THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-000468
Civil Action No. 2017-CP-04-09132

Hicks Unlimited, Inc.,.....Respondent.

v.

UniFirst Corporation, A Massachusetts Corporation.....Appellant,

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REPLY BRIEF OF APPELLANT

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I. Hicks Unlimited's Brief Confirms Its Failure to Satisfy Its Burden on Unconscionability.

In its submission, Hicks Unlimited doubles down on its previous assertions of unconscionability, and presents the argument as its primary attack in the brief. In reality, Hicks Unlimited's brief confirms this is not a case involving unconscionability, and the appellee failed to meet its burden at the trial court on the question of unconscionability.

As an initial matter, nowhere in Hicks Unlimited's brief does it argue the arbitration clause itself is unconscionable. This failure alone is fatal to its defense of unconscionability. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). Instead, Hicks Unlimited attacks the enforceability of the liquidated damages clause with the notion that since the liquidated damages clause and the arbitration clause comprise two paragraphs under one topic heading in the Flame Resistant Garment Agreement, they should be read in conjunction with one another. Respondent's Brief at 8 (citing *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016)). To support the argument, Hicks Unlimited also cited to this Court's opinion in *One Belle Hall Property Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016). But in *One Belle Hall*, this Court actually rejected the unconscionability defense and distinguished its facts from *Smith*, stating that because in *Smith* the various subparagraphs in the contract's warranty section – which included the arbitration clause – contained numerous cross-references to each other, it was appropriate to look at the entire warranty section instead of just the arbitration clause. 418 S.C. at 63, 791 S.E.2d at 293.

Here, as the respondent has identified in its brief, while the liquidated damages clause and arbitration clause are adjacent to one another in the contract, neither clause makes any

reference to one another. They comprise entirely different subject matters. Nothing contained in the liquidated damages clause informs the arbitration clause, and vice versa. There is no portion of the liquidated damages clause that must be read in conjunction with the arbitration clause for both to make sense, and vice versa. Most notably, the arbitration clause includes a choice-of-law clause that applies only to that clause, exclusive to every other provision in the contract. Ultimately, Hicks Unlimited is arguing that the alleged unenforceability of the liquidated damages clause renders the unrelated arbitration clause unenforceable. This is an argument *Smith* and subsequent South Carolina decisions have expressly rejected. *See Smith*, 790 S.E.2d at 4-5; *One Belle Hall*, 418 S.C. at 63, 791 S.E.2d at 293; *Payne v. Amazon.com, Inc.*, C.A. No. 2:17-cv-2313-PMD, 2018 WL 4489275, at *3 (D.S.C. Jul. 25, 2018). Thus, the Court should reject Hicks Unlimited's attempts to use the liquidated damages clause to invalidate the arbitration clause.

But even if this Court were to evaluate the enforceability of the liquidated damages clause as part of the determination of whether the arbitration clause is enforceable, Hicks Unlimited's argument depends on the following assertions: 1) Hicks Unlimited did not see the liquidated damages clause or arbitration clause on the reverse side of the Flame Resistant Garment Agreement; and 2) the liquidated damages clause represents a 50% bonus to UniFirst over and above what it could have received had the contract been fully performed. Each of these assertions is wrong.

It is long-recognized in this State that a party signing a contract is presumed to have read the document before doing so, and that a party cannot complain about misrepresentations in a contract if the truth can be revealed by reading the document. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 789 (1986). In this case, the contract at issue is a single-

paged document. The arbitration clause is located on the same page as the term and renewal clauses, of which Hicks Unlimited knew, and, accepting for the moment as true its allegations in its initial complaint, it attempted to enforce by notifying UniFirst it intended not to renew the contract. It further knew that its failure to properly notify UniFirst of its intent not to renew served to renew the contract for an additional 5-year period. The arbitration clause is only 8 paragraphs away from the tern and renewal clauses, and is in the same type and font size as the term and renewal clauses. Thus, the facts establish that not only should the Court impute to Hicks Unlimited knowledge of the arbitration clause, the Court should deem that Hicks Unlimited *actually knew* about the arbitration clause, given its knowledge of other provisions on the same page of the contract. Ultimately, Hicks Unlimited's argument boils down to contending that while it knew about certain terms on the reverse side of the contract, it did not know about others on the same page. Such an argument does not hold water.

