

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

JUN 24 2014

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Thomas A. Russo, Circuit Court Judge

72618

Case No. 2013-CP-32-03007

Robert Jeff Sarokas, ..... Appellant,

v.

Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor, ..... Respondents,

**MOTION TO DISMISS**

Respondents, Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor, hereby move to dismiss the appeal filed by Appellant Robert Jeff Sarokas.

This is an appeal from the trial court's orders granting Respondents' motion to compel arbitration and, subsequently, denying Appellant's motion to reconsider, alter, or amend same. As further explained in Respondents' Rule 267(c)(2) memorandum, these interlocutory orders are not subject to an immediate appeal for the following reasons:

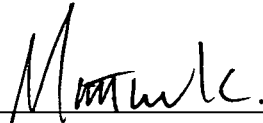
- (1) There is no statutory basis for an immediate appeal under S.C. Code Ann. §§ 14-3-330 and 14-8-200;

(2) The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, which applies here, precludes the appeal of an interlocutory order granting a motion to compel arbitration; and

(3) The South Carolina Uniform Arbitration Act (“SCUAA”), S.C. Code Ann. § 15-48-10, *et seq.*, § 15-48-200 only allows for an appeal from an order denying a motion to compel arbitration, not the appeal of an interlocutory order granting a motion to compel arbitration.

Accordingly, there are no grounds upon which Appellant may seek review of the underlying order denying Appellant’s motion to reconsider or the order granting Respondent’s motion to compel arbitration. This appeal should, therefore, be dismissed.

June 23, 2014



---

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ATTORNEYS FOR RESPONDENT,  
Cafe Enterprises, Inc., d/b/a FATZ  
and Joel Taylor

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
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Robert Jeff Sarokas, ..... Appellant,

v.

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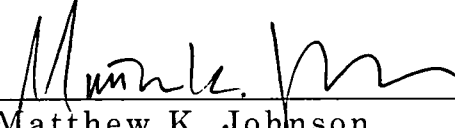
**PROOF OF SERVICE**

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I certify that I have served the Motion to Dismiss of Respondents Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor on Appellant Jeff Robert Sarokas by sending to his attorney of record a copy of the same via first class mail, properly addressed, postage prepaid at the following address:

Nancy A. Lipski, Esq.  
NANCY A. LIPSKI, LLC  
101 Martel Drive  
Lexington, SC 29072

June 23, 2014

  
\_\_\_\_\_  
Matthew K. Johnson  
S.C. Bar No. 12284

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

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Case No. 2013-CP-32-03007

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Robert Jeff Sarokas, .....Appellant,

v.

Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor, ..... Respondents,

---

**MEMORANDUM IN SUPPORT  
OF MOTION TO DISMISS**

---

June 23, 2014

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QUESTION PRESENTED

WHETHER A TRIAL COURT'S ORDER GRANTING A MOTION TO COMPEL ARBITRATION AND THE DENIAL OF A RELATED MOTION TO RECONSIDER ITS DECISION ARE SUBJECT TO IMMEDIATE REVIEW BY THE COURT OF APPEALS?

## PROCEDURAL HISTORY

Appellant previously filed an action in the Lexington County Court of Common Pleas against Respondents arising out of the termination of his Operating Partner Employment Agreement (the "Agreement"). *See*, Complaint, **Exhibit 1**; Agreement, **Exhibit 2**. In short, the Complaint alleged the Agreement was wrongfully terminated. Respondents then filed a motion to compel arbitration. *See*, motion to compel arbitration, **Exhibit 3**. Appellants' motion to compel arbitration was predicated upon the applicability of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.* The trial court granted the motion to compel arbitration. *See*, order granting motion to compel arbitration, **Exhibit 4**. Appellant then filed a motion to reconsider, which the trial court denied. *See*, motion to reconsider, **Exhibit 5**; order denying motion to reconsider, **Exhibit 6**. Rather than instituting arbitration proceedings, Appellant filed this Notice of Appeal.

## ARGUMENT

- 1. The underlying orders are not immediately appealable under S.C. Code Ann. §§ 14-3-330 and 14-8-200.**

An appellate court may determine the question of appealability of a decision from a lower court as a matter of law. S.C. Code Ann. § 14-3-330 (creating appellate jurisdiction in cases at law); S.C. Code Ann. § 14-8-200(a) (setting forth the appellate jurisdiction of the Court of Appeals). Neither S.C. Code Ann. §§ 14-3-330 nor 14-8-200(a) confer the right to appeal here.

Under South Carolina law, matters may only be heard on appeal if they involve the merits of a case, final judgments, or orders affecting a substantial right when such order acts to determine the action and prevents further appeal, grants/refuses a new trial, or strikes all or part of an answer or any pleading. § 14-3-330(1)–(3). In this instance, the trial court’s order granting the motion to compel arbitration and the order denying the motion for reconsideration thereof do not involve the merits of the underlying claims, are not a final judgment, and do not affect a substantial right for which Appellant had no further recourse—full adjudication of his purported claims through arbitration was still available.

Title 14, Chapter 8 of the S.C. Code, which governs this Court of Appeals, provides no further basis for an immediate appeal. Section 14-8-200 governs jurisdiction of the Court of Appeals, which is no greater than that of the Supreme Court as outlined in S.C. Code Ann. § 14-3-330 above. Indeed, the Court of Appeals’ jurisdiction is more limited than that of the Supreme Court. *See*, S.C. Code Ann. § 14-8-200(b).

Accordingly, there is no statutory basis for appealability under S.C. Code Ann. §§ 14-3-330 or 14-8-200.

**2. The underlying orders are not immediately appealable under the FAA.**

The underlying arbitration agreement was enforced pursuant to § 3 of the FAA. The FAA precludes the appeal of an order granting a motion to compel arbitration at this time.

Section 16 of the FAA governs when a party may appeal, *inter alia*, orders granting or denying motions to compel arbitration. *See* 9 U.S.C. § 16; *see also Stedor Enterprises, Ltd. v. Armtex, Inc.*, 947 F.2d 727, 729 (4th Cir. 1991) (Section 16 governs appeals from district court orders in cases involving arbitration). Section 16 states “an appeal may not be taken from an interlocutory order . . . directing arbitration to proceed under [9 U.S.C. § 4],” 9 U.S.C. § 16(b)(3)(emphasis added). Indeed, § 16(b) provides that, except as provided in 28 U.S.C. § 1292(b), an appeal may not be taken from an interlocutory order favoring arbitration over litigation until after the arbitration has proceeded to a final award. *Pisgah Contractors, Inc. v. Rosen*, 117 F.3d 133, 135 (4th Cir. 1997). *See also, Stedor Enters.*, 947 F.2d at 730. As such, because the orders on appeal in this case directed arbitration to proceed, § 16 precludes their immediate appeal.

Not only does the FAA preclude an immediate appeal of orders compelling arbitration, the provisions in § 16 allowing for an immediate appeal are otherwise inapplicable. In *Pisgah Contractors*, 117 F.3d 133, 135, the Fourth Circuit attempted to “determine whether [it had] jurisdiction to hear [the] appeal under § 16.” In that context, the court acknowledged that § 16(a) provides an appeal may be taken from “any order favoring litigation over arbitration, including orders refusing to compel arbitration.” *Pisgah Contractors*, 117 F.3d at 135 (emphasis added), *citing* 9 U.S.C. § 16(a)(1), and

*Stedor Enters.*, 947 F.2d at 730. In this case, the opposite context is present—the trial court appropriately favored arbitration over litigation.

The Fourth Circuit also noted that § 16(a) allows for appeals from “a final decision with respect to an arbitration.” *Pisgah Contractors*, 117 F.3d at 135, *citing* 9 U.S.C. § 16(a)(3). The decision here was not final—it simply required Appellant to pursue available remedies at arbitration rather than litigation.

Accordingly, the Fourth Circuit concluded that “while we have jurisdiction to consider an appeal from an interlocutory order denying a motion to compel arbitration, we generally do not have jurisdiction over an interlocutory order compelling arbitration or directing arbitration to proceed.” *Pisgah Contractors*, 117 F.3d at 135 (emphasis added). *See also*, *Stedor Enters.*, 947 F.2d at 730; *Jeske v. Brooks*, 875 F.2d 71, 73 (4th Cir. 1989).

The Fourth Circuit in *Pisgah Contractors* did consider what it identified as the “two possible exceptions or bases for jurisdiction.” *Pisgah Contractors*, 117 F.3d at 135. These included only two circumstances: “(1) when the district court’s order represents ‘a final decision with respect to an arbitration,’ 9 U.S.C. § 16(a)(3); and (2) when 28 U.S.C. § 1292(b) provides the means for an interlocutory appeal, *id.* § 16(b).” *Pisgah Contractors*, 117 F.3d at 136; *Jeske*, 875 F.2d at 73–4; *Humphrey v. Prudential Sec., Inc.*, 4 F.3d 313, 317 (4th Cir. 1993).

As explained above, neither of the underlying orders at issue were a “final decision” pursuant to § 16(a)(3)—both allowed Appellant to seek full relief through arbitration.

The second exception involving Section 1292(b) is likewise inapplicable. Section 1292(b) allows for interlocutory appeals where: (1) the order involves a controlling question of law as to which there is substantial ground for difference of opinion; and (2) where an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b). *See, Pisgah Contractors*, 117 F.3d at 136. Even then, the court of appeals would have *discretion* to permit an interlocutory appeal—*i.e.* the Court of Appeals would not be required to allow an immediate appeal. *Id.* In this instance, § 1292(b) is inapplicable because the trial court did not affirmatively state in writing that these qualifications are met. Section 1292(b) (“When a district judge, in making in a civil action an order not otherwise appealable under this section, ... he shall so state in writing in such order.”) (emphasis added).

Accordingly, Section 16 of the FAA generally precludes appeals from interlocutory orders directing arbitration to proceed and no exceptions to this rule apply.

**3. The underlying orders are not immediately appealable under the SCUAA.**

Finally, although the FAA applies, the orders granting Respondent’s motion to compel arbitration and denying Appellant’s motion to reconsider

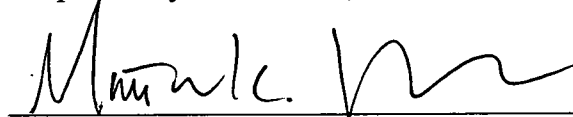
are not immediately appealable under the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. § 15-48-10, *et seq.*

Pursuant to § 15-48-200, an appeal may be taken from an order denying a motion to compel arbitration under the SCUAA. § 15-48-200(a)(1). The SCUAA does not directly address orders granting motions to compel arbitration. As the court explained in *Heffner v. Destiny, Inc.*, 471 S.E.2d 135 (S.C. 1995), "[b]y application of the rule of statutory construction '*expression unius est exclusion alterius*' (the mention of one is the exclusion of the other), all other orders related to arbitration are not immediately appealable." *Heffner*, 471 S.E.2d at 136, *citing Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker*, 320 S.E.2d 458 (S.C. App. 1984). Accordingly, there are no grounds upon which Appellant may seek review of the underlying order denying Appellant's motion to reconsider or the order granting Respondent's motion to compel arbitration.

### CONCLUSION

For the foregoing reasons, the Court should dismiss Appellant's appeal because the orders granting Respondent's motion to compel arbitration and denying Appellant's motion to reconsider are not subject to immediate appeal under any state or federal statutory or common law.

Respectfully submitted,



Matthew K. Johnson, Esq.

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ATTORNEYS FOR RESPONDENT,  
Cafe Enterprises, Inc., d/b/a FATZ  
and Joel Taylor

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
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Thomas A. Russo, Circuit Court Judge

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Case No. 2013-CP-32-03007

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Robert Jeff Sarokas, ..... Appellant,

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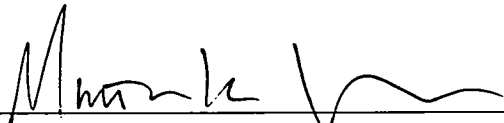
**PROOF OF SERVICE**

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I certify that I have served the Memorandum in Support of Motion to Dismiss of Respondents Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor on Appellant Jeff Robert Sarokas by sending to his attorney of record a copy of the same via first class mail, properly addressed, postage prepaid at the following address:

Nancy A. Lipski, Esq.  
NANCY A. LIPSKI, LLC  
101 Martel Drive  
Lexington, SC 29072

June 23, 2014

  
\_\_\_\_\_  
Matthew K. Johnson  
S.C. Bar No. 12284

*Jeff Robert Sarokas, Appellant*  
*v.*  
*Cafe Enterprises, Inc., d/b/a FATZ*  
*and Joel Taylor, Respondents*

Case No. 2013-CP-32-03007

**Memorandum in  
Support of Motion to  
Dismiss**

**Exhibit 1**

Jeff Robert Sarokas,

Plaintiff(s)

vs.

