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

Civil Action No. 2017-CP-04-01932
Appellate Case No. 2018-000468

Hicks Unlimited, Inc., ... Respondent,

v.

UniFirst Corporation, a Massachusetts Corporation, ... Appellant.

RECORD ON APPEAL

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ATTORNEYS FOR APPELLANT

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
HICKS UNLIMITED, INC., PLAINTIFF, -VS- UNIFIRST CORPORATION, A MASSACHUSETTS CORPORATION, DEFENDANT.	ORDER CASE NUMBER: 2017-CP-04-01932

DATE OF TRIAL:	November 27, 2017
TRIAL JUDGE:	R. Scott Sprouse, Circuit Court Judge For the Tenth Judicial Circuit
ATTORNEY FOR PLAINTIFF:	James S. Eakes of the Law Firm of Allen and Eakes
ATTORNEY FOR DEFENDANT:	Jude C. Cooper, and Ian D. McVey
COURT REPORTER:	Donna Brady

This matter came to be heard before me on November 27, 2017, at 2:00 p.m. pursuant to the Plaintiff's motion to stay arbitration and the Defendant's motion to compel arbitration. The Plaintiff was present and represented by its attorney, James S. Eakes. The Defendant was represented by its attorney Jude C. Cooper, a non-resident attorney, admitted *pro hac vice*, in association with local counsel, Ian D. McVey.

A copy of the contract, which is the subject of this litigation, dated September 21, 2006, is attached to the Plaintiff's complaint and also to the Defendant's motion to compel arbitration. The Plaintiff alleges in its complaint that the contract had been terminated and that "... the terms of the contract are illegal, unconscionable, and unenforceable." The Plaintiff further maintains that the contract was never subject to mandatory arbitration because it did not comply with the mandatory notice provision contained in **S.C. Code Ann.** § 15-48-10(a) (2005).

The primary thrust of the Defendant's motion to compel arbitration and its answer is that the contract involved interstate commerce and is, therefore, subject to the Federal Arbitration Act ("FAA" or "Federal Act"), 94. U.S.C. §1 through §16, and not the South Carolina arbitration statute. The Defendant maintains that federal law prempts state law regarding the subject contract and its arbitration provision.

After carefully considering the arguments of the parties' respective attorneys, the memorandums of law, the legal authority submitted by the respective parties' attorneys, and based upon the pleadings and subject contract, the Court finds as follows:

The contract was entered into in Anderson County, South Carolina, on September 21, 2006, and is titled "Flame Resistant Garment Agreement". By the rental agreement, the Defendant was to provide the Plaintiff with fire retardant overalls for its employees at the Michelin Plant in Sandy Springs, South Carolina, in Anderson County. The Plaintiff is a corporation organized and existing pursuant to the laws of the State of South Carolina, having a place of business, and doing business in Anderson, South Carolina. The Defendant is a Massachusetts corporation authorized to do business and doing business in, South Carolina since 1984. It has a place of business in Greenville County, South Carolina. The Plaintiff always dealt with the Defendant's Greenville business location, and the fire retardant garments were always delivered from Greenville to the Plaintiff in Anderson County.

Based upon the pleadings, the contract, and the surrounding facts, the contract does not involve, nor does it implicate, interstate commerce. The contract was entered into in Anderson County, South Carolina, and the delivery of the flame resistant rental garments was in Anderson County from Defendant's business location in Greenville County. The contract is devoid of any basis for holding that the transaction between the parties involved or implicated interstate commerce. Interstate commerce is a necessary basis for application of the Federal Act (FAA)

and, therefore, the Federal Act does not supersede the State Act contained in S.C. Code Ann §15-48-10 *et seq.* (2005). See Timms v. Mary Greene, National Health Corp., L.P., Greenwood Nursing Homes, Inc., d/b/a Greenwood Health Care Center, 408 S.C. 371, 427 S.E.2d 642 (1993). The contract clearly does not comply with the notice provisions of S.C. Code Ann. §15-48-10 (a) (2005), the State Act.

Furthermore, The Plaintiff has alleged in its complaint that the contract is unconscionable and unenforceable and that the arbitration provision is, therefore, unconscionable and unenforceable. The Plaintiff should be able to raise whether or not it lacked a meaningful choice to arbitrate and that the arbitration provision was unconscionable and unenforceable on its face at a merits hearing. See Smith v. D.R. Horton, Inc., et al., 417 S.C. 42, 790 S.E.2d 1 (2016).

IT IS, THEREFORE, HEREBY, ORDERED, ADJUDGED, AND DECREED:

1.) That the Defendant's motion to compel arbitration is hereby denied; and

2.) That arbitration shall be stayed pending a merits hearing.

IT IS SO ORDERED.

Walhalla, South Carolina
January _____, 2018

_____
R. Scott Sprouse,
Circuit Court Judge for the
Tenth Judicial Circuit

Anderson Common Pleas

Case Caption:	Hicks Unlimited, Inc VS Unifirst Corporation, A Massachusetts Corporation
Case Number:	2017CP0401932
Type:	Order/Other

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
Hicks Unlimited, Inc., Plaintiff, v. Unifirst Corporation, A Massachusetts Corporation, Defendant.	Case No.: 2017-CP-04-1932 ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

DATE OF HEARING:	November 27, 2017
PRESIDING JUDGE:	The Hon. R. Scott Sprouse
ATTORNEY FOR PLAINTIFF:	James S. Eakes
ATTORNEYS FOR DEFENDANT:	Jude C. Cooper and Ian D. McVey
COURT REPORTER:	Donna Brady

THIS MATTER came before the Court pursuant to Plaintiff's Motion to Stay Arbitration and Defendant's Motion to Compel Arbitration. A heared was convened on November 27, 2017, at the Anderson County Courthouse. The Plaintiff was present and represented by James S. Eakes, Esquire. The Defendant was represented by Jude C. Cooper, Esquire, of Florida appearing *pro hac vice* in association with local counsel, Ian D. McVey, Esquire. The Plaintiff's Motion to Stay was granted and the Defendant's Motion to Compel was denied. The Defendant timely filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP and provided notice to the Court pursuant to Rule 59(g), SCRCP.

In its motion, the Defendant asserts that this Court's Order relied upon an incorrect definition of interstate commerce. "To ascertain whether an arbitration agreement implicates interstate commerce and the FAA, the court must examine the agreement, the complaint, and the surrounding facts, focusing primarily on what the terms of the contract specifically require for perfmance." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727,

732 (2014) (citations omitted) (internal quotation marks omitted). This is generally a very fact-specific inquiry. *Id.* The definition of what constitutes interstate commerce has been expanded to the outer-limits of the commerce clause. *See id*, at 379, 759 S.E.2d at 731 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995)).

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Even when considering the facts of this case under the broadest definition of interstate commerce, the contract at issue does not involve, nor does it implicate, interstate commerce.

Accordingly, the Defendants's Motion, pursuant to Rule 59, SCRCP, [1] is DENIED.

AND, IT IS SO ORDERED.

R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
February ____, 2018

[1] The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

Anderson Common Pleas

Case Caption:	Hicks Unlimited, Inc VS Unifirst Corporation, A Massachusetts Corporation
Case Number:	2017CP0401932
Type:	Order/Other

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON HICKS UNLIMITED, INC, PLAINTIFF, -VS- UNIFIRST CORPORATION, A MASSACHUSETTS CORPORATION, DEFENDANT	)	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT **COMPLAINT** Case Number: 2017-CP-04-_____

The Plaintiff in the above-captioned action, complaining of the Defendant herein, would respectfully allege and show unto the Court as follows:

1. The Plaintiff (hereinafter "Hicks") is a corporation organized and existing pursuant to the laws of the State of South Carolina with a place of business in Anderson County, South Carolina, and doing business in said county.

2. The Defendant (hereinafter "UniFirst"), based upon information and belief, is a corporation organized and existing pursuant to the laws of the State of Massachusetts and doing business in Anderson County, South Carolina.

3. This action for declaratory judgement is brought pursuant to **S.C. Code Ann** §15-53-10, **et seq.** (2005) to determine the rights of the parties under a contract dated September 21, 2006, which is attached hereto as Exhibit "A" and incorporated herein by reference thereto.

4. Pursuant to **S.C. Code Ann** §15-53-30 (2005), Hicks seeks a declaration as to whether or not the contract is subject to mandatory arbitration and whether or not UniFirst claim is subject to arbitration.

5. The original term of the contract was for sixty (60) months. At the conclusion of the initial term, Hicks attempted to terminate it due to poor service and over billing by UniFirst. However, written notice was not given to UniFirst as provided by the contract since Hicks was unaware of the renewal provision. Hicks reluctantly honored the contract for an additional sixty (60) months. UniFirst clearly understood that the contract would not be renewed after this second term.

6. Hicks terminated the contract prior to the conclusion of the second term which ended on or about September 21, 2016.

7. Hicks is further informed and believes that the terms of the contract are illegal, unconscionable, and unenforceable.

8. Hicks received a notice on or about June 1, 2017, that UniFirst had initiate arbitration proceedings through ADR Services. By letter dated June 8, 2017, From its attorney, Hicks notified ADR Services and UniFirst that Hicks did not agree to arbitration on any of the issues under the terminated contract or for the claim asserted by the Defendant.

9. Since that time Unifirst has persisted in trying to force arbitration on Hicks without its consent or agreement.

10. Pursuant to the provisions of **S.C. Code Ann** §15-48-10 (a) (2005), the terminated contract clearly is not, and never was, subject to mandatory arbitration since it did not contain the required notice provision.

11. The Defendant and all concerned parties were notified on August 30, 2017, and again on September 5, 2017, that the Plaintiff did not agree to arbitration and that the contract did not legally require mandatory arbitration. UniFirst was advised to cease and desist and stop the illegal arbitration process.

12. The Plaintiff ("Hicks") has never agreed to arbitration and has never signed an agreement to arbitrate.

13. Despite Hicks' notifications to stop the arbitration process, UniFirst has persisted and is now attempting to expedite the arbitration process in an attempt to gain a default judgement against Hicks without even an evidentiary hearing.

14. The question of the arbitrability of a claim is an issue for judicial determination. The Defendant has failed and refused to file an action in Circuit Court. After Plaintiff's clear and unequivocable refusal to arbitrate, it was incumbent upon the Defendant to follow the procedure set forth in **S.C. Code Ann.** §15-48-20 (2005) to obtain a judicial determination as to whether or not its claim was subject to mandatory arbitration.

15. By continuing to attempt to proceed with the arbitration process, the Defendant is attempting to deprive the Plaintiff of due process and to deprive the Plaintiff of important substantive, procedural, and constitutional rights.

16. Hicks is informed and believes that the claim and underlying contract are **not subject** to arbitration.

17. Hicks seeks determination and declaration that the claim of UniFirst is not subject to arbitration, and that the underlying contract does not allow mandatory arbitration.

18. Hicks is further informed and believes that the arbitration process started and continued unilaterally by UniFirst should be stayed before Hicks suffers extreme prejudice.

