THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-000468
Trial Court Case No. 2017-CP-04-09132

Hicks Unlimited, Inc., ... Respondent,

v.

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

RESPONDENT'S FINAL BRIEF

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

On May 17, 2017, Respondent (hereinafter UniFirst) filed an action with the American Arbitration Association against Appellant (hereinafter Hicks Unlimited) for an alleged breach of contract. (R. pp. 8-13).

On September 14, 2017, Hicks Unlimited filed its Complaint with the Anderson County Court of Common Pleas seeking declaratory relief related to the contract at issue along with a motion to stay the arbitration. (R. pp. 8-15). UniFirst filed its Answer on October 12, 2017, generally denying the allegations and offering affirmative defenses. (R. pp. 16-21). On the same date, UniFirst also filed a motion to compel arbitration. (R. pp. 23-27). Hicks Unlimited filed a Return to UniFirst's motion to compel arbitration on November 10, 2017. (R. p. 29).

On November 27, 2017, the parties attended a hearing on the competing motions. This hearing resulted in an Order from the Honorable R. Scott Sprouse filed on January 9, 2018. The Order denied UniFirst's motion to compel arbitration. Further, it stayed arbitration pending a hearing on the merits of Hicks Unlimited's declaratory judgment action. (R. pp. 1-4).

On January 18, 2018, UniFirst filed a Motion to Alter or Amend the January 9, 2018 Order. (R. pp. 31-36). Hicks Unlimited filed a Return to UniFirst's Motion to Alter or Amend on January 31, 2018. (R. pp. 38-43).

On February 14, 2018, the Honorable R. Scott Sprouse issued an Order Denying Defendant's Motion for Reconsideration. (R. pp. 5-7). This appeal followed. At this stage, there has not been a live testimony evidentiary hearing regarding the relief sought by the parties.

SEPARATE STATEMENT OF FACTS

On or around September 21, 2006, Hicks Unlimited signed a document entitled "Flame Resistant Garment Agreement" (hereinafter Agreement). (R. pp. 12-13). It is a form contract with "fill in the blank" areas regarding prices and quantity on the first page. (R. p. 12). The second page, which in its original form was on the back of page one, consists of boiler plate fine print provisions. (R. p. 13). The Agreement was not signed by UniFirst. (R. p. 12).

The Agreement was drafted by UniFirst. It is a lease agreement for services provided by UniFirst to take place solely in South Carolina. (R. pp. 1-4). UniFirst provides flame retardant clothing for Hicks Unlimited's employees, and then cleans those uniforms weekly. (R. pp. 12-13). It is a services contract.

UniFirst is authorized to transact business in South Carolina, and has an office in Greenville County, South Carolina. (R. pp. 1-4). Under the Agreement, UniFirst was to deliver for lease flame retardant clothing to Hicks Unlimited at its place of business in Anderson County, South Carolina. (R. pp. 12-13). All interactions between the parties occurred in South Carolina. (R. p. 2). Further, the Agreement is very careful in defining the Agreement as a lease for services rather than product. (R. p. 13).

The terms included on page two of the Agreement are non-negotiable "take it or leave it" provisions. They are extraordinarily one sided. For instance, the Agreement limits Hicks Unlimited's right to claim for damages as a result of any breach of the lease agreement by UniFirst. However, if Hicks Unlimited breaches the agreement, then UniFirst is entitled to liquidated damages in addition to actual damages. (R. p. 13).

Hicks Unlimited operated under this agreement for five (5) years. At the conclusion of the term, and being dissatisfied with UniFirst's services, Hicks Unlimited notified that it would not

renew the Agreement. (R. p. 9). UniFirst notified that Hicks Unlimited's termination notice was not timely, and did not comply with the provisions of the Agreement. Not willing to fight and due to UniFirst's threats of litigation, Hicks Unlimited paid on the Agreement for an additional five (5) years. It notified UniFirst, at that time, and again subsequently that it would not renew the contract at the conclusion of this second five (5) year period. (R. p. 9). At the conclusion of the second five (5) year period, UniFirst again informed Hicks Unlimited that it did not cancel the contract properly. UniFirst informed Hicks Unlimited that the contract was again renewed for another five (5) year period. (R. pp. 9-10).