Cafe Enterprises, Inc. d/b/a FATZ and Joel Taylor,

Defendant(s)

Submitted By: Nancy A. Lipski
Address: 101 Martel Drive
Lexington, SC 29072

SC Bar #: 12542
Telephone #: 803-951-2772
Fax #: 803-957-3666
Other:
E-mail: nlipski@lipskidlawfirm.com

CIVIL ACTION COVERSHEET
2013-CP-32-
KATH A. GARRIG
CLERK OF COURT
LEXINGTON, SC

COPY

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.
NON-JURY TRIAL demanded in complaint.
This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts: Employment (120)
Torts - Professional Malpractice: Medical Malpractice (220)
Torts - Personal Injury: Assault/Slander/Libel (300)
Real Property: Claim & Delivery (400)
Inmate Petitions: Habeas Corpus (530)
Administrative Law/Relief: Reinstatement of License (800)
Judgments/Settlements: Death Settlement (700)
Appeals: Arbitration (900)
Special/Complex/Other: Environmental (600)
Pharmaceuticals (630)
Unfair Trade Practices (640)
Out-of-State Depositions (650)
Motion to Quash Subpoena in an Out-of-County Action (660)
Sexual Predator (510)

2013 CP 320300;

Submitting Party Signature:

[Handwritten Signature]

Date: August 28, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

**SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.**

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

) IN THE COURT OF COMMON PLEAS  
) FOR THE ELEVENTH JUDICIAL CIRCUIT  
)

Jeff Robert Sarokas,  
Plaintiff,

) Case No.: 2013-CP-32-

v.

Cafe Enterprises, Inc. d/b/a FATZ and  
Joel Taylor,

Defendants.

)  
) **SUMMONS**  
)  
) **(JURY TRIAL DEMANDED)**  
)

COPY

2013CP3203007

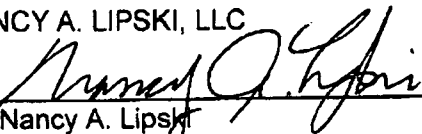
TO: THE DEFENDANTS NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber's attorney, Nancy A. Lipski, at her office located at 101 Martel Drive, Lexington, South Carolina 29072 within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

IF YOU FAIL TO APPEAR AND DEFEND, JUDGMENT BY DEFAULT WILL BE RENDERED AGAINST YOU FOR THE RELIEF DEMANDED IN THE COMPLAINT.

NANCY A. LIPSKI, LLC

By:



Nancy A. Lipski  
101 Martel Drive  
Lexington, South Carolina 29072  
Phone: (803) 951-2772  
Fax: (803) 957-3666  
Attorney for Plaintiff

Lexington, South Carolina

August 28, 2013.

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

COPY

Jeff Robert Sarokas,

2013 CP 32-007

Case No.: 2013-CP-32-

Plaintiff,

ESTHER C. BRIDGES  
CLERK OF COURT

COMPLAINT

v.

(JURY TRIAL DEMANDED)

Cafe Enterprises, Inc. d/b/a FATZ and  
Joel Taylor,

Defendants.

2013CP3203007

Plaintiff complains of Defendants as follows:

1. This complaint arises under the Laws of the State of South Carolina.
2. It is an action for all relief available to Plaintiff against Defendant Cafe Enterprises, Inc. d/b/a FATZ and Joel Taylor.

**FACTS**

3. Plaintiff is a citizen and resident of Lexington County, South Carolina.
4. Cafe Enterprises, Inc. is a corporation that is incorporated in the State of South Carolina. It is a business that operates restaurants. It is the parent company of FATZ restaurants. It owns and operates the FATZ restaurant in Lexington, South Carolina.
5. At all relevant times, Joel Taylor ("Taylor") was, and he continues to be, a citizen and resident of Lexington County, South Carolina.
6. At all relevant times, Plaintiff was employed with Cafe Enterprises, Inc. and worked in the FATZ restaurant in Lexington, South Carolina.
7. This Court has jurisdiction and venue is proper in Lexington County.

8. Plaintiff was employed from around March of 2007 until August 30, 2010.

9. During Plaintiff's employment, FATZ was called FATZ Cafe. Plaintiff refers to it in his Complaint as FATZ.

10. Plaintiff began as a Service Manager. He worked in that position from March 2007 through approximately November 2007. During this time, his supervisor was Brian Hood ("Hood"). Hood was the Operating Partner of the Lexington FATZ restaurant.

11. During Plaintiff's interview with Hood, and subsequent thereto, Hood made clear to Plaintiff that he was going to be promoted to Area Partner and that he was searching for his replacement as Operating Partner of the Lexington FATZ.

12. Hood explained the process of becoming an Operating Partner and believed that Plaintiff was well-qualified. All Operating Partners were contract employees who were hired for a term of 5 years and enjoyed the benefits of operating their own restaurants as if they were owners because they each had to invest \$25,000.00 into the company as part of their written employment contract. That contract was renewable.

13. Hood was promoted to Area Manager in or around December 2007.

14. In or around December 2007, Plaintiff became General Manager of the Lexington FATZ and worked in that position through March 30, 2008.

15. Joel Taylor ("Taylor") was the Area Partner who supervised all of the Operating Partners in Area 3 which covered the Lexington FATZ restaurant and 12 other restaurants.

16. When Hood was promoted, the Lexington FATZ did not have an Operating Partner until Plaintiff became it effective March 31, 2008.

17. Until then, Taylor supervised Plaintiff directly. After Plaintiff become Operating Partner of the Lexington FATZ restaurant, Taylor continued to supervise him.

18. Taylor gave Plaintiff only one (1) formal Performance Appraisal throughout his employment. It was for the period January 2007 through December 2007. At the time of the appraisal, Plaintiff was a General Manager and had only been in that position about one (1) month. In that appraisal, Taylor noted areas where Plaintiff could improve his performance.

19. Plaintiff became the Operating Partner of the Lexington FATZ pursuant to a written contract that he and Cafe Enterprises, Inc. entered into effective March 31, 2008 entitled Operating Partner Employment Agreement ("OPE Agreement"). Cafe Enterprises, Inc. was referred to in the contract as the "Corporation". The contract term was for 5 years from the effective date of March 31, 2008 until March 31, 2013. The contract term could be extended as set forth in the OPE Agreement.

20. Pursuant to the OPE Agreement, Plaintiff's base compensation ("salary") throughout its term would be at least \$52,000.00 per year and no less.

21. Pursuant to the OPE Agreement, Plaintiff was to receive monthly incentive pay (called the monthly "Incentive Amount") if his restaurant's "Profit After Controllables" was at least 15%. The Incentive Amount increased incrementally above 15%. If it was earned, it was to be paid on or before the sixtieth (60) day following the end of each month.

22. Pursuant to the OPE Agreement, Plaintiff was required to pay, and did pay, Twenty-Five Thousand and no/100 (\$25,000.00) Dollars to Cafe Enterprises, Inc. as consideration for becoming an Operating Partner.

23. In addition to serving as Operating Partner of the Lexington FATZ, the OPE Agreement also required Plaintiff to fulfill all general manager duties.

24. Also, the OPE Agreement required Plaintiff, as part of his duties, to exert his best efforts in carrying out the general purposes and affairs of Cafe Enterprises, Inc.

25. The general purposes and affairs of Cafe Enterprises, Inc. are set forth in written policies, including the Operating Partner Program, as well as Operating Principles.

26. At all relevant times, Operating Principle #6 stated: We recruit and staff our organization with the best people and take care of the people who take care of our guests.

27. At all relevant times, Operating Principle #7 stated: We will build a team who cares about each other and has a desire for our company to grow successfully.

28. At all relevant times, Operating Principle #8 stated: We will work together as a team – one for all and all for one.

29. At all relevant times, Operating Principle #12 stated: We will not lose sight of the fact that we work for the associates who operate our restaurants. They don't work for us.

30. At all relevant times, Cafe Enterprises, Inc. publicly stated on its website that its Operating Partner Program, among other things, is:

a. designed to attract and retain experienced restaurant leaders and to promote pride in ownership right at the front lines; and that

b. if accepted, the candidate will sign a renewable agreement as well as make a financial investment...and enjoy the autonomy and pride of operating a great restaurant concept dedicated to hospitality and exceptional guest service (Emphasis added).

31. Therefore, according to the general purposes and affairs of Cafe Enterprises, Inc., operating partners were to operate autonomously as part of their duties under the OPE Agreement.

32. On August 30, 2008, Taylor and Steven R. Corson ("Corson") terminated Plaintiff's employment.

33. Corson is, and at all relevant times was, Vice President of Human Resources for Cafe Enterprises, Inc.

34. When Plaintiff became Operating Partner of the Lexington FATZ, it was approximately 3 months following Taylor's formal Performance Appraisal referenced in paragraph 18 and only about 4 months after Plaintiff became General Manager.

35. Taylor recommended Plaintiff as Operating Partner of the Lexington FATZ restaurant even though Taylor perceived shortcomings in Plaintiff's performance which he noted in Plaintiff's Performance Appraisal.

36. Cafe Enterprises, Inc. accepted Plaintiff as an Operating Partner and cashed Plaintiff's \$25,000.00 check which he had to pay as consideration for becoming an Operating Partner.

37. Besides trusting and relying upon Taylor, Plaintiff trusted and relied upon representations of Cafe Enterprises, Inc. Those representations are set forth in the written policies of the company as well as its Operating Principles and Operating Partner Program which are also set forth on the company's website.

38. When Plaintiff became Operating Partner in 2008, it was around the beginning of what has come to be known as the "Great Recession".

39. Almost immediately after becoming an Operating Partner, a restaurant employee began sabotaging Plaintiff by complaining to Taylor about him.

40. Taylor scrutinized Plaintiff's job performance because of the allegations being lodged against him by at least one (1) restaurant employee.

41. Taylor threatened to have Plaintiff's OPE Agreement terminated or revoked.

42. Plaintiff complied with Taylor's requests and addressed issues laid out by Taylor. Plaintiff demonstrated that the problem was the other employee.

43. Taylor transferred the other employee to a different restaurant. Upon information and belief, that person worked for the company only a short period of time thereafter before leaving it.

44. Nonetheless, Taylor continued scrutinizing Plaintiff's job performance and that of his employees.

45. Plaintiff's employees often complained to Plaintiff that Taylor was micro-managing them and that they, Plaintiff, and the Lexington FATZ restaurant were being held to higher standards and greater levels of accountability than those in other restaurants in Taylor's area.

46. In September 2008, about 5 months after becoming Operating Partner, Plaintiff received a 60 Day Improvement Plan. It stated that it was not intended as punishment and implied that it was applicable to all Operating Partners because the "current plan" was not working.

47. Upon information and belief, Taylor was actively involved in the development of the "current plan" that was not working.

48. Plaintiff's restaurant was profitable such that he received the Incentive Amount every month because his "Profit After Controllables" was at least 15% for the months of April, May, June, July, August, and September 2008.

49. In the aforementioned 60 day Improvement Plan, Plaintiff was advised that he had to develop his own plan for the Lexington FATZ restaurant and that it could not be Taylor's plan.

50. Plaintiff developed a plan which he implemented without any discipline being issued to him until approximately October 2009.

51. During this time, the Great Recession continued to impact business.

52. Plaintiff's restaurant was profitable such that he received the Incentive Amount for the months of October, November, and December 2008, as well as January, February, March, April, May, June, July, August, and September 2009 because his "Profit After Controllables" was at least 15%.

53. Taylor continued micro-managing Plaintiff and the Lexington FATZ restaurant that he was to operate autonomously per company policy and his OPE Agreement.

54. Taylor's micro-management was so excessive that Plaintiff believed that Taylor was harassing him.

55. Taylor's micro-management and conduct was supported by upper management of Cafe Enterprises, Inc. including Richie Cannon ("Cannon") who at all relevant times was Vice President of Operations and an officer of the Corporation.

56. Upon information and belief, Cannon and Taylor are very good friends.

57. Around October 2009, Cannon put Plaintiff on probation for 30 days. This was at the recommendation of Taylor.

58. Plaintiff successfully completed this probation.

59. During this time the Great Recession continued to impact business.

60. Plaintiff's restaurant was profitable such that he received the Incentive Amount for the months of October, November, and December 2009 because his "Profit After Controllables" was at least 15%.

61. In January 2010, Plaintiff met with Steve Bruce ("Bruce"), who then was President and CEO of Cafe Enterprises, Inc., and specifically addressed how Taylor was conducting a "witch hunt" by focusing on Plaintiff and his Lexington restaurant. Plaintiff pointed out how he was being subjected to harsher and more stringent standards than other Operating Partners and how the Lexington restaurant was being targeted for complaints. Plaintiff asked Bruce to conduct an investigation into the motives and actions of his supervisor, Taylor. Plaintiff believed, among other things, that Taylor's motives and actions were improper, inconsistent with, and / or in violation of the Operating Principles and other written policies of the company. Plaintiff believed that Taylor's motives and actions evidenced a personal vendetta against him.

62. Upon information and belief, the company did not conduct an investigation into Taylor.

63. Plaintiff was never advised of the results of any investigation into Taylor.

64. Plaintiff's restaurant was profitable such that he received the Incentive Amount for the month of January 2010 because his "Profit After Controllables" was at least 15%.

65. Around mid-February 2010, Cannon put Plaintiff on a 60 day probation that ended around April 16, 2010. This was at the recommendation of Taylor.

66. Taylor continued to micro-manage Plaintiff and his Lexington restaurant and required Plaintiff to hire another manager.

67. Plaintiff advised Taylor in an email that without Taylor approving his sales building initiatives, the Lexington FATZ restaurant could not sustain the current number of managers let alone the addition of a new one.

68. Nonetheless, Taylor insisted that Plaintiff add another manager and Plaintiff complied with Taylor's request.

69. Plaintiff successfully completed this probation.

70. Plaintiff's restaurant was profitable such that he received the Incentive Amount for the months of February and March 2010 because his "Profit After Controllables" was at least 15%.

71. Cannon and Taylor met with Plaintiff around April 16, 2010. Cannon congratulated Plaintiff for successfully completing this probation.