19. The Defendant has persisted in the arbitration process when it knows that the claim is not subject to mandatory arbitration and that the Plaintiff has never agreed to arbitration or signed an arbitration agreement. The Defendant has NO contractual right to compel arbitration.

20. The Plaintiff has been required to incur unnecessary attorney's fees and costs due to the actions of the Defendant and requests that it be granted judgement against the Defendant for all of its attorney's fees and costs.

21. This case does not involve interstate commerce, and the Federal Arbitration Act does not apply.

WHEREFORE, the Plaintiff prays that the Court grant judgement in its favor against the Defendant as follows:

1.) That the arbitration process be stayed immediately.

2.) That the Court enter a declaration and judgement that the claim of the Defendant is not subject to arbitration.

3.) That the Court enter a declaration and judgement that the claim and the underlying contract are not subject to mandatory arbitration.

4.) That the Court award the Plaintiff judgement against the Defendant for its attorney's fees, costs, and litigation expenses.

5.) That the Plaintiff reserves the right to file a separate legal action for any damages it might sustained to Defendant's conduct.

6.) For such other and further relief as to the Court seems just and proper.

ALLEN AND EAKES

BY: s/ James S. Eakes
James S. Eakes S.C. Bar #1820
Attorneys for Plaintiff
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Anderson, S.C. 29625 (29622)
(864) 224-1681

Anderson, South Carolina
September 14, 2017

Cust. # 604009

UniFirst

FLAME RESISTANT GARMENT AGREEMENT Cont. 36040

COMPANY NAME (Customer)	Hicks Mechanical Services	LOC. NO.	296
ADDRESS	2698 Trail Rd	ROUTE NO.	A2200
	Belton SC. 29627	DATE	9/21/06
PHONE	864-508-0240 fax 338-0591	SIC	

The undersigned (the "CUSTOMER") orders from UniFirst Corporation and/or UniFirst Holdings, L.P. d.b.a. UniFirst and/or UniFirst Canada LTD. (the "COMPANY") the rental service at the prices and upon the conditions outlined:

MERCHANDISE SERVICED

ITEM DESCRIPTION	NO. OF PERSONS / ISSUE PER PERSON	TOTAL NO. OF CHANGES/PIECES	PRICE PER CHANGE/PIECE	STANDARD/ NON-STANDARD*	TOTAL FULL SERVICE	TOTAL VAL-U-LEASE**
Pants Ultimate H	2	16	1.71	S	27.36	
					27.36	

* Out-sizes of otherwise standard Merchandise is deemed to be non-standard Merchandise.
** Merchandise which is Val-U-Leased is not cleaned by UniFirst.

CHARGE	AMOUNT	CHARGE	AMOUNT
Garment preparation per piece	1.25	Non-stock sizes per piece	20.00
Name emblem per piece	1.25	Special Cuts per piece	12.50
Company emblem per piece	2.95	Auto. Wiper Replacement	
Embroidery:		Auto. Linen Replacement	N/A
Wearer name per piece	N/A		
Company name per piece		DEFE*	7.50

* The DEFE charge represents partial recovery of UniFirst's costs incurred in providing delivery of products and services, together with its environmental expenses and fuel and energy charges.

COMMENTS

New Account ☒
Existing Account ☐

Installation Date: _____ M/D/Y

Minimum weekly service charge $: 22.00

Payment Terms: / C.O.D. ☐ Approved Charge* ☐

Approved charge CUSTOMER agrees to make payments within 30 days of invoice receipt. A late charge of 1½% per month (18% annum) for any amount in arrears may be applied.

The undersigned attests to have the authority to execute for the named CUSTOMER, and to approve use of any personalization - including logos or brand identifiles - that has been requested.

SALES REP: _____

BY: _____ Date 9/21/06

ACCEPTED': _____ Location Manager Date

Name and Title

*Charge status contingent upon continuing worthiness and may be revoked at COMPANY's discretion.
'This Agreement is effective only upon acceptance by UniFirst Location Manager.

WHITE COPY - CORPORATE OFFICE COPY YELLOW COPY - DIVISION COPY PINK COPY - CUSTOMER COPY Form #3401 Rev. 3/03

EXHIBIT A

REQUIREMENTS SUPPLIED. The Customer orders from UniFirst Corp. (together with its subsidiaries, "UniFirst") rental and related services for all of Customer's requirements for garments and other items ("Merchandise") of the type listed on the reverse, at the prices and upon the terms and conditions outlined. Additional Merchandise requested by Customer, verbally or in writing, will also be covered by this Agreement. All rental Merchandise supplied to Customer remains the property of UniFirst. Customer warrants that it is not subject to, and that this Agreement does not interfere or conflict with, any existing agreement for the supply of the Merchandise or services covered.

PERFORMANCE GUARANTEE. UNIFIRST GUARANTEES TO DELIVER HIGH QUALITY SERVICE AT ALL TIMES. All items of Merchandise cleaned, finished, inspected, repaired and delivered by UniFirst will meet or exceed its quality standards, or non-conforming items will be replaced by the next scheduled delivery day to Customer. Items of rental Merchandise requiring replacement due to normal wear and tear will be replaced at no cost to Customer, save for any applicable personalization and set-up charges.

If Customer believes UniFirst has consistently failed, to a material degree, to satisfy this guarantee, Customer may terminate this Agreement without penalty, provided written notice specifying deficiencies is given to UniFirst and UniFirst fails to resolve such deficiencies within 60 days after receipt of notice. Deficiencies will be presumed resolved unless Customer gives UniFirst a second written notice, detailing continuing deficiencies, within ten days after the expiration of the sixty-day resolution period. Customer may thereafter terminate this Agreement by giving written notice, providing that all balances due UniFirst have been paid in full and other conditions to terminate have been satisfied. Any delay or interruption of the service provided for in this Agreement, by reason of acts of God, fires, explosions, strikes or other industrial disturbances, or any other cause not within the control of UniFirst, shall not be deemed a violation of the guarantee set forth above.

TERM AND RENEWAL. This agreement is effective when signed by both the Customer and UniFirst Location Manager and continues in effect for 60 months (260 revenue weeks) after installation of Merchandise (for new customers) or of any renewal date. This Agreement will be renewed automatically and continuously for multiple successive 60 month periods unless Customer or UniFirst gives written notice of non-renewal to the other at least 90 days prior to the next expiration date.

PRICES AND PAYMENTS. All charges are based upon the total Merchandise covered by this Agreement and may change as the amount of such Merchandise is increased or decreased. Customer agrees to pay the additional service-related charges listed on the front of this Agreement. Charges relating to an individual leaving the Customer's employ can be terminated by giving notice to UniFirst and by returning or paying for any Merchandise issued to that individual. Reduction from the program of any wearers outfitted in non-standard garments will require purchase by customer of the applicable clothing items. Any Merchandise payments required, pursuant to this Agreement, will be at UniFirst's list replacement price(s) then in effect.

Upon each anniversary date of this Agreement, the prices then in effect will be increased by the greater of the annual percent increase in the Consumer Price Index (CPI-U) or by 5%. Additional price increases and other charges may be imposed by separate written notice or by notation on Customer's invoice. Customer may, however, decline such additional increases or charges by notifying UniFirst in writing within ten days after receipt of such notice or notation.

Prices are based on fifty-two weeks of service per year. Customer agrees to pay all charges on receipt of invoice or, if a pre-approved charge customer, per standard terms. A late charge of 1 1/2 % per month (18 % per year) will be added to all amounts not paid within thirty days of invoice. If Customer fails to make timely payment, UniFirst may at any time and in its sole discretion, terminate this Agreement by giving written notice to Customer, whether or not UniFirst has previously strictly enforced Customer's obligation to make timely payments. Customer agrees to pay, and will pay, all applicable sales, use, personal property and other taxes and assessments arising out of this Agreement. Customer agrees to a minimum weekly service charge as indicated.

MERCHANDISE. The flame resistant ("FR") garments provided under this Agreement are intended to prevent the ignition and burning of fabric away from the point of high heat impingement and to be self-extinguishing upon removal of the ignition source. Flame resistant garments will not provide significant protection from burns in the immediate area of high heat contact, due to thermal transfer through the fabric and/or destruction of the fabric in the area of such exposure. These flame resistant garments are designed for continuous wear as a secondary level of protection. Primary protection is still required for work activities where direct or significant exposure to heat or open flame is likely to occur. Customer acknowledges that UniFirst makes no representation, warranty or covenant regarding the flame resistant characteristics of garments or their fitness or suitability for Customers intended use. Accordingly, UniFirst assumes no liability for any injury, personal or otherwise, associated with any use of FR garments, and Customer indemnifies and holds UniFirst harmless from and against all liabilities and claims relating in any way to actual or alleged failure of any FR garments to be flame resistant.

UniFirst advises against the use of identifying crests, patches, or emblems on FR garments. If Customer insists upon such use, UniFirst advises that only special FR emblems be employed. Customer agrees to notify all employees who will be wearing the FR garments that they are designed for the prevention of clothing ignition during short-term flame exposure only and are not designed for long-term flame or heat exposure, and that no representation is made as to the garments ability to protect users from injury or death. Customer agrees to indemnify and hold harmless UniFirst and its employees and agents from and against all claims, injuries or damages to any person or property resulting from Customer's or Customer's employee's use of the Merchandise, including without limitation all claims, injuries or damages arising from any alleged defects of the Merchandise. Customer agrees not to contaminate any Merchandise with asbestos, heavy metals, bloodborne pathogens, solvents, inks or hazardous or toxic substances ("Contaminants"). Customer agrees to pay UniFirst for all Merchandise that is lost, stolen, damaged or abused beyond repair.

As a condition to the termination of this Agreement, for whatever reason, Customer will (1) return to UniFirst all standard Merchandise in good and usable condition or pay for same at the replacement charges then in effect, and/or (2) purchase all non-standard Merchandise either in issue or in inventory. Nonstandard Merchandise is any item which is not customarily inventoried by UniFirst for any reason (including style, color, size or brand) or any item which has been permanently personalized.

OBLIGATIONS AND REMEDIES. If Customer breaches or terminates this Agreement before the expiration date for any reason (other than for UniFirst's failure under the performance guarantee described above), Customer will pay UniFirst, as liquidated damages and not as a penalty (the parties acknowledging that actual damages would be difficult to calculate with reasonable certainty) an amount equal to 50 percent of the average weekly amounts invoiced in the preceding 26 weeks, multiplied by the number of weeks remaining in the current term. These damages will be in addition to all other obligations or amounts owed by Customer to UniFirst, including the return of Merchandise or the payment of replacement charges.

All disputes of whatever kind between the Customer and UniFirst based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted in the capital city of the state where the Customer has its principal place of business (or some other location mutually agreed to by Customer and UniFirst) pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association and shall be governed by the Federal Arbitration Act. The Customer acknowledges that, with respect to all such disputes, it has voluntarily and knowingly waived any right it may have to a jury trial or to participate in a class action as a representative of any other persons or class of persons or as a member of any class of persons, or to consolidate its claims with those of any other persons or class of persons. This paragraph shall be governed by New York law (exclusive of choice of law).

