IN THE SUPREME COURT OF MISSISSIPPI

NO. 2000-IA-00790

SANDERSON FARMS, INC., **Appellant**

VERSUS

ROY R. GATLIN and NELDA T. GATLIN, **Appellees.**

APPELLEES' BRIEF

Interlocutory Appeal from the Circuit Court of the Second Judicial District of Jones County, Mississippi

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ORAL ARGUMENT REQUESTED

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(CORRECTED) CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate the possible disqualification or recusal.

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STATEMENT OF ISSUES PRESENTED

1) Whether the Circuit Court correctly held that Sanderson Farms' refusal to pay any of the $2,000 arbitration filing fee after it promised to pay half the costs of arbitration is a breach of the arbitration clause which waives the company's right to enforce the clause in this case.

2) Whether Sanderson Farms' arbitration clause, which the company imposed on a take it or leave it basis with no opportunity for negotiation and which requires Roy Gatlin to pay at least $11,000 in arbitration costs before he can have a hearing on his state law claims and to forego any right to recover punitive damages in arbitration, is unconscionable and therefore unenforceable.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Roy Gatlin first contracted with Sanderson Farms to grow chickens for the company in approximately November 1980, when Gatlin and his wife were buying their farm. (R. 435). The original contract between Gatlin and Sanderson Farms contained no provision respecting arbitration. After Gatlin began performance under this contract, Sanderson Farms authorized him to build two additional broiler houses on his farm based on his ranking in the top 50% of the company's growers. (R. 435). The Gatlins pledged their farm, which included their home and four broiler houses, as security on a mortgage of over $250,000, so that Roy Gatlin could perform under his contract with Sanderson Farms. (R. 435-36).

In January 1997, Sanderson Farms presented a new 15 year contract to Roy Gatlin. The new Broiler Production Agreement contained for the first time a mandatory arbitration clause requiring Mr. Gatlin to give up his right to bring claims against Sanderson Farms in court. (R. 34-35). The arbitration clause provided that "[t]he cost of such arbitration will be divided equally among the parties to the arbitration." (R. 34-35). These costs would include payment for hearings before a panel of three arbitrators, which the arbitration clause mandated. (R. 34). The arbitration clause limited the types of remedies that would be available to Gatlin:

> The arbitrators will have the authority to award actual money damages as provided in Section 15 (with interest on unpaid amounts from the date due), specific performance, and temporary injunctive relief, but the arbitrators shall not have the authority to award exemplary or punitive damages, and the parties expressly waive any claimed right to such damages.

(R. 34). The arbitration clause also gives Sanderson Farms a unilateral veto to prevent Gatlin from being part of any class action proceedings against it by providing that "[u]pon objection by any party, multi-party arbitration shall not be utilized." (R. 34). The arbitration clause would

prevent Gatlin from recovering attorney's fees and costs under any statutes allowing such recovery, specifying instead that "[e]ach party will bear the cost of their own expenses and attorneys' fees." (R. 35).

Sanderson Farms required Gatlin to accept this arbitration clause in order to keep doing business with the company. (R. 436). Sanderson Farms told Gatlin that it would suspend delivery of chickens if he did not sign the contract. (R. 436). At the time this new contract was formed, Gatlin was still in debt under the $250,000 mortgage on his home and farm, and felt that he had no choice but to sign. (R. 436).

Some time after Gatlin and Sanderson Farms signed the 15 year 1997 contract, Gatlin was told that Sanderson Farms was going to find a way to terminate the contract because of his earlier questioning of the company's management procedures. (R. 437). On Christmas Day, 1997, Sanderson Farms called Gatlin and told him to be in their office the next day. Sanderson Farms terminated its contract with Gatlin on December 26, 1997, to be effective January 1, 1998 when there were still 14 years remaining on the contract. (R. 437). Sanderson Farms then took its most recent shipment of chickens from the Gatlins' farm and delivered them to another grower. (R. 437). Gatlin immediately contacted every poultry processing company in his area, but every one of these companies refused to deliver him any chickens. (R. 437).

In February 1998, Roy Gatlin filed a demand for arbitration against Sanderson Farms based on the company's unilateral termination of the Broiler Production Agreement. (R. 82). Gatlin paid his share of the $2,000 arbitration filing fee to the American Arbitration Association. (R. 462). Sanderson Farms refused to pay any of this arbitration filing fee when AAA requested payment of the balance, claiming that its arbitration clause's reference to the "'cost of

arbitration' was never intended to include the filing fee for initiation of proceedings." (R. 83). To avoid having to file a separate proceeding in order to get a decision on the filing fee dispute, Gatlin paid the full $2,000 arbitration filing fee to AAA. (R. 86). An arbitration hearing originally scheduled for May 1999 was postponed until August 3-4, 1999. (R. 88). In July 1999, less than two weeks before the arbitration hearing was to be held, Gatlin received a billing statement from AAA requiring him to pay an additional $8,250 in arbitration costs, including $6,900 in arbitrators' compensation and $1,000 in arbitrators' expenses. (R. 462). When this is added to his prior payments, Roy Gatlin was required to pay at least $11,000 before he ever had an arbitration hearing on his claims against Sanderson Farms. Gatlin could not afford to pay these arbitration costs, therefore he was forced to abandon the arbitration. (R. 437).

In September 1999, Roy and Nelda Gatlin filed their claims in the instant proceeding in the Circuit Court of the Second Judicial District of Jones County, seeking compensatory and punitive damages based on breach of contract and tort claims relating to Sanderson Farms' termination of the Broiler Production Agreement. (R. 7). The filing fee in the Jones County Circuit Court was $94. (R. 2). In their complaint, the Gatlins alleged that the arbitration clause was unenforceable because Sanderson Farms breached the clause in bad faith by refusing to pay any of the $2,000 arbitration filing fee and because the arbitration clause was unconscionable based on its effective denial of access to legal remedies. (R. 6). The Circuit Court denied Sanderson Farms' motion to dismiss the case in favor of arbitration, finding that Sanderson Farms breached its own arbitration clause by refusing to pay any of the filing fee after promising to pay half the costs of arbitration. (R. 95). The case is now before this Court after the grant of Sanderson Farms' petition for interlocutory appeal. (R. 413).