72. In that meeting, Cannon and Taylor presented Plaintiff with an 8 week Trend Performance Goal Setting that ended June 13, 2010. This was not disciplinary in nature.

73. Plaintiff's restaurant was profitable such that he received the Incentive Amount for the months of April, May, and June 2010 because his "Profit After Controllables" was at least 15%.

74. However, around June 16, 2010, Plaintiff advised Taylor in an email that the addition of the new manager was not returning the profitability that Taylor expected and that Plaintiff needed to reduce management by one (1).

75. Taylor forbid Plaintiff to reduce his management staff and implement the cut that Plaintiff thought was necessary to further increase his restaurant's profitability (and thereby increase his ability to earn more incentive pay under his OPE Agreement).

76. Cannon sent Plaintiff an email around June 17, 2010, supporting Taylor's decision and asked Plaintiff why he would criticize Taylor when he just came off of probation. In this email, Cannon reminded Plaintiff that he had the "privilege" of being an Operating Partner in the company. In this email, Cannon made no mention that this "privilege" cost Plaintiff \$25,000.00. Cannon expressed his opinion that Plaintiff's leadership at the Lexington restaurant was lacking.

77. Between June 2010 and August 30, 2010, Taylor's micro-management of Plaintiff and the Lexington FATZ restaurant escalated.

78. During this time, among other things, Taylor:

- a. required Plaintiff to submit all employee schedules (even his own) to Taylor for review and approval,
- b. inspected Plaintiff's restaurant during times that Plaintiff was not there to immediately verify or respond to Taylor's criticisms,
- c. reversed discipline that Plaintiff administered to one (1) of his employees,
- e. reversed his position regarding Plaintiff reducing the number of his management staff and blamed Plaintiff for not foreseeing the need to reduce it,
- f. complained that Plaintiff was not getting his food costs within goals,
- g. criticized Plaintiff for not being in the restaurant during a weekend when the Dixie Youth World Series was in town even though Taylor knew of and approved

Plaintiff's work schedule which included Plaintiff taking that weekend off so that he could spend a few days with his family to celebrate his son's birthday.

79. During this time, Plaintiff complied with Taylor's directives, received emails from Taylor acknowledging that Plaintiff had many "positives", and received emails from Taylor wherein Taylor admitted that he was part of Plaintiff's team and responsible for its success (and thereby impliedly its failures).

80. During the weekend that Plaintiff was not in the restaurant so that he could celebrate his son's birthday and spend time with his family (which Taylor knew about and approved), Plaintiff still worked on marketing his restaurant's catering business.

81. During the weekend that Plaintiff was not in the restaurant so that he could celebrate his son's birthday and spend time with his family (which Taylor knew about and approved), Plaintiff advised his team to call him if they encountered any problems. No one called.

82. Plaintiff's restaurant was profitable such that he received the Incentive Amount for the month of July 2010 because his "Profit After Controllables" was at least 15%.

83. Yet in an email to Plaintiff around August 17, 2010, Taylor threatened to have him placed on another "plan". In that email, Taylor specifically promised to work with Plaintiff and/or his team to get them on track.

84. During this time, the Great Recession still impacted business.

85. Nonetheless, Plaintiff's Lexington restaurant was performing acceptably (especially compared to other FATZ restaurants) and overall statistics were improving.

86. Statistics for Plaintiff's restaurant for the week ending August 29, 2010, showed that his net sales for August 2010 were up 11.42% from August 2009 with minimal to no advertising dollars spent at the restaurant level.

87. Statistics for Plaintiff's restaurant for 3<sup>rd</sup> Quarter 2010 showed that sales were up 9.02% from the same quarter in 2009.

88. Statistics for Plaintiff's restaurant for the month of August 2010 as well as 3<sup>rd</sup> Quarter 2010 showed that Plaintiff's restaurant outperformed the Company by 6.61% and 5.51% respectively.

89. Plaintiff's labor statistics through August 1, 2010 were better than most other restaurants, even though Taylor tied his hands.

90. Plaintiff's food cost statistics through August 1, 2010, were the second best in his area.

91. The week before Plaintiff was terminated, Plaintiff's food cost statistics were 1% better than the Company's.

92. Yet, Taylor, along with Corson, fired Plaintiff on August 30, 2010 for habitual neglect of the Operating Partners' duties under Item 11(e)(ii) on page 7 of the OPE Agreement.

93. According to the aforementioned Item 11(e)(ii), Plaintiff had thirty (30) days after written notice from the Corporation or its Board of Directors to remedy any deficiencies.

94. Besides the Board of Directors, Plaintiff understood that only officers of Cafe Enterprises, Inc. could issue the written notice referenced in paragraph 93.

95. Cannon, as Chief Operating Officer, was an officer of Cafe Enterprises, Inc. Plaintiff understood that he could issue the written notice referenced in paragraph 93.

96. The two (2) previous written notices that Plaintiff received (in October 2009 and around February 2010) were issued by Cannon.

97. Taylor was not an officer of Cafe Enterprises, Inc. Plaintiff understood that he could make a recommendation but could not issue the written notice referenced in paragraph 93.

98. Plaintiff did not receive any written notice as set forth in paragraph 93.

99. As a result of Plaintiff's termination, Plaintiff lost his base salary, incentive pay, benefits, the end of contract buy-out pursuant to Item 11(g) of the OPE Agreement, and the \$25,000.00 investment he paid. He lost the opportunity to operate a restaurant and all of the benefits, extrinsic and intrinsic, that went along with it. He suffered unemployment and then reduced employment opportunities because of the non-compete clause in his contract. He suffered sleepless nights and worry about no longer being able to provide for his family. He suffered other damages too.

100. Had Taylor and the company allowed Plaintiff to work throughout the rest of the term of his OPE Agreement, Plaintiff estimates that he would have earned at least \$294,140.00.

101. Plaintiff's restaurant was profitable such that he would have received the Incentive Amount for the month of August of 2010 because his "Profit After Controllables" was at least 15%.

102. However, pursuant to Item 11(e), any termination based thereunder (i.e. for just cause) provided for the forfeiture of any accrued but unpaid Incentive Amount.

103. Plaintiff was not paid his accrued Incentive Amount for the month of August of 2010.

**FOR A FIRST CAUSE OF ACTION**  
**(AS TO THE COMPANY)**

**(Breach of Contract)**

104. Plaintiff incorporates paragraphs 1 through 103 as if they were repeated verbatim.

105. The OPE Agreement was drafted by or on behalf of Cafe Enterprises, Inc.

106. The OPE Agreement is an employment contract. Pursuant to it, Cafe Enterprises, Inc. offered to employ Plaintiff as an Operating Partner for a term of 5 years under conditions set forth in it. The contract was renewable at the expiration of the term.

107. Plaintiff accepted the offer of employment.

108. Both parties executed the contract.

109. Plaintiff paid, and Cafe Enterprises, Inc. cashed, Plaintiff's check for \$25,000.00 which was the consideration for the contract and the financial investment by Plaintiff in the Company.

110. The OPE Agreement, in Item 14, provides that it shall in all respects be subject to, and governed by, the laws of the State of South Carolina.

111. The OPE Agreement, in Item 15, provides that the invalidity or unenforceability of any provision shall not in any way affect the validity or enforceability of any other provision and the OPE Agreement shall be construed in all respects as if the invalid or unenforceable provision had never been in it.

112. The OPE Agreement, in Item 11(e) contains an arbitration provision that is invalid or unenforceable. Among other things, it is not mutual. It only provides for

arbitration if Plaintiff disputes the Company's determination that he was terminated for Just Cause. It does not require arbitration in any other circumstance or under any other provision or Item of the Agreement. Moreover, the OPE Agreement itself states that it is in all respects governed by South Carolina law. Pursuant to § 15-48-10 S.C Code of Laws, 1976, as amended, agreements to arbitrate cannot be made a condition of employment. Also, pursuant to § 15-48-10 S.C. Code of Laws, 1976, as amended (South Carolina's Uniform Arbitration Act), all contracts that contain an arbitration clause must contain a notice to that effect which must be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract. Unless the contract contains this notice, then it is not subject to arbitration. The OPE Agreement did not contain such notice. These are some of the reasons why the arbitration provision is invalid and / or unenforceable.

113. Though the arbitration provision is invalid and/or unenforceable, it does not void the entire OPE Agreement pursuant to Item 15.

114. Cafe Enterprises, Inc. breached the OPE Agreement because it did not comply with the thirty (30) day written notice requirement of Item 11(e)(ii).

115. Cafe Enterprises, Inc. breached the OPE Agreement because it did not have just cause to terminate Plaintiff.

116. Alternatively, upon information and belief, Cafe Enterprises, Inc. had a handbook with a written disciplinary procedure with which the company had to comply before terminating an employee. The language in the policy is mandatory in nature. Plaintiff had notice of the policy.

117. There was no disclaimer in the handbook or on the policy that complied with the requirements of South Carolina law.

118. Therefore, the handbook or policy constitutes a contract.

119. The Company breached the contract because it failed to follow the mandatory procedure set forth in it before terminating Plaintiff.

120. As a result, Plaintiff suffered damages as set forth in paragraph 99. The Company is liable to Plaintiff for them and for such other damages to which he may be entitled, including pre-and post-judgment interest.

**FOR A SECOND CAUSE OF ACTION**  
**(AS TO THE COMPANY)**

**(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

121. Plaintiff incorporates paragraphs 1 through 120 as if they were repeated verbatim.

122. Except as set forth above, the OPE Agreement constituted a valid contract between Plaintiff and Cafe Enterprises, Inc. The handbook disciplinary procedure policy constituted a valid contract between Plaintiff and Cafe Enterprises, Inc. Each contract contained the implied covenant of good faith and fair dealing.

123. Therefore, Cafe Enterprises, Inc. impliedly covenanted to refrain from doing anything to impair the rights of Plaintiff under the respective contracts.

124. Cafe Enterprises, Inc. knew about the notice requirements contained in Item 11(e)(ii) of the OPE Agreement with which it had to comply before terminating Plaintiff. It knew about the progressive disciplinary procedure with which it had to comply before terminating Plaintiff. It knew that it did not have just cause to terminate Plaintiff given the fact that the performance of Plaintiff's restaurant was much improved from the previous

year and exceeded the performance of other restaurants and even the Company in many ways for 3<sup>rd</sup> Quarter 2010 and particularly for August 2010 (respectively the quarter and month during which he was terminated).

125. Consequently, Cafe Enterprises, Inc. did not have a good faith belief that it had sufficient good cause to terminate Plaintiff or that his conduct was serious enough to justify termination. The company intentionally, unreasonably, and in bad faith breached the implied covenant of good faith and fair dealing and withheld and / or denied benefits due to Plaintiff under the contracts. They included but were not limited to compensation, Incentive Amounts, and a total or partial refund of his \$25,000.00 investment which would have been payable under other Items of the OPE Agreement if Plaintiff had not been terminated for just cause.

126. As a direct and proximate result of the conduct of Cafe Enterprises, Inc. Plaintiff sustained substantial compensable losses including lost compensation and other benefits and consequential damages, and attorney's fees, expert fees, and costs. The conduct of Cafe Enterprises, Inc. caused Plaintiff to engage legal counsel. Also, the actions of the company were willful, wanton and/or in reckless disregard for Plaintiff's rights and Plaintiff is entitled to punitive damages against it as well as such other damages to which he may be entitled, including pre-and post-judgment interest.

**FOR A THIRD CAUSE OF ACTION**  
**(AS TO THE COMPANY)**

**(Breach of Contract Accompanied by a Fraudulent Act)**

127. Plaintiff incorporates paragraphs 1 through 126 as if they were repeated verbatim.

128. Except as set forth above, the OPE Agreement constituted a valid contract between Plaintiff and Cafe Enterprises, Inc. The handbook disciplinary procedure policy constituted a valid contract between Plaintiff and Cafe Enterprises, Inc. Cafe Enterprises, Inc. breached the OPE Agreement and/or the handbook disciplinary procedure policy.

129. Cafe Enterprises, Inc. entered into the OPE Agreement with Plaintiff when he only had about 4 months experience as General Manager of a FATZ restaurant.

130. It willingly accepted Plaintiff's \$25,000.00.

131. Plaintiff successfully completed the 2 probationary periods it placed Plaintiff on.

132. It knew that it did not have just cause to terminate Plaintiff given the fact that the performance of Plaintiff's restaurant was much improved from the previous year and exceeded the performance of other restaurants and even the Company in many ways for 3<sup>rd</sup> Quarter 2010 and particularly for August 2010 (respectively the quarter and month during which he was terminated).

133. It terminated Plaintiff pursuant to the just cause provision of the OPE Agreement thereby intending to defraud Plaintiff of the Incentive Amounts and/or a total or partial refund of his \$25,000.00 investment and/or other benefits that would have been payable to him pursuant to the OPE Agreement if he had not been terminated for just cause.

134. It unlawfully appropriated at least the Incentive Amount that otherwise would have been payable to him for the month of August 2010 as well as all or a portion of his \$25,000.00 investment.

135. Consequently, Cafe Enterprises, Inc. acted with fraudulent intent relating to its breach of the contract and not merely to its making; and engaged in a dishonest act by unlawfully appropriating by design the August Incentive Amount as well as all or a portion of his \$25,000.00 investment.