MISCELLANEOUS. The parties agree that this Agreement represents the entire agreement between them. UniFirst may, in its sole discretion, assign this Agreement. Customer may not assign this Agreement without the prior written consent of UniFirst. Customer agrees that in the event it sells or transfers its business, it will require the purchaser or transferee to assume all obligations and responsibilities under this Agreement. Neither party will be liable for any consequential punitive damages. In the event any portion of this Agreement is held by a court of competent jurisdiction or by a duly appointed arbitrator to be unenforceable, the balance will remain in effect. All written notices provided to UniFirst must be sent by certified mail to the attention of the Location Manager. In Texas and certain other locations, UniFirst's business is conducted by, and the term "UniFirst" as used herein, means UniFirst Holdings, LP dba UniFirst.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	TENTH JUDICIAL CIRCUIT
	)	
	)	
HICKS UNLIMITED, INC,	)	
	)	**NOTICE OF MOTION**
	)	**AND MOTION**
PLAINTIFF,	)	Case Number: 2017-CP-04-_____
	)	
-VS-	)	
	)	
UNIFIRST CORPORATION,	)	
A MASSACHUSETTS CORPORATION,	)	
	)	
DEFENDANT	)	
	)	

TO: UNIFIRST CORPORATION, DEFENDANT, AND IT"S ATTORNEY, JUDE C. COOPER, ESQUIRE; ADR SERVICES AND ITS REPRESENTATIVE, BARABARA C. COOK; AND THOMAS WILLIAM MCGEE, III, ESQUIRE:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff will move before the presiding Circuit Court Judge for the Anderson County Court of Common Pleas on the tenth (10^{th}) day afetr service hereof, or at such other time and date convenient to the Court and Counsel, in the Anderson County Court of Common Pleas located in the Anderson County Courthouse, 100 South Main Street, Anderson, South Carolina, for an order staying the threatened arbitration proceeding in the case of **UniFirst Corporation Location #296 –vs- Hicks Unlimited, Inc., d/b/a Hicks Mechanical Services (Case Number: 01-17-0002-8792).**

S.C. Code Ann §15-48-20 (b) (2005) allows the Court "...on application to stay an arbitaration proceeding commenced or threatened on a showing that there is no agreement to

arbitrate". The Plaintiff will suffer extreme prejudice if the stay is not ordered and will be deprived of important constitutional, due process, substantive, and procedural rights.

The motion will be based upon the Plaintiff's complaint for a declaratory judgement and applicable statutory and case law.

ALLEN AND EAKES

By: s/ James S. Eakes
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(P. O. Box 1405)
Anderson, SC 29621 (29622)
(864) 224-1681

Anderson, South Carolina
September 14, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	C/A No: 2017-CP-04-01932
Hicks Unlimited, Inc. Plaintiff, v. UniFirst Corporation, a Massachusetts Corporation, Defendant.	)	**ANSWER**

NOW COMES Defendant UniFirst Corporation, by and through undersigned counsel, who hereby submits its Answer and Affirmative Defenses to the Complaint, filed by the Plaintiff, Hicks Unlimited, Inc., and states as follows:

FOR A FIRST DEFENSE

1. As an initial matter, UniFirst Corporation ("UniFirst") answers this Complaint without waiving any of its rights to participate in the arbitration proceeding currently pending before the American Arbitration Association ("AAA"), Case No. 01-17-0002-8792. Answering this Complaint is not intended to constitute, and does not constitute, record activity which may waive any rights UniFirst may have to compel arbitration as the parties agreed by contract to do; all such rights are expressly reserved.

2. Each and every allegation contained in the Plaintiff's Complaint not hereinafter admitted, qualified or otherwise explained is denied and strict proof thereof demanded.

3. UniFirst admits the allegations of paragraph 1.

4. In response to the allegations of paragraph 2, UniFirst admits it is a Massachusetts corporation doing business in Anderson County, South Carolina.

5. In response to the allegations of paragraph 3, UniFirst admits only this purports to be an action for declaratory judgment brought by the Plaintiff, but denies both that the statute cited in this paragraph is applicable to this action, or that the Plaintiff is entitled to the relief demanded in this paragraph and in this Complaint.

6. In response to the allegations of paragraph 4, UniFirst admits only this purports to be an action for declaratory judgment brought by the Plaintiff, but denies both that the statute cited in this paragraph is applicable to this action, or that the Plaintiff is entitled to the relief demanded in this paragraph and in this Complaint.

7. In response to the allegations of paragraph 5, UniFirst admits the original term of the contract was for sixty (60) months. UniFirst further admits the parties agreed to the renewal of the contract for an additional sixty (60) month period. UniFirst also admits the contract at issue contains a notice provision regarding renewal of the contract term. UniFirst denies the remaining allegations of paragraph 5.

8. UniFirst denies the allegations of paragraphs 6 and 7 and demands strict proof thereof.

9. In response to the allegations of paragraph 8, UniFirst admits it has initiated arbitration proceedings against the Plaintiff, as provided in the Customer Service Agreement the parties signed. UniFirst also admits it notified the Plaintiff of the pendency of the arbitration. UniFirst also admits the Plaintiff, through its counsel, sent a letter to the AAA on or about June 9, 2017 regarding the pending arbitration. As for the remaining allegations, UniFirst admits only the June 9, 2017 letter sent by the Plaintiff speaks for itself.

10. In response to the allegations of paragraph 9, UniFirst admits only it has pursued arbitration in this matter, in accordance with the terms of the Customer Service Agreement the parties signed. UniFirst denies the remaining allegations of paragraph 9.

11. UniFirst denies the applicability of the statute cited in this paragraph to the dispute alleged in this forum. UniFirst also denies the factual allegations stated in paragraph 10.

12. In response to the allegations of paragraph 11, UniFirst admits only it received copies of letters the Plaintiff sent to the AAA, the contents of which speak for themselves. UniFirst denies the remaining allegations of paragraph 11.

13. UniFirst denies the allegations of paragraphs 12 and 13.

14. In response to the allegations of paragraph 14, UniFirst admits it has not previously filed an action in this Court to compel arbitration. UniFirst denies the remaining allegations of paragraph 14.

15. UniFirst denies the allegations of paragraphs 15 and 16.

16. In response to the allegations of paragraph 17, UniFirst admits the Plaintiff appears to be seeking the relief stated in this paragraph, but denies the Plaintiff is entitled to the relief requested. Any remaining allegations are denied.

17. UniFirst denies the allegations of paragraphs 18 and 19.

18. UniFirst is without knowledge of the allegations of paragraph 20, and therefore denies same.

19. UniFirst denies the allegations of paragraph 21.

20. UniFirst denies the Plaintiff is entitled to the relief requested in the Complaint.

FOR A SECOND DEFENSE

21. The Customer Service Agreement, as drafted, and as performed, constituted interstate commerce. As such, the provisions of the Federal Arbitration Act apply to this matter.

FOR A THIRD DEFENSE

22. The Customer Service Agreement, as drafted, and as performed, constituted a business-to-business, arm's length transaction.

FOR A FOURTH DEFENSE

23. Based on facts alleged in the Complaint, the Plaintiff, at all times relevant to this action, knew the terms of the Customer Service Agreement, and/or was charged with knowledge of the Customer Service Agreement, and is therefore estopped from disclaiming its terms, including but not limited to the agreement to arbitrate all disputes before the American Arbitration Association.

FOR A FIFTH DEFENSE

24. At the time of contract, the Plaintiff occupied equal, or substantially equal, bargaining position with UniFirst. It had the choice of several merchandise rental providers in the area, and, in fact, when it terminated UniFirst's services, it chose one of those other providers to engage. The terms of the service were negotiated between the parties, and were not presented by UniFirst on a "take it or leave it" basis.

FOR A SIXTH DEFENSE

25. The Plaintiff accepted services under the Customer Service Agreement and paid for same for approximately ten (10) years, and received notice each week from UniFirst that the service being provided to the Plaintiff was being done pursuant to a written contract between the

parties. The Plaintiff is hereby estopped from claiming, or has waived the right to claim, the contract did not represent a meeting of the minds.

FOR A SEVENTH DEFENSE

26. The dispute between the parties arises out of the formation, terms, and performance of the Customer Service Agreement. The parties agreed to submit all such disputes to the American Arbitration Association. To that end, the Plaintiff actively participated in the arbitration process. The Plaintiff is therefore estopped from bringing this action, and/or has waived the right to file suit in this forum. The Court should compel arbitration of this dispute.

FOR AN EIGHTH DEFENSE

27. The Plaintiff's attack on the Customer Service Agreement is on the contract as a whole, and not directed at the arbitration agreement. There is no allegation the arbitration agreement was procured by fraud. There is no allegation the signor to the contract lacked the authority to bind the company. As a matter of law, the dispute as framed by the Complaint is a dispute that must be decided by an arbitrator, not a court. Therefore, the Court should compel arbitration of this dispute.

FOR A NINTH DEFENSE

28. The Customer Service Agreement as drafted, and as accepted by the Plaintiff for ten (10) years, contains a written agreement to arbitrate. The dispute as framed by the Complaint falls within the scope of the arbitration clause. UniFirst has not waived the right to arbitrate. Therefore, the Court should compel arbitration of this dispute.

WHEREFORE, the defendant, UniFirst Corporation, demands judgment in its favor and against the Plaintiff, Hicks Unlimited, Inc., and that it be awarded the costs of suit herein, attorney fees pursuant to the terms of the Customer Service Agreement between the parties, and

such other and further relief as this Court deems proper including without limitation compelling arbitration in this matter.