After Hicks Unlimited returned the uniforms and did not pay, UniFirst filed an action with the American Arbitration Association (AAA) for breach of contract against Hicks Unlimited. On multiple occasions, Hicks Unlimited notified UniFirst that its arbitration action was illegal and that it cease and desist from pursuing the same. When those notifications were ignored by UniFirst, Hicks Unlimited had no other recourse but to file a Declaratory Judgment action with the Court of Common Pleas. (R. pp. 9-10).

ARGUMENT

Standard of Review

"Unless the parties otherwise provide, the question of arbitrability of a claim is an issue for judicial determination." *Hodge v. UniHealth Post-Acute Care of Bamberg,* 422 S.C. 544, 554, 813 S.E.2d 292, 297 (Ct. App. 2018). Arbitrability determinations are subject to de novo review. *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). However, the trial court's "factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Smith v. D.R. Horton, Inc.,* 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016).

ISSUE 1: THE CIRCUIT COURT DID NOT ERR IN DENYING THE APPELLANT'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION AGREEMENT IS UNCONCIONABLE AND UNENFORCEABLE.

The Arbitration Agreement is Unconsionable

General contract principals of state law apply to arbitration clauses. *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016). As such, courts may invalidate arbitration agreements on general state law contract defenses such as fraud, duress, and unconscionability. *Id.*

At issue in this case is the following provision of the Agreement:

> **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).

"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." *Smith*, 417 S.C. at 49, 790 S.E.2d at 8.

Adhesion contracts with "take it or leave it" provisions are viewed with considerable skepticism by the court. *One Belle*, 418 S.C. at 61, 792 S.E.2d at 291. In determining whether a contract had an absence of meaningful choice, courts should take into account 1) the nature of the injuries suffered by the plaintiff; 2) whether the plaintiff is a substantial business concern; 3) the relative disparity in the parties' bargaining power; 4) the parties' relative sophistication; 5) whether there is an element of surprise in the inclusion of the challenged clause; and 6) the conspicuousness of the clause. *Simpson,* 373 S.C. at 25, 644 S.E.2d at 669.

In this case, there is no question that the fine print provisions on page two constitute an adhesion contract. (R. p. 13). First, Hicks Unlimited was unaware that these provisions even existed as they were located on the back of page one in the Agreement's original form. UniFirst is a large corporation. Hicks Unlimited is a locally owned entity with less business sophistication than UniFirst. The arbitration clause is buried on the backside of page one with no reference on page one to the fine print terms. (R. p. 13). No negotiations resulted in the fine print provisions.

"The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." *Simpson*, 373 S.C. at 29-30, 644 S.E.2d at 671. An arbitration clause that limits one party's rights to damages may be a reason to find an arbitration clause to be unenforceable. *Simpson,* 373 S.C. at 28, 644 S.E.2d at 670; *Smith*, 417 S.C. at 50, 790 S.E.2d at 10. Therefore, it only stands to reason that a provision that unlawfully expands one party's right to damages would be a reason to invalidate an arbitration clause.

> Implicit in the meaning of 'liquidated damages' is the idea of compensation; in that of 'penalty,' the idea of punishment. Thus, where the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the

> stipulation is for liquidated damages; and where the stipulation is not based upon actual damages in the contemplation of the parties, but is intended to provide punishment for breach of the contract, the sum stipulated is a penalty.
>
> *Erie Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460-61, 713 S.E.2d 318, 321 (Ct. App. 2011) citing *Tate v. LeMaster*, 231 S.C. 429, 441, 99 S.E.2d 39, 45-46 (1957).
>
> In order to determine whether the sum named in a contract as a forfeiture for noncompliance is intended as a penalty or liquidated damages, it is necessary to look at the whole contract, its subject matter, the ease or difficulty in measuring the breach in damages and the magnitude of the stipulated sum, not only as compared with the value of the subject of the contract, but in proportion to the probable consequences of the breach.
>
> *Erie Ins. Co.*, 393 S.C. at 462, 713 S.E.2d at 322 citing *Foster v. Roach*, 119 S.C. 102, 107, 111 S.E. 897, 899 (1922).