136. As a direct and proximate result of the conduct of Cafe Enterprises, Inc. Plaintiff sustained substantial compensable losses including lost compensation and other benefits and actual and consequential damages, and attorney's fees, expert fees, and costs. The conduct of Cafe Enterprises, Inc. caused Plaintiff to engage legal counsel. Also, the actions of the company were willful, wanton and/or in reckless disregard for Plaintiff's rights and Plaintiff is entitled to punitive damages against it as well as such other damages to which he may be entitled, including pre-and post-judgment interest.

**FOR A FOURTH CAUSE OF ACTION**  
**(AS TO THE COMPANY)**

**(Payment of Wages)**

137. Plaintiff incorporates paragraphs 1 through 136 as if they were repeated verbatim.

138. Plaintiff is an employee and Cafe Enterprises, Inc. is an employer covered by § 41-10-10, *et seq.*, S.C. Code of Laws, 1976, as amended.

139. The OPE Agreement provided that if Plaintiff were terminated for any reason other than just cause, the Company would have paid him the Incentive Amount that he earned for August 2010 no later than October 30, 2010 (which would have been the sixtieth (60) day following the end of the month). This constitutes wages under § 41-10-10, *et seq.*, S.C. Code of Laws, 1976, as amended.

140. The OPE Agreement provided that if Plaintiff were terminated for a reason other than just cause, the company would have paid Plaintiff at least \$10,000.00 no later than November 28, 2010 (which would have been the ninetieth day following his termination). If this provision is valid under South Carolina law, payment of this amount constitutes wages under § 41-10-10, *et seq.*, S.C. Code of Laws, 1976, as amended. It appears that this is a liquidated damages provision which may not be valid because it affords Plaintiff an unreasonably low recovery which does not account for enough recoupment of his \$25,000.00 financial investment in the company.

141. Though the company maintained that Plaintiff was terminated for just cause, the facts do not support it.

142. Therefore, there was no bona fide dispute and Cafe Enterprises, Inc. owed Plaintiff this money or more and should have paid it all to him by the aforementioned dates.

143. The company has not paid any of it to Plaintiff.

144. The conduct of Cafe Enterprises, Inc. caused Plaintiff to engage legal counsel to recover his damages.

145. The company therefore owes Plaintiff the amounts due or more plus attorney's fees, expert fees, costs, and up to three (3) times any amounts that may be due as well as such other damages to which he may be entitled, including pre-and post-judgment interest.

**FOR A FIFTH CAUSE OF ACTION**  
**(AS TO THE COMPANY)**

**(Quantum Meruit / Unjust Enrichment)**

146. Plaintiff incorporates paragraphs 1 through 145 as if they were repeated verbatim.

147. Cafe Enterprises, Inc. received a benefit from Plaintiff who provided services to it as well as a \$25,000.00 financial investment.

148. The company realized the benefits conferred upon it by Plaintiff.

149. The company retained all of Plaintiff's August 2010 Incentive Amount as well as Plaintiff's \$25,000.00 investment under conditions that make it unjust to retain it

150. The company therefore owes Plaintiff the amounts due or more plus attorney's fees, expert fees, costs, and such other damages to which he may be entitled, including pre-and post-judgment interest.

**FOR A SIXTH CAUSE OF ACTION**  
**(AS TO TAYLOR)**

**(Tortious Interference with Contract)**

151. Plaintiff incorporates paragraphs 1 through 150 as if they were repeated verbatim.

152. Except as set forth above, the OPE Agreement constituted a valid contract between Plaintiff and Cafe Enterprises, Inc. The handbook disciplinary procedure policy constituted a valid contract between Plaintiff and Cafe Enterprises, Inc.

153. Taylor was not mentioned in the OPE Agreement.

154. Taylor was not a party to the OPE Agreement.

155. As consideration for the OPE Agreement, Plaintiff paid Cafe Enterprises, Inc. \$25,000.00.

156. Plaintiff did not pay any of that money to Taylor.

157. Cafe Enterprises, Inc. did not pay any of that money to Taylor.

158. As set forth in paragraph 30(b), Cafe Enterprises, Inc. publicly stated on its website that its Operating Partner Program required all Operating Partners to sign a renewable contract as well as to make a financial investment.

159. As set forth in paragraph 41, Taylor threatened to have Plaintiff's contract terminated or revoked.

160. Therefore, Taylor knew of the contract between Plaintiff and Cafe Enterprises, Inc. and intended to procure its breach.

161. As set forth in this Complaint, particularly paragraphs 44, 45, 53, 54, and 61, Taylor had a personal vendetta against Plaintiff.

162. Taylor did not act toward Plaintiff consistent with the general purposes and affairs of Cafe Enterprises, Inc., including its Operating Principles and other policies.

163. Taylor acted with improper motives and outside the scope of his employment in the way he treated Plaintiff and / or in the recommendations he made to Cannon regarding Plaintiff. Only an officer such as Cannon or the Board of Directors could discipline Plaintiff.

164. Plaintiff's restaurant was profitable. Plaintiff earned and was paid the Incentive Amount for each month he was an Operating Partner, except August 2010 because that was the month in which he was terminated. Though Plaintiff earned the Incentive Amount for August 2010, the company withheld it and did not pay it to him.

165. Plaintiff's restaurant would have been more profitable if Taylor had not required Plaintiff to increase and maintain his staff by one (1). These actions adversely impacted the Incentive Amount that Plaintiff earned.

166. Plaintiff's restaurant was much improved from the previous year and exceeded the performance of other restaurants and even the Company in many ways for 3<sup>rd</sup> Quarter 2010 and particularly for August 2010 (respectively the quarter and month during which he was terminated).

167. Therefore, the Company's breach of Plaintiff's OPE Agreement and Taylor's intentional procurement of that breach were not justified.

168. Taylor was a third party. He did not act in good faith. No qualified privilege pertained to him.

169. As a result, Plaintiff suffered damages as set forth in paragraph 99. The Company is liable to Plaintiff for them and for such other damages to which he may be entitled, including pre-and post-judgment interest.

**FOR A SEVENTH CAUSE OF ACTION**  
**(AS TO THE COMPANY)**

**(Negligent Misrepresentation)**

170. Plaintiff incorporates paragraphs 1 through 169 as if they were repeated verbatim.

171. Cafe Enterprises, Inc., through Taylor and other employees, made representations to Plaintiff as set forth in the written policies of the company as well as its Operating Principles and Operating Partner Program. Many of these representations were set forth on the company's website. They include the representations set forth in paragraphs 12 and 25 through 31.

172. These representations were material.

173. These representations were false.

174. Cafe Enterprises, Inc. had a pecuniary interest in making these statements to Plaintiff. It would receive from Plaintiff \$25,000.00 if he became an Operating Partner.

175. Cafe Enterprises, Inc. owed a duty of care to Plaintiff to see that truthful information was communicated to him. The company, its upper management, and its officers possessed special knowledge that would make it reasonable for Plaintiff to rely on them.

176. Cafe Enterprises, Inc. breached the duty by failing to exercise due care.

177. Plaintiff justifiably relied on the representations.

178. Plaintiff entered into the OPE Agreement with Defendant and paid \$25,000.00 to do so.

179. As a direct and proximate result of Plaintiff's reliance of the representations, Plaintiff suffered a pecuniary loss. When he was terminated on the basis of just cause, he lost Incentive Amounts that he earned, he lost his \$25,000.00 financial investment in the company, as well as those pecuniary and other losses set forth in paragraph 99.

180. As a direct and proximate result of the conduct of Cafe Enterprises, Inc. Plaintiff sustained substantial compensable losses including actual and consequential damages, and attorney's fees, expert fees, and costs. The conduct of Cafe Enterprises, Inc. caused Plaintiff to engage legal counsel. Also, the actions of the company were willful, wanton and/or in reckless disregard for Plaintiff's rights and Plaintiff is entitled to punitive damages against it as well as such other damages to which he may be entitled, including pre-and post-judgment interest.

WHEREFORE, Plaintiff prays that this Court grant him the following relief:

- a. As to his First Cause of Action, for actual, consequential, compensatory, and punitive damages and such other damages to which he may be entitled, including attorney's fees, expert fees, costs, and pre-and post-judgment interest.
- b. As to his Second Cause of Action, for actual, consequential, compensatory, and punitive damages and such other damages to which he may be entitled, including attorney's fees, expert fees, costs, and pre-and post-judgment interest.
- c. As to his Third Cause of Action for actual, consequential, compensatory, and punitive damages and such other damages to which he may be entitled, including attorney's fees, expert fees, costs, and pre-and post-judgment interest.
- d. As to his Fourth Cause of Action, the amounts due as wages, attorney's fees, expert fees, costs, and up to three (3) times any amounts that may be due and such other damages to which he may be entitled, including pre-and post-judgment interest.
- e. As to his Fifth Cause of Action, actual, consequential, compensatory, and punitive damages and such other damages to which he may be entitled, including attorney's fee, expert fees, costs, and pre-and post-judgment interest..
- f. As to his Sixth Cause of Action actual, consequential, compensatory, and punitive damages and such other damages to which he may be

entitled, including attorney's fees, expert fees, costs, and pre-and post-judgment interest.

FILED

g. As to his Seventh Cause of Action actual, consequential, compensatory, and punitive damages and such other damages to which he may be entitled, including attorney's fees, expert fees, costs, and pre-and post-judgment interest.

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BETH A. CARRICO

LEXINGTON, SC

h. For such other and further legal and equitable relief as this Court deems necessary, just, and proper.

NANCY A. LIPSKI, LLC

By: 

Nancy A. Lipski

101 Martel Drive

Lexington, South Carolina 29072

Phone: (803) 951-2772

Fax: (803) 957-3666

Attorney for Plaintiff

Lexington, South Carolina

August 28, 2013.

*Jeff Robert Sarokas, Appellant*  
*v.*  
*Cafe Enterprises, Inc., d/b/a FATZ*  
*and Joel Taylor, Respondents*

**Case No. 2013-CP-32-03007**

**Memorandum in  
Support of Motion to  
Dismiss**

**Exhibit 2**

STATE OF SOUTH CAROLINA )  
 )  
 )  
COUNTY OF GREENVILLE)

OPERATING PARTNER EMPLOYMENT  
AGREEMENT

OPERATING PARTNER EMPLOYMENT AGREEMENT, by and between Cafe Enterprises, Inc. ("Corporation"), a corporation incorporated under the laws of South Carolina with offices at 4324 Wade Hampton Boulevard, Suite B, Taylors, South Carolina 29687 and Jeff Robert Sarokas ("Operating Partner") of 544 Peachland Drive, Gilbert, South Carolina 29054, entered into this thirty first day of March 2008 (the "Effective Date").

WHEREAS, the Corporation is in the business of operating unique, distinctive full service restaurants featuring a specialized menu and full bar service;

WHEREAS, the Corporation has established an operating partner plan with certain individuals;

WHEREAS, the Corporation desires to enter into an operating partner relationship with the Operating Partner on certain terms and conditions as set forth herein; and

WHEREAS, the Operating Partner is willing to accept such relationship upon the terms and conditions set forth herein.

NOW, THEREFORE, for and in consideration of the within premises, the payment of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars to the Corporation by the Operating Partner, employment of Operating Partner by the Corporation, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto do hereby agree as follows:

1. Location. Corporation agrees to engage the Operating Partner and the

Operating Partner agrees to serve the Corporation as the operating partner of the Corporation's restaurant located or to be located at 5462 Augusta Road, Lexington, South Carolina 29072 ("the Restaurant").

2. Term. The term of the Agreement shall commence on the Effective Date and shall continue until the fifth (5th) anniversary thereof.

3. Duties. The Operating Partner agrees to exert his best efforts in carrying out the general purposes and affairs of the Corporation. The Operating Partner further agrees to serve as the Restaurant's operating partner, including, without limitation, fulfilling all general manager duties associated with the Restaurant, including without limitation, operating the Restaurant and being on site during meal shifts as required by the Corporation. Notwithstanding any contrary provision herein, the Operating Partner agrees to perform such services and duties as may be assigned to him from time to time by the Corporation and to devote his full time, energies and best efforts to the performance thereof.

4. Comprehensive Compensation. As compensation for the Operating Partner's services under this Agreement, the Corporation shall pay to the Operating Partner compensation in such amounts and upon such terms as provided in this Section.

(a) Base Compensation. The Corporation shall pay a gross salary as determined from time to time by the Corporation ("Base Compensation"); provided, however, the Operating Partner's annual Base Compensation during the term of this Agreement shall not be less than Fifty-Two Thousand and No/100 (\$52,000.00) Dollars payable in equal weekly installments.

(b) Incentive Amounts. The Corporation shall pay, pursuant to subsection (c) below and less any required federal, state or local withholding requirements, a monthly amount (as adjusted, the "Incentive Amount") equal to : (i) four (4.0%) percent of each

month's Profit After Controllables if Profit After Controllables is greater than or equal to fifteen (15%) percent but less than twenty (20%) percent; (ii) five (5.0%) percent of each month's Profit After Controllables if Profit After Controllables is greater than or equal to twenty (20%) percent but less than twenty-five (25%) percent; (iii) six (6.0%) percent of each month's Profit After Controllables if Profit After Controllables is greater than or equal to twenty-five (25%) percent but less than twenty-seven and one-half (27.5%) percent; and seven and one-half (7.5%) percent of each month's Profit After Controllables if Profit After Controllables is greater than twenty-seven and one-half (27.5%) percent; provided, however, that the Corporation shall not pay, and the Operating Partner shall not be entitled to, any such Incentive Amount for months during which the Profit After Controllables is not greater than or equal to fifteen (15%) percent of the Restaurant's Total Sales.