TURNER PADGET GRAHAM & LANEY, P.A.

s/ Ian D. McVey
Ian D. McVey, SC Bar No. 71196
PO Box 1473
Columbia, South Carolina 29202
Tel. (803)227-4267
Fax (803)400-1564
Email imcvey@turnerpadget.com

Attorneys for Defendant UniFirst Corporation

October 12, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
Hicks Unlimited, Inc.	)	C/A No: 2017-CP-04-01932
Plaintiff,	)	
v.	)	**CERTIFICATE OF SERVICE**
UniFirst Corporation, a Massachusetts Corporation,	)	
Defendant.	)	

The undersigned hereby certifies that she served copies of the foregoing **Answer** in the above-captioned matter to all counsel on record by placing a copy in the United States Mail, with due and proper postage affixed thereto as address below:

James S. Eakes, Esquire
Allen and Eakes
P.O. Box 1405
Anderson, South Carolina 29622
Attorney for Plaintiff

Cindy A. Gatlin

Cindy A. Gatlin, Legal Assistant to Ian McVey

October 12, 2017
Columbia, South Carolina

TPGL 8110543v1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
	)	C/A No: 2017-CP-04-01932
Hicks Unlimited, Inc.	)	
Plaintiff,	)	
	)	**MOTION TO COMPEL ARBITRATION**
v.	)	
UniFirst Corporation, a Massachusetts Corporation,	)	
Defendant.	)	

TO: JAMES S. EAKES, ESQUIRE, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant, by and through their undersigned attorneys, will move before the presiding judge of the Anderson County Court of Common Pleas, on such day and time as the Court may appoint, for an Order compelling arbitration of all claims of Plaintiff pursuant to the Customer Service Agreement by and between Defendant and Plaintiff. The Defendant makes this Motion pursuant to the Federal Arbitration Act on the following grounds:

(1) A written agreement between the Plaintiff and Defendant provides:

> All disputes of whatever kind between [Plaintiff] and [Defendant] based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted in the capital city of the state where [Plaintiff] has its principal place of business (or some other location mutually agreed to by [Plaintiff] and [Defendant]) pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association and shall be governed by the Federal Arbitration Act. [Plaintiff] acknowledges that, with respect to all such disputes, it has voluntarily and knowingly waived any right it may have to a jury trial or to participate in class action or class litigation as a representative of any other persons or as a member of any class of persons, or to consolidate its claims with those of any other persons or class of

persons. If this prohibition of class litigation is ruled to be unenforceable for any reason in any proceeding, the prohibition against class litigation shall be void and of no force and effect in that proceeding. This paragraph is governed by New York law (exclusive choice of law). The arbitrators shall award to the substantially prevailing party, if any, as determined by the arbitrators, all of its costs and fees. "Costs and fees" are defined as all reasonable pre-award expenses of the arbitration, including the arbitrators' fees, administrative costs, travel expenses, out-of-pocket expenses, such as copying and telephone expenses, court costs, witness fees and attorneys' fees. (*See* Exhibit A hereto).

(2) All of Plaintiff's claims alleged in the Complaint are within the scope of the arbitration clause contained in the agreement between the parties.

(3) The Plaintiff has failed or refused to submit to arbitration as provided in the agreement.

(4) The agreement out of which the controversy among the parties arises in this action involves interstate commerce, and is, therefore, subject to the Federal Arbitration Act, 9 U.S.C. §§ 1 through 16.

(5) The written arbitration agreement is valid, irrevocable, and enforceable by the Court under the Federal Arbitration Act, 9 U.S.C. §§ 1 through 16.

(6) Based on the foregoing, Plaintiff's claims should be referred to binding arbitration in accordance with the terms of the agreement between the parties (*See* Ex. A to Plaintiff's Complaint)

Therefore, based upon the facts, exhibits, pleadings, motions, arguments and legal authorities set forth herein and in such supporting memorandum as may be filed by Defendant, Defendant requests that the Court enter an Order compelling arbitration of every claim asserted by the Plaintiff in accordance with the arbitration agreement.

Affirmation

Pursuant to Rule 11, SCRCP, the undersigned counsel hereby certifies that consultation with Plaintiff's counsel would serve no useful purpose as this Action pertains directly to the enforceability of the arbitration clause contained in the Customer Service Agreement.

TURNER PADGET GRAHAM & LANEY, P.A.

By: s/ Ian D. McVey
Ian D. McVey, SC Bar No. 71196
Post Office Box 1473
Columbia, South Carolina 29202
Tel. (803) 227-4267
Fax (803) 400-1564
Email imcvey@turnerpadget.com

Attorneys for Defendant

October 12, 2017
Columbia, South Carolina

CUST. # 604009

UniFirst FLAME RESISTANT GARMENT AGREEMENT Cont. 36046

COMPANY NAME (Customer)	Parker Mechanical Services	LOC. NO.	296
ADDRESS	2698 Trail Rd	ROUTE NO.	92200
	Belton SC 29627	DATE	9/21/06
PHONE	864-508-0240 Fax 338-0591	SIC	

The undersigned (the "CUSTOMER") orders from UniFirst Corporation and/or UniFirst Holdings, L.P. d.b.a. UniFirst and/or UniFirst Canada LTD. (the "COMPANY") the rental service at the prices and upon the conditions outlined:

MERCHANDISE SERVICED

ITEM DESCRIPTION	NO. OF PERSONS P. ISSUE PER PERSON	TOTAL NO. OF CHANGES/PIECES	PRICE PER CHANGE/PIECE	STANDARD/ NON-STANDARD*	TOTAL FULL SERVICE	TOTAL VAL-U-LEAS
Flame Res Wash	2	16	1.71	S	27.36	

* Out-sizes of otherwise standard Merchandise is deemed to be non-standard Merchandise.
** Merchandise which is Val-U-Leased is not cleaned by UniFirst.

27.36

CHARGE	AMOUNT	CHARGE	AMOUNT
Garment preparation per piece	1.25	Non-stock sizes per piece	20.58
Name emblem per piece	1.25	Special Cuts per piece	1.75
Company emblem per piece	2.75	Auto. Wiper Replacement	
Embroidery:		Auto. Linen Replacement	N/A
Wearer name per piece	N/A		
Company name per piece		DEFE*	7.50

* The DEFE charge represents partial recovery of UniFirst's costs incurred in providing delivery of products and services, together with its environmental expenses and fuel and energy charges.

COMMENTS

New Account ☑
Existing Account ☐
Installation Date: M/D/Y
Minimum weekly service charge $: 27.00
Payment Terms: I/ C.O.D. ☐ Approved Charge* ☑

Approved charge CUSTOMER agrees to make payments within 30 days of invoice receipt. A late charge of 1½% per month (18% annum) for any amount in arrears may be applied.

The undersigned attests to have the authority to execute for the named CUSTOMER and to approve use of any personalization - including logos or brand identities - that has been requested.

SALES REP: [signature]
BY: [signature] 9/21/06
Date
ACCEPTED: Location Manager Date
Name and Title

*Charge status contingent upon continuing worthiness and may be revoked at COMPANY's discretion.
'This Agreement is effective only upon acceptance by UniFirst Location Manager.

WHITE COPY - CORPORATE OFFICE COPY YELLOW COPY - DIVISION COPY PINK COPY - CUSTOMER COPY Form #3401 Rev. 3/00

EXHIBIT A

R-026

REQUIREMENTS SUPPLIED. The Customer orders from UniFirst Corp. (together with its subsidiaries, "UniFirst") rental and related services for all of Customer's requirements for garments and other items ("Merchandise") of the type listed on the reverse, at the prices and upon the terms and conditions outlined. Additional Merchandise requested by Customer, verbally or in writing, will also be covered by this Agreement. All rental Merchandise *supplied to Customer remains* the property of UniFirst. Customer warrants that it is not subject to, and that this Agreement does not interfere or conflict with, any existing agreement for the supply of the Merchandise or services covered.

PERFORMANCE GUARANTEE. UNIFIRST GUARANTEES TO DELIVER HIGH QUALITY SERVICE AT ALL TIMES. All items of Merchandise cleaned, finished, inspected, repaired and delivered by UniFirst will meet or exceed its quality standards, or non-conforming items will be replaced by the next scheduled delivery day to Customer. Items of rental Merchandise requiring replacement due to normal wear and tear will be replaced at no cost to Customer, save for any applicable personalization and set-up charges.

If Customer believes UniFirst has consistently failed, to a material degree, to satisfy this guarantee, Customer may terminate this Agreement without penalty, provided written notice specifying deficiencies is given to UniFirst and UniFirst fails to resolve such deficiencies within 60 days after receipt of notice. Deficiencies will be presumed resolved unless Customer gives UniFirst a second written notice, detailing continuing deficiencies, within ten days after the expiration of the sixty-day resolution period. Customer may thereafter terminate this Agreement by giving written notice, providing that all balances due UniFirst have been paid *in full and other conditions to terminate* have been satisfied. Any delay or interruption of the service provided for in this Agreement, by reason of acts of God, fires, explosions, strikes or other industrial disturbances, or any other cause not within the control of UniFirst, shall not be deemed a violation of the guarantee set forth above.

TERM AND RENEWAL. This agreement is effective when signed by both the Customer and UniFirst Location Manager and continues in effect for 60 months (260 revenue weeks) after installation of Merchandise (for new customers) or of any renewal date. This Agreement will be renewed automatically and continuously for multiple successive 60 month periods unless Customer or UniFirst gives written notice of non-renewal to the other at least 90 days prior to the next expiration date.

PRICES AND PAYMENTS. All charges are based upon the total Merchandise covered by this Agreement and may change as the amount of such Merchandise is increased or decreased. Customer agrees to pay the additional service-related charges listed on the front of this Agreement. Charges relating to an individual leaving the Customer's employ can be terminated by giving notice to UniFirst and by returning or paying for any Merchandise issued to that individual. Reduction from the program of any wearers outfitted in non-standard garments will require purchase by customer of the applicable clothing items. Any Merchandise payments required, pursuant to this Agreement, will be at UniFirst's list replacement price(s) then in effect.

Upon each anniversary date of this Agreement, the prices then in effect will be increased by the greater of the annual percent increase in the Consumer Price Index (CPI-U) or by 5%. Additional price increases and other charges may be imposed by separate written notice or by notation on Customer's invoice. Customer may, however, decline such additional increases or charges by notifying UniFirst in writing within ten days after receipt of such notice or notation.

Prices are based on fifty-two weeks of service per year. Customer agrees to pay all charges on receipt of invoice or, if a pre-approved charge customer, per standard terms. A late charge of 1 1/2 % per month (18 % per year) will be added to all amounts not paid within thirty days of invoice. If Customer fails to make timely payment, UniFirst may at any time and in its sole discretion, terminate this Agreement by giving written notice to Customer, whether or not UniFirst has previously strictly enforced Customer's obligation to make timely payments. Customer agrees to pay, and will pay, all applicable sales, use, personal property and other taxes and assessments arising out of this Agreement. Customer agrees to a minimum weekly service charge as indicated.

MERCHANDISE. The flame resistant ("FR") garments provided under this Agreement are intended to prevent the ignition and burning of fabric away from the point of high heat impingement and to be self-extinguishing upon removal of the ignition source. Flame resistant garments will not provide significant protection from burns in the immediate area of high heat contact, due to thermal transfer through the fabric and/or destruction of the fabric in the area of such exposure. These flame resistant garments are designed for continuous wear as a secondary level of protection. Primary protection is still required for work activities where direct or significant exposure to heat or open flame is likely to occur. Customer acknowledges that UniFirst makes no representation, warranty or covenant regarding the flame resistant characteristics of garments or their fitness or suitability for Customers intended use. Accordingly, UniFirst assumes no liability for any injury, personal or otherwise, associated with any use of FR garments, and Customer indemnifies and holds UniFirst harmless from and against all liabilities and claims relating in any way to actual or alleged failure of any FR garments to be flame resistant.

