THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
COURT OF COMMON PLEAS
THE HONORABLE DANIEL D. HALL
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2021-000986
CIVIL ACTION NO. 2021-CP-46-01651

Tony's Garage, LLC,

APPELLANT,

versus

UniFirst Corporation,

RESPONDENT.

FINAL BRIEF OF RESPONDENT

Caleb M. Riser (S.C. Bar No. 76738)
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
criser@richardsonplowden.com
cganjehsani@richardsonplowden.com
ATTORNEYS FOR RESPONDENT
UNIFIRST CORPORATION

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COUNTERSTATEMENT OF THE CASE

This appeal arises out of the lower court's confirmation of an arbitration award and denial of a motion to vacate such award. On May 24, 2021, Appellant Tony's Garage, LLC ("Tony's Garage") filed a Petition against Respondent UniFirst Corporation ("UniFirst") to Vacate an Arbitration Award in the Court of Common Pleas for York County. Tony's Garage alleged the arbitration award had been procured by "fraud or undue means" and that the arbitration agreement was unconscionable. [R.pp. 7-10; Petition.]

On June 23, 2021, UniFirst filed a Response in Opposition to the Petition to Vacate the Arbitration Award as well as a Motion to Confirm the Arbitration Award. UniFirst submitted supporting documentation showing that the award was not obtained by "fraud or undue means." [R.pp. 11-73; Response in Opp. and Mtn. To Confirm with Exs.]

A hearing was held before The Honorable Daniel D. Hall on July 28, 2021. [R.pp. 74-91; Hearing Tr.] The Trial Court denied the Petition to Vacate the Arbitration Award on August 6, 2021 and subsequently granted the Motion to Confirm the award on August 23, 2021. [R.pp. 1-6; Orders.]

Tony's Garage filed and served its Notice of Appeal on or about September 1, 2021.

COUNTERSTATEMENT OF FACTS

UniFirst is a Massachusetts corporation engaged in the primary business of (1) renting uniforms, mats, and other textile products; (2) providing laundering and pick-up and delivery services for the rented items; and (3) providing restroom products and services. [R.p. 37; Memo. in Support of Claim, p. 1.] UniFirst provides its services from commercial laundry and distribution facilities throughout the United States, including a facility located in Charlotte, North Carolina. [R.p. 37; Id.]

Tony's Garage is a South Carolina limited liability company that operates an automotive repair business in Rock Hill, South Carolina. UniFirst provided its services to Tony's Garage from UniFirst's Charlotte, North Carolina facility. [R.p. 37; Id.]

UniFirst and Tony's Garage entered into a Customer Service Agreement dated September 25, 2018 (the "Agreement") for the provision of services by UniFirst to be used in the operation of the business of Tony's Garage. [R.p. 45; Agreement, p. 2.] The initial term of the Agreement was for a period of sixty (60) months (260 revenue weeks) from the date UniFirst made its first delivery to Tony's Garage, which upon information and belief was September 27, 2018. The Agreement replaced an earlier agreement for the same services. [R.p. 37; Memo. in Support of Claim, p. 1.] The Agreement further contained the following arbitration provision:

> This Agreement shall be governed by Massachusetts law (exclusive of choice of law). If a dispute arises from or relates in any way to this Agreement or any alleged breach thereof at any time, the parties will first attempt to resolve the claim or dispute by negotiation at agreed time(s) and location(s). All negotiations are confidential and will be treated as settlement negotiations. Any matter not resolved through direct negotiations within 30 days shall be resolved exclusively by final and binding arbitration, conducted in the capital city of the state where Customer has its principal place of business (or some other location mutually agreed); pursuant to the Commercial Arbitration Rules of the American Arbitration Association; and, governed by the Federal Arbitration Act, to the exclusion of state law inconsistent therewith. The parties will agree upon one (1) Arbitrator to settle the controversy or claim. The successful or substantially prevailing party in any proceeding, including any appeals thereof (as determined by the Arbitrator/court) shall recover all of its costs and expenses including, without limitation, reasonable attorney fees, witness fees and discovery costs, all of which shall be included in and as a part of the judgment or award rendered hereunder. This provision for Arbitration is specifically enforceable by the parties; the Arbitrator shall have no power to vary or ignore the provisions hereof; and the decision of the Arbitrator in accordance herewith, may be entered in any court having jurisdiction thereof. 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 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 against class litigation is ruled to be unenforceable for any reason in any proceeding, then the prohibition against class litigation shall be void and of no force and effect in that proceeding.

