Policy,
J. Reformation is not Feasible.

To facilitate the Court's review, Intervenors' arguments will be addressed as follows:

A. Preliminary Matters.

B. Federal Arbitration Act, Texas Arbitration Act, and Preemption.

C. Intervenors' argument that equity requires the arbitration clauses be held void against public policy is a complete mis-statement of the law. The arbitration agreements do not achieve an impermissible prospective waiver of Intervenors' Title VII rights, are not unconscionable, and, therefore, furthermore, do not constitute contracts of adhesion.

D. Basic principles of contract law, including sufficient evidence of a meeting of the minds, and consideration, are fulfilled in this case.

E. The arbitration agreements are unambiguous as a matter of law.

F. The reformation argument is moot.

A. Preliminary Matters

2. The Reply has attached to it the Affidavits of only three of the Intervenors; there is no affidavit attached of Intervenor Robyn Purvis McGehee. Accordingly, in the absence of any proof, this Court can summarily disregard Intervenors' arguments as to this particular Intervenor.

3. Additionally, Intervenors' Response is predicated solely upon Arbitration rules that do not exist, have never been used by the Defendants in this case, and do not apply to the disputes at issue before this Court. Defendants would refer the Court to the Affidavit of Terry Rabe with

Exhibits attached to Defendants' Reply to the EEOC's Response to Defendants' Motion to Dismiss (the "EEOC Response"), which set forth the current rules governing arbitration of this matter. Defendants would further refer the Court to their Reply to the EEOC Response with respect to this non-issue.

4. Intervenors, in their Response, consistently urge this Court to "take notice of the findings and evidence in the *Phillips* case . . . ." Inasmuch as the *Phillips* case involved different parties, in a different venue and applying different arbitration rules, there can be no *res judicata* effect and virtually no precedential value. Notwithstanding same, it is clear from the *Hooters of America, Inc. v. Phillips* opinion that had the AAA or J.A.M.S./ENDISPUTE rules been the applicable arbitration rules, the Fourth Circuit Court of Appeals would have compelled arbitration. Moreover, it is incumbent upon Defendants to advise the Court that Intervenors' Brief is replete with inaccuracies ranging from mere oversight to apparently intentional mis-statements of the law.[1]

B. Federal Arbitration Act, Texas Arbitration Act, and Preemption

5. Intervenors incorrectly argue that the Federal Arbitration Act (the "FAA") does not apply to the case at bar because the employment agreements between the employees and Defendants

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[1] Other mis-statements by Intervenors are equally egregious. (A) The vast majority of Intervenors' case quotations (all but three) are paraphrased rather than quoted. In most instances, the paraphrase either does not exist in the opinion, or is out of context. (B) Intervenors apparently rely on Montana, West Virginia, and California state cases. With respect to their California case, if truly review has been granted by the California Supreme Court, then the case is not citable under Cal. Rules of Court 976 and 977. (C) *Prudential v. Lai*, 42 F 3d 1299 (9th Cir 1994) is cited as the leading case on the "knowing and intentional" waiver of substantive rights in the context of arbitrations. In fact, it was the minority view, was not the view followed in the Fifth Circuit, and was rejected by the United States Supreme Court in *Circuit City v. Adams*, ___ U.S. ___, 121 S.Ct. 1302 (2001) (D) *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) is cited throughout, despite it being dismantled by *Gilmer v Interstate/Johnson Lane Corp.*, 500 U.S 20 (1991), and its progeny. (E) An implication is made that *Gibson v. Neighborhood Health Clinics*, 121 F 3d 1126, 1129 (7th Cir.) stands for the proposition that "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 " If one actually reads the opinion, one notes that the Seventh Circuit was stating that the U.S. Supreme Court did not reach this issue in *Gilmer* The Seventh Circuit also did not reach this issue: "While we therefore stress the advantage of arbitration agreements that are the product of an employee's knowing and voluntary consent, we decline today to decide whether such consent is a prerequisite to the validity of an agreement to arbitrate federal civil rights claims " *Gibson* at 1129. The issue has been laid to rest in *Circuit City v. Adams*, which is discussed *infra* (F) Intervenors' cite to *Gilmer* for the proposition that, "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," as an implication that an arbitration does not constitute such a neutral forum. This is clearly a complete mis-statement as to everything for which *Gilmer* and its progeny stand. (G) Finally, Intervenors end their brief with the statement that "all contracts have a duty of good faith." This statement, of course, could not be further from the truth. As recently as 1999, the Texas Supreme Court reiterated its long standing position that, "there is no duty between parties to a contract to act in good faith." *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 313 (Tex 1999), *citing, Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 697 (Tex. 1994). This, of course, has been acknowledged by the Northern District of Texas, as well as by the Fifth Circuit. *See, e.g., Transamerican Natural Gas Corp. v. Zapata*, 12 F.3d 480, 486 (5th Cir. 1994)(under Texas law there is no duty of good faith and fair dealing in contracts); *Golden v. Daiwa Corp.*, 2000 U.S. Dist. Lexis 2660 (N.D. Tex. 2000)(the Texas Supreme Court has declined to impose an implied covenant of good faith and fair dealing in every contract as far back as *English v. Fischer*, 660 S.W.2d 521, 522 (Tex. 1983)). Even more to the specific point before the Court, the Texas Supreme Court, last year, declined "to impose a duty of good faith and fair dealing on employers . " *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000).

