THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Opinion No. 2021-UP-289 (S.C. Ct. App. Filed August 4, 2021)

Civil Action No. 2017-CP-04-01932
Appellate Case No. 2021-001042

Hicks Unlimited, Inc. ..... Petitioner,

v.

Unifirst Corporation, a Massachusetts Corporation,..... Respondent.

RESPONSE BRIEF OF RESPONDENT

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I. Statement of the Case

On or about September 21, 2006, UniFirst Corporation and Petitioner entered into a Flame Resistant Garment Agreement, pursuant to which Petitioner paid UniFirst a weekly service fee for renting from UniFirst flame retardant garments for its business. The initial term of the Agreement was 5 years. Under the terms of the Agreement, the contract automatically renewed for additional 5-year terms unless Petitioner notified UniFirst in writing at least 90 days before the expiration of the then-current term that it did not intend to renew the contract. (R-026-27).

The Flame Resistant Garment Agreement was a one-page, double-sided contract, with the contractual terms at issue in this case on the reverse side. *Id.*

UniFirst is a corporation organized by the laws of the State of Massachusetts, with its principal place of business in Wilmington, Massachusetts. It serviced Petitioner through its facility in Simpsonville, South Carolina. UniFirst's board of directors in Massachusetts controlled the operation of UniFirst's business in South Carolina. (A121).

Consistent with the terms of the Agreement, UniFirst measured and sized the Petitioner employees, and then ordered flame retardant garments from its facility in Kentucky, and then shipped those garments from Kentucky to South Carolina. (A121).

In accordance with the provisions of the Flame Resistant Garment Agreement, UniFirst provided merchandise rental services to Petitioner from 2006 through 2011. The contract automatically renewed in 2011; UniFirst continued to provide, and Petitioner continued to pay, for merchandise rental services for an additional 5-year period from 2011 through 2016. *Id.* Stated differently, Petitioner accepted the terms of the Flame Resistant Garment Agreement and paid UniFirst for weekly service for 10 years. UniFirst deposited in its account in Massachusetts Petitioner's payments for the services UniFirst provided under the Agreement. (R009).

Petitioner claims it attempted to terminate the Flame Resistant Garment Agreement in 2011, but it was not aware of the renewal deadline contained in the Agreement. After becoming aware of the missed deadline, Petitioner claims it agreed to accept services under the Agreement for a 5-year renewal period. Petitioner then contends that at some point before September 21, 2016, after having become aware of the renewal deadline, it terminated the Flame Resistant Garment Agreement. That is, in 2016, Petitioner asserts it triggered the nonrenewal clause in the contract in order to terminate service. UniFirst disagreed Petitioner had provided the required notice, and contended the Agreement had renewed for a second time. (R-009; 017).

Under the terms of the Flame Resistant Agreement, in the section entitled "OBLIGATIONS AND REMEDIES," the parties agreed as follows:

> All disputes of whatever kind between the Customer and UniFirst based upon past, present, or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted in the capital city of the state where the Customer has its principal place of business (or some other location mutually agreed to by Customer and UniFirst) pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association and shall be governed by the Federal Arbitration Act.

(R-027).

Under the section "MISCELLANEOUS," one paragraph below the arbitration clause, the Flame Resistant Garment Agreement provided that "[i]n the event any portion of this Agreement is held by a court of competent jurisdiction or by a duly appointed arbitrator to be unenforceable, the balance will remain in effect." *Id.*

In the first paragraph under "OBLIGATIONS AND REMEDIES," Petitioner agreed that if it breached the Flame Resistant Garment Agreement, it would pay UniFirst, as liquidated damages and not as a penalty, an amount equivalent to fifty percent of the average weekly service amount multiplied by the weeks remaining in the then-current term of the Agreement. The

liquidated damages amounts were recoverable in addition to other amounts owed by Petitioner to UniFirst under the terms of the Flame Resistant Agreement. Those additional amounts could be as follows:

Under the section entitled "MERCHANDISE," Petitioner agreed that as a condition to terminating the contract, it would return to UniFirst all merchandise in good and usable condition, or pay for it at the replacement charges then in effect; and

Under the section entitled "PRICES AND PAYMENTS," Petitioner agreed it would pay for services rendered to UniFirst in a timely manner. *Id.*