[R.p. 46; Agreement, p. 2.]

At all times, UniFirst performed its obligations and provided services to Tony's Garage according to the terms of the Agreement. According to UniFirst's records, Tony's Garage had never complained about the quality of UniFirst's services. On or about April 2, 2020, Tony's Garage unilaterally and without justification terminated the Agreement and refused to return or pay for certain rental merchandise provided by UniFirst as required under the terms of the Agreement. [R.p. 38; Memo. in Support of Claim, p. 2.]

Tony' Garage attempted to justify its termination of the Agreement and refusal of services upon the COVID-19 pandemic. UniFirst continued to visit Tony's Garage periodically to inquire if it would resume services as the initial impact of the pandemic decreased. While UniFirst had several customers temporarily close during the beginning of the pandemic, these customers reopened and recommenced receiving services from UniFirst. Tony's Garage, however, would not resume services from UniFirst. [R.p. 38; Id.]

During this time, UniFirst's rental merchandise remained in the possession of Tony's Garage. Tony's Garage continued to use UniFirst's rental items without paying UniFirst the required charges under the terms of the Agreement. [R.p. 38; Id.]

In August 2020, four months after Tony's Garage suspended UniFirst's services, UniFirst's Route Service Manager, Phillip Richter, visited Tony's Garage and insisted that it start accepting and paying for weekly deliveries in accordance with the terms of the Agreement. Mr. Richter asked the owner of Tony's Garage, Tony Pannell, to return all of UniFirst's rental merchandise for proper cleaning and further agreed to replace any items that were worn through ordinary wear and tear while in the possession of Tony's Garage. Mr. Parnell, however, informed Mr. Richter that it was unable to pay for UniFirst's services and refused to return any of UniFirst's rental merchandise. Mr. Pannell later informed Mr. Richter that he had found better pricing from a competitor of UniFirst's. The acts of Tony's Garage in unilaterally suspending and terminating the Agreement and refusing to return or pay for certain rental merchandise constituted a breach of the Agreement's terms. [R.pp. 38; 57; Id.; Richter Aff.]

Following UniFirst's attempts with Tony's Garage to resolve the dispute, counsel for UniFirst served a demand letter upon Tony's Garage on October 7, 2020, demanding $12,034.89 in damages for the breach of the Agreement by Tony's Garage, including $3,670.10 in charges for unreturned merchandise and $8,364.79 in additional liquidated damages as specified in the Agreement. [R.p. 59; Oct. 7, 2020 ltr.] UniFirst also advised Tony's Garage that if the dispute between them could not be resolved, UniFirst would file a demand for arbitration with the American Arbitration Association ("AAA"). [R.p. 59; Id.] Tony's Garage did not respond to UniFirst's demand letter.

Thereafter, on October 20, 2020, UniFirst initiated arbitration proceedings with the AAA pursuant to the Agreement. [R.pp. 27-35; Oct. 20, 2020 Demand for Arbitration with Statement of Claim and attachments.] The demand for arbitration was served upon Tony's Garage on October 20, 2020. [R.p. 32; Demand for Arbitration Cert. of Serv.]