UniFirst advises against the use of identifying crests, patches, or emblems on FR garments. If Customer insists upon such use, UniFirst advises that only special FR emblems be employed. Customer agrees to notify all employees who will be wearing the FR garments that they are designed for the prevention of clothing ignition during short-term flame exposure only and are not designed for long-term flame or heat exposure, and that no representation is made as to the garments ability to protect users from injury or death. Customer agrees to indemnify and hold harmless UniFirst and its employees and agents from and against all claims, injuries or damages to any person or property resulting from Customer's or Customer's employee's use of the Merchandise, including without limitation all claims, injuries or damages arising from any alleged defects of the Merchandise. Customer agrees not to contaminate any Merchandise with asbestos, heavy metals, bloodborne pathogens, solvents, inks or hazardous or toxic substances ("Contaminants"). Customer agrees to pay UniFirst for all Merchandise that is lost, stolen, damaged or abused beyond repair.

As a condition to the termination of this Agreement, for whatever reason, Customer will (1) return to UniFirst all standard Merchandise in good and usable condition or pay for same at the replacement charges then in effect, and/or (2) purchase all non-standard Merchandise either in issue or in inventory. Nonstandard Merchandise is any item which is not customarily inventoried by UniFirst for any reason (including style, color, size or brand) or any item which has been permanently personalized.

OBLIGATIONS AND REMEDIES. If Customer breaches or terminates this Agreement before the expiration date for any reason (other than for UniFirst's failure under the performance guarantee described above), Customer will pay UniFirst, as liquidated damages and not as a penalty (the parties acknowledging that actual damages would be difficult to calculate with reasonable certainty) an amount equal to 50 percent of the average weekly amounts invoiced in the preceding 26 weeks, multiplied by the number of weeks remaining in the current term. These damages will be in addition to all other obligations or amounts owed by Customer to UniFirst, including the return of Merchandise or the payment of replacement charges.

All disputes of whatever kind between the Customer and UniFirst based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted in the capital city of the state where the Customer has its principal place of business (or some other location mutually agreed to by Customer and UniFirst) pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association and shall be governed by the Federal Arbitration Act. The Customer acknowledges that, with respect to all such disputes, it has voluntarily and knowingly waived any right it may have to a jury trial or to participate in a class action as a representative of any other persons or class of persons or as a member of any class of persons, or to consolidate its claims with those of any other persons or class of persons. This paragraph shall be governed by New York law (exclusive of choice of law).

MISCELLANEOUS. The parties agree that this Agreement represents the entire agreement between them. UniFirst may, in its sole discretion, assign this Agreement. Customer may not assign this Agreement without the prior written consent of UniFirst. Customer agrees that in the event it sells or transfers its business, it will require the purchaser or transferee to assume all obligations and responsibilities under this Agreement. Neither party will be liable for any consequential punitive damages. In the event any portion of this Agreement is held by a court of competent jurisdiction or by a duly appointed arbitrator to be unenforceable, the balance will remain in effect. All written notices provided to UniFirst must be sent by certified mail to the attention of the Location Manager. In Texas and certain other locations, UniFirst's business is conducted by, and the term "UniFirst" as used herein, means UniFirst Holdings, LP dba UniFirst.

EXHIBIT A

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	
Hicks Unlimited, Inc.	C/A No: 2017-CP-04-01932
Plaintiff,	**CERTIFICATE OF SERVICE**
v.	
UniFirst Corporation, a Massachusetts Corporation,	
Defendant.	

The undersigned hereby certifies that she served copies of the foregoing **Motion to Compel Arbitration** in the above-captioned matter to all counsel on record by placing a copy in the United States Mail, with due and proper postage affixed thereto as address below:

James S. Eakes, Esquire
Allen and Eakes
P.O. Box 1405
Anderson, South Carolina 29622
Attorney for Plaintiff

Cindy A. Gatlin

Cindy A. Gatlin, Legal Assistant to Ian McVey

October 12, 2017
Columbia, South Carolina

TPGL 8110543v1

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
Hicks Unlimited, Inc., Plaintiff, vs. UniFirst Corporation, a Massachusetts Corporation, Defendant.	)	**RETURN TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND MOTION FOR STAY** Docket No. 2017-CP-04-01932

TO: Ian D. McVey, Esquire, Attorney for Defendant, and UniFirst Corporation, A Massachusetts Corporation, Defendant:

The Plaintiff, by and through its undersigned attorney, will move before the Honorable R. Scott Sprouse, presiding Circuit Court Judge for the Tenth Judicial Circuit, on the 27th Day of November, 2017, at 2:00 p.m. in the Anderson County Court of Common Pleas, located in the Anderson County Courthouse, 100 South Main Street, Anderson, South Carolina, as follows:

1. That the Defendant's motion to compel arbitration be denied and dismissed.

2. That the Plaintiff's motion to stay arbitration be granted.

S.C. Code Ann. §15-48-10 (2005) specifically provides: "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contact shall not be subject to arbitration." The contract alleged clearly and unequivocally does not comply with the unambiguous provisions of this statute and, therefore, is not subject to mandatory arbitration.

The Plaintiff's motion to stay will be based upon Plaintiff's complaint and supported by applicable statutory and case law.

ALLEN AND EAKES

S/ James S. Eakes
James S. Eakes, S.C. Bar # 1820
Attorneys for the Defendant
114 Orr Street
(P.O. Box 1405)
Anderson, South Carolina 29625(29622)

November 10, 2017
Anderson, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON HICKS UNLIMITED, INC, PLAINTIFF, -VS- UNIFIRST CORPORATION, A MASSACHUSETTS CORPORATION, DEFENDANT	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT **CERTIFICATE OF SERVICE** Case Number: 2017CP0401932

The undersigned hereby certifies that she is employed in the law offices of Allen and Eakes, 114 West Orr Street, Anderson, South Carolina, and is a person of such age and discretion as to be competent to serve papers.

That on November 10, 2017, she served certified copies of the *RETURN TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND MOTION FOR STAY* in the above-captioned case by placing said copy in a postpaid envelope addressed to the person or persons hereinafter named at the place(s) and address(s) stated below, by depositing said envelope and contents in the United States Mail at Anderson, South Carolina:

TO:
Ian D. McVey, Esquire
Post Office Box 1473
Columbia, South Carolina 29202

Tonya M. Gambrell

Tonya M. Gambrell

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ANDERSON)	
)	
Hicks Unlimited, Inc.,)	CASE NO.: 2017-CP-04-01932
)	
Plaintiff,)	
)	**MOTION TO ALTER OR AMEND**
v.)	
)	
UniFirst Corporation,)	
)	
Defendant.)	
)	

The defendant, UniFirst Corporation, by and through undersigned counsel, hereby submits its Motion to Alter or Amend the Order entered by the Court on January 9, 2018, denying the Motion to Compel Arbitration and Staying Arbitration, and in support thereof, states as follows:

On May 17, 2017, UniFirst Corporation commenced an arbitration proceeding through the American Arbitration Association, arising out of Hicks Unlimited, Inc.'s breach of the Customer Service Agreement executed by the parties. That arbitration remains pending.

On or about September 14, 2017, Hicks Unlimited commenced the instant proceeding in an attempt to claim the dispute as framed by UniFirst's demand is not subject to arbitration.

On October 13, 2017, UniFirst Corporation answered the plaintiff's petition, asserted affirmative defenses, and filed its Motion to Compel Arbitration.

On November 27, 2017, the Court heard argument of counsel regarding UniFirst's Motion to Compel Arbitration, and on Hicks Unlimited's Motion for Summary Judgment.

On December 1, 2017, the Court advised the parties that both motions were denied. On January 9, 2018, the Court entered its Order denying the relief requested. A copy of the Order is

attached hereto as Exhibit 1. This Motion has been filed and served within ten (10) days pursuant to Rules 59(e) and (g), SCRCP.

The purpose of Rule 59(e), SCRCP, to alter or amend judgment is to request the trial judge 'reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). A court may "alter or amend the judgment [pursuant to Rule 59(e), FRCP] if the movant shows either (1) an intervening change in the controlling law, (2) new evidence that was not available at trial, or (3) that there has been a clear error of law or a manifest injustice." *Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010). The moving party must satisfy at least one of these three grounds to warrant relief pursuant to Rule 59(e). *Loren Data Corp. v. GXS, Inc.*, 501 Fed. Appx. 275, 285 (4th Cir. 2012). The decision to grant or deny a Rule 59(e) motion is within the sound discretion of the trial court. *Hughes v. Bedsole*, 48 F.3d 1376, 1382 (4th Cir. 1995).

In reviewing the Order, it appears the Court denied the Motion to Compel Arbitration based on two points of law: 1) the Customer Service Agreement between the parties did not contemplate interstate commerce; and 2) Hicks Unlimited should be able to assert in this forum the defense the contract was unconscionable. With regard to the first point, the question of whether the contract contemplated interstate commerce is answered in the terms of the contract themselves: namely, **that the parties expressly agreed the Federal Arbitration Act would govern resolution of all disputes**. Specifically, the parties agreed:

> All disputes of whatever kind between the Customer and UniFirst based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted...pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association **and shall be governed by the Federal Arbitration Act**....
> *See* Motion to Compel Arbitration, at Ex. A [emphasis added].

Within the scope of the Customer Service Agreement, the above passage constitutes an agreement to arbitrate by the parties. The Supreme Court of South Carolina has held that arbitration agreements, like other contracts, are enforceable in accordance with their terms. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). In enforcing the parties' express agreement that the Federal Arbitration Act (FAA) applied to the disputes raised in the action, the provisions of the FAA preempt the notice provisions of the South Carolina Uniform Arbitration Act on which Hicks Unlimted relied to avoid the arbitration proceeding. *See Munoz*, 343 S.C. at 539-40, 542 S.E.2d at 364; *see also* S.C. Code Ann. § 15-48-10 (preempted by the FAA).

In addition, even where both contracting parties may be "domiciled" in South Carolina, the contract may contemplate interstate commerce such that the FAA would apply to the dispute even where the parties did not expressly provide as such. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. Here, while UniFirst provided service to Hicks Unlimited out of its facility in Simpsonville, South Carolina, it is a Massachusetts corporation, with decisions controlled by a board of directors in Massachusetts. Payments tendered by Hicks Unlimited to UniFirst in South Carolina would be forwarded to Massachusetts, and when UniFirst ordered merchandise to rent to Hicks Unlimited, it did so by purchasing garments in, and having them shipped from, Kentucky to South Carolina. On these facts, even if the parties had not expressly agreed to the FAA, the relationship implicated interstate commerce such that the FAA applied to the dispute, thereby exempting any requirement by UniFirst to comply with the notice requirements contained in the South Carolina Arbitration Act.

In its Order, the Court relies on the decision of *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993). In *Timms*, the contract at issue stated that the "Uniform Arbitration Act"

would apply to the dispute. 310 S.C. at 470-71, 427 S.E.2d at 643. The court then stated the contract for patient-residential service was "obscure, if not devoid, of any basis for holding that commerce was involved in the transaction between the parties." *Id.* at 644, 310 S.C. at 472.