In this case, included in the section of the Agreement that encompasses the arbitration provision is a provision about liquidated damages. (R. p. 13). The right to make a claim for liquidated damages in the Agreement only extends to UniFirst not Hicks Unlimited. The contract language states that "actual damages would be difficult to calculate with reasonable certainty." That is a false statement. This was a lease agreement for a term of 5 years. Hicks Unlimited paid a fixed monthly "fee" or "rent" each month for UniFirst's services in providing flame retardant uniforms. (R. pp. 12-13). If Hicks Unlimited breached the agreement during the term, actual damages would be simple to calculate. Actual damages would be the amount owed left on the term. Adding an additional 50% to that figure is a penalty. As such, the liquidated damages clause is an additional damage unallowable and unenforceable under South Carolina law. Strangely, Hicks Unlimited's damages would be difficult to ascertain if UniFirst breached the Agreement. Yet no provision for liquidated damages to Hicks Unlimited is included in the Agreement.

The liquidated damages clause is included in the same section as the arbitration clause. (R. p. 13). The entire clause is to be read as a whole when determining arbitrability. *Smith*, 417 S.C. 49-50, 790 S.E.2d at 9-10. As such, even applying a *Prima Paint* analysis, the arbitration clause

itself is unconscionable and unenforceable. *Smith*, 417 S.C. at 48-49, 790 S.E.2d at 7-8; see also *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S. Ct. 1881, 18 L.E.2d 1270 (1967).

While UniFirst is allowed unenforceable, liquidated damages in this clause, Hicks Unlimited is limited by the Agreement in what it can claim as damages. In the "Merchandise" section, UniFirst disclaims any liability for its merchandise not doing what it was designed to do. Further, in the "Performance Guarantee" section Hicks Unlimited is limited to rescission of the contract if UniFirst fails to perform. (R. p. 13).

The limitation on remedies to Hicks Unlimited and the expansion of unlawful remedies granted to UniFirst under the Agreement is important as it speaks to the overall and general fairness of an arbitration proceeding. Not only is the arbitration section of the Agreement unconscionable, but the entire Agreement is unconscionable.

UniFirst also claims that the lower court's Order should be reversed because Hicks Unlimited did not specifically plead that the arbitration provision is unconscionable. It is undisputed that Hicks Unlimited plead that the Agreement is unconscionable. (R. pp. 8-11). Further, Hicks Unlimited alleged a number of other facts sufficient to place UniFirst on notice that the arbitration clause of the Agreement, as well as the entire Agreement, is unconscionable. (R. pp. 8-11). It is well established that pleadings are to be liberally construed. *Montgomery v. Conway Lumber Co.,* 171 S.C. 483, 486-487, 172 S.E. 620, 621 (1934). The object of pleadings is to allege sufficient facts to place the other party on notice of the issues involved in the case. *Id.* A review of the Plaintiff's Complaint makes clear that Hicks Unlimited is challenging the arbitration clause on a number of grounds including unconscionability.