On November 18, 2020, Tony's Garage responded to the arbitration demand via e-mail to the AAA with an attached letter. [R.pp. 61-62; Nov. 18, 2020 e-mail and attached ltr.] In its letter to the AAA, Tony's Garage disputed the merits of UniFirst's claims, but also acknowledged that the two parties had attempted to resolve the disputes between them without success: "On our final contact with UniFirst we again attempted to resolve the ongoing issues we were experiencing and were given an offer of reduced fees." [R.p. 62; Nov. 18, 2020 Ltr. to AAA.] In its letter to the AAA, Tony's Garage also thanked the AAA for its service and ability to resolve the dispute with UniFirst. [R.p. 62; Id. ("We thank you for your service and look forward to your ability to resolve these grievances.").] The AAA acknowledged receipt of the letter from Tony's Garage on November 19, 2020. [R.p. 61; Nov. 19, 2020 E-mail.]

Retired South Carolina Circuit Court Judge Kristi L. Harrington (hereinafter "arbitrator" or "Judge Harrington") was selected as the arbitrator. On January 7, 2021, Judge Harrington provided both parties with a Document Submission Schedule and set a final conference call date for February 16, 2021 prior to completion of the arbitration. [R.p. 64; Schedule.]

Pursuant to the Document Submission Schedule, UniFirst submitted its Memorandum in Support of Claim with supporting documentation to the AAA on January 18, 2021 with a copy served upon Tony's Garage. UniFirst sought $12,034.82 in compensatory damages, as well as $2,489.00 in arbitration costs and attorney's fees. [R.pp. 37-57; Memo. in Support of Claim with Exs.]

Under the Document Submission Schedule, Tony's Garage had until February 8, 2021 to submit its response to the AAA. [R.p. 64; Schedule.] Rather than filing a response with the AAA, two days after its deadline on February 10, 2021, counsel for Tony's Garage submitted a letter to counsel for UniFirst stating that Tony's Garage did not agree to arbitration because it believed the arbitration clause was not valid or enforceable and further did not believe that the contractual requirement of negotiation had been satisfied prior to the filing of the demand for arbitration. [R.p. 66; Feb. 10, 2021 Ltr.] Tony's Garage did not send this letter to the arbitrator.

Pursuant to the previously established schedule, Judge Harrington conducted a final conference call on February 16, 2021. Despite adequate notice to the parties, only counsel for UniFirst attended. Tony's Garage did not participate. During the conference call, counsel for UniFirst advised Judge Harrington of its receipt of the February 10, 2021 letter from counsel for Tony's Garage stating it was not agreeable to engaging in arbitration.

This February 10, 2021 letter was uploaded into the AAA case file. [R.p. 70; Arbitration Award, p. 1.]

Upon review of the documentation she had received, including the February 10, 2021 letter from counsel for Tony's Garage, Judge Harrington found that Tony's Garage had received proper notice of the arbitration proceeding and had "failed to present any legal authority to prevent an issuance of an Award." She further noted that Tony's Garage had failed to submit documents after due notice in accordance with the AAA Rules to dispute UniFirst's claim. As a result, oral hearings on the arbitration were waived in accordance with the AAA Rules, and the arbitrator considered all written documents submitted by the parties. [R.p. 70; Id.]

Judge Harrington found that Tony's Garage was in breach of the Agreement between the parties, that the liquidated damages clause was enforceable, and that UniFirst was entitled to attorney's fees from Tony' Garage. The total amount of the award against Tony's Garage was $14,523.82. [R.p. 70; Id.]

The AAA served the award upon the parties, including both Tony's Garage and its counsel, on March 1, 2021. [R.pp. 68-69; Mar. 1, 2021 AAA Ltr.] The following day on March 2, 2021, counsel for UniFirst contacted counsel for Tony's Garage with additional notice of the issuance of the arbitration award and inquired about the timeframe for Tony's Garage's payment of the award. [R.p. 73; Mar. 2, 2021 E-mail.]