But in 2014, the Supreme Court of South Carolina, through *Dean v. Heritage Healthcare of Ridgeway, LLC*, overruled *Timms* in its entirety. 408 S.C. 371, 759 S.E.2d 727 (2014). In doing so, the court stated, "[W]e find *Timms* is a relic of the past, decided before the broad definition of interstate commerce...." As the *Dean* court noted, courts since then who have looked at nursing home residency contracts of the type discussed in *Timms* have noted that the nursing homes provide their residents items – such as meals and medical supplies – that are shipped across state lines from out-of-state vendors, just as the merchandise was shipped across state lines in this case. *See* 408 S.C. at 381, 759 S.E.2d at 732. Incidentally, nowhere in the contract in the *Dean* case did the parties agree to the application of the FAA to their dispute. As a result, *Dean*, while factually distinguishable from the case at bar, nullifies reliance on *Timms*, while supporting the altering of the Order in this case.

In sum, the Court should have enforced the parties' express agreement to apply the provisions of the FAA to preempt requirement by UniFirst of the notice provisions of the South Carolina Arbitration Code, both because the parties agreed to the FAA in the contract, and because the transactions between the parties contemplated interstate commerce. By not doing so, the Court erred. Therefore, the Court should alter its Order to enforce the parties' agreement.

The second point on which the Court based its Order was that Hicks Unlimited should be given the right to argue the contract is unconscionable. Where, as here, the FAA applies, the Supreme Court of the United States has identified that there are two types of challenges to the validity of arbitration agreements. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444

(2006). The first type specifically challenges the validity of the agreement to arbitrate – the specific language in the contract containing the arbitration clause. *Id.* The second type challenges the contract as a whole, on a ground that directly affects the entire agreement. *Id.* In *Buckeye Check Cashing*, the defendant challenged the enforceability of the arbitration agreement by claiming the entire contract was void because it charged illegal, usurious interest rates. *Id.* at 442. In reversing the lower court's denial of the motion to compel arbitration, the Supreme Court held that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go the arbitrator." *Id.* at 449.

Stated simply, Hicks Unlimited's argument is that the contract is void, voidable, or unenforceable, because it is in some way unconscionable. It is indisputable Hicks Unlimited's challenge to enforcing the contract, and by extension, the agreement to arbitrate contained in the contract, is a challenge to the contract as a whole. The Supreme Court of the United States has mandated that Hicks Unlimited's unconscionability challenge is one that an arbitrator must decide. By deciding that Hicks Unlimited should be permitted to make its unconscionability argument in this forum, the Court erred.

Accordingly, the Court should alter its January 8, 2018 Order, grant the motion to compel arbitration, and require the parties to complete the arbitration proceeding that was commenced and has been pending since 2017.

[SIGNATURE PAGE TO FOLLOW]

TURNER PADGET GRAHAM & LANEY, P.A.

By: s/ Ian D. McVey
Ian D. McVey, SC Bar No. 71196
Post Office Box 1473
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Fax (803) 400-1564
Email imcvey@turnerpadget.com

Attorneys for Defendant

January 18,2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
Hicks Unlimited, Inc.	)	C/A No: 2017-CP-04-01932
Plaintiff,	)	
v.	)	CERTIFICATE OF SERVICE
UniFirst Corporation, a Massachusetts Corporation,	)	
Defendant.	)	

The undersigned hereby certifies that she served copies of the foregoing **Motion to Alter or Amend** in the above-captioned matter to all counsel on record by placing a copy in the United States Mail, with due and proper postage affixed thereto as address below:

James S. Eakes, Esquire
Allen and Eakes
P.O. Box 1405
Anderson, South Carolina 29622
Attorney for Plaintiff

Cindy A. Gatlin

Cindy A. Gatlin, Legal Assistant to Ian McVey

January 18, 2018
Columbia, South Carolina

TPGL 8110543v1

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT
HICKS UNLIMITED, INC, PLAINTIFF, -VS- UNIFIRST CORPORATION, A MASSACHUSETTS CORPORATION, DEFENDANT.	PLAINTIFF'S RETURN TO DEFENDANT'S MOTION TO ALTER OR AMEND Case Number: 2017-CP-04-01932

The Plaintiff, Hicks Unlimited, Inc., by and through its undersigned counsel, submits the following Return to Defendant's Motion to Alter or Amend.

This matter initially came to be heard before the Court pursuant to Plaintiff's motion to stay arbitration pursuant to S. C. Code Ann.§15-48-20(b)(2005) and Defendant's motion to compel arbitration. The Plaintiff's motion to stay was attached to its complaint and was filed to stay Defendant's repeated attempts to force arbitration over Plaintiff's strong objections pending a trial on the merits. The Plaintiff, by its motion, maintained that it would suffer extreme prejudice and would be deprived of important constitutional, due process, substantive, and procedural rights if the stay was not granted. The Defendant timely served and filed its motion to compel arbitration together with its answer. After a hearing on November 27, 2017, the subject order dated January 9, 2018, granted Plaintiff's motion to stay arbitration and denied Defendant's motion to compel arbitration.

There has been no discovery or trial on the merits. The Defendant's motion does not demonstrate that there has been an intervening change in controlling law or new evidence since the date of the hearing on November 27, 2017. Furthermore, it does not demonstrate that there

has been a clear error of law or manifest injustice. The decision to grant or deny a Rule 59(e) motion is within the sound discretion of the trial judge.

It is the Plaintiff's position that, not only is the contract not subject to the Federal Arbitration Action because it does not implicate interstate commerce, but that the contract had been terminated, and that its terms are "illegal, unconscionable, and unenforceable". All of these are raised by Plaintiff's complaint.

The contract, which is the subject of this litigation, was executed on September 21, 2006, in the parking lot of Martin and Martin Auctioneers in Anderson County, South Carolina. It was drafted by Defendant's attorneys without input from Plaintiff. The initial "Flame Resistant Garment Agreement" was signed by Plaintiff and a sales representative of Defendant. It was not signed by the UniFirst Location Manager as required by the contract. The contract was a rental agreement for Defendant to provide flame resistant garments to Plaintiff.

The initial term of the contract was for 60 months with an automatic renewal provision for "multiple successive 60 month periods". The Plaintiff was unaware of the automatic renewal provisions hidden in the contract or of the arbitration provision. At the expiration of the initial 60 month term, the Plaintiff attempted to terminate the services due to poor service and overbilling by the Defendant. After being informed of the automatic renewal provision, the Plaintiff reluctantly agreed to honor the contract for an additional 60 month term. At this time the Defendant's operation manager, its sales representative, the driver of its service truck, and its secretaries and other office employees all knew that the Plaintiff was terminating the contract at the end of the second term and that it would not be renewed. Therefore, the Plaintiff paid the Defendant for its service in providing flame resistant coveralls for ten (10) years. It was only after the second 60 month period that the Defendant attempted to compel arbitration to enforce a

liquidated damages provision. The Defendant waived its right to deny that the contract had been terminated and should be estopped to deny termination of the agreement. The Plaintiff maintains that the contract dated September 21, 2006, had been effectively terminated and, therefore, the arbitration agreement, even if applicable, was no longer in effect.

The case cited by Defendant, Cape Romain Contractors, Inc. vs. Warlo E, LLC, 405 S.C. 115, 747 S.E.2d 461 (2013) only overruled the case of Timms v. Greene, 408 S.C. 371, 427 S.E.2d 642 (1993) to the extent that it determined that the Federal Arbitration Act ("FAA") did not apply because the contract on its face failed to demonstrate that the parties contemplated an interstate transaction at the time of the contract formation. In determining if the FAA applies to a particular arbitration agreement, a Court still must determine whether or not the contract concerned a transaction involving interstate commerce. There is no evidence that the contract at hand concerned a transaction involving interstate commerce. It was entered into in Anderson County, and it involved providing for the rental of flame resistant coveralls to Plaintiff in Anderson County by Defendant from its place of business in Simpsonville, South Carolina. The contract was entered into in South Carolina and was to be performed entirely in South Carolina. The Defendant argues that the contract involved interstate commerce because the Defendant is a Massachusetts corporation and the flame resistant coveralls which it rented were purchased by it and shipped from Kentucky. (There is no proof of this.) The Defendant is domesticated and authorized to do business in South Carolina and has a long standing, state wide presence doing business in South Carolina. It is the Plaintiff's position that the assertions, standing alone, are not sufficient to implicate interstate commerce. To ascertain whether or not an arbitration agreement implicates interstate commerce and the FAA, the court must examine the agreement, the complaint and the surrounding facts, focusing particularly on what the terms of the

agreement specifically require for performance. Whether or not an arbitration agreement implicated interstate commerce is generally a very fact-specific inquiry. See Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). The subject contract provided solely for the rental of flame resistant coveralls to the Plaintiff in Anderson County, South Carolina, to be delivered by the Defendant from its Simpsonville place of business. The garments remain the property of the Defendant. Nothing in the contract, in the surrounding facts, or in the performance of the contract implicate interstate commerce. Interstate commerce is a necessary basis for application of the Federal Act ("FAA"). Therefore, the federal act does not preempt state law. To determine whether the contract giving rise to the transaction between the parties involves interstate commerce under the FAA, "commerce" is defined as commerce among several states or with foreign nations. Soil Remediation Company v. Nu-Way Environmental, Inc., 323 S.C. 454, 476 S.E.2d 149 (1996).

Finally, the Plaintiff maintains that the rental agreement is unconscionable and unenforceable on its face. The Plaintiff was unsophisticated and was not represented by independent counsel and lacked a meaningful choice to arbitrate when entering into the rental agreement. The Defendant is a substantial, long-standing business concern specializing solely in the rental of uniforms and other items to local businesses. The contract was prepared solely by its attorneys. It was presented to the Plaintiff without Plaintiff having a meaningful chance to review its terms, nor was it advised of the terms. This was an adhesive contract. The liquidated damages provision of the contract which provides for "... an amount equal to 50 percent of the average weekly amounts invoiced in the preceding 26 weeks, multiplied by the number of weeks in the current term ... ." was unconscionable and oppressive, especially in light of the fact that Plaintiff made rental payments to Defendant for ten (10) years. The arbitration agreement is

contained in the paragraph titled "Obligations and Remedies" which contain the liquidated damages provision. Therefore, in determining whether the arbitration agreement is unconscionable, the entire contract and specifically this provision must be considered in their entirety. See Smith v. D. R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016).

"In South Carolina, unconscionability is defined as the 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 v. MSA of Myrtle Beach, Inc., 373 S.C. at 24-25, 644 S.E.2d, 663 at 668 (2007). Whether a party lacks a meaningful choice when entering into the arbitration agreement speaks to the fundamental fairness of the bargaining process. This was an adhesion contract or standard form contract offered on a "take-it or leave-it" basis, and its terms were not negotiable. Adhesive contracts should be looked upon with considerable skepticism since there is considerable doubt any true agreement to arbitrate ever existed. In determining the issue of whether a party had a meaningful choice to arbitrate, the Court should consider the relative disparity of the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether the party is a substantial business concern. Id, See Simpson, 373 S.C. at 25, 644 S.E.2d at 669.

It is the position of the Plaintiff that the arbitration agreement in the agreement dated September 21, 2006, was unconscionable and unenforceable. See Smith v. D. R. Horton, Id, and authority cited therein.