do not affect interstate commerce. As the Court is well aware, this is not the standard. The standard is whether the contract evidenced a transaction involving interstate commerce. This was emphatically set forth by the United States Supreme Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), where it held that the FAA's provision making enforceable, "a written arbitration provision in 'a contract *evidencing* a transaction *involving* commerce," extends, "the Act's reach to the limits of Congress' Commerce Clause power . . . ." *Dobson* at 268 (emphasis in original). The Supreme Court, furthermore, cited to its decision in *Southland Corp. v. Keating*, for the proposition that, "the Federal Arbitration Act preempts state law; . . . state courts cannot apply state statutes that invalidate arbitration agreements." *Id.* at 272, *citing*, *Southland Corp. v. Keating*, 465 U.S. 1, 15 - 16 (1984). *Dobson* has been recognized by the Texas Supreme Court in *L&L Kempwood Associates, L.P. v. Omega Builders, Inc.*, 9 S.W.3d 125, 127 (Tex. 1999):

> The Supreme Court held in *Allied-Bruce* that the provision of the Federal Arbitration Act that "makes enforceable a written arbitration provision in 'a contract evidencing a transaction involving commerce'" extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach.

6. The two central cases relied upon by Intervenors on the issue of preemption are miscited by Intervenors, and in fact, fully support Defendants' position. Intervenors argue that the "FAA requires the transaction in fact involve interstate commerce," citing *Cantella & Co. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996). In truth, nowhere is this stated in *Cantella*. However, *Cantella* does state:

> Federal and state law strongly favor arbitration. Indeed a presumption exists in favor of agreements to arbitrate under the FAA. Courts must resolve any doubts about an agreement to arbitrate in favor of arbitration. A party opposing an arbitration agreement bears the burden of defeating it. Once a party seeking to compel arbitration establishes that an agreement exists under the FAA, and that the claims raised are within the agreement's scope, the trial court "has no discretion but to compel arbitration and stay its proceedings pending arbitration."

Cantella at 944 (cites omitted). *Cantella*, incidentally, involved a mandamus action to compel arbitration, and the Texas Supreme Court ultimately directed the trial court to allow arbitration to proceed. Intervenors then cite *Phillips Petroleum Co. v. Marathon Oil Co.*, 794 F.2d 1080, 1082 (5th Cir. 1986) for the proposition that the party seeking to compel arbitration has the burden to establish that the transaction involves interstate commerce. Again, *Phillips Petroleum Co.* simply does not stand for this proposition. (See *Cantella*, *supra*, to the effect that the presumption is in favor of arbitration under the FAA, and the party opposing arbitration has the burden of defeating arbitration.) Instead, the *Phillips Petroleum Co.* opinion states:

> Phillips alternatively argues that the arbitration clause is unenforceable under the Federal Arbitration Act, because the district court made no finding that the contract involved interstate commerce. In its opinion, however, the district court specifically found that federal law governed the arbitrability of the dispute. Inherent in such a finding is that the contract had an effect on interstate commerce. This court had rejected the need for explicit findings of an effect on interstate commerce under the Act where such an effect is obvious from the facts in the case.