- (c) Incentive Amount Payment. The Incentive Amount shall be paid to the Operating Partner on or before the sixtieth (60th) day following the end of each month.
- (d) For purposes of this Agreement, Profit After Controllables and Total Sales shall have the meanings ascribed thereto on the Corporation's monthly operating statements. For the purpose of determining Profit After Controllables and Total Sales for any time period other than the Corporation's fiscal year, the Corporation shall determine Profits After Controllables and Total Sales and the Operating Partner shall not have the right to dispute or challenge such determination. Profit After Controllables and Total Sales for the Corporation's fiscal year shall be determined by the Corporation's independent accountants and such determination may be reviewed by the Operating Partner. Any discrepancy shall be corrected as soon as possible after detection.
- (e) The Operating Partner hereby acknowledges that the Incentive Amount in Subsection (b) above does not constitute an interest of any kind in the Corporation or any specific assets of the Corporation.

5. Life Insurance. The Corporation, in its discretion, may apply for and procure in its own name and for its own benefit, life insurance on the life of the Operating Partner in any amount or amounts considered advisable by the Corporation, and the Operating Partner shall submit to any medical or other examination, and shall execute and deliver any application or other

instrument in writing, reasonably necessary to effectuate such insurance.

6. Confidential Information. The Operating Partner acknowledges that he will have possession of or access to confidential information relating to the business of the Corporation including, but not limited to, writings, reports, manuals, processes, financial information, business plans, arrangements with suppliers, or other material embodying trade secrets, including, but not limited to, recipes and other information utilized by the Corporation in preparation of its products for its customers. Such information other than any information which is in the public domain through no act or omission of the Operating Partner or which he is authorized to disclose, is referred to collectively as the "Confidential Information". As a material inducement to the Corporation to enter into this Agreement, during his relationship by the Corporation and thereafter the Operating Partner agrees:

- (a) Not to divulge, disclose, use or exploit in any manner the Confidential Information for himself or any other person, partnership, association, corporation or other entity other than the Corporation;
- (b) Not to remove any Confidential Information, or any reproduction thereof, from the possession of control of the Corporation; and
- (c) To otherwise treat the Confidential Information in a confidential manner.

7. Non-Compete Agreement. In consideration of his operating partner relationship, his employment with the Corporation and his access to the Confidential Information, the Operating Partner agrees that, for so long as he is employed by the Corporation, and for a period of two (2) years thereafter, he will not, within a twenty-five (25) mile radius of any facility currently operated by the Corporation or any Affiliate of the Corporation as of the date of this Agreement or subsequently established or acquired by the Corporation, render his services as an employee, owner,

officer, director, executive, or consultant to any Family Dining Restaurant business similar to or competitive with that engaged in by the Corporation during the Operating Partner's employment by the Corporation. "Affiliate" shall mean, for the purposes of this Agreement, each entity that directly or indirectly through one or more intermediaries, owns or controls, or is controlled by or under common control with any other entity. For the purpose of this definition, "control" means the possession, directly or indirectly, of the power to direct or cause the direction of management and policies, whether through the ownership of voting securities, by contract or otherwise.

8. Remedies. The Operating Partner expressly agrees that the remedy at law for any breach or threatened breach by the Operating Partner of Sections 6 or 7 will be inadequate and that upon any such breach or threatened breach the Corporation shall be entitled as a matter of right to injunctive relief in any Court of competent jurisdiction, in equity or otherwise, to enforce a specific performance of the Operating Partner's obligations under these provisions without the necessity of proving the actual damages to the Corporation or the inadequacy of a legal remedy. The rights conferred upon the Corporation by the preceding sentence shall not be exclusive of but shall be in addition to, any other rights or remedies which the Corporation may have at law, in equity or otherwise.

9. Reasonableness of Restrictions. The Operating Partner has carefully read and considered the provisions of the above paragraphs and, having done so, agrees that the restrictions set forth in these Paragraphs, including but not limited to, the time period of restriction and the substance of the restriction are fair and reasonable and are reasonably required for the protection of the interests of the Corporation and its parent or subsidiary corporations, officers, directors, shareholders, and other Operating Partner. If a Court determines that the foregoing

restrictions are too broad or otherwise unreasonable under the applicable law, including with respect to time, geography, or scope of the Agreement, the Court is hereby requested and authorized by the parties hereto to revise the foregoing restriction to include the maximum restriction allowable under the applicable law. In the event that, notwithstanding the foregoing, any of the provisions of the above paragraphs shall be held to be invalid or unenforceable, the remaining provisions thereof shall nevertheless continue to be valid and enforceable as though the invalid or unenforceable parts had not been included therein. In the event that any provision of the above paragraphs relating to the time period and/or the areas of restriction and/or related aspects shall be declared by a court of competent jurisdiction to exceed the maximum restrictiveness such court deems reasonable and enforceable, the time period and/or areas of restriction and/or related aspects deemed reasonable and enforceable by the court shall become and thereafter be the maximum restriction in such regard, and the restriction shall remain enforceable to the fullest extent deemed reasonable by such court.

10. Hold Harmless - Indemnity. The Corporation shall indemnify the Operating Partner and hold him harmless for any acts or decisions made by him in good faith while performing services for the Corporation. The Corporation shall, in all events when the Operating Partner is in good faith performing services or acting on behalf of the Corporation, pay any and all judgments, attorney's fees and costs incurred by the Operating Partner in connection with the defense of any act, suite or proceeding, including any appeal, and including the cost of any in-court or out-of-court settlement arising out of or in connection with such acts or representations by the Operating Partner.

11. Termination. The Operating Partner's employment and this Agreement will be terminated:

- (a) By the Operating Partner's death, at which time the Corporation's Base Compensation and Incentive Amount obligations under paragraph 4 above will cease; provided, however, that if the Operating Partner's employment is terminated under this subsection (a), the Corporation shall pay within ninety (90) days following the Operating Partner's death, and the Operating Partner's estate shall accept as full settlement of any claims under this Agreement, the following: Twenty Thousand and No/100 (\$20,000.00) Dollars if employment is terminated during the first (1st) year following the execution of this Agreement; Fifteen Thousand and No/100 (\$15,000.00) Dollars if employment is terminated during the second (2nd) year following the execution of this Agreement; Ten Thousand and No/100 (\$10,000.00) Dollars if employment is terminated during the third (3rd) year following the execution of this Agreement; and Five Thousand and No/100 (\$5,000.00) Dollars if employment is terminated during the fourth (4th) year following the execution of this Agreement;
- (b) At the election of the Operating Partner upon one months advance notice, at which time the Corporation's obligation to pay Base Compensation under paragraph 4 above will cease and the Operating Partner shall forfeit any accrued but unpaid Incentive Amount;
- (c) By mutual agreement of the Operating Partner and the Corporation;
- (d) By the dissolution and liquidation of the Corporation (other than as part of a reorganization, merger, consolidation, or sale of all or substantially all of the assets of the Corporation whereby the business of the Corporation is continued), at which time the Corporation's Base Compensation and Incentive Amount obligations under paragraph 4 above will cease;
- (e) By the Corporation for Just Cause. For purposes of interpreting this Agreement "Just Cause" can include: (i) a conviction of or a plea of guilty or nolo contendere by the Operating Partner to a felony or misdemeanor involving fraud, embezzlement, theft, or dishonesty or other criminal conduct against the Corporation or against others outside the corporation; (ii) habitual neglect of the Operating Partner's duties or failure by the Operating Partner to perform or observe any obligation of such employment that is not remedied within thirty (30) days after written notice thereof from the Corporation or its Board of Directors; (iii) any material breach by the Operating Partner of this Agreement; (iv) any fraud, embezzlement, theft or dishonesty, any intentional misrepresentation of the revenues

or expenses at the Restaurant, including, without limitation, "padding" the payroll, allowing unauthorized complementary meals and altering actual inventory levels; or (v) any disloyal act designed to injure the Corporation's business. The above are provided by way of example but are not exclusive. Should the Operating Partner dispute whether he was terminated for Just Cause, then the Corporation and the Operating Partner shall enter immediately into binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association, the cost of which shall be borne by the non-prevailing party. A termination for Just Cause will result in the immediate cessation of all Base Compensation under paragraph 4 and the Operating Partner shall forfeit any accrued but unpaid Incentive Amount, but will not affect the Operating Partner's obligations hereunder;

- (f) At the option of the Corporation for a reason other than "Just Cause," at which time the Base Compensation and the Incentive Amount obligations shall terminate; provided, however, that if the Operating Partner's employment is terminated under this subsection (f), the Corporation shall pay within ninety (90) days following termination, and the Operating Partner shall accept as full settlement of any claims under this Agreement, the following: Twenty Thousand and No/100 (\$20,000.00) Dollars if employment is terminated during the first (1st) year following the execution of this Agreement; Fifteen Thousand and No/100 (\$15,000.00) Dollars if employment is terminated during the second (2nd) year following the execution of this Agreement; Ten Thousand and No/100 (\$10,000.00) Dollars if employment is terminated during the third (3rd) year following the execution of this Agreement; and Five Thousand and No/100 (\$5,000.00) Dollars if employment is terminated during the fourth (4th) year following the execution of this Agreement; or
- (g) At the end of the term of this Agreement, at which time the Base Compensation and the Incentive Amount obligations shall terminate and the Corporation shall pay, within ninety (90) days following the termination of this Agreement, an amount equal to ten and seven tenths (10.7%) percent of the average of the Restaurant's Profit After Controllables for the last two (2) years of this Agreement to the Operating Partner.

In the event of termination of this Agreement other than for death, the Operating Partner hereby agrees to resign from all positions held in the Corporation, including without limitation any position

as a director, officer, agent, trustee, or consultant of the Corporation or any affiliate of the Corporation.

12. Option upon Termination of Agreement. If this Agreement terminates as provided in paragraph 11(g) above, the parties may agree to continue the Operating Partner's employment as follows:

- (a) Operating Partner may continue to serve the Corporation as the operating partner of the Restaurant for an additional five (5) year term. In such case, Operating Partner shall execute the Operating Partner Employment Agreement then in use by the Corporation and shall pay Twelve Thousand Five Hundred and No/100 (\$12,500.00) Dollars as consideration for such Agreement. In such case, the Incentive Amount will remain constant and at the end of the additional five (5) year term, the Operating Partner will be eligible for an additional payment as provided in Paragraph 11(g) above; or
- (b) Operating Partner and the Corporation may agree that Operating Partner may continue to serve the corporation as the operating partner of a restaurant in a different location. In such case, Operating Partner shall execute the Operating Partner Employment Agreement then in use by the Corporation and shall pay any consideration then required by that Operating Partner Employment Agreement.

13. Waiver. A party's failure to insist on compliance or enforcement of any provision of this Agreement, shall not affect the validity or enforceability or constitute a waiver of future enforcement of that provision or of any other provision of this Agreement by that party or any other party.

14. Governing Law. This Agreement shall in all respects be subject to, and governed by, the laws of the State of South Carolina.

15. Severability. The invalidity or unenforceability of any provision in the Agreement shall not in any way affect the validity or enforceability of any other provision and this Agreement shall be construed in all respects as if such invalid or unenforceable provision had never

been in the Agreement.

16. Notice. Any and all notices required or permitted herein shall be deemed delivered if delivered personally or if mailed by registered or certified mail to the Corporation at its principal place of business and to the Operating Partner at the address hereinafter set forth following the Operating Partner's signature, or at such other address or addresses as either party may hereafter designate in writing to the other.

17. Assignment. This Agreement, together with any amendments hereto, shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors, assigns, heirs and personal representatives, except that the rights and benefits of the Operating Partner under this Agreement may not be assigned.

18. Amendments. This Agreement may be amended at any time by mutual consent of the parties hereto, with any such amendment to be invalid unless in writing, signed by the Corporation and the Operating Partner.

19. Entire Agreement. This Agreement contains the entire agreement and understanding by and between the Operating Partner and the Corporation with respect to the employment of Operating Partner, and no representations, promises, agreements, or understandings, written or oral, relating to the hiring of the Operating Partner by the Corporation not contained herein shall be of any force or effect.

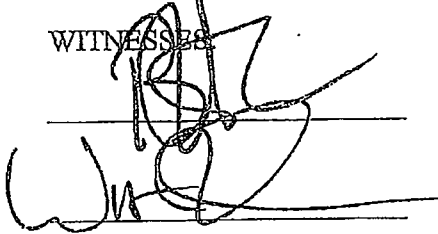
20. Burden and Benefit. This Agreement shall be binding upon, and shall inure to the benefit of, the Corporation and Operating Partner, and their respective heirs, personal and legal representatives, successors, and assigns.

21. Headings. The various headings in this Agreement are inserted for

convenience only and are not part of the Agreement.

IN WITNESS WHEREOF the Corporation has by its appropriate officer, signed and affixed its seal and the Operating Partner has signed and sealed this Agreement the date and year above written.

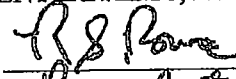
WITNESSES



Two handwritten signatures are present over two horizontal lines. The first signature is a large, stylized scribble. The second signature is a smaller, more legible scribble.

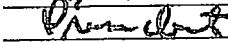
CAFE ENTERPRISES, INC.

BY:



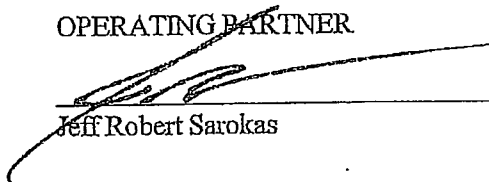
A handwritten signature in cursive script, appearing to read "R. J. Ponce".