For the reasons set forth above, the Plaintiff respectfully requests that the Court deny the Defendant's motion to alter or amend.

ALLEN AND EAKES

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Anderson, South Carolina
January 31, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable J. Scott Sprouse, Circuit Court Judge

Civil Action No. 2017-CP-04-09132

UNIFIRST CORPORATION,

Appellant,

v.

HICKS UNLIMITED, INC.,

Respondent.

NOTICE OF APPEAL

Pursuant to Rules 201 and 203 of the South Carolina Appellate Court Rules, Appellant, UniFirst Corporation, ("Appellant") hereby appeals the Order of the Court of Common Pleas dated and filed on January 9, 2018 and the Order Denying Defendant's Motion for Reconsideration dated and filed on February 14, 2018. Appellant received written notice of entry of the Order Denying Motion for Reconsideration on February 14, 2018.

March 15, 2018 By: _____

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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable J. Scott Sprouse, Circuit Court Judge

Civil Action No. 2017-CP-04-09132

UNIFIRST CORPORATION,

Appellant,

v.

HICKS UNLIMITED, INC.,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on March 15, 2018 on the above named Respondent by via email as follows:

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ATTORNEY FOR RESPONDENT

Cindy Gatlin

Cindy Gatlin, Legal Assistant to Ian McVey

March 15, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO: 2017-CP-04-1932
Hicks Unlimited, Inc.,	)	
	)	
PLAINTIFF,	)	
	)	
-vs-	)	TRANSCRIPT OF RECORD
	)	
Unifirst Corporation,	)	
A Massachusetts Corporation,	)	
	)	
DEFENDANT.	)	
	)	
	)	

November 27, 2017
ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE, JUDGE

A P P E A R A N C E S:

James S. Eakes, Esquire
Attorney for the Plaintiff

Jude C. Cooper and Ian D. McVey,
Attorneys for Defendant

LESA D. WILLIAMS
Court Reporter

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EXHIBITS

NO EXHIBITS ENTERED

THE COURT: All right, let's go on the record. What's our first case?

MR. MCVEY: Your Honor, Ian McVey on behalf of Defendant Unifirst Corporation. This is Hicks Unlimited, Inc., versus Unifirst Corporation, a Massachusetts corporation, case number 2000-CP-04-01932. As a housekeeping matter, I have an order to hand up to have Mr. Jude Cooper admitted *pro hac vice*. Mr. Eakes has consented to that. All the requisite -- the motion was filed. All the requisite provisions have been received by the Court. I'd just like to, if I may approach.

THE COURT: Yes, sir.

MR. MCVEY: Thank you. I've got multiple copies in here for the Court. Thank you.

THE COURT: Okay.

MR. MCVEY: I didn't know how many copies that the clerk would want, so I just ---

THE COURT: Well, it'll have to be e-filed.

MR. MCVEY: Okay.

THE COURT: It'll have to be ---. But I'm going to look at it. I'm going to look at your hard copy here, but you'll have to file it through the system.

MR. MCVEY: Okay. It can't be -- can you execute it, and have them e-file it? I don't -- I'm not sure I've completely figured out the state --- e-filing system yet. And I don't think I'm the only one.

THE COURT: I am not the appropriate technical expert to advise you on that, but I can -- just let me look at it real quick.

MR. MCVEY: Sure. Thank you, Judge.

THE COURT: All right, I have reviewed the documents submitted on behalf of Mr. Jude Cooper on a *pro hac vice* application. The paperwork appears to be in order and this is consented to by Mr. Eakes, counsel for the Defendant, so I will order from the bench that be

approved. Mr. McVey, you can just submit the order through e-filing, but it has been approved from the bench.

MR. MCVEY: Thank you, Your Honor.

MR. COOPER: Thank you, Your Honor.

MR. MCVEY: I appreciate that. Your Honor, we're going to hand these cases to Mr. Eakes now. I also have the cases that we're going to be discussing today, and ---

THE COURT: Okay.

MR. MCVEY: --- in support of the Motion to Compel Arbitration.

MR. EAKES: Thank you.

THE COURT: All right. This is the Defendant's Motion to Compel Arbitration.

MR. EAKES: Your Honor, we had -- when we filed our action -- we were forced to file an action. We also have a Motion to Stay Arbitration.

THE COURT: Okay. All right. Let me hear from the Defendant first. It looks like their motion was listed first, so, then I'll hear from you, Mr. Eakes.

MR. COOPER: Thank you very much, Your Honor. May it please the Court?

This was originally commenced as an arbitration matter back in June of this year. Unifirst filed an arbitration through the American Arbitration Association and served that on the Plaintiff in this case, Hicks Unlimited, for a breach of a -- what was called a flame-resistant garment agreement that the parties entered into back in 2006, pursuant to which my client, Unifirst Corporation rented to Hicks Unlimited a set of flame retardant garments, and the Defendant paid a rental service charge for that service over a period of approximately 11 years.

In response to the arbitration demand, the parties engaged in a preliminary hearing, at which time the final hearing was -- the date of the final hearing was set. Shortly thereafter, Hicks Unlimited filed this action seeking to stay the arbitration on several grounds, which I

will discuss in my motion. First off, my --- counsel provided a copy of several cases that we're going to rely on in support of our motion.

The first, *Parsons vs John Weiland Homes,* talks about just the general policy concerning arbitration in this state, that it's the policy of the state of South Carolina to favor arbitration disputes and this -- to that end, there's a heavy presumption in favor of arbitrability which requires that when the scope of the arbitration clause is open to question, the Court must decide in favor of arbitration. So, the questions before the Court today are as follows.

Number one, is there an agreement to arbitrate between the parties? Number two, if the answer to question number one is yes, did -- does the scope of the dispute -- or, excuse me, does the dispute fall within the scope of the arbitration clause? The answer to question number one is that there is a contract between the parties. Now, there's no dispute between Hicks Unlimited and Unifirst, but there was a contract. It was single-page, double-sided, and on the back side of the contract, there was an arbitration clause. And the scope of that arbitration clause is very broad. I'll go to the specific language in just a moment when I talk about the -- whether the dispute falls within it.

On its face, the parties performed under this contract for about 11 years. The customer received service, paid for it. Unifirst provided those garments, updated them over the course of 10 years. So, on its face, there is a contract between the parties, and that contract contains an arbitration clause. Therefore, there is an agreement to arbitrate this dispute. The challenge raised by Hicks Unlimited in this case, is that the arbitration clause is not enforceable under the terms of South Carolina code 15-48-10, which, based on an idea that there was improper notice, but the clause itself doesn't give the appropriate notice that the code provision requires. But, that provision in the contract states that the parties agreed, amongst other things, that the dispute initiated by arbitration shall be governed by the Federal

Arbitration Act, quote, unquote. So, when you have a situation where the parties agree that the Federal Arbitration Act applies, and a provision in state law that seems to go against arbitration, how does -- how do those two play out? How does that conflict work itself out?

Well, the Supreme Court of South Carolina has answered that question by saying that the provision to the Federal Arbitration Act, what the parties have agreed that the Federal Arbitration Act is going to control in an arbitration dispute, those provisions preempt application of South Carolina section 15-48-10, and that is in the *Munoz versus Green Tree Financial* case, which I have also provided a copy of to Your Honor. In that case, there was a lawsuit alleging various torts and statutory violations, and in response, the Defendant moved to compel arbitration, some of which what happened here.

And in response to that, the Plaintiff said, well, the arbitration clause, it violates section 15-48-10. In overturning the trial court's decision, the Supreme Court in California -- or excuse me, of South Carolina, said that in situations where quoted the relevant provision of the Federal Arbitration Act, which does not have a notice provision anywhere resembling the type of provision of the South Carolina state code has. And in that situation where the parties have expressly agreed that the FAA applies, the tension is resolved by saying that the state law remains applicable, if that law went to legislative or judicial arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally.

But, a state law that places arbitration clauses on an unequal footing with contracts generally is preempted where the FAA applies. And here, the parties expressly agreed to the FAA applying in this dispute. And as *Munoz* talks about, even if the parties hadn't expressly agreed in the contract that the FAA applies, it would still apply here because just by its very nature you have Hicks Unlimited doing business with Unifirst Corporation, a Massachusetts corporation doing business in South Carolina. By itself that implicates interstate commerce, and the FAA would apply to this dispute even as the *Munoz* court talks about, even where

Hicks Unlimited may not have even contemplated that the transaction they were entering into with Unifirst would implicate interstate commerce. And in that situation, the statutory challenge that they have raised is preempted by the provisions of the Federal Arbitration Act, which allow for arbitration clauses such as the one contained in the agreement between the parties to be enforceable.

Therefore, there is an agreement between the parties to arbitrate that is not preempted, or is not canceled out by South Carolina code. Once that question is answered, the remainder is whether the dispute, as alleged in the arbitration proceeding and is alleged in this action, falls within the scope of the arbitration clause. And in the contract itself, it states, quote, all disputes of whatever kind between the customer and Unifirst, based upon past, present, or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation, or performance of this agreement, shall be resolved exclusively by final and by binding arbitration.

The issue is framed by the arbitration, that the customer, Hicks Unlimited, breached the contract by terminating improperly. Hicks Unlimited -- a defense of the -- to the arbitration appears to be that they are trying to trigger the renewal clause. But the question in the applicability of the renewal clause and whether they activated the notice provision falls under the renewal clause. In other words, they are challenging the continued performance and the continued enforceability of the customer service agreement.

Consequently, the scope of the arbitration clause and the allegations giving rise to the arbitration fall directly within the provisions of the contract. So, the answer to both of those questions that the Court is being asked to consider today are yes, there is an agreement to arbitrate, and the dispute falls within the scope of the arbitration clause. Though not express, expressly stated in their papers, Hicks Unlimited also seems to be raising the idea they properly exercise the notice provision, that the contract is no longer enforceable, and

therefore, there's no agreement to arbitrate.

In essence, they are not raising the attack on the arbitration clause itself, but they're raising an attack on the arbitration -- the contract as a whole. And the Supreme Court case of *Buckeye Cashing -- Check Cashing versus Cardegna*, which is at 596 -- 546 U.S. 440, a copy of which is also provided to Your Honor -- the Supreme Court of the United States held that a challenge to the validity of a contract as a whole, not specifically to the arbitration clause, is a question that must be decided by the arbitrator rather than the Court.

So practical implication of that is that in this forum, the Court can decide if there's an agreement to arbitrate and decide that the dispute falls within the auspices of the arbitration clause, and that whatever other challenges there are to enforceability, such as the contract's no longer in force, the contract is unconscionable procedurally or substantively, the contract is --- by fraud, or some other defense to the enforceability of the contract, those are all questions that we can go back to the arbitrator and have him or her decide as part of the agreement of the parties to arbitrate those types of contractual disputes.

Based on the motion that we have before Your Honor, put to Your Honor, the cases we've cited in support of it, and the facts that establish an agreement to arbitrate, and that there's a dispute falling within the arbitration clause, we respectfully request the Court to grant our Motion to Compel Arbitration and send the parties back to the American Arbitration Association to conclude this dispute.