Phillips Petroleum Co. at 1082.

7. Finally, as acknowledged by Intervenors, at least as to Brennan, Cleveland, and Purvis, the parties specifically agreed to applicability of the FAA.

8. Even if the Court were to find that TAA applicable to the case at bar, the "exception" cited by Intervenors would not apply. Intervenors are not asserting a claim for personal injury as contemplated by the TAA, but rather are asserting a statutory claim under Title VII. Furthermore, the exception cited by Intervenors clearly contemplates a post-dispute arbitration of a claim for personal injury. Obviously, prior to having a car wreck, parties are not in a position to get together with their attorneys and agree to arbitrate any disputes they may have in the future. The statute clearly, by its terms, contemplates a post-dispute situation, where parties are represented by counsel.[2]

[2] Because of time and brief length constraints, and due to Defendants' firm belief that the FAA applies, this issue is not further addressed in this brief. If the Court believes that the TAA and the "exception" cited by Intervenors may apply, Defendants request leave to brief this issue with case law and legislative history.

C. Intervenors' argument that equity requires the arbitration clauses be held void against public policy is a complete mis-statement of the law. The arbitration agreements do not achieve an impermissible prospective waiver of Intervenors' Title VII rights, are not unconscionable, and, therefore, furthermore, do not constitute contracts of adhesion.

9. Incredibly, at paragraph 47 of their Brief, Intervenors, citing *Alexander v. Garnder-Denver Co.*, 415 U.S. 36 (1974), state that, "Because the Supreme Court has found that Congressional policy according the elimination of discrimination the highest priority the entire arbitration agreements should be found to be void against public policy." Unbelievably, Intervenors cite to *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) as the "leading case on point in the context of arbitrations" with respect to their waiver argument. As the Court is aware from its own opinions in cases such as *Middleton v. Ball-Foster Glass Container Co., L.L.C.*, 139 F. Supp. 2d 782, 789 - 790 (N.D. Tex. 2001), these are complete mis-statements of the law.

10. Intervenors' citation to *Alexander v. Gardner-Denver Co.* is apparently a deliberate attempt to mislead this Court as this opinion was completely supplanted and superseded by *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 27 - 28 (1991). In *Gilmer*, the Supreme Court held that, "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA." *Gilmer* at 26. Immediately thereafter, the Fifth Circuit case, *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990) was vacated by the Supreme Court for reconsideration in light of *Gilmer*. On remand, the Fifth Circuit became the first Circuit Court to conclude that Title VII claims are subject to compulsory arbitration under the FAA. The Fifth Circuit analyzed *Gilmer*, and then held: "Title VII claims, like ADEA claims, are subject to arbitration under the FAA." *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991).

11. Following the Fifth Circuit's pronouncement, virtually every Circuit that has considered the issue has held that arbitration is an adequate forum for resolution of Title VII claims.[3] The only Circuit to give any credence to the anti-arbitration argument made by Intervenors was the Ninth Circuit, in *Prudential Ins. Co. v. Lai*, *supra*, and *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998). *Lai* and *Duffield* have been resoundingly criticized by most Circuits (including the First, Second, Third, Fourth, Fifth, Seventh, Eleventh Circuits, and the D.C. Circuit).