On May 17, 2017, UniFirst Corporation commenced an arbitration proceeding through the American Arbitration Association, arising out of Petitioner, Inc.'s breach of the Flame Resistant Garment Agreement executed by the parties. (R-009). There is no claim by Petitioner that it terminated services pursuant to the termination clause in the Flame Resistant Garment Agreement. The primary issue raised in the arbitration proceeding was whether Petitioner had properly notified UniFirst of its intent not to renew the Flame Resistant Garment Agreement at least 90 days before the expiration of the then-current contractual term. *Id.*

The negotiation and signing of the Flame Resistant Garment Agreement by the parties to this action constituted a business-to-business, arm's-length transaction, with the parties enjoying substantially equal bargaining position, with no provisions presented by UniFirst as "take-it-or-leave-it" propositions. If Petitioner did not sign with UniFirst, it could have signed with any number of other merchandise rental providers in the area for the same or similar terms as the Agreement it signed with UniFirst. In fact, when Petitioner terminated UniFirst's services, it then chose one of those other providers to receive uniform services. (R-019.)

On or about September 14, 2017, Petitioner commenced an action in the Court of Common Pleas in Anderson County, South Carolina, attempting to claim the dispute as framed by UniFirst's demand was not subject to arbitration. (R-008-11).

More specifically, as alleged in the Complaint, Petitioner acknowledged it received and paid for service from UniFirst for 10 years, but claimed it properly terminated the contract. Nevertheless, Petitioner argued the contract was "illegal, unconscionable, and unenforceable," and claimed UniFirst had failed to comply with the mandatory notice provision in S.C. Code Ann. § 15-48-10(a). Petitioner further argued it had never signed an agreement to arbitrate. *Id.*

On October 13, 2017, UniFirst Corporation answered the petition, asserted affirmative defenses, and filed its Motion to Compel Arbitration, based on the arbitration provision contained in the Agreement, and because the parties expressly agreed in the contract that the Federal Arbitration Act (FAA) would apply. Consequently, under South Carolina law, the FAA preempted the application of South Carolina's statute concerning the size, type, and location of arbitration clauses in contracts. In response, Petitioner filed a Motion for Summary Judgment. (R-016-28).

On November 27, 2017, the trial court heard argument of counsel regarding UniFirst's Motion to Compel Arbitration, and on Petitioner's Motion for Summary Judgment. (R-047-63). On December 1, 2017, the trial court advised the parties that both motions were denied. On January 9, 2018, the trial court entered its Order denying the relief requested by both parties and stayed the arbitration pending a hearing on the merits. (R-001-003).

On January 18, 2018, UniFirst Corporation filed a 59(e) motion to alter or amend the trial court's January 9, 2018 Order. (R-031-36). On February 14, 2018, the trial court denied UniFirst Corporation's motion to alter or amend the January 9, 2018 Order. (R-005-006). On March 15, 2018, UniFirst Corporation appealed the trial court's rulings; it filed its initial brief on January 7,

2019. (A65-83). On August 4, 2021, the Court of Appeals issued an opinion overturning the trial court's decision. *Hicks Unlimited, Inc. v. UniFirst Corp.*, No. 2018-000468, 2021 WL 3400641 at *1 (S.C. Ct. App. Aug. 4, 2021) (A119-24).

On August 18, 2021, Petitioner filed a Motion for Rehearing regarding the Court of Appeals' decision. (A125-30). On August 26, 2021, the Court of Appeals denied Petitioner's Motion for Rehearing. (A135).

On September 22, 2021, Petitioner petitioned this Court for certiorari. On November 21, 2021, UniFirst submitted its opposition to Petitioner's request. On October 7, 2022, the Court granted Petitioner's request. On November 4, 2022, Petitioner filed its Initial Brief.

II. ARGUMENT

A. When Applying the Correct Standard, the FAA Applied to this Dispute.

South Carolina's policy is to favor arbitration of disputes. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016). Therefore, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). "[A]s a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." *Landers v. FDIC*, 402 S.C. 100, 108-09, 739 S.E.2d 209, 213 (2013). As a result, the "heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Id.* at 109, 739 S.E.2d at 213.

The Federal Arbitration Act provides in relevant part that:

> [A] written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. With regard to the matter before this Court, the terms of the FAA preempt application of those provisions of the South Carolina Consumer Protection Code requiring the agreement to arbitrate be presented in specific type and font sizes not found in the parties' Flame Resistant Garment Agreement. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Therefore, the issue the Court of Appeals was asked to consider was whether the FAA applied to the Flame Resistant Garment Agreement. Based on the facts of the case, and the terms of the contract, this Court should uphold the Court of Appeals' decision.