Instead of arranging for payment of the award, Tony's Garage filed its Petition to Vacate the Arbitration Award on May 24, 2021, arguing that the award was procured by "fraud or undue means" and further that the Agreement was unconscionable and unenforceable. [R.pp. 7-10; Petition.] The Trial Court denied the petition on August 6,

2021 and subsequently confirmed the arbitration award on August 23, 2021, both of which Tony's Garage has now appealed. [R.pp. 1-6; Orders.] In its appeal, Tony's Garage does not argue that the Agreement was unconscionable and unenforceable, but only argues that the arbitration award was obtained by undue means. For the reasons set forth herein, the Trial Court's denial of the petition to vacate the arbitration award and subsequent confirmation of the award should be affirmed by this Court.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." Lucey v. Meyer, 401 S.C. 122, 130, 736 S.E.2d 274, 279 (Ct. App. 2012) (internal citations omitted). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. (internal citations omitted); see also Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

Furthermore, "[w]hen a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact." Gissel, 382 S.C. at 241, 676 S.E.2d at 323. Judicial review of an arbitrator's award is limited and may only be vacated under narrow circumstances because an arbitration award is conclusive and courts will refuse to review the merits of an award. Weimer v. Jones, 364 S.C. 78, 80, 610 S.E.2d 850, 851-52 (Ct. App. 2005); Gissel, 382 S.C. at 241, 676 S.E.2d at 323.

"[C]ourts defer to the arbitral panel both on the merits of the final decision and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition.'" Grp. III Mgmt., Inc. v. Suncrete of Carolina, Inc., 425 S.C. 141, 150, 819 S.E.2d 781, 785-86 (Ct. App. 2018) (quoting UBS Fin. Servs., Inc. v. Padussis, 842 F.3d 336, 339 (4th Cir. 2016) (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S.

79, 84 (2002)). "This circumscribed scope of review means that 'in reviewing [an arbitration] award, a district or appellate court is limited to determine whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it.'" Grp. III Mgmt., 425 S.C. at 150, 819 S.E.2d at 786 (quoting UBS Fin. Servs., Inc., 842 F.3d at 339 (quoting Three S Del., Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 527 (4th Cir. 2007)).

ARGUMENT

The Trial Court properly denied Appellant's petition to vacate the arbitration award and thereafter properly confirmed the award because Appellant did not show by clear and convincing evidence that the award was procured by fraud or undue means and because Appellant had due notice of the arbitration proceeding but elected not to appear or raise proper objections to the procedure before the arbitrator.

In its appeal to this Court, Tony's Garage argues that the Trial Court erred in failing to vacate the arbitration award and subsequently confirming such award because the award was procured by fraud or undue means. Specifically, Tony's Garage contends that the award was obtained by fraud or undue means because (1) settlement negotiations between the parties did not occur pursuant to the terms of the Agreement prior to the arbitration proceeding; (2) the procedure to appoint an arbitrator as set forth under the terms of the Agreement was not followed; and (3) the arbitration did not occur in Columbia, South Carolina or another mutually agreeable location as set forth under the terms of the Agreement.

As more fully set forth below, the arguments raised by Tony's Garage do not merit reversal of the Trial Court's denial of its petition to vacate the arbitration award and subsequent confirmation of the award because Tony's Garage did not establish that the award was procured by fraud or undue means and further waived any objections to the

issuance of the award by choosing not to participate in the proceeding and by not raising any objections before the arbitrator after having due notice of the arbitration proceeding.

Tony's Garage moved to vacate the arbitration award upon the grounds of "fraud or undue means." [R.p. 9; Petition; ¶ 20.] While it did not specify the statutory authority under which it was proceeding, South Carolina's Uniform Arbitration Act and the Federal Arbitration Act ("FAA") both provide that an award may be vacated where "the award was procured by corruption, fraud, or other undue means." S.C. CODE ANN. § 15-48-130(a)(1); 9 U.S.C.A. § 10(a)(1) (authorizing vacatur of award "where the award was procured by corruption, fraud, or undue means").