SUMMARY OF THE ARGUMENT

Sanderson Farms attempted to use private arbitration proceedings to impose increasingly prohibitive forum costs that would prevent Roy Gatlin from ever enforcing his legal rights based on the company's unilateral termination of their 15 year poultry production contract. The Circuit Court was correct to hold that Sanderson Farms cannot do this under the terms of its own arbitration clause and under Mississippi law.

Sanderson Farms inserted into its Broiler Production Agreement an arbitration clause which requires Roy Gatlin to waive his right of access to court and take his legal claims against Sanderson Farms to binding arbitration. This arbitration clause also requires Mr. Gatlin to pay half the costs of such arbitration, including the costs of a three arbitrator panel, and to relinquish his right to recover punitive damages on any of his claims. When Gatlin tried to bring his state law claims against Sanderson Farms through arbitration, Sanderson Farms refused to pay any of the $2,000 arbitration filing fee, which is a AAA administrative charge that is based on the value of his claims. After Gatlin was forced to bear the full $2,000 filing fee to preserve his state law claims in arbitration, he was billed an *additional* $8,250 for a total of at least $10,250 as his share of arbitration costs before there was even a hearing on his claims. Gatlin had previously paid a $750 fee to AAA for mediation. Sanderson Farms' refusal to pay any of the $2,000 arbitration filing fee is a material breach of the arbitration clause and, furthermore, the non-negotiable requirement that he pay at least $11,000 for arbitration proceedings where he cannot recover punitive damages renders the arbitration clause unconscionable. Based on either or both of these arguments, the Court should hold that the Sanderson Farms arbitration clause cannot be

enforced against the Gatlins in this case.[1]

The Circuit Court below correctly held that Sanderson Farms waived its right to compel arbitration under its own arbitration clause. By refusing to pay any of the $2,000 arbitration filing fee that AAA charged based on the value of Gatlin's claims, Sanderson Farms materially breached its own arbitration clause because it had promised to pay half of all arbitration costs as a *minimum* guarantee against prohibitive arbitration costs for growers like Roy Gatlin. This material breach of the arbitration clause waives the company's right to enforce the clause under established principles of Mississippi contract law, whose application to this case is consistent with the express terms of the Federal Arbitration Act.

In addition, it is unconscionable for Sanderson Farms to require as a non-negotiable condition of doing business that individual growers like Roy Gatlin submit to an arbitration system which requires them to pay thousands upon thousands of dollars to the decision-makers and to forego substantive rights in order to preserve their legal claims. Sanderson Farms alone drafted the terms of the arbitration clause in the Broiler Production Agreement, and then presented the arbitration clause on a take it or leave it basis to Mr. Gatlin. It is well-established as a matter of Mississippi contract law that a contractual provision whose formation is controlled by one party with overwhelming bargaining power and whose terms are one-sided in favoring that powerful party is unconscionable and will not be enforced. The U.S. Supreme Court has stated that the Federal Arbitration Act allows courts to strike down specific arbitration clauses under generally applicable rules of contract law such as the doctrine of unconscionability, and

[1] Since Nelda Gatlin is not a signatory to the arbitration clause, her claims against Sanderson Farms should not be subject to arbitration whether or not the clause is enforceable.

dozens of courts around the country have held that particularly unfair arbitration clauses such as this one are unenforceable. The Sanderson Farms arbitration clause should therefore be held unenforceable under either or both of the arguments set forth herein.

Rather than respond to Mr. Gatlin's arguments against the enforcement of its arbitration clause, Sanderson Farms devotes most of its brief to asserting that this Court cannot even address these arguments and instead must refer them to arbitration, claiming in effect that the arbitration clause should be enforced *regardless* of any breach or waiver (or unconscionability). It is not surprising that Sanderson Farms is trying to keep this Court from examining these issues. Sanderson Farms would likely expect a far more favorable decision if private arbitrators were to decide whether imposing their own fees of $11,000 on Mr. Gatlin is unconscionable. What's more, under Sanderson Farms' argument, Mr. Gatlin would have to pay the $11,000 arbitration costs *up front* before he could get a decision on whether it is unconscionable to make him pay these costs in the first place. This would all but guarantee that Gatlin never gets a hearing on his underlying claims for Sanderson Farms' termination of the contract. Fortunately, neither the Federal Arbitration Act nor Mississippi contract law allows Sanderson Farms to so stack the deck. It is a bedrock principle of federal and state law that arbitration is simply a matter of contract, that there is no right to arbitrate independent of a valid contractual arbitration agreement, and that a court must decide whether or not there is such an enforceable arbitration contract between the parties before one party may be compelled against its own wishes to waive its right of access to court. The Circuit Court's judgment rejecting Sanderson Farms' motion to compel arbitration of the Gatlins' claims should be affirmed.

ARGUMENT

IV. SANDERSON FARMS WAIVED OR DEFAULTED ON ANY RIGHT TO ENFORCE THE ARBITRATION CLAUSE BY BREACHING ITS PROMISE THEREIN TO PAY HALF THE COSTS OF ARBITRATION.