1. The Parties Expressly Agreed the FAA Applied.

In order to uphold the Court of Appeals' decision, this Court does not have to engage in the type of fact-evaluating and evidence-weighing Petitioner is urging the Court to do. This Court need only apply the holding it rendered in *Munoz*. Specifically, the *Munoz* case involved substantially the same arbitration clause as exists in the matter before this Court. *Id.* at 536, 542 S.E.2d at 362. The Court italicized for emphasis the phrase in the parties' contract that the agreement "shall be governed by the Federal Arbitration Act." *Id.* at 536-37, 542 S.E.2d at 362. The Court, as its first basis for finding the FAA applied, cited to that same phrase, and stated that "[a]rbitration agreements, like other contracts, are enforceable in accordance with their terms." *Id.* at 538, 542 S.E.2d at 363-64.

In the same way, where, as here, the parties specifically agreed the FAA applied to dispute resolution, the Court must enforce that portion of the contract just like it would any other term of the Flame Resistant Garment Agreement. Since the parties expressly agreed the FAA would apply, this Court can uphold the Court of Appeals' holding without further inquiry.

It is worth reiterating that the fundamental basis for Petitioner's claim is that it is not liable for breach of contract to UniFirst because it alleges that it timely notified UniFirst of its intent not

to renew the Flame Resistant Garment Agreement. Stated differently, Petitioner exploited and enjoyed the benefits of the Agreement and is now claiming another provision of the Agreement should benefit it, while simultaneously refusing to comply with the Agreement's arbitration clause. If under these facts, this Court can estop a nonsignatory from avoiding enforcement of an arbitration clause, the Court should be able to similarly prevent Petitioner, one of the signing parties, from trying to do the same thing. *See Wilson v. Willis*, 426 S.C. 326, 340-41, 827 S.E.2d 167, 175 (2019).

It is also worth noting here that UniFirst agrees Petitioner should be allowed to attempt to enforce the nonrenewal clause of the Flame Resistant Garment Agreement, even though UniFirst contends the facts do not support Petitioner's attempt. But the Court should uphold Petitioner's previous agreement that it must make any such attempt in an arbitration proceeding, under the auspices of the FAA as was agreed by the parties in the Flame Resistant Garment Agreement.

2. Though Not Necessary to the Decision, the Parties' Relationship Involved Interstate Commerce.

As stated above, the parties' agreement the FAA applied should end the review then and there with regard to the Court of Appeals' decision that the FAA applies. While the parties' agreement is dispositive, the appellate court's review of the facts regarding interstate commerce should also be upheld.

The FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce. *Id.* The phrase "involving commerce" has been interpreted as being the functional equivalent of "affecting commerce." *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003). "Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in

commerce – that is, within the flow of interstate commerce." *Id.* (*quoting Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003)). In determining whether a transaction involves interstate commerce, courts will review whether the transaction involves: the use of channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things within interstate commerce; or those activities having a substantial relation to interstate commerce. *Cape Romain Contractors v. Waldo E., LLC*, 405 S.C. 115, 122, 747 S.E.2d 461 (2013). Based on the pertinent factors and law, it follows that this Court has applied the FAA to transactions involving interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

Once again, as noted above, the Court's review regarding the Court of Appeals' decision should start with *Munoz*. In *Munoz*, the transaction at issue was a loan for home improvements to a residence in South Carolina. *Munoz*, 343 S.C. at 536, 542 S.E.2d at 362. The homeowners and the contractor were domiciled in South Carolina. *Id.* at 538, 542 S.E.2d at 364. Nevertheless, this Court found interstate commerce because of three facts: 1) the contractor assigned its rights under the contract to a Delaware corporation; 2) the Delaware company prepared the agreement in Minnesota; and 3) the loan proceeds were disbursed to South Carolina from a bank in Minnesota. *Id.* Significantly, none of the three facts relates to the actual improvements done in South Carolina, and none of the three facts relates to the transport of materials out-of-state into South Carolina.

Blanton v. Stathos is a prime example of how far South Carolina courts have gone to find there was interstate commerce in a business relationship. 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002). In *Blanton*, the parties entered into a contract whereby an architect agreed to provide design, drawing, and architectural services for a restaurant in Seneca, South Carolina. 351 S.C. at 537, 570 S.E.2d at 567. The architect did her work in South Carolina; before construction began, and even

before procurement of the materials had occurred, the parties' business relationship terminated. 351 S.C. at 538, 570 S.E.2d at 567.