12. This issue has now been fully and finally laid to rest by the United States Supreme Court in *Circuit City v. Adams*, ___ U.S. ___, 121 S.Ct. 1302 (2001). In *Circuit City*, the Supreme Court acknowledged that every Circuit Court of Appeals that has considered the issue, other than the Ninth Circuit, has held the FAA to apply to employment disputes. "In the instant case, following the rule announced in *Craft* [*v. Campbell Soup Co.*, 177 F.3d 1083 (9th Cir. 1999)], the [Ninth Circuit] Court of Appeals held that the arbitration agreement between Adams and Circuit City was contained in a "contract of employment," and so was not subject to the FAA." *Circuit City* at 1306. The Supreme Court, after a detailed analysis, then reversed the Ninth Circuit, and explicitly held employment agreements to be subject to the FAA. Clearly, had Intervenors been aware of the *Circuit City* case, they never would have stated, at paragraph 22 of their Response, that: "even if this Court were to find INTERVENORS knowingly and voluntarily waived their substantive rights," this Court

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[3] *See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999)(every circuit save one that has considered the issue has upheld pre-dispute agreements to arbitrate Title VII claims); *Desiderio v National Association of Securities Dealers, Inc.*, 191 F.3d 198, 206 (2d Cir. 1999), *cert denied*, 531 U.S. 1069 (2001); *Sues v. John Nuveen & Co., Inc.*, 146 F.3d 175 (3rd Cir. 1998), *cert denied*, 525 U.S 1139 (1999)(finding Title VII entirely compatible with applying the FAA to agreements to arbitrate such claims); *Austin v Owens-Brockway Glass Container, Incorporated*, 78 F.3d 875 (4th Cir.), *cert. denied*, 519 U.S. 980 (1996)(there is no inherent conflict between arbitration and the underlying purposes of Title VII); *Haskins v. Prudential Ins. Co. of America*, 230 F.2d 231, 239 (6th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001); *Gibson v Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997)(the parties agree that an employee and employer may contractually agree to submit federal claims, including Title VII claims, to arbitration under *Gilmer*); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997)(thus we agree with those post-Gilmer decisions that have ruled that Title VII claims, like ADEA claims, are subject to individual consentual agreements to arbitrate); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir 1992), and *Cole v Burns International Security Services*, 105 F.3d 1465, 1467 - 1468 (D.C. Cir. 1997).

should deny the Motion to Dismiss, "because such a waiver, at least in the context of a predispute arbitration agreement, is not valid as a matter of law."

13. Intervenors' arguments as to unconscionability are based upon rules that do not apply to the case at bar, and are, therefore, moot. *See*, paragraph 3, *supra*.

D. Basic principles of contract law, including sufficient evidence of a meeting of the minds, and consideration, are fulfilled in this case.

14. Intervenors set forth basic elements of contract formation and then argue that these elements were not fulfilled. It is important to note that the cases cited by Intervenors in support of the basic elements of contract formation involved either oral contracts or a written contract with a number of missing terms. This case law would not seem to apply to the case at bar involving clear written contracts with no missing terms. Clearly, this Court does not have to engage in any analysis of any missing or oral terms, because it has written, signed contracts before it. Moreover, Intervenors are ignoring the presumption existing under both Texas and United States Supreme Court case law that a party has read and understood the contract he has signed. In Texas, a party to a contract is, "presumed to have read and understood all agreements which they have signed." *See*, *e.g.*, *MJR Corporation v. B&B Vending Co.*, 760 S.W.2d 4, 16 (Tex. App. - Dallas 1988, writ denied), *citing*, *Ellick v. Schiller*, 235 S.W.2d 494, 496 (Tex. Civ. App. - Galveston 1950), *rev'd on other grounds*, 140 S.W.2d 997 (1951). The United States Supreme Court, furthermore, held in analyzing a contract under general contract law that:

> The written contract merged all previous negotiations, and is presumed, in law, to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it.

Brawley v. United States, 96 U.S. 168, 173 (1877); *see also*, *Simpson v. United States*, 172 U.S. 372, 379 (1899) and *Valero Energy Corp. v. M.W. Kellog Constr. Co.*, 866 S.W.2d 252, 259 (Tex. App. - Corpus Christi 1993, writ denied).