Hicks Unlimited's argument regarding the liquidated damages clause constitutes a fundamental misunderstanding of the math, and of the business in which UniFirst operates. In its brief, Hicks Unlimited claims that the liquidated damages clause represents 50% more than what UniFirst would have received had the respondent complied with its contractual obligations. A plain reading of the clause in the Flame Resistant Garment Agreement reveals that the liquidated damages clause calls for UniFirst to receive damages equivalent of 50% of the average weekly service amount multiplied by the remaining weeks in the then-current term of the contract. In other words, the contract calls for UniFirst to receive half of what it would have received had the contract been fully performed.

Further, as to the calculation of liquidated damages, Hicks Unlimited fails to grasp that the Flame Resistant Garment Agreement is a requirements contract, recognized under South

Carolina law, and applied to this case, as an agreement whereby a seller has agreed to provide, and the buyer has agreed to buy exclusively from the seller, a quantity of goods and services to be measured by the buyer's actual needs during the period of the contract. *See, e.g., Stevens Aviation, Inc. v. DynCorp Int'l, LLC*, 407 S.C. 407, 756 S.E.2d 148 (2014).

Here, at the time the parties entered into the Flame Resistant Garment Agreement, the parties had determined Hicks Unlimited's uniform requirements, as they were identified on the front page of the contract. Because that determination had been made, UniFirst knew the amount of money it was going to have to spend as far as the initial purchase of the merchandise. UniFirst also knew, based on its experience in the industry, that during the life of the contract, the uniform requirements for Hicks Unlimited would fluctuate; the customer would, at certain points, hire new employees, which would require UniFirst to purchase new garments, and the customer's weekly service amount would correspondingly rise. In contrast, the customer would, at certain points, most likely also reduce its staff, and in effect, the customer weekly service amount would correspondingly decrease.

As a result, because of the uncertainty and lack of foreknowledge as to the nature of the customer's business for the following 5 years (and, as to this case, 10 years), it was impossible for UniFirst, at the time the Flame Resistant Garment Agreement was executed, to accurately estimate how much revenue and profit it would have realized had Hicks Unlimited lived up to its end of the bargain. This is why the liquidated damages clause is, in essence, set up as a sliding scale, based on the customer's needs at the time, and based on the extent to which the customer has performed under the terms of the contract. Thus, the provision is in proportion to the actual damages that might be sustained by reason of Hicks Unlimited's nonperformance, and is therefore enforceable. *Accord ERIE Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 713 S.E.2d

318 (Ct. App. 2011). At a minimum, the liquidated damages clause – presented in a form found in substantial part in every major uniform rental company's standard contract – is not so oppressive that no reasonable person would make such an offer, and no fair and honest person would accept them; thus, it is not unconscionable. *Accord Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001).

Lastly, as it pertains to the unconscionability argument, UniFirst reiterates that the arbitration clause provides for unbiased resolution by a neutral decision-maker in the event of a dispute, which, according to the cases cited by Hicks Unlimited in its own brief, is of paramount importance when determining whether unconscionability exists. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007); *One Belle Hall*, 418 S.C. at 64-65, 791 S.E.2d at 294. This was the final point the court in *One Belle Hall* used to find the trial court erred in finding the arbitration agreement unconscionable. *See id.* In this case, there is no set of facts Hicks Unlimited could use to establish, or even sufficiently allege, that either the arbitration clause or the liquidated damages clause is unconscionable. Therefore, the Court, as it did in *One Belle Hall*, should reject the unconscionability argument.