In challenging arbitrability, the party who contracted for the architectural services asserted that since construction had not yet begun, and since all work was done, and had been done, by individuals residing in South Carolina, concerning a restaurant in South Carolina, the contract did not evidence interstate commerce. *See* 351 S.C. at 537-40, 570 S.E.2d at 567-69. In response, the architect averred that because she consulted with technicians outside South Carolina, her design and drawings contemplated the purchase and acquisition of materials and labor from states other than South Carolina. *Blanton*, 351 S.C. at 541, 570 S.E.2d at 568-69. Even though none of the "purchases and acquisitions" had occurred at the time the parties' relationship ended, the Court concluded the transaction evidenced interstate commerce, and affirmed the arbitration award. 351 S.C. at 541, 570 S.E.2d at 569. *See also Zabinski v. Bright Acres Associates, Inc.*, 346 S.C. 580, 595, 553 S.E.2d 110 (2001) (finding interstate commerce through out-of-state investors in a purely intrastate project).

In addition, and similar to this action, in *Cape Romain Contractors*, two of the three facts the Court utilized to find the marina construction transaction involved interstate commerce were: 1) certain of the raw materials used in constructing in the marina originated in Ohio; and 2) those materials were shipped from Ohio to South Carolina. 405 S.C. at 122-23, 747 S.E.2d 461.

Here, the Court of Appeals identified these facts: UniFirst deposited Petitioner's payments in its account in Massachusetts. UniFirst purchased the garments it then rented to Petitioner from a facility in Kentucky and shipped them from Kentucky to South Carolina. UniFirst's board of directors in Massachusetts controlled the operation of UniFirst's business in South Carolina. In other words, UniFirst's rights under the Flame Resistant Agreement were held by a Massachusetts

corporation with its principal place of business in Massachusetts. Just as in *Zabinski* and *Munoz*, out-of-state interests were directing the decision-making of people within South Carolina. And if monies coming into South Carolina from Minnesota evidence interstate commerce, then monies going out of South Carolina to Massachusetts do as well. In short, any one of the facts the Court of Appeals identified would be sufficient to uphold the court's decision.

In its brief, Petitioner provides a standard of review and emphasizes it in its brief: the Court should focus on *what* the contract requires for performance. Petitioner then ignores that standard of review for the remainder of the brief, instead choosing to focus on *where* the contract is performed – a standard South Carolina courts in each of the decisions identified in this section has effectively rejected.

When focusing on the "what," as Petitioner at least originally urges, the result is the same. UniFirst's performance of its obligations under the Flame Resistant Agreement consisted of furnishing garments for Petitioner's employees as and when Petitioner required them for its employees, both current and new. UniFirst furnished the garments by having them shipped from Kentucky. UniFirst performed weekly pickup, laundry, and drop-off service of the garments – activities managed and supervised by UniFirst's management team in Massachusetts. On the other side, Petitioner's obligations consisted of paying in a timely manner for the services rendered, which it did, and UniFirst deposited the payments in its account in Massachusetts. When reviewing what was required to perform the contract, each of those requirements involved interstate commerce. Accordingly, this Court should uphold the Court of Appeals' decision.

B. The Court of Appeals Overruled No Factual Findings.

Petitioner's second argument is largely a rehash of its first, but it also incorrectly contends the Court of Appeals exceeded its authority by overruling the trial court's decision. In making its

argument, Petitioner acknowledges that determinations of arbitrability such as the trial court's decision, and subsequent Court of Appeals' decision, are subject to *de novo* review by this Court. *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012). But Petitioner then claims the Court of Appeals was precluded from overturning the trial court's findings because there was evidence to support those findings. Pet. Brief at 8-9. In making its argument, Petitioner omitted a key word in the relevant standard: if any evidence reasonably supports the trial court's **factual** findings, neither the Court of Appeals nor this Court will overrule those factual findings. *Pearson*, 400 S.C. at 286, 733 S.E.2d at 599.

The Court of Appeals did not change the facts in the record. It merely came to a different conclusion than the trial court did on those same facts. Importantly, given Petitioner had filed a motion for summary judgment in the trial court, and that motion was part of the trial court's decision, the Court of Appeals, as part of its *de novo* review, viewed "all facts" in favor of the nonmoving party. *South Carolina Dept. of Transportation v. Powell*, 424 S.C. 206, 210, 818 S.E.2d 433 (2018).