Sanderson Farms promised to pay half the costs of arbitration when it inserted into the Broiler Production Agreement its arbitration clause that would require individual growers like Roy Gatlin to waive their right of access to court. Whether or not this promise would be sufficient to shield growers from prohibitive arbitration costs, Mr. Gatlin had a right to expect that Sanderson Farms would comply with the promise as a minimum protection under the arbitration clause. By refusing to pay any part of the $2,000 arbitration filing fee in this case, Sanderson Farms materially breached its arbitration clause and required Gatlin to bear additional and unanticipated forum costs in trying to preserve his legal claims. This breach of the arbitration clause gave Gatlin the option to rescind any previous duty he might have had to arbitrate his claims. The trial court correctly applied Mississippi contract law in determining that Sanderson Farms' breach of the arbitration clause is a default or waiver of the company's right to enforce the clause which allows Gatlin to pursue his underlying claims in court. Furthermore, even assuming that the Federal Arbitration Act's procedural provisions apply to this determination, the trial court properly exercised its jurisdiction in reaching a decision on Gatlin's argument that Sanderson Farms breached the arbitration clause.

A. Sanderson Farms Breached the Arbitration Clause and Waived any Right to Compel Arbitration in this Case.

The most fundamental principle of federal and state law regarding arbitration is that arbitration is, at bottom, a contractual right governed by ordinary principles of state contract law. The purpose of the Federal Arbitration Act is to "place arbitration agreements on equal footing

with other contracts." *Keymer v. Management Recruiters Int'l, Inc.*, 169 F.3d 501, 504 (8th Cir. 1999). Where there is a contractual agreement to arbitrate, the FAA provides for enforcement "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. When a party brings an action in federal court to enforce an arbitration agreement under the FAA, the court shall order arbitration "upon being satisfied that the making of the agreement for arbitration *or the failure to comply therewith* is not in issue." 9 U.S.C. § 4 (emphasis added).[2] When a defendant raises arbitration as a basis to stay judicial proceedings on the plaintiff's underlying substantive claims, as occurred in the instant case, the court may stay the litigation only if there is an "agreement in writing for such arbitration" and "the *applicant for the stay is not in default in proceeding with such arbitration*." 9 U.S.C. § 3 (emphasis added). Thus, the precondition to judicial enforcement of any proclaimed right to arbitrate is the formation of a valid arbitration agreement under state contract law *and* the parties' ongoing compliance with the terms of such agreement. Sanderson Farms violated the terms of its arbitration clause when it refused to pay any of the $2,000 arbitration filing fee that Roy Gatlin was left to bear. The company has thus waived whatever right it may previously have claimed under the clause to compel arbitration.

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[2] It is important to emphasize that Section 4 of the Federal Arbitration Act on its face applies only to petitions in "any United States district court." *Id*. While the U.S. Supreme Court has held that the FAA's substantive provision for enforcement of arbitration agreements in Section 2 applies in state court, the Supreme Court has also expressed doubt as to whether the FAA's procedural provisions like Sections 3 and 4 apply in state court. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984) ("...we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts."); *Volt Information Sciences v. Board of Trustees of Stanford University*, 489 U.S. 468, 477 n.6 (1989) ("...we have never held that §§ 3 and 4, which by their terms appear to apply only in federal court, are nonetheless applicable in state court.") (citations omitted). Although the Gatlins do not concede that Sections 3 and 4 of the FAA apply in this Court, the trial court's judgment may be affirmed *whether or not* these provisions apply.

1. Sanderson Farms Breached its Arbitration Clause by Refusing to Pay any of the $2,000 Arbitration Filing Fee.

Sanderson Farms devotes little space in its brief to arguing that it did not actually breach its arbitration clause when it refused to pay any of the $2,000 arbitration filing fee. This is understandable since the terms of the arbitration clause plainly distinguish between "the cost of such arbitration [which] will be divided equally among the parties" and the duty of each party to "bear the cost of their own expenses and attorneys' fees." R. at 34-35. The arbitration filing fee is paid to the American Arbitration Association as an administrative cost based on the value of claims submitted, and is imposed as a condition for arbitrating a claim. Additionally, the $2,000 filing fee is more than twenty times the $94 filing cost that would apply to the same claims in the absence of the arbitration clause. *See* (R. 2) (showing $94 filing fee for Gatlin's claims filed in Jones County Circuit Court). The $2,000 arbitration filing fee is a "cost of arbitration" within the plain meaning of the contract drafted by Sanderson Farms because this cost is imposed solely by operation of the arbitration clause.

Sanderson Farms' primary answer is to assert that it is "contrary to common sense" to read the contract language it drafted as meaning precisely what it says, i.e. that the company would pay part of the cost for an individual grower to file a claim against it. Br. at 41. By this reasoning, Sanderson Farms could just as easily assert next that it is contrary to common sense that it would pay *any* of the arbitrators' fees to decide claims filed against it and stick Mr. Gatlin with an additional $8,000 in costs above the $11,000 that he has already been billed by AAA as a precondition to getting a hearing on his claims. But Sanderson Farms cannot invoke common sense as a defense to the plain terms of its own arbitration clause. Sanderson Farms drafted this arbitration clause to make growers believe that they would pay no more than half the costs of an

arbitration; the company cannot now back away from its promise by asserting that it defies common sense.

The arbitration clause's general reference to AAA's commercial rules do not make Sanderson Farms' interpretation of the clause any more plausible. The arbitration clause neither discloses the contents of the AAA rules nor purports to make those rules override the provisions of the clause itself. What's more, even if Mr. Gatlin had reason to look beyond the arbitration clause's specific provision for payment of costs and refer to the AAA rules, the first section he would have found would tell him that "[t]he parties, by written agreement, may vary the procedures set forth in these rules." Commercial Arbitration Rules of the AAA, Section 1. Thus, even if the AAA commercial rules *by themselves* would require growers like Mr. Gatlin to pay the entire $2,000 arbitration filing fee, Section One of those same rules would override this requirement and enforce the explicit provision of the arbitration clause requiring Sanderson Farms to share the burdens of this cost.[3]

Finally, this Court should reject the argument that Gatlin has, in effect, waived his waiver argument by obtaining a benefit after Sanderson Farms breached the arbitration clause. Sanderson Farms concedes that one party's breach of a contract is grounds for an aggrieved