15. Again, the cases cited by Intervenors simply do not apply to the case before this Court. Intervenors cite *Zurich Ins. Co. v. Bass*, 443 S.W.2d 371, 374 (Tex. Civ. App. - Dallas 1969, no writ), for the proposition that, "It is basic contract law that thee (sic) must be a meeting of the minds between the parties to the agreement before an enforceable contract exists." *Zurich* was a contract reformation case, in which this issue arose because there was a mutual mistake in the underlying contract, and the Court was asked to reform the contract to express the true intent of the parties - *i.e.*, the meeting of the minds. The second case cited by Intervenors, *Charlie Thomas Courtesy Ford, Inc. v. Sid Murray Agency*, 517 S.W.2d 869, 875 (Tex. Civ. App. - Corpus Christi 1974, writ ref'd n.r.e.) simply does not state what Intervenors claim it states - that no contract exists if one party intends to make an agreement and the other does not intend to make an agreement. Instead, *Charlie Thomas Courtesy Ford, Inc.* states that with respect to the defense of accord and satisfaction, "There can be no agreement when one party has an intention to make it, but the other has not." *Id.* at 875. Neither of these cases appear to assist this Court in considering Defendants' Motion to Dismiss.

16. Intervenors' desperate arguments that the arbitration clauses are not supported with valid consideration likewise have no merit. The consideration provided by Defendants was employment. Intervenors seem to believe because the employment was at-will, that somehow there was not a contract. The Fifth Circuit has repeatedly held that an at-will employment relationship is still an employment contract, albeit one that can be terminated at any time. *See, e.g., Byers v. The Dallas Morning News, Inc.*, 209 F.3d 419, 425 (5th Cir. 2000); *Paniagua v. City of Galveston, Texas*, 995 F.2d 1310, 1313 (5th Cir. 1993). Intervenors believe that because, "Defendants could have fired each INTERVENOR the very moment any agreement to arbitrate was signed," that there was "insufficient" consideration. This is exactly why there was consideration, Intervenors were employed, and continued their employment until they quit. Moreover, Intervenors' rights to arbitrate employment related disputes clearly survives the termination of their employment.

E. The arbitration agreements are unambiguous as a matter of law.

17. Indisputably, "The determination of whether a contract is ambiguous is a question of law." *Geoscan, Inc. of Tex. v. Geotrace Techs., Inc.*, 226 F.3d 387, 390 (5th Cir. 2000); *Aland v. Faison Assoc's.*, 1999 U.S. Dist. Lexis 11188 (N.D. Tex. 1999); and *Bank One, Tex., N.A. v. FDIC*, 16 F. Supp. 2d 698, 707 (N.D. Tex. 1998). The Court has before it the arbitration agreements at issue. Defendants are confident that a review and analysis of these provisions by the Court, much as it did in *Geoscan, Inc. of Tex.*, *supra*, will lead to the inescapable conclusion that the arbitration agreements are unambiguous as a matter of law.

F. The reformation argument is moot.

18. Intervenors' argument against reforming the arbitration provisions by severance is moot. As stated repeatedly, there are no offensive nor illegal provisions to sever. The rules applicable to the arbitration of this matter are those of the American Arbitration Association or J.A.M.S./ENDISPUTE. As there is no need to invoke any severance clause, Intervenors' argument has no applicability to this dispute.

WHEREFORE, PREMISES CONSIDERED, Defendants Hooters Arlington Venture I, TWI IV, Inc., and Texas Wings, Inc. respectfully pray that this Court dismiss the Complaint in Intervention for lack of jurisdiction or for failure to state a claim upon which relief can be granted. Alternatively, Defendants pray that they be granted a take nothing judgment in their favor and against Intervenors; that they be granted their costs of Court; and that the Court grant them such other and further relief, both at law and in equity, as is just and proper.

Respectfully submitted,

BY: _____
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CERTIFICATE OF SERVICE

This is to certify that on the 21st day of August, 2001, a true and correct copy of the above and foregoing Defendants' Reply to Intervenors' Response to Defendants' Motion to Dismiss has been sent via certified mail, return receipt requested to William E. Robbins, attorney for Intervenors, at Kondos & Kondos, 1595 North Central Expressway, Richardson, Texas 75080; with a copy to William C. Backhaus, Equal Employment Commission, Dallas District Office, 207 S. Houston Street, 3rd Floor, Dallas, Texas 75202.

John B. Gessner