II. There Can Be No Dispute There Was an Enforceable Contract.

Hicks Unlimited next argues there was no enforceable agreement – and therefore no agreement to arbitrate – because UniFirst's Location Manager did not sign the document. It is well-settled law that it is not necessary for both parties to sign a contract where one party has signed it, and the other party has accepted and acted upon it. *Peddler, Inc. v. Rikard*, 266 S.C. 28, 32, 221 S.E.2d 115, 117 (1975). There is no dispute Hicks Unlimited signed the contract, and no dispute that UniFirst provided services under the contract for more than 10 years. In other words, UniFirst accepted the contract by performing under it. Thus, Hicks Unlimited

cannot rely on the lack of a signature by UniFirst's location manager as a way to escape the fact there was an enforceable contract, and, therefore, an agreement to arbitrate.

III. The Agreement Evidences and Implicates Interstate Commerce, Regardless of Whether Hicks Unlimited Contemplated It.

In its brief, Hicks Unlimited acknowledges the facts asserted in UniFirst's brief regarding the fact it is a Massachusetts corporation with a board of directors in Massachusetts governing operations in South Carolina, that payment was forwarded to Massachusetts for services rendered to Hicks Unlimited, and that the uniforms used in the Hicks Unlimited were purchased and shipped from Kentucky into South Carolina. Yet it states these facts do not implicate interstate commerce. For the reasons stated in its initial brief, UniFirst submits that Hicks Unlimited's argument simply does not comport with the case law in this State. *See, e.g., Blanton v. Stathos*, 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002). Again, in *Blanton*, this Court found interstate commerce was contemplated even though no actual interstate commerce had occurred at the time the parties' relationship ended, except for consultations between the architect and technicians; it was only contemplated that there would at some point in the future be purchases of materials and labor from states other than South Carolina. 351 S.C. at 541, 570 S.E.2d at 568-69.

Ultimately, it was Hicks Unlimited that bore the burden of proving the claims at issue were unsuitable for arbitration. *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 91 (2000). Any doubts concerning the scope of arbitrability should be resolved in favor of arbitration. *Carolina Care Plan, Inc. v. United HealthCare Svcs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). And unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, the court should order arbitration of the dispute. *Id.*

Applying the standard to this case, Hicks Unlimited fell far short of its burden. To the extent Hicks Unlimited would claim it met its burden based on the alleged noncompliance of the Flame Resistant Garment Agreement with the provisions of section 15-48-10(a) of the South Carolina Uniform Arbitration Act, the parties expressly agreed the FAA would apply, and the FAA preempts application of the state statute. *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364.

Ultimately, this is a case in which two companies entered into a contract, and performed under that contract, for more than 10 years, with each enjoying the benefits, and performing the burdens, applicable to each under the contract. Without cause or justification, Hicks Unlimited chose to terminate the contract. It is now attempting to employ hyper-technical means to claim the agreement under which it performed for more than 10 years never existed in the first place. Worse still, it is claiming the contract's terms were so onerous and oppressive in the contract's initial 5-year term that it reacted by re-upping for another 5-year term under the same provisions. The Court should view Hicks Unlimited's attacks for what they are: after-the-fact excuses for its prior breach of the contract. The Court should reject Hicks Unlimited's arguments, overrule the decision of the trial court, and require the parties to arbitrate their disputes, which will afford Hicks Unlimited exactly the same opportunity to assert its defenses as it would in court, except it will do so in the forum, and before the factfinder, it had agreed by contract would resolve the matter.

CONCLUSION

Based on the foregoing points and authorities, the appellant respectfully requests the Court reverse the trial court's orders denying the motion for summary judgment, direct the trial court to grant the motion to compel arbitration, and require the parties to complete the arbitration proceeding that was commenced and has been pending since 2017.

Respectfully submitted,

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October 29, 2018

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the foregoing Reply Brief of Appellant to Respondent's Initial Brief on October 29, 2018 on the above named Respondent by via electronic mail, addressed to counsel of record for Hicks Unlimited, Inc. as follows:

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October 29, 2018

VIA HAND DELIVERY
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Re: *Hicks Unlimited, Inc. v. UniFirst Corp., A Massachusetts Corporation*
Appellate Case No.: 2018-000468
Civil Action No.: 2017-CP-04-09132
TPGL File No.: 15057.110

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy the Reply Brief of Appellant and Proof of Service regarding the above-referenced matter. Please file the original document and return clocked copy to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

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