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[3] Any ambiguity that the relationship between the terms of the arbitration clause and the AAA rules might create should be resolved against the interpretation put forth by Sanderson Farms, which drafted this arbitration clause. *See Ronald Adams Contractor, Inc. v. Mississippi Transp. Comm'n*, 777 So.2d 649, 650 (Miss. 2001) ("We have held in the past that ambiguities in a contract are to be construed against the drafter."); *Theobald v. Nosser*, 752 So.2d 1036, 1041 (Miss. 1999) ("'in a case where language of an otherwise enforceable contract is subject to more than one fair reading, we will give that language the reading most favorable to the non-drafting party.'") (emphasis omitted), *quoting Leach v. Tingle*, 586 So.2d 799, 801-02 (Miss. 1991); *see also Henrcik v. Brown & Root, Inc.*, 50 F. Supp.2d 527, 533 (E.D. Va. 1999) (applying contract rule that "ambiguities in unilaterally prepared contracts are to be resolved against the drafter" to narrow proposed scope of employer's arbitration clause).

party to rescind, Br. at 38 (citing 17A Am. Jur. 2d § 570 (1991)), so that Gatlin would be free to litigate his claims if Sanderson Farms did breach its arbitration clause. Sanderson Farms instead relies on this Court's opinion in *Brent Towing Co., Inc. v. Scott Petroleum Corp.*, 735 So.2d 355 (Miss. 1999), to argue that Gatlin waived his right to rescind. The *Brent Towing* decision is based on "'the general rule that where a contracting party, with knowledge of a breach by the other party, receives money in the performance of the contract, he will be held to have waived the breach.'" *Id*. at 359, *quoting* 17A Am. Jur. 2d *Contracts* § 663, at 669 (1991). This rule was appropriately applied in *Brent Towing* because the party there claiming breach continued to accept payments under the contract after the time that the breach allegedly occurred, and this Court found that "[s]uch acceptance was an effective waiver of any breach by Scott." *Brent Towing*, 735 So.2d at 360. Just the opposite occurred in this case. Gatlin obtained no benefit from Sanderson Farms after its breach; instead, he bore the *burden* of the breach in having to pay the balance on a $2,000 arbitration filing fee or face the prospect of initiating a separate proceeding on the breach of the arbitration clause and on his underlying claims.

After paying the full filing fee, Gatlins was faced with the *additional* burden of a bill for $8,250 in arbitration costs to be paid before he would have a hearing on his underlying claims. R. at 462. These additional charges exacerbated the effect of Sanderson Farms' breach by leaving him unable to pursue any of his claims in arbitration. R. at 437. Sanderson Farms nowhere explains how *it* was prejudiced by the timing of Gatlin's recission of the arbitration clause, even though this is an essential element of its waiver argument, because it was Gatlin who bore all the burdens created by the breach. Gatlin's additional payment of his own money to the arbitration service did not revive Sanderson Farms' right to enforce the contract that it

breached. *Cf. Cornell & Co. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C. Cir. 1966) ("Once having waived the right to arbitrate, that party is necessarily in default in proceeding with such arbitration.") (citations omitted). This Court should reject Sanderson Farms' waiver argument and hold that the company breached the arbitration clause when it backed off its promise to share all the costs imposed by its own requirement of arbitration.

2. Sanderson Farms' Breach of the Arbitration Clause Waives the Company's Right to Compel Arbitration.

This Court has held, consistent with numerous courts finding waiver of the right to compel arbitration under the Federal Arbitration Act, that a party's failure to comply with the terms of an arbitration clause is grounds for ruling that the party has waived the right to arbitrate. It is a basic principle of Mississippi contract law that "a party to a contract may by words or conduct waive a right to which he would otherwise have been entitled." *Canizaro v. Mobile Communications Corp. of America*, 655 So.2d 25, 29 (Miss. 1995). Since Section 2 of the FAA expressly preserves application of general rules of contract law, this Court has applied Mississippi law dealing with waiver of contracts to cases involving arbitration clauses. In *Del Cox v. Howard, Weil, LaBouisse, Friedrichs, Inc.*, 619 So.2d 908 (Miss. 1993), the Court found that an investor had waived its right to compel arbitration of claims brought against it by a brokerage firm when he failed to follow the contractual procedure for electing arbitration. *Id*. at 913. The applicability of the FAA to the dispute in *Del Cox* did not disturb the Court's finding of waiver because "a party defaults on or waives a demand for arbitration under the Federal Arbitration Act when that party 'actively participates in a lawsuit *or takes other action inconsistent with [the right to arbitration*.]'" *Id*. at 914 (emphasis added), *quoting Cornell & Co.*, 360 F.2d at 513. Sanderson Farms attempts to read out the "other action" out of this Court's

holding in *Del Cox* by arguing that participation in litigation is the only basis for a waiver of rights under an arbitration clause. This Court recently reaffirmed both that Mississippi common law principles determine whether a party has waived a contractual right to compel arbitration and that actions other than participation in litigation may constitute such a waiver. *Scott Addison Construction, Inc. v. Lauderdale County School System*, - - So.2d - -, 2001 WL 393927, *4-5 (Miss. April 19, 2001). Sanderson Farms should thus be found to have waived any right to compel arbitration when it breached its contractual promise to share arbitration costs.