Ultimately, the Court of Appeals gave effect to the terms of the contract, and viewed all of the facts, including those identified by Petitioner, and determined that based on the record presented, the transaction involved interstate commerce, just as other South Carolina courts have routinely done when given similar facts and operative documents.[1]

While claiming the Court of Appeals went beyond its permissible standards of review, Petitioner, in its second argument, identifies no factual findings the Court of Appeals disturbed.

[1] In addition, with regard to Petitioner repeating the same arguments on the record facts in the context of interstate commerce, by contending the facts the Court of Appeals utilized in finding interstate commerce were insufficient, Petitioner has negated whatever claim it was making that the Court of Appeals should not have used those same facts in making its decision. If, as Petitioner argues, the facts utilized by the Court of Appeals were insufficient to change the final decision, then it follows it was not error to use them in the first place. Regardless, when viewing all facts pertinent to this case, the transaction between the parties in this case involved interstate commerce.

Instead, Petitioner cites three facts the Court of Appeals identified, and reprises the same contentions raised in its previous argument that the three facts Petitioner asserts should not have led the court to conclude the transaction involved interstate commerce. Petitioner was incorrect in its initial argument, and is similarly incorrect in its second. Thus, the Court should uphold the Court of Appeals' decision.

C. Petitioner's Unconscionability Arguments Are Without Merit.

In its original pleadings in the trial court, Petitioner alleged it was "informed and believe[d]" the contract at issue was unconscionable, and asked the trial court for leave to argue at a later date the question of unconscionability. In subsequent appellate briefs, Petitioner has attempted to argue unconscionability on its merits, even though the trial court, as part of its findings, did not find the Flame Resistant Garment Agreement to be unconscionable. Consistently with what was (and was not) argued below, there is not one word in Petitioner's brief devoted to the contention that any word or phrase in the arbitration clause to the Agreement is either procedurally or substantively unconscionable. Nevertheless, as its final argument to this Court, Petitioner, in essence, contends the Flame Resistant Garment Agreement's arbitration clause is unconscionable and unenforceable because the Agreement's liquidated damages clause is unconscionable and unenforceable. Petitioner's arguments on unconscionability are wrong in every respect, and should be summarily rejected.

1. The Argument Violates the *Prima Paint* Doctrine.

When considering whether there is a valid arbitration agreement, this Court must first separate the arbitration provision from the rest of the contract. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Building on *Prima Paint*, the Supreme Court of the United States has subsequently held that "a challenge to

the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 448, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). That is, the party seeking to challenge arbitration must make a specific, pinpoint challenge to the validity of the arbitration provision itself; "a party's challenge to another provision of the contract...does not prevent a court from enforcing a specific agreement to arbitrate." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010).

Petitioner is inviting this Court to do precisely what the Supreme Court prohibits: use another clause in the contract to determine the enforceability of the arbitration clause. Petitioner's request is also exactly what the Court of Appeals was requested to do in *One Belle Hall Property Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 63-64, 791 S.E.2d 286, 293 (Ct. App. 2016). In *One Belle Hall*, the Court of Appeals found the trial court erred by finding that the disclaimers contained in the warranty section of the contract and found by the trial court to be tantamount to a contract of adhesion contributed to a finding of unconscionability of the arbitration agreement. *Id.* In overturning the trial court's decision, the Court of Appeals found: 1) such a request violated the *Prima Paint* doctrine; and 2) the contract contained a severability clause (just as the Flame Resistant Garment Agreement does), so that even if the remedies provisions violated South Carolina law, they would not apply to the question of enforcing the agreement to arbitrate. *Id.*

In the face of controlling authority, Petitioner cites *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), in an attempt to claim the Court may consider the arbitration clause in tandem with the liquidated damages clause if the provisions are intertwined with one another. But in *Smith*, this Court found that it was appropriate to consider multiple subparagraphs within one paragraph

as a single provision where "the subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." 417 S.C. at 48, 790 S.E.2d 1.