ITS:



A handwritten signature in cursive script, appearing to read "President".

OPERATING PARTNER



A handwritten signature in cursive script, appearing to read "Jeff Robert Sarokas".

Jeff Robert Sarokas

JEFF ROBERT SAROKAS HM (803) 808-6514  
MICHELLE H SAROKAS  
544 Peachland Dr  
Gilbert, SC 29054

4031

04-17-08

67-770/632  
BRANCH 77444

Date

Pay to the  
Order of

*Cafe Enterprises, Inc.*

\$ 25,000

*Twenty Five Thousand & No/100*

Dollars



WACHOVIA  
Wachovia Bank, N.A.  
wachovia.com

For

*[Signature]*

⑆053207766⑆ 1002210617108⑈ 4031

*Jeff Robert Sarokas, Appellant*  
*v.*  
*Cafe Enterprises, Inc., d/b/a FATZ*  
*and Joel Taylor, Respondents*

**Case No. 2013-CP-32-03007**

**Memorandum in  
Support of Motion to  
Dismiss**

**Exhibit 3**

ORIGINAL

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-32-03007

Jeff Robert Sarokas,

Plaintiff,

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

vs.

Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor,

Defendant.

Plaintiff's Attorney: Nancy A. Lipski, Esq.  
NANCY A. LIPSKI, LLC,  
101 Martel Drive, Lexington, SC 29072  
Phone: 803.951.2772 Fax: 803.957.3666  
E-mail: [nlipski@lipskilawfirm.com](mailto:nlipski@lipskilawfirm.com)

Defendant's Attorney: Matthew K. Johnson, Esq.  
Ogletree Deakins, PO Box 2757, Greenville, SC 29602  
Phone: 864.271.1300 Fax: 864.235.8806  
E-mail: [matthew.johnson@ogletreedeakins.com](mailto:matthew.johnson@ogletreedeakins.com)

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Compel Arbitration

Estimated Time Needed: 30 minutes

Court Reporter Needed:  YES /  NO

SECTION II: Motion/Order Type

- Written motion attached
- Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for  Plaintiff /  Defendant

9.27.2013  
Date submitted

SECTION III: Motion Fee

- PAID - AMOUNT: \$25.00
- EXEMPT: (check reason)
  - Rule to Show Cause in Child or Spousal Support
  - Domestic Abuse or Abuse and Neglect
  - Indigent Status  State Agency v. Indigent Party
  - Sexually Violent Predator Act  Post-Conviction Relief
  - Motion for Stay in Bankruptcy
  - Motion for Publication  Motion for Execution (Rule 69, SCRCP)
  - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
- Name of Court Reporter: \_\_\_\_\_
- Other: \_\_\_\_\_

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
- Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

CLERK'S VERIFICATION

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

- MOTION FEE COLLECTED: \$ \_\_\_\_\_
- CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

W/H

**ORIGINAL**

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON )

Jeff Robert Sarokas,

Plaintiff,

vs.

Cafe Enterprises, Inc., d/b/a FATZ  
and Joel Taylor,

Defendants.

**NOTICE OF MOTION  
AND  
MOTION TO COMPEL  
ARBITRATION**

C.A. No. 2013-CP-32-03007

TO: PLAINTIFF/COUNTERCLAIM DEFENDANT, JEFF ROBERT SAROKAS,  
AND HIS ATTORNEY, NANCY A. LIPSKI, ESQ.

**YOU WILL PLEASE TAKE NOTICE** that Defendants, Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor will, ten (10) days from the date of service of this motion or at such time as the Court may determine, move the Court for an order pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, compelling arbitration of all claims asserted by Plaintiff Jeff Robert Sarokas against Defendants in the above captioned action.

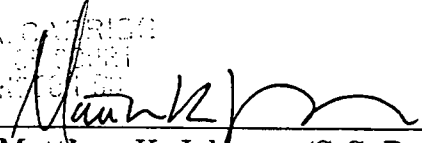
Defendants certify that it attempted, without success, to resolve the matters giving rise to this motion by e-mail to Plaintiffs' counsel, a copy of which is attached as **Exhibit A** to this motion, and that Plaintiff has refused through lack of response, Defendants' demand for arbitration.

This motion is further based on the applicable statutory and case law of the State of South Carolina and the United States of America, the South Carolina Rules of Civil Procedure, and any memoranda of law, affidavits or other evidence which

FILED

may be submitted prior to the hearing on this motion, as well as any oral argument that might be submitted by counsel at the hearing.

RECEIVED  
CLERK OF COURT  
LEWIS & CLARK



Matthew K. Johnson (S.C. Bar No. 12284)  
OGLETREE, DEAKINS, NASH, SMOAK  
& STEWART, P.C.

300 N. Main Street (29601)  
PO Box 2757

Greenville, South Carolina 29602

(864) 271-1300 (telephone)

(864) 235-8806 (facsimile)

[matthew.johnson@ogletreedeakins.com](mailto:matthew.johnson@ogletreedeakins.com)

Attorney for Defendants,  
Cafe Enterprises, Inc., d/b/a FATZ and Joel  
Taylor

September 27, 2013

FILED

**ORIGINAL**

STATE OF SOUTH CAROLINA )

2013 SEP 27 ) IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON )

BETH A. CARRICO

Jeff Robert Sarokas, )  
CLERK OF COURT )  
LEXINGTON, SC )

Plaintiff, )

vs. )

**CERTIFICATE OF SERVICE**

Cafe Enterprises, Inc., d/b/a FATZ )

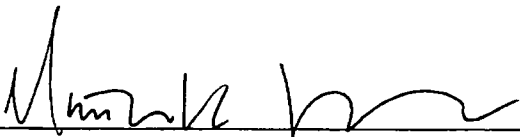
C.A. No. 2013-CP-32-03007

and Joel Taylor, )

Defendants. )

I hereby certify that on this 27<sup>th</sup> day of September, 2013, I have caused a true and correct copy of the foregoing Defendants/Counterclaim Plaintiff's **Notice of Motion and Motion to Compel Arbitration** to be served upon Plaintiff/Counterclaim Defendant through counsel, via U.S. Mail, First Class, with sufficient postage attached thereto, as follows:

Nancy A. Lipski, Esq.  
NANCY A. LIPSKI, LLC  
101 Martel Drive  
Lexington, SC 29072

  
\_\_\_\_\_  
Matthew K. Johnson (S.C. Bar No. 12284)

15995318.1

**Jeff Robert Sarokas, Plaintiff, vs. Cafe  
Enterprises, Inc., d/b/a FATZ and Joel Taylor**

**C.A. No. 2013-CP-32-03007**

**Exhibit A**

16070148.1

**Johnson, Matthew K.**

---

**From:** Johnson, Matthew K.  
**Sent:** Wednesday, September 18, 2013 10:09 AM  
**To:** 'Nancy Lipski'  
**Subject:** Cafe Enterprises/Sarokas - Arbitration

Nancy:

I've received the Complaint filed against Cafe Enterprises, Inc., and Joel Taylor. I will be representing both defendants. As you are aware based upon our prior discussions, we believe that the Operating Partner Employment Agreement requires that these issues be arbitrated. I'd like to ask that you consent to dismissing the lawsuit, or agreeing to stay the lawsuit pending arbitration. Based upon our prior discussions and the allegations of the Complaint, I am assuming you are not interested in arbitration, or that you simply believe the arbitration provision is unenforceable. Before I file our motion to compel arbitration, I wanted to confirm your position to satisfy our obligation under Rule 11(a) to attempt in good faith to resolve the matter before filing our motion. Thank you.

**Matthew K. Johnson | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**  
P.O. Box 2757 | Greenville, SC 29602 | Telephone: 864-240-8252 | Fax: 864-235-8806  
[matthew.johnson@ogletreedeakins.com](mailto:matthew.johnson@ogletreedeakins.com) | [www.ogletreedeakins.com](http://www.ogletreedeakins.com)

*Jeff Robert Sarokas, Appellant*  
*v.*  
*Cafe Enterprises, Inc., d/b/a FATZ*  
*and Joel Taylor, Respondents*

**Case No. 2013-CP-32-03007**

**Memorandum in  
Support of Motion to  
Dismiss**

**Exhibit 4**

STATE OF SOUTH CAROLINA  
COUNTY OF Lexington  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 13 CP- 3007

Jeff R. Sarokas

Cafe Enterprises et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRCP;  Rule 41(a), SCRCP (Vol. Nonsuit);  Rule 43(k), SCRCP (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRCP;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk :

Order Granting Motion to Compel

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 3rd day of Feb, 2011 and a copy mailed first class or placed in the appropriate attorney's box on this 3rd day of Feb, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Nancy Lipski

Matthew K. Johnson \*

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Ben Carnaghi  
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1:

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Lined area for additional information regarding the decision by the court.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

FILED IN THE COURT OF COMMON PLEAS

2014 JAN 17 P 2:46

Jeff Robert Sarokas,

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
COMPEL ARBITRATION AND  
DENYING PLAINTIFF'S  
MOTION TO DISMISS  
COUNTERCLAIMS**

vs.

Cafe Enterprises, Inc., d/b/a FATZ  
and Joel Taylor,

Defendants.

C.A. No. 2013-CP-32-03007

Before this Court are the Motion to Compel Arbitration filed by Defendants Cafe Enterprises, Inc., d/b/a FATZ ("FATZ") and Joel Taylor, dated September 27, 2013, and file-stamped October 1, 2013, and the Motion to Dismiss Counterclaims or Make More Definite Statements and Motion for Judgment on the Pleadings as to Alternative Defenses ("Motion to Dismiss Counterclaims"), filed by Plaintiff Jeff Robert Sarokas ("Sarokas"), dated October 28, 2013, and filed-stamped October 29, 2013. After reviewing the parties' motions, hearing oral argument on December 13, 2013, and considering the memoranda, supplemental memoranda, and exhibits filed by the parties with respect to the Motion to Compel Arbitration, the Court is of the opinion that the Motion to Compel should be GRANTED and the Motion to Dismiss Counterclaims should be DISMISSED, with the latter subject to consideration by the arbitrator.

The parties' Operating Partner Employment Agreement ("Agreement"), which governed Sarokas' employment as an Operative Partner by FATZ, contains

language governing termination and, in particular, termination for “Just Cause” in the instance of “habitual neglect of the Operating Partner’s duties . . . .” Agreement, §11(e)(ii), p. 7. Furthermore, with respect to disputes related to termination pursuant to “Just Cause,” the Agreement requires “binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association, the cost of which shall be borne by the non-prevailing party.” Agreement, § 11(e) (emphasis added). The plain meaning of § 11(e) and § 11(e)(ii) encompasses the present dispute between parties pertaining to the termination of the Agreement.

The arbitration provision at issue is enforceable pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 *et seq.* The FAA reflects “a liberal federal policy favoring arbitration agreements.” *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4<sup>th</sup> Cir. 2002). This presumption in favor of arbitration is equally apparent in our state court case law. “There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” *Herron v. Century BMW*, 693 S.E.2d 394, 397 (S.C. 2010) (emphasis added); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007); *Towles v. United Healthcare Corp.*, 524 S.E.2d 839, 842 (S.C. App. 1999).

In this case, arbitration pursuant to the FAA is appropriate because: (1) there is a dispute between the parties; (2) there is a written agreement that includes an arbitration provision which purports to cover the dispute; (3) there is a relationship

of the transaction at issue to interstate commerce; and (4) one party has refused to arbitrate the dispute. *Adkins*, 303 F.3d at 500–501.

At most, Sarokas challenged satisfaction of the third element—whether there is a relationship of the transaction at issue to interstate commerce. However, FATZ has shown that it operates casual dining restaurants in multiple states—South Carolina, North Carolina, Virginia, Tennessee, and Georgia. Affidavit of Johnny R. Cannon, ¶ 3. Further, FATZ purchases food and supplies pursuant to a Master Distributor Agreement with U.S. Foodservice’s Charlotte Division that are warehoused and distributed to FATZ from Charlotte, North Carolina. Cannon Aff. ¶¶ 5–8. Furthermore, FATZ has shown it regularly attracted guests from outside the state of South Carolina. Cannon Aff. ¶¶ 9 & 10. Even absent these evidentiary proofs, the “interstate” nature of restaurants has been recognized as a matter of law by the United Supreme Court in *Katzenbach v. McClung*, 379 U.S. 294 (1964). Because interstate commerce is evident, federal law pursuant to the FAA applies. *See also, Brown v. Ryan’s Family Steak Houses, Inc.*, 2004 U.S. Dist. LEXIS 27456 at \*7, fn. 3 (D.S.C. 2004) (South Carolina District Court held agreement to arbitrate between restaurant and waitress in North Charleston was sufficiently related to interstate commerce because, among others restaurant operated restaurants in multiple states and was involved in the interstate procurement of food.).