Many federal and state courts have ruled that a party has waived arbitration by acting inconsistently with its rights under a contractual arbitration clause. These courts typically recognize a general standard for waiver where the party seeking to enforce an arbitration agreement "(1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts." *Ritzel Communications, Inc. v. Mid-American Cellular Telephone Co.*, 989 F.2d 966, 969 (8th Cir. 1993) (finding waiver based on defendant's filing of motion on merits of case in litigation).[4] A number of courts have specified that waiver arises out of conduct that is inconsistent with the specific requirements of

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[4] *See also, e.g., PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2nd Cir. 1997) (waiver where party engaged in discovery and filed motions on the merits in court); *Grumhaus v. Comerica Securities, Inc.*, 223 F.3d 648, 652 (7th Cir. 2000) (waiver based on investor's prior litigation of claims arising out of same transaction asserting same rights and seeking same remedies), *cert. denied*, 121 S. Ct. 1600 (2001); *Worldsource Coil Coating, Inc. v. McGraw Constr. Co., Inc.*, 946 F.2d 473, 477 (6th Cir. 1991) (waiver based on moving party's filing of state court action); *Palm Harbor Homes, Inc. v. Crawford*, 689 So.2d 3, 8 (Ala. 1997) (waiver where party waited to invoke arbitration until after jury verdict was returned); *Christensen v. Dewor Developments*, 661 P.2d 1088, 1092 (Cal. 1983) (waiver where moving party filed litigation for purpose of forcing opponent to specify pleadings and reveal case strategy; court found prejudice to non-moving party in movant's "procedural gamesmanship"); *Marble Slab Creamery v. Wesic, Inc.*, 823 S.W.2d 436, 438 (Tex. App. 1992) (waiver based on participation in pre-trial discovery and motions in court).

the parties' written arbitration agreement.[5] In *Lauricia v. Microstrategy, Inc.*, 114 F. Supp.2d 489 (E.D. Va. 2000), for example, the federal district court held that the defendant in an employment discrimination case waived its right to demand arbitration in part by engaging in discovery that was specifically prohibited by the arbitration clause. *Id*. at 492-93. The court in *Lauricia* found that the plaintiff would be prejudiced by enforcement of the arbitration clause after the defendant obtained information on the underlying claims by deposing the plaintiff, "an action not permitted under the arbitration agreement." *Id*. at 493. In the instant case, Sanderson Farms' breach of the arbitration clause likewise has prejudiced Roy Gatlin by forcing him to bear significant arbitration costs that the contract said he would not have to pay.

Sanderson Farms' breach of the arbitration clause without engaging in litigation activity does not prevent this Court from finding a waiver of the right to arbitrate under state law and under the Federal Arbitration Act. Several courts have found waiver based on a party's non-litigation conduct that violates the terms of a particular arbitration clause. The U.S. Court of Appeals for the Fourth Circuit, for example, has held that a party cannot enforce arbitration after it is found to have breached its duty under the arbitration clause to promulgate arbitration rules in good faith. *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999). In the *Hooters* case, the Fourth Circuit squarely rejected the argument that judicial review of an

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[5] *See Engalla v. Permanente Medical Group*, 938 P.2d 903, 923 (Cal. 1997) (waiver may mean "'the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to...relinquish the right.'") (citation omitted); *Atkins v. Rustic Wooods Partners*, 525 N.E.2d 551, 555 (Ill. App. 1992) ("Waiver may occur...when a party acts in a manner which is inconsistent with the arbitration clause, thus indicating an abandonment of the right."); *see also* Anthony DeToro, "Waiver of the Right to Compel Arbitration of Investor-Broker Disputes," 21 Cumberland L. Rev. 615, 624 (1991) ("The first factor the court should consider is whether the party against whom waiver is sought has taken any steps inconsistent with the agreement to arbitrate.")

arbitration clause is limited to the circumstances of contract formation. *Id*. at 938. Finding instead that courts should resolve any asserted grounds for revocation of the arbitration clause, the court in *Hooters* held that the defendant in an employment discrimination case breached its contractual duty to establish dispute resolution rules and its contractual obligation of good faith by designing a one-sided arbitration system. *Id*. at 938 and 940. Rather than repair the defendant's breach by referring the case to arbitration under neutral rules, the Fourth Circuit rescinded the arbitration clause and allowed the plaintiff to bring her claims in court. *Id*. at 940 ("Given Hooters' breaches of the arbitration agreement and Phillips' desire not to be bound by it, we hold that rescission is the proper remedy."). In the instant case, this Court should likewise hold that Sanderson Farms' material breach of its own arbitration clause in shifting substantial forum costs onto Roy Gatlin is a waiver of the company's right to enforce the arbitration clause when Gatlin has also chosen to pursue his claims in court.

The fact that the instant case was initially filed in arbitration does not prevent this Court from finding that Sanderson Farms has waived its rights under the arbitration clause. A party may waive the right to arbitrate by disregarding the requirements of an arbitration agreement after arbitration is commenced; a party trying to enforce an arbitration clause does not get two bites at the apple. In *Engalla v. Permanente Medical Group*, 938 P.2d 903 (Cal. 1997), the California Supreme Court reversed an arbitration order in a medical malpractice case against an HMO that had started out in arbitration but ended up in court. The issue before the court in *Engalla* was whether a party's dilatory conduct in the course of arbitration proceedings may be so contrary to the contractual right to arbitrate as to constitute a waiver of the right. The relevant conduct in *Engalla* was the HMO's delays in processing the plaintiffs' claims, appointing a party

arbitrator, agreeing to a neutral arbitrator and scheduling depositions. *Id*. at 910-14. Since there had been no trial court determination on the issue of waiver, the California Supreme Court remanded the question, but not before advising the trail court:

> We conclude that the evidence of Kaiser's course of delay, reviewed extensively above, which was arguably unreasonable or undertaken in bad faith, may provide sufficient grounds for a trier of fact to conclude that Kaiser has in fact waived its arbitration agreement.
>
> ...In this case, there is ample evidence that the claimant was diligent in seeking Kaiser's cooperation, and instead suffered from Kaiser's delay, a delay which was unreasonable or in bad faith.

Id. at 924. Likewise in the instant case, Gatlin at first attempted to vindicate his claims against Sanderson Farms through arbitration, but then was burdened by the company's refusal to pay any of the $2,000 arbitration filing fee that it promised to share in its arbitration clause. This burden on Gatlin's ability to enforce his legal rights should constitute sufficient prejudice for this Court to find that Sanderson Farms has waived its rights under the arbitration clause.