In this case, no such cross-references exist here. Each of the two paragraphs discusses only those matters pertinent to itself. There is no reference to arbitration in the liquidated damages clause; there is no reference to liquidated damages in the arbitration clause. Notably, the court in *Smith* also found that because the agreement in question did not have a severability clause, the parties did not intend for a court to sever any unconscionable terms from the arbitration agreement. *Id.* at 50, n. 6, 790 S.E.2d at 5, n. 6. The lack of any cross-references in the Flame Resistant Garment Agreement between the liquidated damages paragraph and arbitration paragraph, coupled with the existence of a severability clause in the contract, establish that Petitioner's reliance on *Smith* is misplaced. Ultimately, there was no basis for the Court of Appeals to evaluate the enforceability of the arbitration clause by evaluating the enforceability of the liquidated damages clause. This Court should reject Petitioner's request to do so here.

2. There Is No Procedural Unconscionability.

To the extent the Court chooses to review Petitioner's unconscionability arguments on their "merits," it is well-settled that to prove an arbitration clause is unconscionable, Petitioner would have to show it lacked a meaningful choice as to whether to arbitrate because the arbitration agreement's provisions were one-sided; and that the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007). In other words, the clause must be both procedurally and substantively unconscionable: there must be both an absence of

meaningful choice *and* oppressive, one-sided terms. *Id.* at 25; 644 S.E.2d at 669; *Lucey v. Meyer*, 401 S.C. 122, 140, 736 S.E.2d 274, 284 (2012).

As to procedural unconscionability, no such facts exist in this case. This was a business-to-business, arm's-length transaction. If Petitioner did not sign with UniFirst, it could have signed with any number of other merchandise rental providers for the same or similar terms. And in fact, Petitioner did so; after it terminated UniFirst's services, it engaged the services of another uniform provider. That fact alone establishes that Petitioner agreed to services from UniFirst simply because it wanted to, not because it was compelled to, or that it lacked a meaningful choice to.

In addition, this Court has recognized that a party signing a contract is presumed to have read the document before doing so, and that a party cannot complain about misrepresentations in a contract if the truth can be revealed by reading the document. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786 (1986). In this case, the contract at issue is a single-paged document, with the arbitration clause on the "second side" of the single page. *See, e.g., Lucey*, 401 S.C. at 141, 736 S.E.2d at 284-85 (no procedural unconscionability in a 3-page contract, with the arbitration clause on the second page). The arbitration clause is located on the same page as the term and renewal clauses, of which Petitioner knew and has alleged it attempted to enforce on two separate occasions. Accepting for the moment Petitioner's facts as true, Petitioner further knew that its failure to properly notify UniFirst of its intent not to renew served to renew the contract for an additional 5-year period. The arbitration clause is only 8 paragraphs away from the term and renewal clauses, and is in the same type and font size as the term and renewal clauses. There is not a single fact in the record that would militate toward a finding of procedural unconscionability, much less sufficient facts for Petitioner to have met its pleading burden. The Court should uphold the Court of Appeals' finding on procedural unconscionability.

3. No Substantive Unconscionability.

When it comes to substantive unconscionability regarding the arbitration clause, this Court has emphasized that its review should be focused on evaluating whether the clause is "geared towards achieving an unbiased decision by a neutral decisionmaker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. As written, the agreement to arbitrate is bilateral and requires both Petitioner and Respondent to arbitrate their respective claims against each other; such a mutual promise to arbitrate constitutes sufficient consideration to underpin an arbitration agreement. *O'Neil v. Hilton Head Hospital*, 115 F.3d 272, 275 (4th Cir. 1997) (*citing Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996)). Indeed, this Court has previously held this one fact was determinative in finding no unconscionability existed. *Simpson*, 373 S.C. at 24-25, 644 S.E.2d 663. After all, such an agreement to arbitrate did not unduly limit Respondent's right to a meaningful judicial proceeding. *See One Belle Hall*, 418 S.C. at 64-65, 791 S.E.2d at 294.

A review of several South Carolina decisions indicates just how far Petitioner is from meeting its burden on substantive unconscionability. In *Lucey*, the arbitration clause at issue provided that the only witnesses the parties could call in person at the arbitration hearing were the parties themselves. 401 S.C. at 142-43, 736 S.E.2d at 285. In other words, the counterpart to UniFirst in the *Lucey* case was making preliminary determinations on how the counterpart to Petitioner could present its case, and whom it could present in a potential arbitration hearing.