In this case, the FAA applies because the Agreement specified it was to be governed by the FAA, [R.p. 46; Agreement, p. 2], and because the Agreement involves interstate commerce between a Massachusetts corporation providing goods and services to a South Carolina company from its North Carolina facility. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001) (holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms; further observing that the FAA applies to any arbitration agreement regarding a transaction that involves interstate commerce). Despite whether South Carolina's Act or the FAA applies, the analysis is the same.

Under both the FAA and South Carolina's statutory and decisional law, it has long been established that policy favors arbitration of disputes. Trident Tech. Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 103-04, 333 S.E.2d 781, 784-85 (1985). To advance the underlying purposes of arbitration, the scope of judicial review is "necessarily restricted" and "severely limited" because "[i]f it were otherwise, the ostensible purpose for resort to

arbitration, i.e., avoidance of litigation, would be frustrated." Id. at 105, 333 S.E.2d at 785 (internal citations omitted); see also Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., LLC, 519 F.3d 200, 206-07 (4th Cir. 2008) (observing authority of court to review an arbitration award is "substantially circumscribed" and further recognizing "the scope of judicial review for an arbitrator's decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all-the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.") (internal citations omitted).

The court must uphold the arbitration award unless the challenging party meets its "heavy burden" in demonstrating sufficient grounds for vacating the award under 9 U.S.C.A. § 10 or one of certain limited common law grounds (or South Carolina's equivalent). Trident Tech. Coll., 286 S.C. at 111, 333 S.E.2d at 789; Choice Hotels Int'l, 519 F.3d at 207. Tony's Garage has failed to establish its pursued challenge that the arbitration award here was procured by fraud or undue means.

"The term 'undue means' has generally been interpreted to mean something like fraud or corruption." MCI Constructors, LLC v. City Of Greensboro, 610 F.3d 849, 858 (4th Cir. 2010) (quoting Three S Del., Inc. v. DataQuick Info. Sys., Inc., 492 F.3d 520, 529 (4th Cir. 2007); see also Nat'l Cas. Co. v. First State Ins. Group, 430 F.3d 492, 499 (1st Cir. 2005) ("The best reading of the term 'undue means' under the maxim *noscitur a sociis* ["it is known from fellows or allies"] is that it describes underhanded or conniving ways of procuring an award that are similar to corruption or fraud, but do not precisely constitute either."). Typically, to prove that an award was procured by undue means, the party seeking vacatur

> must show that the fraud [or corruption] was (1) not discoverable upon the exercise of due diligence prior to the arbitration, (2) materially related to an issue in the arbitration, and (3) established by clear and convincing evidence.

MCI Constructors, LLC, 610 F.3d at 858 (quoting A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992); see also Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) (collecting cases).

The term "undue means" is not interpreted to apply to actions of counsel that are "merely legally objectionable." MCI Constructors, LLC, 610 F.3d at 858; see also A.G. Edwards, 967 F.2d at 1403–04 (defining "undue means" as conduct "that is immoral if not illegal"; holding that the term does not apply to defendant's raising of frivolous defenses during arbitration, or "sloppy or overzealous lawyering").

Tony's Garage has not shown, much less by clear and convincing evidence, that the arbitration award issued in this case was procured by fraud or undue means. Tony's Garage was given full and due notice of the arbitration proceeding. It acknowledged receipt of UniFirst's arbitration claim in its November 18, 2020 letter to the AAA in which Tony's Garage, instead of objecting to the arbitration proceeding, advised the AAA that it "look[ed] forward to the [AAA's] ability to resolve these grievances." [R.p. 62; Nov. 18, 2020 Ltr.]

Tony's Garage was duly advised of the Document Submission Schedule by the arbitrator on January 7, 2021 which set forth the deadline for Tony's Garage to respond to UniFirst's claim and also scheduled a final conference call on February 16, 2021 prior to the conclusion of the arbitration proceeding. [R.p. 64; Schedule.] Tony's Garage made no objections to the deadlines set forth in this schedule or the procedure.