Sanderson Farms would have this Court limit the principles of contractual waiver set out under Mississippi law and would require the Court to reject the cases from other jurisdictions recognizing that various types of actions may constitute waiver. Sanderson Farms argues that this Court may find waiver only if there has been substantial litigation activity by the parties or if delays have resulted in the loss of evidence. Br. at 36-38. In its recent decision in *Addison Construction*, this Court rejected the argument that participation in litigation is the only basis for finding waiver of rights under an arbitration clause. *Addison Construction*, 2001 WL 393927 at *4. This is consistent with the decisions in *Hooters* and *Engalla*, both of which recognize that contractual waiver principles enable a court to prevent a party from using its adhesion contract to impose an arbitration system that unfairly and unexpectedly burdens parties of lesser bargaining

power in the exercise of their legal rights.[6] A finding of waiver is appropriate here because Sanderson Farms promised in its arbitration clause to share equally in all the costs of arbitration and then refused to pay any of a $2,000 arbitration filing fee when Roy Gatlin attempted to arbitrate. This breach of the arbitration clause prejudiced Mr. Gatlin by placing a substantial and unexpected financial burden on the enforcement of his rights under state law. The trial court was therefore correct to hold that Sanderson Farms defaulted on its right to compel arbitration.

B. The Question of Whether Sanderson Farms Breached its Arbitration Clause and Waived any Right to Compel Arbitration is for a Court to Decide.

The previous section identified more than a dozen courts which have held that parties waived their rights to arbitrate, and many more could be cited. In light of these cases holding that a party waived its rights under an arbitration clause, this Court should reject Sanderson Farms' argument that the issues of breach of an arbitration clause and waiver are for an arbitrator rather than a court to decide. In a case such as this, where Sanderson Farms raised arbitration in response to litigation on the Gatlins' underlying claims, Section 3 of the Federal Arbitration Act specifically directs a court to "stay the trial of the action...*providing the applicant for the stay is not in default in proceeding with such arbitration*." 9 U.S.C. § 3 (emphasis added). Sanderson Farms would like this Court to read the default proviso right out of the FAA and have courts step aside when a party is in default under an arbitration clause. This will not do. When a party seeks to stay litigation, the FAA reserves to courts the power to decide whether there is a valid

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[6] *See* Note, "Engalla v. Permanente Medical Group, Inc.: Can Arbitration Clauses in Employment Contracts Survive a 'Fairness' Analysis?," 50 Hastings L.J. 635, 653 (1999) ("where procedural unfairness is successfully linked to claims of fraud, waiver, or unconscionability, as alleged in Engalla, traditional deference to arbitration and the usual presumption of arbitrability may be overcome.")

arbitration agreement and whether the parties have complied with its terms because "arbitration is simply a matter of contract between the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The FAA does not create an independent right to arbitrate against another party's wishes in the absence of an enforceable agreement.[7] The provision of Sanderson Farms' arbitration clause allowing arbitration of disputes over arbitrability does not alter this basic fact. That provision applies to disputes over the *scope* of an arbitration clause once a court has determined that there is an arbitration clause in effect. To allow an arbitrator to determine the *existence* of an enforceable arbitration clause would be to place the cart before the horse.

1. Courts Must Decide Whether There is a Breach of an Arbitration Clause and a Waiver of any Right to Compel Arbitration.

The short answer to Sanderson Farms' argument that breach and waiver of the right to enforce an arbitration clause are for an arbitrator to decide is that this Court and other courts have said that these are judicial determinations. In its recent *Addison Construction* decision, this Court held in deciding whether or not a party could compel arbitration that "[t]he existence of a waiver is a factual determination to be made by the trial court." *Addison Construction*, 2001 WL 393927 at *5. This holding is perfectly consistent with a line of cases applying the U.S. Supreme Court's discussion of the relationship between arbitration and contract formation under the Federal Arbitration Act in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395

[7] *See Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 266 (5th Cir. 1978) ("in seeking to compel arbitration, the plaintiff's complaint does not rest upon Section 2 of the Act. Instead, the basis of the plaintiff's complaint is the contractual agreement of the parties to arbitrate."); *W.M. Schlosser Co., Inc. v. School Board of Fairfax County, Va.*, 980 F.2d 253, 259 (4th Cir. 1993) ("Section 2 [of the FAA] dictates the effect of a contractually agreed-upon arbitration provision, but it does not displace state law on the general principles governing formation of the contract itself.") (citation omitted).

(1967).

In *Prima Paint*, the Supreme Court addressed the question of whether a court or an arbitrator should resolve a claim of fraud in the inducement of a contract which includes an arbitration clause. *Id*. at 396-97. In holding that an arbitrator should resolve this claim, the Supreme Court sharply distinguished the claim of fraud in the inducement of an arbitration clause itself as involving "an issue which goes to the 'making' of the agreement to arbitrate" and therefore would be for the Court to decide under the FAA. *Id*. at 403-04, *quoting* 9 U.S.C. § 4.[8] The Supreme Court explained that judicial resolution of arguments attacking the validity of an arbitration clause was consistent with the structure and purposes of the FAA because:

> As the 'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so*. *To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the 'saving clause.'*

Id. at 404 n.12 (emphasis added). Like the claim of fraud in the inducement of an arbitration clause discussed in *Prima Paint*, the Gatlins' claim of breach and waiver of the arbitration clause in the instant case goes to the very existence of an agreement to arbitrate and should therefore be decided by the Court. A contrary holding would exalt arbitration clauses over other types of contracts by immunizing them alone from judicial challenge based on breach and waiver, and thus would be inconsistent with the Federal Arbitration Act.

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[8] The full passage of Section 4 referenced in *Prima Paint* reads: "[U]pon being satisfied that the making of the agreement for arbitration *or the failure to comply therewith* is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." (emphasis added). Section 4 thus requires courts to make determinations regarding the *existence* of an arbitration clause, examining both the parties' formation of *and compliance with* the arbitration clause.