Thank you very much.

THE COURT: Thank you, Mr. Cooper. All right, Mr. Eakes?

MR. EAKES: May it please the Court? May I approach?

THE COURT: Yes, sir.

MR. EAKES: I believe opposing counsel has everything I'm going to hand up other than the two cases that I'm handing up. The first one is the contract that ---. The next is a

series of letters that I wrote regarding my client's objection to arbitration and kind of explains why we're here today.

THE COURT: Okay.

MR. EAKES: I would first of all like to point out that this contract was entered into between Unifirst and my client on September 21st, 2006. And we haven't done any discovery, and this is -- my argument would go a little bit beyond the allegations of the complaint. But this was a 60-month, 5-year contract to provide flame-resistant garments for my client, the flame-resistant garment agreement. You will notice the front page is what he signed.

It was signed in the parking lot of Martin and Martin Auctioneers at the ---, Highway I-85 and Highway 8. These contracts -- I've been involved with Unifirst contracts before. They have -- all of the fine print is on the second page. My client doesn't even have a copy of the original contract he signed. This was provided to us when we got involved in this litigation. But in any event, this contract was to provide flame-retardant coveralls to my client, Hicks Mechanical Unlimited. He was an independent contractor doing services for Michelin at Sandy Springs and the Star plants.

The contract was entered into in the parking lot in Anderson County, state of South Carolina. The contract was wholly to be performed within the state of South Carolina. He was to be provided flame-retardant coveralls. My client went beyond the initial 5-year rollover period, got into the second rollover without realizing that there was a rollover provision, and without realizing that there was a 90-day termination.

This contract also provides for liquidated damages. When my client learned that he was in the second rollover, he was unhappy with the services he was being provided. He was unhappy with what he was being charged. He decided to bite the bullet and to go ahead and complete the second rollover period, which is basically 10 years. Everyone at Unifirst

Greenville office for three years knew that he was only going to complete the second rollover 5-year period of this contract, and then it would be terminated.

There were emails exchanged terminating this agreement. I guess the point I'm making is that we have a threshold issue of whether there was a contract in existence at the time they attempted to force arbitration. Now, my primary -- when I -- if you read my letters on June the 9th, I wrote Unifirst to inform them that my client did not agree to arbitration. They attempted to force arbitration. This pretrial conference that was so-called telephone conference was when I was headed out the door to court and they got me on the telephone about the arbitration proceeding. I again told them that we do not agree to arbitrate. And I wrote two subsequent letters to that effect. They attempted to continue with the arbitration even in light of my letters, therefore forcing me to file this action, and also to file a Motion to Stay the arbitration proceeding. And that's what we did.

As a threshold matter, the contract clearly does not comply with the South Carolina Arbitration statute. There's nowhere where it's typed, underline, capital letters, or rubber stamped predominantly on the first page of the contract that it is subject to mandatory arbitration. Therefore, it is clear this does not comply with the South Carolina arbitration statue and under South Carolina law is not subject to arbitration. When I got the Defendant's pleadings, they are attempting to raise -- that this is subject to the Federal Arbitration Act. All the case laws, my secretary has pulled the case law -- I don't have them books up online, I'm sick today, so if I didn't get the most recent case law.

But in order to override the South Carolina statue, the contract has to implicate interstate or foreign commerce. If it does not, the South Carolina law controls it. So, they're basically arguing that federal law preempts the South Carolina statute. To do that, they have to show that there is some implication of interstate commerce or foreign commerce, which is defined in the cases I've passed up. To determine whether a contract giving rise to the

transaction between the parties involved involves interstate commerce under Federal Arbitration Act, commerce is defined as commerce among the several states or with foreign nations.

Admittedly, Unifirst is a Massachusetts corporation, but they've got places of business all over South Carolina. The case law dealing with whether you have a federal preemption basically *dicta* states to ascertain whether an arbitration agreement implicates under state commerce in the Federal Arbitration Act, a court must examine the agreement, the complaint, and the surrounding facts, focusing particularly on what the terms of the agreement specifically require for performance.

This agreement provides for Unifirst to provide flame-retardant coveralls to my client. They were transported by the same driver from Greenville to the Michelin plant every week. The dirty overalls were picked up and taken back to the Michelin plant. My client has always done business for Michelin in Anderson County. He's a South Carolina corporation. Unifirst has a registered agent. The service of process are involved in numerous -- in a lot of litigation in this state over that liquidation clause -- liquidated damages clause.

This case does not involve interstate commerce, plain and simply. Therefore, there would be no preemption. The contract clearly does not comply with South Carolina Arbitration Act, section 15-48-10. Under the section 15-48-20, we're entitled to have a stay of the arbitration. Now, I didn't -- we haven't done any discovery. I don't know what their position is on why interstate commerce is implicated in this action. I can't see that it is.

Also, this clause that they refer to is buried at the end of this contract in the fine print. I'm not sure who would read it. But it also states that my client waives his right to a jury trial and that this paragraph shall be governed by New York law -- contract entered into in South Carolina, wholly performed in South Carolina, no implication of interstate commerce. I believe it is our position that the Plaintiff is entitled to have this matter -- the arbitration

stayed. The Court can have a further hearing on -- I take it that Mr. Cooper's Motion to Compel Arbitration is in the form of a Motion for Summary Judgment.

Like I've stated, we have not done any discovery, but unless there is some factual basis for implicating interstate commerce, this matter should go back to the South Carolina Court of Common Pleas. It is our position that by compelling arbitration under the circumstances of a 10, 11-year old contract, it would be grossly unfair to my client and would impair a number of substantial substantive rights that he has to a jury trial, discovery, and other things that you have in Common Pleas court. Thank you, Your Honor.

THE COURT: All right, gentlemen let me ask you a couple of questions and I'm going to -- Mr. Eakes, you're still standing. I'm going to ask you first, and then I'm going to turn it over to Mr. Cooper. This contract was originally signed September 21st, 2006, so the first 60-month period should have ended September 21st, 2011, is that ---

MR. EAKES: That is correct, Your Honor.

THE COURT: Okay, and the second period should have ended September 21st, 2016?

MR. EAKES: Yes, Your Honor, that's correct.

THE COURT: When did your client notify the Unifirst company that he was terminating the contract?

MR. EAKES: He notified them -- he never -- he didn't have the contract. He notified them three years before -- approximately three years before September 21st, 2016. He told them he was unhappy. He told them that he was going to terminate the contract, that he was not going to renew it, but that he would fulfill the obligations of the first rollover because they had -- because he was in the second -- in the first rollover period. But admittedly, the only emails he could come up with start in September of 2016. And there is a 90-day written notification part to that contract, and that's where you get into, you know,

whether they should be a --- under all the facts and circumstances, things that have to be fleshed out and tried by either a court or a jury.

THE COURT: Okay. Mr. Cooper, do you want to respond to that?

MR. COOPER: Your Honor, the terms of the contract under miscellaneous, the last paragraph on the back page -- again, this is a one-page contact, double-sided -- says that all written notices provided to Unifirst -- the last sentence in that paragraph -- all written notices provided to Unifirst must be sent by certified mail to the attention of the location manager. Under the term of renewal section, a renewal clause would have activated again in -- effective June of 2016, unless Hicks Unlimited sent written notice of its intent not to renew the contract no less than 90 days before the expiration of the next triggering date. There's no facts that have been induced either in the petition or in the arbitration to indicate that they've complied with that provision.

Regardless, what counsel is talking about is whether there was an enforceable agreement as of 2017. He's not arguing whether there was an enforceable agreement at all. It was clearly an enforceable agreement for 10 years, but nobody seems to be arguing that.

THE COURT: All right, well, let me ask you this. He's saying his client is paid up through the second rollover. Is that correct?

MR. COOPER: I believe that is correct, because Unifirst then continued to provide services after the -- for the third five-year period.

THE COURT: So, your client's position is that since he didn't send written notice, he owes another five years' worth of contract?

MR. COOPER: He owes the damages that are required under the contract, which is -- which includes liquidated damages calculated at 50 percent of the average weekly service amounts, multiplied by the remainder of weeks on the term of the agreement, which I believe it went several months into the third five-year period.

THE COURT: Okay. And your client -- your position is your client, based on the information you have, never received a notice in accordance with the contract of termination?

MR. COOPER: That is correct, Your Honor. And even if it had, I submit to Your Honor whether they properly terminated is a question that the arbitrator is supposed to decide.

THE COURT: Okay, okay. Mr. Eakes, I'm going to give you last word.

MR. EAKES: Well, I mean, just quite simply, Your Honor, that paragraph he refers to, I had it in another case. I had --- it's liquidated damages are not a penalty. I have some question about that, but as the Court -- as you indicated, my client bit the bullet and for three years finished out the second rollover and paid Unifirst every dime he owed them through the second rollover period. And they're trying to impose this liquidated damages clause on him because he didn't technically send written notice as required by the contract, which is a trap if you don't have a contract, number one. But number two, the whole issue is whether or not this contract is subject to mandatory arbitration, and it's our -- again, our position that it does not have the required terminology to force mandatory arbitration under South Carolina law, and there is no interstate commerce implicated.

THE COURT: I haven't had an opportunity to read this in detail yet. What is the -- Mr. Cooper, you mentioned it's -- and I see it here, the amount equal to 50 percent of the average weekly amount's invoice. All right, is there some sort of notice or summary given to the party that you allege violated the contract? How is that calculated by your ---

MR. COOPER: Each week, Unifirst provided service to Hicks Unlimited and provided, in connection with those services, tendered to the customer a weekly invoice for -- it's a weekly rental charge, essentially. Every week that they provide -- every week that they have the garments and are using them, they get an invoice for the rental rate for those garments. And the way that the liquidated damages is calculated is that you take the invoices

that Unifirst provided to them on a weekly basis, take the last 26 weeks, get the average of them, and multiply that by half, and multiply that by the number of weeks remaining in the term of the agreement.

THE COURT: Okay. All right. Well, gentlemen, I'm going to read the materials that have been submitted and this case law, and I appreciate your well thought out arguments, and I'll take this under advisement, and have my law clerk email you.

MR. EAKES: Thank you, Your Honor.

MR. COOPER: Thank you very much, Your Honor.

MR. MCVEY: Thank you, Your Honor.

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED LESA D. WILLIAMS, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF ALL REQUESTED PROCEEDINGS RECORDED AND EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF COMMON PLEAS, ANDERSON COUNTY, SOUTH CAROLINA, ON THE 27th DAY OF NOVEMBER, 2017.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

April 2, 2018

_____
LESA D. WILLIAMS
COURT REPORTER

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

Civil Action No. 2017-CP-04-01932
Appellate Case No. 2018-000468

Hicks Unlimited, Inc., ...Respondent,

v.

UniFirst Corporation, a Massachusetts Corporation, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies, pursuant to Rule 210(g), SCACR, that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 18, 2018 By: _____

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