There Was No Agreement to Arbitrate

If the Agreement is not valid then the arbitration provisions contained in the Agreement are unenforceable. See *Hodge,* 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018). In *Hodge*, the arbitration provision of a nursing home admission agreement was deemed unenforceable because the patient's spouse signed the agreement without authority from the patient. *Id.* 422 S.C. at 550-553, 813 S.E.2d at 295-297. The Court of Appeals relied, in part, on provisions of the nursing home agreement that required the signature of the patient, if competent. *Id.* 422 S.C. at 550-551, 813 S.E.2d at 295-296. Further, the spouse did not have power of attorney over the patient in order to enter into the agreement. *Id.* In other words, there was no contract because the terms of the contract themselves were violated making it unenforceable. *Id.*

In this case, the Agreement was not signed by UniFirst. (R. p. 12). On the bottom of page one of the Agreement it states, "This Agreement is effective only upon acceptance by UniFirst Location Manager." (R. p. 12). More importantly, in the Section 'Term and Renewel' on page two it states, "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 renewel date." (R. p. 13) (emphasis added). The UniFirst Location Manager did not sign his acceptance to the Agreement. (R. p. 12). As such, by the very terms of the adhesion agreement drafted by UniFirst, the Agreement is not enforceable and not effective because it was not signed by the Location Manager of UniFirst.

Additionally, the Agreement expired. After the first 5 year period, Hicks Unlimited notified UniFirst that it no longer wished to rent its uniforms. UniFirst informed that Hicks Unlimited did not terminate properly and that the contract automatically renewed. At that stage, Hicks Unlimited

informed that it would adhere to the additional 5 year term, but that it would terminate and not renew beyond that time. (R. pp. 9-10).

The Agreement provides: "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." (R. p. 13). Hicks Unlimited gave notice of non-renewal 5 years prior to the expiration date. (R. p. 9). As such, the Agreement is no longer enforceable.

ISSUE 2: THE CIRCUIT COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION AS THE NOTICE CLEARLY VIOLATED THE SOUTH CAROLINA ARBITRATION ACT AND WAS NOT PREEMPTED BY THE FEDERAL ARBITRATION ACT.

The Arbitration Agreement Violates the South Carolina Uniform Arbitration Act and is Unenforceable

S.C. Code Ann. § 15-48-10(a) (2005) provides as follows:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. 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 contract shall not be subject to arbitration. (emphasis added).

By enacting this statute, the South Carolina Legislature clearly intended for arbitration clauses to be given prominence in a contract so parties understand the nature and importance of what they are giving up when agreeing to an arbitration clause. The court has strictly construed the statute, and held that its terms are clear and unambiguous and must be applied according to their literal meaning. *Soil Remediation Company v. Nu-Way Environmental, Inc.*, 323 S.C. 454, 457, 476 S.E. 2d 149, 151 (1996).

While UniFirst admits that the Agreement violates the notice requirements of the South Carolina Uniform Arbitration Act (UAA) and would therefore be unenforceable pursuant to the UAA. (See Appellant's Brief, p. 10). UniFirst argues that the UAA is not applicable and is preempted by the Federal Arbitration Act (FAA), which does not provide the same type of notice requirements as required by the UAA.

The FAA Does Not Apply to this Case

UniFirst argues that Hicks Unlimited agreed to the FAA controlling the analysis of arbitrability due the following sentence in the arbitration clause:

> 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.[1]

Hicks Unlimited has not contracted away its right to contest the arbitration clause. A similar provision existed in the arbitration clause in *Hodge*; however, despite the existence of that provision, the Court of Appeals did not find that the FAA applied to the dispute. 422 S.C. at 553, 813 S.E.2d at 296. More importantly, to take such a strict interpretation of the Agreement would also require a finding that the Agreement is unenforceable due to UniFirst failing to sign the Agreement in violation of the "Term and Renewal" provision of the Agreement. (R. p. 13).

The primary case cited by UniFirst for this position is *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). *Munoz* is distinguishable. It involved an admittedly valid and signed installment contract and security agreement. The arbitration clause stated: "This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. § 1..." *Id.*, 343 S.C. at 536, 542 S.E.2d at 362. The arbitration clause in the UniFirst contract is hidden and does not state that it is made pursuant to

[1] Subsequently, in the same provision, it states, "This paragraph shall be governed by New York law (exclusive of choice of law)." (R. p. 13).

interstate commerce. (R. p. 13). However, even in light of the specific language implicating interstate commerce in *Munoz*, the Supreme Court still analyzed the facts of the case to determine whether the transaction in fact involved interstate commerce. *Id.*, 343 S.C. at 364, 542 S.E.2d at 538. Therefore, the terms of the contract are not controlling without an analysis of whether or not interstate commerce is actually implicated by the transaction.