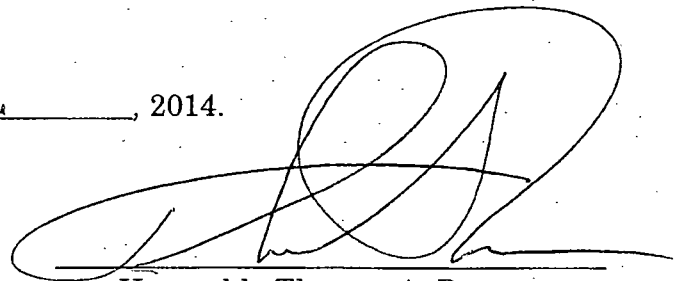
Further, the Agreement is not unconscionable or otherwise unenforceable. “[A] party may seek revocation of the contract under ‘such grounds as exist at law or in equity,’ including fraud, duress, and unconscionability.” *Simpson v. MSA of*

*Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (S.C. 2007). Unconscionability requires a finding of "absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 644 S.E.2d at 668. Here, there is insufficient evidence upon which to conclude the elements on unconscionability are present.

It is, therefore, ORDERED that the Motion to Compel Arbitration is GRANTED and, because all claims asserted by Plaintiff are proper for arbitration, this action be dismissed pursuant to *Choice Hotels Int'l, Inc., v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 710 (4th Cir. 2001), and all claims asserted by Plaintiff should be referred to arbitration consistent with the parties Agreement. In addition, Plaintiff's Motion to Dismiss Counterclaims is moot and, therefore, DISMISSED, subject to further consideration by the arbitrator, should arbitration be pursued further.

AND IT IS SO ORDERED.

Dated this 17<sup>th</sup> day of JAN, 2014.



The Honorable Thomas A. Russo

16854444.1

*Jeff Robert Sarokas, Appellant*  
*v.*  
*Cafe Enterprises, Inc., d/b/a FATZ*  
*and Joel Taylor, Respondents*

**Case No. 2013-CP-32-03007**

**Memorandum in  
Support of Motion to  
Dismiss**

**Exhibit 5**

STATE OF SOUTH CAROLINA )

COUNTY OF LEXINGTON )

Jeff Robert Sarokas, )

vs. )

Cafe Enterprises, Inc., d/b/a FATZ and Joel Taylor, )

Defendant. )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-32-03007

**MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET**

COPY

Plaintiff's Attorney:

Nancy A. Lipski, Esq., Bar No. \_\_\_\_\_

Address:

101 Martel Drive, Lexington, SC 29072

Phone: 803-951-2772 Fax 803-957-3666

E-mail: nlipski@lipskilawfirm.com Other: \_\_\_\_\_

Defendant's Attorney:

Matthew K. Johnson, Esq., Bar No. \_\_\_\_\_

Address:

PO Box 2757, Greenville, Sc 29602

Phone: 864-271-1300 Fax 864-235-8806

E-mail:

matthew.johnson@olgetreedeakins.com Other: \_\_\_\_\_

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
- FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
- PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Motion to Reconsider, Alter, or Amend Order Granting Defendants' Motion to Compel Arbitration and Denying Plaintiff's Motion to Dismiss Counterclaims

Estimated Time Needed: 30 mins

Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

Written motion attached

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for  Plaintiff /  Defendant

Date submitted \_\_\_\_\_

**SECTION III: Motion Fee**

PAID - AMOUNT: \$ 2500 (check # 2853)

EXEMPT:

(check reason)

Rule to Show Cause in Child or Spousal Support

Domestic Abuse or Abuse and Neglect

Indigent Status  State Agency v. Indigent Party

Sexually Violent Predator Act  Post-Conviction Relief

Motion for Stay in Bankruptcy

Motion for Publication  Motion for Execution (Rule 69, SCRCP)

Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_

Other: \_\_\_\_\_

**JUDGE'S SECTION**

Motion Fee to be paid upon filing of the attached order.

Other: \_\_\_\_\_

JUDGE CODE \_\_\_\_\_

Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

MOTION FEE COLLECTED: \$ \_\_\_\_\_

CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

**FILED** IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

2014 FEB 25 10 10 AM '14

Jeff Robert Sarokas,  
Plaintiff,

BETH A. CARROLL  
CLERK OF COURT  
LEXINGTON

Case No.: 2013-CP-32-03007

**COPY**

v.

Cafe Enterprises, Inc. d/b/a FATZ and  
Joel Taylor,  
Defendants.

**NOTICE OF MOTION AND MOTION  
TO RECONSIDER, ALTER, OR AMEND  
ORDER GRANTING DEFENDANTS'  
MOTION TO COMPEL ARBITRATION AND  
DENYING PLAINTIFF'S MOTION TO  
DISMISS COUNTERCLAIMS**

TO: MATTHEW K. JOHNSON, ESQ., ATTORNEY FOR DEFENDANTS:

YOU WILL PLEASE TAKE NOTICE THAT the Plaintiff, by and through his undersigned counsel, as soon as counsel may be heard, will move before the Honorable Thomas A. Russo, for an Order reconsidering, altering, or amending the Order Granting Defendants' Motion to Compel Arbitration and Denying Plaintiff's Motion to Dismiss Counterclaims ("Order") emanating from a hearing that was held in this case on December 13, 2013 in Lexington County Common Pleas Court. The grounds for this motion are:

1. A copy of the Order entered in this case (Exhibit A) is attached.
2. Plaintiff's counsel received written notice of the entry of it on Friday, February 14, 2014 when Defendants' counsel emailed her advising that he had received the executed Order.<sup>1</sup>
3. The Order did not address Defendants' failure to timely comply with Rule 6(d) of the South Carolina Rules of Civil Procedure ("SCRCP"). Plaintiff objected to

<sup>1</sup> Defendant's counsel emailed the Order to Plaintiff's counsel on Wednesday, February 19, 2014, pursuant to her request because she had not yet received it.

Defendants providing the Affidavit of Johnny R. Cannon and other Exhibits only 2 days before the hearing, though they were obtained almost 3 months before the hearing. Plaintiff moved to strike them. It appears that the Court allowed them and considered them inasmuch as they provided the only information upon which the Court could base its decision. Without them, there would be no evidence in the record to support Defendants' position or the Court's Order. Compliance with Rule 6(b) SCRPC is mandatory by its plain language to ensure due process.

4. Arbitration is a matter of contract. The Order does not address the plain and unambiguous language contained in paragraph 14 on page 9 of the Operating Partner Employment Agreement ("OPEA") which states that "(t)his Agreement **shall in all respects** be subject to, and governed by, the laws of the State of South Carolina." (emphasis added). That includes the arbitration provision. The Court did not apply South Carolina law and instead applied federal law and by doing so erred and, in the process, reformed the parties' contract and deprived Plaintiff of the basis of his bargain. Instead of considering the Federal Arbitration Act ("FAA"), the Court instead should have considered the South Carolina Uniform Arbitration Act.<sup>2</sup>

5. Assuming arguendo, that federal law applies and analysis pursuant to the FAA is appropriate, the Court misapplied the law.<sup>3</sup> The Court, by applying a liberal

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<sup>2</sup> The Court may not use policy considerations as a substitute for the parties' agreement. *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 130 S.Ct. 2847, 2859, 177 L.Ed.2d 567 (2010).

<sup>3</sup> Consideration of the FAA is only permitted in this case because of *Southland Corp. v. Keating*, 465 U.S.1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984). *Southland* held that the FAA applied in state courts. As Justice Scalia and Justice Thomas stated in their dissents in *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), both would overrule *Southland* if presented the opportunity because they believe that the FAA should not be applied in state courts. They would only need 3 more Justices to join them. Based on recent decisions of the United States Supreme Court, those 3 Justices could be Justices Sotomayor, Kagan, and Ginsburg. This is a state court case that involves only state law claims. There are no federal claims.

federal policy favoring arbitration, focused on only 2 indicia of interstate commerce and prioritized a case (that did not deal with the FAA and hence is not applicable) which espoused that, as a matter of law, restaurants by their nature engage in interstate commerce. The Court erred by not analyzing the underlying transaction between Plaintiff and Defendants – i.e. Plaintiff's employment – as did the South Carolina courts in the employment cases set forth in Plaintiff's memoranda of law respectfully submitted on December 13, 2013 and January 3, 2014, and as the United States Supreme Court did in *Allied Bruce, infra*, at 276-277. Analyzed in that manner, Plaintiff's evidence overwhelmingly demonstrates that any nexus between his employment and interstate commerce was *de minimis*.

6. The Order does not address the evidence that Plaintiff presented which shows overwhelmingly that the arbitration clause was unconscionable or otherwise unenforceable. By its conclusion, the Court misapplied the law.

7. The Order does not address bifurcation. Defendants filed a Summons and lodged seven (7) counterclaims against Plaintiff in this state court action. By doing so, Defendants evidenced their intent and understanding that arbitration does not apply to all claims. For if it did, Defendants would and should have instituted arbitration proceedings against Plaintiff to vindicate their claims against him in that forum. Because they did not, their actions reflect agreement with and acquiescence to bifurcation as espoused in the case of *Wellman, Inc. v. Square D. Company*, 366 S.C. 61, 620 S.E.2d 86 (2005), and others.<sup>4</sup> Therefore, Plaintiff's claims against Joel Taylor

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<sup>4</sup> The presumption of arbitrability does not override the principle that a court may submit to arbitration only those disputes the parties have agreed to submit. *Granite Rock Co, supra*, at 2859.

(who was not a signatory to the contract) as well as Defendants' claims against Plaintiff must still be litigated.

8. The Order does not address the plain and unambiguous language of the arbitration clause (§ 11(e) of Plaintiff's OPEA) which required both the Corporation and Plaintiff to immediately enter into binding arbitration if Plaintiff disputed whether he was terminated for cause. Though other corporations may not have entered into an agreement imposing upon it the mandatory obligation to arbitrate Plaintiff's termination for cause, the Defendant Corporation in this case did. As the Court stated in *Wellman, supra*, an unambiguous contract must be enforced according to its terms, regardless of the wisdom or folly of those terms or the parties' failure to guard their rights. Therefore, Defendants are barred by the Statute of Limitations and/or waiver and/or laches because they filed their motion to compel arbitration 1 month after the 3 year statute of limitations period ended (Plaintiff was terminated for cause on August 30, 2010 and put Defendants on notice that day that he disputed the "for cause" basis for it; however, Defendants did not serve their motion until September 27, 2013).

9. The Court did not address Plaintiff's SCRPC 12(b) Motions. If the Court reconsiders, amends, or alters its Order and denies Defendants' Motion to Compel Arbitration, then the Court should also address Plaintiff's SCRPC 12(b) motions. This is especially so as Defendants have alleged 7 claims against Plaintiff but failed to plead any facts from which Plaintiff could determine if some or all of them, too, are time barred, among many other things set out by Plaintiff in his Motions served October 28, 2013 and filed October 29, 2013.

10. This motion is based on relevant case and statutory law, the evidence of record, the arguments of counsel, memoranda, and any other matters the Court may allow.

WHEREFORE, Plaintiff prays that this Court reconsider its Order and amend or alter it so as to:

a) deny Defendants' motion to compel arbitration in its entirety and grant Plaintiff's SCRPC 12(b) motions in their entirety; or alternatively,

b) deny Defendants' motion to compel arbitration partially and bifurcate the proceeding and allow Plaintiff's claims against Joel Taylor and the Defendants' claims against Plaintiff to continue to proceed in this state court litigation (so that the only matter to be arbitrated – based upon the OPEA and arbitration contract – is the "just cause" reason for Plaintiff's termination); and/or alternatively,

c) make findings of fact and conclusions of law or otherwise clarify its Order and address more specifically the matters discussed herein so that Plaintiff and/or any reviewing authority may more fully understand the basis for the Court's Order.

Plaintiff reserves the right to amend and/or supplement this motion.

NANCY A. LIPSKI, LLC

By: 

Nancy A. Lipski

101 Martel Drive

Lexington, South Carolina 29072

Phone: (803) 951-2772

Fax: (803) 957-3666

Attorney for Plaintiff

Lexington, South Carolina

February 24, 2014.

# EXHIBIT A

2

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON ) FILED IN THE COURT OF COMMON PLEAS

Jeff Robert Sarokas, 2014 JAN 17 P 2:46

Plaintiff, BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
COMPEL ARBITRATION AND  
DENYING PLAINTIFF'S  
MOTION TO DISMISS  
COUNTERCLAIMS**

vs.

Cafe Enterprises, Inc., d/b/a FATZ  
and Joel Taylor,

Defendants.

C.A. No. 2013-CP-32-03007

Before this Court are the Motion to Compel Arbitration filed by Defendants Cafe Enterprises, Inc., d/b/a FATZ ("FATZ") and Joel Taylor, dated September 27, 2013, and file-stamped October 1, 2013, and the Motion to Dismiss Counterclaims or Make More Definite Statements and Motion for Judgment on the Pleadings as to Alternative Defenses ("Motion to Dismiss Counterclaims"), filed by Plaintiff Jeff Robert Sarokas ("Sarokas"), dated October 28, 2013, and filed-stamped October 29, 2013. After reviewing the parties' motions, hearing oral argument on December 13, 2013, and considering the memoranda, supplemental memoranda, and exhibits filed by the parties with respect to the Motion to Compel Arbitration, the Court is of the opinion that the Motion to Compel should be GRANTED and the Motion to Dismiss Counterclaims should be DISMISSED, with the latter subject to consideration by the arbitrator.

The parties' Operating Partner Employment Agreement ("Agreement"), which governed Sarokas' employment as an Operative Partner by FATZ, contains

language governing termination and, in particular, termination for "Just Cause" in the instance of "habitual neglect of the Operating Partner's duties . . . ." Agreement, §11(e)(ii), p. 7. Furthermore, with respect to disputes related to termination pursuant to "Just Cause," the Agreement requires "binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association, the cost of which shall be borne by the non-prevailing party." Agreement, § 11(e) (emphasis added). The plain meaning of § 11(e) and § 11(e)(ii) encompasses the present dispute between parties pertaining to the termination of the Agreement.