It was not until two days after its deadline to submit responsive documents to the arbitrator expired that Tony's Garage advised only counsel for UniFirst and not the arbitrator herself that it disagreed with the arbitration on the basis that the negotiation provision in the Agreement had not been satisfied. [R.p. 66; Feb. 10, 2021 Ltr.] While Tony's Garage did not submit its letter to the arbitrator, UniFirst's counsel properly advised the arbitrator of its receipt of the letter and Tony's Garage's disagreement with the arbitration. [R.p. 70; Arbitration Award, p. 1.]

The arbitrator noted in her award that she considered the argument of Tony's Garage but found that it had "received proper notice of the Arbitration, had counsel who advised he was aware of the pending litigation, and failed to present any legal authority to prevent an issuance of an Award." [R.p. 70; Id.]

While Tony's Garage argues in this appeal that the arbitration award was obtained by undue influence because the negotiation clause in the Agreement was not met because such negotiations did not occur at "agreed times and locations," the evidence before both the arbitrator and later the Trial Court supports a finding that this provision was satisfied prior to the institution of the arbitration proceeding. After Tony's Garage unilaterally suspended services under the Agreement, UniFirst continued to visit Tony's Garage's place of business to see if it would resume services. UniFirst's Route Service Manager, Phillip Richter, visited with Tony's Garage in August 2020 to attempt to negotiate a resolution. [R.p. 38; Memo. in Support of Claim, p. 2.] Thereafter, UniFirst sent a demand letter to Tony's Garage on October 7, 2020 in another attempt to reach a resolution. [R.p. 59; Oct. 7, 2020 Ltr.] Tony's Garage did not respond.

Tony's Garage did, however, acknowledge in its November 18, 2020 letter to the AAA that it had attempted to resolve the ongoing issues with UniFirst. [R.p. 62; Nov. 18, 2020 Ltr.] This acknowledgment by Tony's Garage to the AAA of the parties' attempts to negotiate prior to the institution of the arbitration proceeding satisfies the negotiation condition in the Agreement.[1]

Furthermore, "arbitrators—not courts—must decide whether a condition precedent to arbitrability has been fulfilled." Chorley Enterprises, Inc. v. Dickey's Barbecue Restaurants, Inc., 807 F.3d 553, 565 (4th Cir. 2015); see also BG Group PLC v. Republic of Arg., 572 U.S. 25, 34-35 (2014); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85–86, (2002). The United States Court of Appeals for the Fourth Circuit has therefore held that the arbitrator decides whether the parties satisfied a meditation or negotiation condition precedent prior to arbitration. Chorley Enterprises, Inc., 807 F.2d at 565.

Here, UniFirst informed the arbitrator that Tony's Garage had sent it a letter that it was not agreeable to the arbitration on the basis that the negotiation provision of the Agreement was not satisfied. The arbitrator had before her evidence of attempts to negotiate as set forth in UniFirst's Memorandum in Support of its Claim, as well as the acknowledgement by Tony's Garage of the attempts to negotiate as set forth in its November 18, 2020 letter to the AAA. The arbitrator thereafter determined Tony's Garage

[1] Moreover, Tony's Garage cannot purposely refuse to negotiate and then rely upon the negotiation clause in the Agreement to prevent arbitration. See Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339 n.2, 611 S.E.2d 485, 487 n.2 (2005) ("A party that wrongfully prevents satisfaction of a condition precedent to its performance is not excused from performing."); see also Lobosco v. Donovan, 565 N.E.2d 819, 821 (Mass. App. Ct. 1991) ("[I]t is fundamental that a promisor may not avoid his promised performance based on the nonoccurrence of a condition, where the promisor has himself hindered or prevented its occurrence.") (in the event Massachusetts law applies to the Agreement).

presented no legal authority to prevent the issuance of an arbitration award. [R.p. 70; Arbitration Award, p. 1.] Under the standard of review, appellate courts should defer to the arbitrator on its resolution of procedural questions. Grp. III Mgmt., Inc. v. Suncrete of Carolina, Inc., 425 S.C. 141, 150, 819 S.E.2d 781, 785-86 (Ct. App. 2018). Accordingly, the negotiation provision in the Agreement does not provide a basis for the arbitration award to be vacated for fraud or undue means.