The FAA only preempts state law if the underlying transaction involves or implicates interstate commerce sufficient to invoke the commerce clause. *Soil Remediation*, 323 S.C. at 460, 476 S.E.2d at 152. "Commerce" is defined as commerce among the several states or with foreign nations... ." 9 U.S.C.A. §1. In its analysis, the court must examine the agreement, the complaint, and the facts surrounding the transaction to determine whether the transaction is one involving commerce within the meaning of the FAA. *Mathews v. Fluor Corp.,* 312 S.C. 404, 407, 440 S.E. 2d 880, 881 (1994). Furthermore, just stating that the contract will be governed by the FAA does not amount to a stipulation that interstate commerce is involved.

In the case of *Cape Romain Contactors, Inc. v. Wando E. LLC*, 405 S.C. 115, 747 S.E. 2d 461 (2013), the parties selected arbitration as the binding method of dispute resolution in their agreement and further provided that "... the Federal Arbitration Act (FAA) shall govern the arbitration process." *Id.,* 405 S.C. at 120, 747 S.E.2d at 463. This language was not conclusive on the issue of the enforceability of the arbitration clause. *Id.* Despite the language, the Supreme Court still performed analysis of whether or not the transaction involved interstate commerce. *Id.*, 405 S.C. at 121, 747 S.E.2d at 464. As such, the Court has to determine, as a threshold matter, whether the transaction involves interstate commerce regardless of the contractual language. *Id.,* see also *Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 759 S.E 2d 727 (2014).

"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 terms the contract specifically requires for performance." *Dean,* 408 S.C. at 380, 759 S.E.2d at 732. This is generally a very fact specific inquiry.

The commerce involved in the contract must be interstate or foreign. 9 U.S.C.A. §1, *et seq.* "Commerce" is defined as "commerce among the several States or with foreign nations... ". 9 U.S.C.A. §1. The proper analysis includes consideration of three broad categories, to-wit: (1) use of the channels of interstate commerce; (2) regulation of the persons, things, or instrumentalities in interstate commerce; and (3) regulation of activities having a substantial relationship to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 626, 637 (1995); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001).

The Agreement was entered into on September 26, 2006, in Anderson County, South Carolina, between Hicks Unlimited and UniFirst. (R. p. 12). Hicks Unlimited is a South Carolina Corporation. UniFirst is a Massachusetts corporation domesticated and authorized to do business in South Carolina, with a long-standing state-wide presence in South Carolina. This was a services agreement whereby UniFirst agreed to lease and clean fire resistant garments to Hicks Unlimited for its employees. (R. p. 12). The rental uniforms were delivered by UniFirst to Hicks Unlimited from its Simpsonville warehouse. The uniforms were then picked up by UniFirst from Hicks Unlimited's place of business in Anderson County to be cleaned and repaired in Greenville County. (R. p. 2). This cycle repeated with uniforms delivered and picked up, all within a two county radius. No one traveled out-of-state, and everything occurred in South Carolina. The uniforms belonged to UniFirst, not Hicks Unlimited. (R. pp. 12-13). Hicks Unlimited only dealt

with the employees of UniFirst in Greenville County. Bills and invoices were mailed from UniFirst's office in Greenville County to Hicks Unlimited in Anderson County, and then paid by Hicks Unlimited at UniFirst's location in Greenville County. (R. p. 2).

Based upon the specific facts of this case, the Agreement did not involve or implicate interstate commerce. Nothing in the contract, the surrounding facts of the transaction, or in the performance of the contract involved or implicated interstate commerce. It was a cleaning services and rental contract to be performed solely within South Carolina.