Federal and state courts applying *Prima Paint* have held repeatedly that challenges to the enforceability of arbitration clauses, as opposed to challenges to underlying contracts, must be decided by courts. The Fifth Circuit has held, for example, that an allegation of fraud in the inducement of an arbitration clause must be decided by a court. *See Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979) ("If, in fact, the arbitration clause was induced by fraud, there can be no arbitration; and if the party charging this fraud shows there is substance to this charge, there must be a judicial trial of that question before a stay can issue."); *see also R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534, 538 (5th Cir. 1992) ("If the fraud relates to the arbitration clause itself, the court should adjudicate the claim.") Other courts have similarly held that challenges to the existence of an enforceable arbitration clause under various principles of state contract law must be decided by the courts.[9] The dispute in the instant case over whether Sanderson Farms can enforce its arbitration clause after breaching its provision regarding the allocation of arbitration costs goes to the existence of an enforceable arbitration clause and thus

[9] *See*, *e.g.*, *Sandvik AB v. Advent Int'l Corp.*, 220 F.3d 99, 107 (3rd Cir. 2000) ("Because under...the FAA a court must decide whether an agreement to arbitrate exists before it may order arbitration, the District Court was correct in determining that it must decide whether Huep's signature bound Advent before it could order arbitration."); *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 791 (8th Cir. 1998) (claims that arbitration clause lacks mutuality, is unconscionable, and violates public policy "go to the making of the arbitration agreement itself. Under *Prima Paint*, a court must decide whether the agreement to arbitrate is valid."); *Glass v. Kidder, Peabody & Co.*, 114 F.3d 446, 453 (4th Cir. 1997) ("[W]hether granting an order to arbitrate under section 3 or section 4, the district court must first determine if the issues in dispute meet the standards of either 'substantive arbitrability' or 'procedural arbitrability.' A *substantive arbitrability inquiry* confines the district court to considering only those issues relating to the arbitrability of the issue in dispute *and the making and performance of the arbitration agreement*.") (emphasis added); *Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903, 923 (Cal. 1997) (question of whether party waived right to compel arbitration should be decided by court); *County of Rockland v. Primiano Construction Co., Inc.*, 409 N.E.2d 951, 953-54 (N.Y. 1980) (court must decide whether parties complied with arbitration clause's prerequisites to entry into arbitration process).

is for the courts to resolve.

None of the cases relied upon by Sanderson Farms supports its argument that this Court should require the Gatlins to go to arbitration for a determination of whether there is an enforceable arbitration clause that might require them to arbitrate their underlying claims. The U.S. Supreme Court's decisions in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) and *International Union of Operating Engineers, Local 150 v. Flair Builders, Inc.*, 406 U.S. 487 (1972), were both labor relations disputes involving collective bargaining agreements governed not by the Federal Arbitration Act, but by Section 301 of the Labor-Management Relations Act. *See*, *e.g.*, *John Wiley & Sons*, 376 U.S. at 544. The FAA's provisions saving the application of state contract law to determine the existence of an arbitration clause thus did not apply in those federal labor law cases. *See Id*. at 548. Even so, the Supreme Court in *John Wiley & Sons* held that courts must decide the initial question of whether the parties are bound by an enforceable arbitration clause: "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id*. at 547; *see also Flair Builders*, 406 U.S. at 491 ("nothing we say here diminishes the responsibility of a court to determine whether a union and employer have agreed to arbitrate.") Only after the court decided that there was an enforceable arbitration agreement did it send the case to arbitration on the issue of whether the parties had complied with other provisions of the labor contract. *Id*. at 557; *see also Engalla*, 938 P.2d at 922-23 (finding *John Wiley & Sons* "inapposite" to question of whether a court should decide a waiver claim because existence of arbitration agreement was beyond dispute in *Wiley* when case was referred to arbitration). To the extent that these labor relations cases are at all relevant to the

instant dispute, they support the Gatlins' argument that a court must determine whether or not the arbitration clause can still be enforced.

Likewise, the Second Circuit's opinion in *World Brilliance Corp. v. Bethlehem Steel Co.*, 342 F.2d 362 (2nd Cir. 1965), has no application to this case even under prevailing Second Circuit law. In *World Brilliance*, the court held that waiver should be decided by an arbitrator in a case that was filed as an independent action to compel arbitration under Section 4 of the FAA. *Id*. at 364. In finding that Section 4 only allowed courts to address defenses to arbitration based on contract formation, *Id*., *World Brilliance* read out of that section its explicit direction to courts to find before ordering arbitration that "the making of the arbitration agreement *or the failure to comply therewith is not in issue*." 9 U.S.C. § 4 (emphasis added). The Second Circuit later held, however, that this limitation in *World Brilliance* does not prevent courts from deciding waiver arguments when they are raised in a Section 3 action, like the instant case, where the party seeking arbitration did not initiate litigation. *See Doctor's Associates, Inc. v. Distajo*, 66 F.3d 438, 454 (2nd Cir. 1995). In *Distajo*, the Second Circuit identified a long line of cases holding that waiver is a defense to a stay application under Section 3 of the FAA based on this section's explicit proviso with regard to default. *Id*. Thus, even if *World Brilliance* survives the Supreme Court's later instruction in *Prima Paint* that questions relating to enforcement of the arbitration clause are for a court to decide, this Second Circuit opinion would not be relevant to the instant case because Sanderson Farms is seeking a stay under Section 3 of the FAA, which explicitly requires courts to address the issue of waiver or default under an arbitration clause.

2. The "Arbitrability" Provision of Sanderson Farms' Arbitration Clause Does Not Apply to Disputes Over Whether the Arbitration Clause is Enforceable.