The remaining grounds which Tony's Garage contends constitute undue means - that the procedure to appoint an arbitrator as set forth under the terms of the Agreement was not followed and that the arbitration did not occur in Columbia, South Carolina or another mutually agreeable location as set forth under the terms of the Agreement – also do not authorize vacatur of the award under the facts and circumstances present.

Tony's Garage had full notice of the arbitration proceeding and, rather than submitting any objections to the AAA regarding the arbitration procedure, advised the AAA that it looked forward to the AAA's ability to resolve its dispute with UniFirst. [R.p. 62; Nov. 18, 2020 Ltr.] Tony's Garage was given notice of the Document Submission Schedule from the appointed arbitrator which also outlined the arbitration procedure. [R.p. 64; Schedule.] Never once did Tony's Garage object to the selection of the arbitrator, the location of the arbitration, or the procedure to be used. In fact, when Tony's Garage expressed its disagreement with the arbitration proceeding, it did not provide this information to the arbitrator but rather only to UniFirst who then properly informed the arbitrator of the letter from Tony's Garage. In this letter, Tony's Garage also only disputed the arbitration on the basis that it believed the arbitration clause was not enforceable and

that the negotiation provision in the Agreement had not been satisfied and did not object to any other procedural aspect of the arbitration. [R.p. 66; Feb. 10, 2021 Ltr.]

Parties may not sit idly by while an arbitration proceeds and then later "collaterally attack the procedure on grounds not raised before the arbitrators." A party must raise an objection to the procedure of an arbitration, including the arbitrator selection process, at the time of the arbitration or otherwise the objection is waived. See Brook v. Peak Int'l, Ltd., 294 F.3d 668, 673-74 (5th Cir. 2002) (internal citation omitted) (finding employee waived objection to failure of the American Arbitration Association (AAA) to follow the arbitrator selection rules set out in the employment agreement by not contemporaneously raising objection during the arbitration proceedings); see also WellPoint, Inc. v. John Hancock Life Ins. Co., 576 F.3d 643, 647 (7th Cir. 2009) (holding losing party could not, consistent with the purpose of the FAA, sit silently by while a substitute arbitrator was selected according to the procedure proposed by its own representative on the panel, and then raise an objection to the process only after it lost before the panel and was attempting to oppose confirmation of the award); see also Teamsters Loc. Union No. 764 v. J.H. Merritt & Co., 770 F.2d 40, 42-43 (3d Cir. 1985) ("[A] party may waive its right to raise on appeal an objection to the decision of an arbitrator when the party failed to address the objection before the arbitrator in the first instance.").

The arbitration award issued in this case was clearly not the product of fraud or any undue means. Tony's Garage was given full notice of the arbitration proceeding and all corresponding deadlines, was served copies of all of UniFirst's pleadings, was allowed to submit its own documentation in response if it so chose, and was given the opportunity to discuss any factual or legal contentions, including any objections, at the final

teleconference prior to the conclusion of the proceeding. Tony's Garage chose not to attend that teleconference and chose not to participate in the arbitration apart from its November 18, 2020 letter to the AAA in which it advised the AAA that it looked forward to the AAA's ability to resolve the dispute with UniFirst and its later February 10, 2021 letter to UniFirst's counsel, but not the arbitrator, asserting that it was not agreeable to engaging in arbitration.