UniFirst contends that it is a Massachusetts corporation with a board of directors in Massachusetts; that the payments tendered by Hicks Unlimited in Greenville County were then forwarded to Massachusetts; and that the rental uniforms were purchased in and shipped from Kentucky. There was no discovery prior to this appeal and no affidavits filed to verify these assertions. However, assuming their validity, none of these matters are relevant as this was a services contract with the services taking place solely in South Carolina.

All of the cases cited by UniFirst are factually distinguishable from the case at hand. Those cases largely involve the purchase of items from the stream of interstate commerce, or services that clearly implicate interstate commerce. In this case, the Agreement is a services agreement. All aspects of this service agreement are to be performed within the borders of South Carolina. This transaction did not involve the channels of interstate commerce; the instrumentalities of interstate commerce; nor persons or things in interstate commerce. See *Lopez*, 514 U.S. at 558-59, 115 S.Ct. at 1629, 131 L.Ed.2d at 637; *Cape Romain Conts.*, 405 S.C. at 122, 747 S.E.2d at 464, and *Dean*, 408 S.C. at 380, 759 S.E.2d at 732.

By enacting the UAA, the South Carolina legislature expressed an obvious public policy preference that proper notice be given before subjecting someone to mandatory arbitration. The

heart of the transaction in this case is a simple rental agreement for services to be performed entirely within the borders of the State, a purely intrastate activity, with no nexus to interstate commerce. If interstate commerce is defined as encompassing a service agreement to take place solely within South Carolina, then there is no situation in which interstate commerce would not be implicated. This would make the UAA and the South Carolina Legislature's public policy regarding notice for arbitration moot. Hicks Unlimited contends that the UAA is not preempted, making the alleged arbitration agreement unenforceable.

CONCLUSION

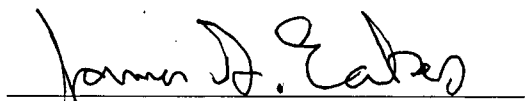
The Agreement is not binding in this case. It was not signed and executed by UniFirst in clear violation of the terms on the Agreement. Further, Hicks Unlimited clearly did not renew the Agreement before it expired.

Further, utilizing a *Prima Paint* analysis in conjunction with the Supreme Court's ruling in *Smith v. D.R. Horton*, the arbitration agreement is clearly unconscionable as it grants damages to UniFirst that are disallowed under the South Carolina law while disclaiming liability to Hicks Unlimited in remaining parts of the Agreement.

Lastly, UniFirst admits that the Agreement violates the UAA. However, UniFirst argues that the UAA is preempted by the FAA because of allegations that the Agreement implicates interstate commerce. The Agreement is a contract for services provided by UniFirst to Hicks Unlimited with said services occurring solely in South Carolina. It does not involve the purchase of products within the channels of interstate commerce. It is essentially a cleaning service for uniforms rented by Hicks Unlimited and owned by UniFirst.

Accordingly, for those reasons, as well as any ground appearing on the record, pursuant to Rule 220(c), SCACR, Hicks Unlimited requests that this Court affirm the decision of the Circuit Court.

Respectfully Submitted,



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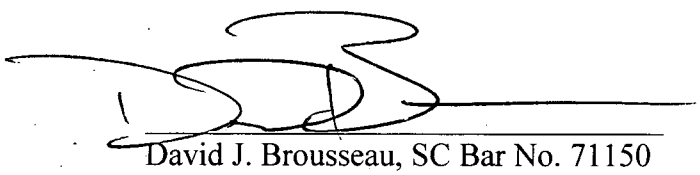

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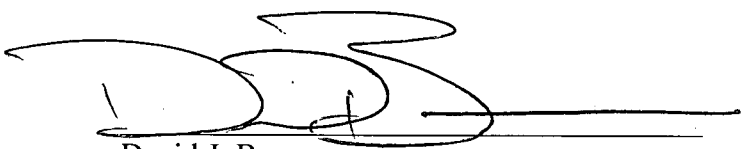
CERTIFICATE OF COUNSEL

The undersigned certifies that the Respondent's Final Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules*.



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