In *Munoz*, this Court noted that the arbitration clause allowed one party to seek foreclosure on its mortgage in court, but denied the homeowners to litigate any counterclaim in the foreclosure action, instead requiring the homeowners to pursue those claims in a separate arbitration proceeding. 343 S.C. at 542, 542 S.E.2d at 365. The Court found that the homeowners were not

deprived of a remedy, but instead had to seek that remedy through a different forum, and rejected the homeowners' attempts to invalidate the arbitration clause. *Id.*

In far contrast to the matter at bar, this Court recently found substantively unconscionable the provision in *Damico* that gave Lennar, the putative defendant in an arbitration proceeding, the sole election to include or exclude parties the plaintiff may have wanted to sue in the matter, and the clause precluded any legal or factual finding in an arbitration proceeding to be binding in any other arbitral or judicial proceeding unless there was mutuality of parties – a condition Lennar had the "sole election" to decide. *Damico v. Lennar Carolinas, LLC*, No. 2020-001048, 2022 WL 4231032 at *8 (Sept. 14, 2022).

Comparing these three cases with the instant case, a garden-variety arbitration clause under which the parties agree to a third-party trier of fact is not remotely unconscionable substantively. And at no point in the 5 years of this litigation has Petitioner asserted one fact that could give any could give any court sufficient cause to find substantive unconscionability in the arbitration clause, and nothing has changed in its most recent submission.

4. No Substantive Unconscionability in the Liquidated Damages Clause.

Undeterred, and in the absence of procedural or unconscionability in the arbitration clause, along with the absence of procedural unconscionability in the liquidated damages clause, Petitioner still attempts to claim there was substantive unconscionability in the liquidated damages clause, and that this unconscionability militates in favor of a finding of unconscionability for the arbitration clause. For the reasons stated above, Petitioner is wrong.

Additionally, with regard to the damages paragraph in the contract, the Flame Resistant Garment Agreement expressly states the provision is for "liquidated damages." While this designation is not necessarily conclusive of the issue of whether the sum specified in the contract

is liquidated damages or a penalty, the designation is indicative of the parties' intent and must be accepted as the true expression of their intention until Petitioner shows the provision is for a penalty. *Rental Uniform Service of Greenville, S.C., Inc. v. K & M Tool & Die, Inc.*, 292 S.C. 571, 573, 357 S.E.2d 722, 724 (Ct. App. 1987). Stated differently, it is Petitioner's burden contesting the characterization set forth in the Flame Resistant Garment Agreement to show that a specified sum is actually a penalty, and where there is no evidence that would enable the court to find the amount of damages anticipated by the parties, it cannot say the provision is a penalty by reason of the fact the amount is disproportionate to the actual damages. *DD Danmar, LLC v. SC LAUNCH!, Inc.*, 431 S.C. 9, 21-22, 846 S.E.2d 883, 889-90 (Ct. App. 2020).

Without engaging in substantial factual discussion outside of the trial court setting, it is worth noting that Petitioner's own argument belies the notion that the liquidated damages provision is disproportionate. On the one hand, Petitioner claims actual damages would hypothetically be recoverable by calculating UniFirst's weekly fee minus any expenses. Simultaneously, Petitioner claims the liquidated damages would therefore be a penalty. But the liquidated damages are calculated at fifty percent of the average weekly service amount, not one hundred percent, as Petitioner seems to have calculated. (R-027).

Further, the Agreement does not provide that liquidated damages are recoverable in addition to actual damages. Rather, the Agreement provides that liquidated damages are recoverable in addition to other amounts owed, which the Agreement identifies in two other instances: 1) amounts owed for outstanding accounts receivable; and 2) monies owed for unreturned or damaged merchandise. In other words, the Agreement as written calls for the recovery of three categories of damages, each separate and distinct: 1) outstanding accounts receivable for services already rendered; 2) unreturned or damaged merchandise for uniforms

Petitioner either failed to return when it terminated the Agreement or had damaged beyond repair; and 3) liquidated damages as a measure of UniFirst's lost profits as a result of Petitioner terminating the Agreement before the expiration of the then-current contractual term. *Id.*

In sum, there is not one term in either the arbitration clause or liquidated damages clause that would come close to the standard required to find substantive unconscionability. At a minimum, the Court of Appeals correctly found Petitioner had failed to meet its burden, and this Court should uphold that decision.

CONCLUSION

Based on the foregoing points and authorities, UniFirst Corporation respectfully requests the Court uphold in all respects the decision of the Court of Appeals, and require the parties to complete the arbitration proceeding that was commenced and has been pending since 2017, and enter such other and further relief as this Court deems just and appropriate.

Respectfully submitted,

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