The arbitration provision at issue is enforceable pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.* The FAA reflects "a liberal federal policy favoring arbitration agreements." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4<sup>th</sup> Cir. 2002). This presumption in favor of arbitration is equally apparent in our state court case law. "There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." *Herron v. Century BMW*, 693 S.E.2d 394, 397 (S.C. 2010) (emphasis added); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007); *Towles v. United Healthcare Corp.*, 524 S.E.2d 839, 842 (S.C. App. 1999).

In this case, arbitration pursuant to the FAA is appropriate because: (1) there is a dispute between the parties; (2) there is a written agreement that includes an arbitration provision which purports to cover the dispute; (3) there is a relationship

of the transaction at issue to interstate commerce; and (4) one party has refused to arbitrate the dispute. *Adkins*, 303 F.3d at 500–501.

At most, Sarokas challenged satisfaction of the third element—whether there is a relationship of the transaction at issue to interstate commerce. However, FATZ has shown that it operates casual dining restaurants in multiple states—South Carolina, North Carolina, Virginia, Tennessee, and Georgia. Affidavit of Johnny R. Cannon, ¶ 3. Further, FATZ purchases food and supplies pursuant to a Master Distributor Agreement with U.S. Foodservice's Charlotte Division that are warehoused and distributed to FATZ from Charlotte, North Carolina. Cannon Aff. ¶¶ 5–8. Furthermore, FATZ has shown it regularly attracted guests from outside the state of South Carolina. Cannon Aff. ¶¶ 9 & 10. Even absent these evidentiary proofs, the “interstate” nature of restaurants has been recognized as a matter of law by the United Supreme Court in *Katzenbach v. McClung*, 379 U.S. 294 (1964). Because interstate commerce is evident, federal law pursuant to the FAA applies. *See also, Brown v. Ryan's Family Steak Houses, Inc.*, 2004 U.S. Dist. LEXIS 27456 at \*7, fn. 3 (D.S.C. 2004) (South Carolina District Court held agreement to arbitrate between restaurant and waitress in North Charleston was sufficiently related to interstate commerce because, among others restaurant operated restaurants in multiple states and was involved in the interstate procurement of food.).

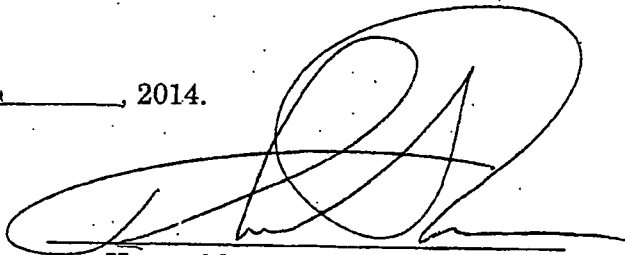
Further, the Agreement is not unconscionable or otherwise unenforceable. “[A] party may seek revocation of the contract under ‘such grounds as exist at law or in equity,’ including fraud, duress, and unconscionability.” *Simpson v. MSA of*

*Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (S.C. 2007). Unconscionability requires a finding of "absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 644 S.E.2d at 668. Here, there is insufficient evidence upon which to conclude the elements on unconscionability are present.

It is, therefore, ORDERED that the Motion to Compel Arbitration is GRANTED and, because all claims asserted by Plaintiff are proper for arbitration, this action be dismissed pursuant to *Choice Hotels Int'l, Inc., v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 710 (4th Cir. 2001), and all claims asserted by Plaintiff should be referred to arbitration consistent with the parties Agreement. In addition, Plaintiff's Motion to Dismiss Counterclaims is moot and, therefore, DISMISSED, subject to further consideration by the arbitrator, should arbitration be pursued further.

AND IT IS SO ORDERED.

Dated this 17<sup>th</sup> day of JAN, 2014.



The Honorable Thomas A. Russo

16854444.1

STATE OF SOUTH CAROLINA  
COUNTY OF Lexington  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 13 CP- 3007

Jeff R. Sarokas

Cafe Enterprises et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk :

Order Granting Motion to Compel

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 3rd day of Feb, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 3rd day of Feb, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Nancy Lipski

Matthew K. Johnson \*

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Ben Carny  
CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1:

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED

) IN THE COURT OF COMMON PLEAS  
) FOR THE ELEVENTH JUDICIAL CIRCUIT

Jeff Robert Sarokas,

2014 FEB 25

) Case No.: 2013-CP-32-03007

Plaintiff,

BETH A. GARRICK  
CLERK OF COURT

) CERTIFICATE OF SERVICE

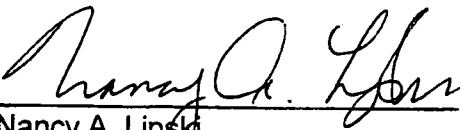
v.

Cafe Enterprises, Inc. d/b/a FATZ and  
Joel Taylor,

Defendants.

I, Nancy A. Lipski, Attorney for Plaintiff, hereby certify that I placed in the United States Mail, with the correct amount of postage affixed, and return address clearly marked, the following: NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER, OR AMEND ORDER GRANTING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DENYING PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS on this the 24th day of February, 2014.

ADDRESSEE: Matthew K. Johnson, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
Post Office Box 2757  
Greenville, South Carolina 29602

  
\_\_\_\_\_  
Nancy A. Lipski

*Jeff Robert Sarokas, Appellant*  
*v.*  
*Cafe Enterprises, Inc., d/b/a FATZ*  
*and Joel Taylor, Respondents*

Case No. 2013-CP-32-03007

**Memorandum in  
Support of Motion to  
Dismiss**

**Exhibit 6**

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF LEXINGTON  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2013CP3203007

Jeff Robert Sarokas

Cafe Enterprises Inc  
 Joel Taylor

FATZ

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:  
**ORDER INFORMATION**

This order  ends  does not end the case.  
 Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

4/30/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on 1st of May 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Nancy A. Lipski 101 Martel Dr. Lexington, SC 29072

Matthew Kinard Johnson ✓  
PO Box 2757 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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**ORIGINAL**

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON ) IN THE COURT OF COMMON PLEAS  
2014 APR 28 ) P 3 01

Jeff Robert Sarokas,

BETH A. O'NEAL  
CLERK OF COURT  
LEXINGTON, SC

Plaintiff,

vs.

Cafe Enterprises, Inc., d/b/a FATZ  
and Joel Taylor,

Defendants.

**ORDER DENYING PLAINTIFF'S  
MOTION TO RECONSIDER,  
ALTER, OR AMEND ORDER  
GRANTING DEFENDANTS'  
MOTION TO COMPEL  
ARBITRATION AND DENYING  
PLAINTIFF'S MOTION TO  
DISMISS COUNTERCLAIMS**

C.A. No. 2013-CP-32-03007

Before this Court is the Motion to Reconsider, Alter, or Amend ("Motion to Reconsider") filed by Plaintiff Jeff Robert Sarokas ("Sarokas"), dated February 24, 2014, and file-stamped February 25, 2014, with respect to the Order granting the Motion to Compel Arbitration filed by Defendants Cafe Enterprises, Inc., d/b/a FATZ ("FATZ") and Joel Taylor, and denying Sarokas' Motion to Dismiss Counterclaims, dated and filed-stamped January 17, 2014. Oral argument was heard on April 2, 2014.

After reviewing Sarokas' Motion to Reconsider and the parties' underlying motions, memoranda, supplemental memoranda, and exhibits, after hearing oral argument on the underlying motions on December 13, 2013, and after oral argument herein, the Court is of the opinion that the Motion to Reconsider should be DENIED.

The basis for the Court's decision to grant the underlying Motion to Compel Arbitration has been addressed in the underlying Order granting the Motion to

Compel Arbitration and is consistent with the memoranda, supplemental memoranda, affidavits, and related documents submitted by the parties therewith.

The South Carolina Supreme Court has clarified when a Rule 59(e) motion for reconsideration is appropriate. "A party may wish to file such a motion when she believes the Court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the Court to reconsider or rule on it. A party must file such motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dept. of Transportation*, 602 S.E.2d 772, 780 (S.C. 2004). In this case, plaintiff's arguments are in many respects consistent with those raised previously during the parties' oral argument and memoranda and supplemental memoranda with respect to the underlying motions. With respect to issues raised previously, the Court affirms its prior analysis on all issues.

However, the Court desires to be clear in its ruling and to ensure that all issues raised have been thoroughly addressed. Sarokas' counsel stressed at oral argument, and on pp. 1-2 of Sarokas' Motion for Reconsideration, the issue of timeliness of the Cannon affidavit pursuant to Rule 6(d), *SCRCP*. Although Defendants' affidavit was filed subsequent to the filing of the related Motion to Compel Arbitration, Sarokas submitted a lengthy responsive affidavit, numerous exhibits thereto, and a supplemental memoranda after oral argument, but never requested any additional time to submit further affidavits or argument. Moreover, Sarokas has not shown prejudice other than to argue that the underlying motion

was granted and that the affidavit at issue was accepted. At most, the Cannon affidavit provided additional information with respect to the question of "interstate commerce" under the Federal Arbitration Act ("FAA"), which element was also shown otherwise by Defendants given that the parties' underlying agreement for which Sarokas would serve as an Operating Partner was a restaurant, which inherently involves interstate commerce as shown by the United States Supreme Court in *Katzenbach v. McClung*, 379 U.S. 294 (U.S. 1964).

In addition, Sarokas' Motion to Reconsider at p. 2 suggests that paragraph 14 of the parties' Operating Partner Employment Agreement ("the Agreement") states it "shall in all respects be subject to, and governed by, the laws of the State of South Carolina." However, Sarokas also argues that the Agreement is unenforceable under South Carolina law. As argued in Defendants' supplemental memorandum in support of the underlying Motion to Compel Arbitration, South Carolina state law would require arbitration in this instance pursuant to the FAA since South Carolina law, as Sarokas argues, would render the arbitration agreement unenforceable. *See, Towles v. United Health Care Corp.*, 524 S.E.2d 839, 843 (S.C. App. 1999) ("because interstate commerce is involved, the FAA applies and displaces the South Carolina Uniform Arbitration Act"); *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 116 (S.C. 2001) ("[T]he FAA will pre-empt any state law that completely invalidates the parties' agreement to arbitrate").

In addition, Sarokas argues the underlying order granting the Motion to Compel Arbitration failed to address evidence that the arbitration provision was

unconscionable and unenforceable. This is inaccurate. The Court specifically found in the Order below that there was insufficient evidence of unconscionability. Sarokas' argued he had insufficient time to review the Agreement prior to execution. Still, this is only one allegation supporting an absence of meaningful choice. No other facts were presented and Sarokas presented no sufficient evidence of one-sided contract provisions or oppressive terms supporting unconscionability pursuant to *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (S.C. 2007).

Sarokas also argues at p. 3 of his Motion to Reconsider that his bifurcation argument was not addressed. Sarokas cites *Wellman, Inc. v. Square D Co.*, 620 S.E.2d 86 (S.C. 2005), and others as supporting law. However, the cases cited do not support Sarokas' position, which is essentially that Defendants are not entitled to arbitration because they did not institute arbitration and because they filed counterclaims to Sarokas' lawsuit. This position is not supported at law. Further, the allegations against Defendant Joel Taylor, the only non-signatory to the Agreement, arise out of the same facts and circumstances, Sarokas' termination and his claims against Defendant Cafe Enterprises, Inc. Judicial efficiency will be enhanced, particularly when counsel for Defendant Joel Taylor has stated his preference for resolving all related issues at arbitration.

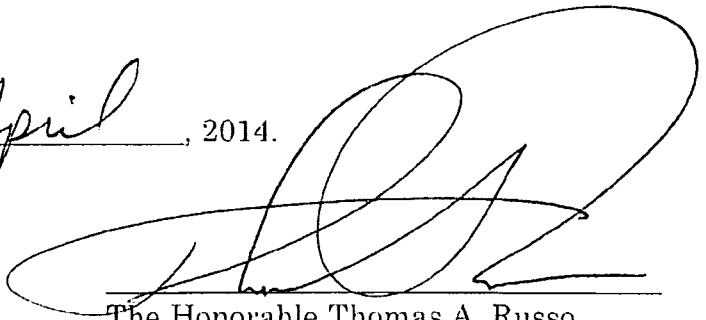
Finally, Sarokas argues at p. 4 of his Motion to Reconsider that paragraph 11 of the Agreement would require Defendant Cafe Enterprises, Inc., to immediately pursue binding arbitration in all instances where it has reason to believe a departing operating partner disputes his or her termination for cause. Sarokas'

theory suggests that Defendant Cafe Enterprises, Inc., should have immediately begun arbitration proceedings once it learned that Sarokas disputed his termination, which would presumably be the case in nearly all terminations. The Court does not read this paragraph as placing such a requirement upon Defendant Cafe Enterprises, Inc., not does Sarokas cite case law supporting such an interpretation. In context, this provision appears designed to confirm the parties' agreement to arbitrate, not to place a statute of limitations or other time limitations preventing Defendant Cafe Enterprises from seeking to enforce the parties' agreement to arbitrate in a subsequent lawsuit, as in this instance.

It is, therefore, ORDERED that the Motion to Reconsider is DENIED.

AND IT IS SO ORDERED.

Dated this 28<sup>th</sup> day of April, 2014.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

The Honorable Thomas A. Russo

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