"A disputant cannot stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in [ ] court." Dean v. Sullivan, 118 F.3d 1170, 1172 (7th Cir. 1997) (quotation marks omitted) (finding party's refusal to appear before the arbitral board and later attack in court of the board's composition was simply an attempt to "sandbag" the arbitral process). Tony's Garage opted to not only refuse to participate in the arbitration process, but also opted to not inform the arbitrator herself of its objections to the proceeding.[2]

UniFirst did nothing objectionable during the process but rather gave Tony's Garage notice of every step of the arbitration proceeding and even ensured that the arbitrator was made aware of the letter Tony's Garage sent to only UniFirst notifying that it did not agree with engaging in arbitration. The arbitrator had the authority to determine whether any conditions precedent to arbitration were met, the only arguable protest Tony's Garage made during the process. The arbitrator, based upon the evidence, properly

[2] In its Appellant's Brief, Tony's Garage argues that UniFirst should have petitioned the court for an order directing that arbitration proceed under 9 U.S.C.A. § 4 when Tony's Garage refused to participate in the arbitration. Courts have held that the procedural requirements of § 4 are permissive, not mandatory, and nothing in this provision requires a party to seek an order compelling another party to participate in arbitration proceedings when that party refuses to do so. Val-U Const. Co. of S. D. v. Rosebud Sioux Tribe, 146 F.3d 573, 580 (8th Cir. 1998).

determined that Tony's Garage had not presented any legal authority to prevent the issuance of an arbitration award. The arbitration proceeding was conducted in the regular course and was not tainted by any fraud or undue means. See Domnarski v. UBS Fin. Servs., Inc., 919 F. Supp. 2d 183, 187-88 (D. Mass. 2013) (finding employer's failure to provide a statement of claim to employee's attorney or advise the arbitrator that the employee was represented by counsel did not constitute "corruption, fraud, or under means" justifying vacatur of the arbitration award and that there was "nothing immoral or deceitful in the routine manner in which the arbitration was commended and proceeded"). Accordingly, this Court should affirm the Trial Court's denial of the petition to vacate the arbitration award and subsequent confirmation of the same.[3]

[3] In its Appellant's Brief, Tony's Garage suggests that the order issued by the Trial Court in denying the petition to vacate the arbitration award is in error because the Trial Court did not state any specific findings of fact in its order. If Tony's Garage had any objection to the form of the Trial Court's order, it should have filed a motion under Rule 59(e), SCRCP requesting the Trial Court to make specific findings. Because it did not, this issue is not preserved for appellate review. See Jackson v. Speed, 326 S.C. 289, 311, 486 S.E.2d 750, 761 (1997) (holding because the appellant failed to object either at the hearing or in their motion to alter or amend that the trial judge failed to make findings of fact concerning the specific costs expended, the issue is not preserved for appellate review); Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995) (holding an appellant's argument that the entry of default should be reversed because the trial court neglected to make specific findings of certain factors was not preserved for appellate review because the appellant failed to raise the issue to the trial court in a post-trial motion).

CONCLUSION

For the reasons set forth herein, Respondent UniFirst Corporation respectfully requests this Court to affirm the Trial Court's denial of Appellant Tony's Garage, LLC's petition to vacate the arbitration award and subsequent confirmation of such award.

Respectfully submitted,

/s Carmen V. Ganjehsani
Caleb M. Riser (S.C. Bar No. 76738)
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
criser@richardsonplowden.com
cganjehsani@richardsonplowden.com
ATTORNEYS FOR RESPONDENT UNIFIRST CORPORATION

June 7, 2022.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

/s Carmen V. Ganjehsani
Caleb M. Riser (S.C. Bar No. 76738)
Carmen V. Ganjehsani (S.C. Bar No. 73515)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
criser@richardsonplowden.com
cganjehsani@richardsonplowden.com
ATTORNEYS FOR RESPONDENT UNIFIRST CORPORATION

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