The specific terms of the arbitration clause in this case do not divest this Court of jurisdiction to decide whether or not Sanderson Farms breached and waived the right to enforce its arbitration clause. Sanderson Farms attempts to argue that the provision calling for arbitration of "disputes relating to...the arbitrability of any dispute relating to this agreement" distinguishes this case from the many cases cited herein requiring courts to decide whether or not there is an enforceable arbitration agreement. A federal court within the Fifth Circuit recently rejected this precise argument, however, relying on the Fifth Circuit's holdings in light of *Prima Paint* that courts must decide claims going to the validity of an arbitration clause. *See Prevot v. Phillips Petroleum Co.*, 133 F. Supp.2d 937, 939-40 (S.D. Tex. 2001). In *Prevot*, injured parties sued their employer on various tort claims, the employer moved to stay the court action and compel arbitration under the FAA, and the plaintiffs opposed this motion on the ground that the employer's arbitration clause was unconscionable and could not be enforced. *Id*. at 938, 939. The court in *Prevot* held that the unconscionability defense to the arbitration clause was for the court to decide:

> At the outset, the Court must decide whether the claims of arbitrability are themselves subject to arbitration. Defendant contends that under the terms of the agreements, the parties agreed to submit questions of arbitrability to arbitration. Plaintiffs Soto and Valles, however, make a claim of procedural unconscionability. Such claims are for the Court to decide when they relate specifically to the arbitration clause.

Id. at 939.[10] In the instant case, Roy Gatlin's breach and waiver arguments (as well as his own

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[10] Other courts have also held that unconscionability arguments against the enforcement of an arbitration clause go to the making of the agreement and thus should be decided by courts. *See*, *e.g.*, *Barker v. Golf U.S.A., Inc.*, 154 F.3d 788, 791 (8th Cir. 1998); *Teleserve Systems, Inc. v. MCI Telecomm. Corp.*, 659 N.Y.S.2d 659, 664 (N.Y. App. Div. 1997). The decision of the Fifth Circuit in *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996), is not to the contrary. In *Rojas*, the court found that many of the plaintiff's unconcionability attacks went to the

unconscionability argument made in Part II below) also relate specifically to the arbitration clause and to whether or not it can be enforced. Just as Phillips Petroleum's provision for arbitration of arbitrability disputes did not apply to the question of whether the arbitration agreement itself was unconscionable, so the same provision in Sanderson Farms' arbitration clause does not apply to the arguments made against enforcement in this case.

The inapplicability of the "arbitrability" provision to Roy Gatlin's waiver and unconscionability arguments in this case does not leave the provision without any eventual application in this or another case. Sanderson Farms emphasizes in its brief the established principle that a court has two roles in an arbitration dispute under the FAA. *See* Br. at 9 and 21. First, the court must determine whether there is an enforceable arbitration agreement between the parties. Second, the court must decide whether the specific dispute before it falls within the scope of the arbitration agreement. *See Smith, Barney, Harris Upham & Co., Inc. v. Robinson*, 12 F.3d 515, 520 (5th Cir. 1994); *Arce v. Cotton Club of Greenville, Inc.*, 883 F. Supp. 117, 119 (N.D. Miss. 1995). The "arbitrability" provision in Sanderson Farms' arbitration clause may apply to the second of these determinations by allowing an arbitrator to displace the role of the courts in deciding the scope of the arbitration agreement once a court has determined that the arbitration clause (which includes the "arbitrability" provision) is enforceable under state contract law. *Cf. First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995) (holding that courts generally should decide whether a particular claim is covered by an arbitration clause, but that parties may by contract refer this decision to arbitration). The

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contract as a whole rather than just the arbitration clause. *Id*. at 749. Here, the Gatlins are seeking to *enforce* the rest of the contract and only attack the validity of the arbitration clause.

"arbitrability" provision should not, however, cover the first of these determinations under the FAA because the Act's various provisions specifically require courts to determine whether there is an enforceable arbitration clause before sending a case to arbitration.[11] Sanderson Farms cannot evade this requirement by attempting to place a duty to arbitrate ahead of the existence of an enforceable arbitration clause.

The Circuit Court below was correct in holding that Sanderson Farms breached and waived its right to enforce the arbitration clause by refusing to share in the cost of the $2,000 arbitration filing fee, and was correct in holding implicitly that this question of whether the arbitration clause is enforceable is for the court rather than the arbitrator to decide in the first place. The opinion of the Circuit Court should therefore be affirmed.

II. SANDERSON FARMS' ARBITRATION CLAUSE IS UNCONSCIONABLE AND SHOULD NOT BE ENFORCED REGARDLESS OF BREACH AND WAIVER.

Even if this Court were to find that Sanderson Farms' breach of its own arbitration clause does not by itself render the clause unenforceable, the trial court's judgment that Sanderson Farms cannot compel arbitration should be affirmed on the ground that the arbitration clause is unconscionable as it works to impair Roy Gatlin's ability to vindicate his legal claims. Under Sanderson Farms' interpretation of the contract, Gatlin must pay at least $11,000 in arbitration

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[11] In this regard, Sanderson Farms' reliance on the decision of the Washington Court of Appeals in *Munsey v. Walla Walla College*, 906 P.2d 988 (Wash. App. 1995), is inapposite because *Munsey* did not involve application of the Federal Arbitration Act. What's more, the parties in *Munsey* drafted their arbitration agreement after the underlying dispute between them arose so that the entire agreement was over arbitration, and the parties specifically provided that the arbitrator would have "sole and exclusive authority to resolve any dispute relating to the... enforceability of this Agreement." *Id*. at 988-89. In the instant case, the arbitration clause has no provision specifying arbitration of disputes over the enforceability of the arbitration clause, and it is unclear under *Prima Paint* whether the FAA would give effect to such a provision.

fees before he can have a hearing on his claims. Sanderson Farms also unilaterally drafted this arbitration clause to prohibit the arbitrator from ever awarding exemplary or punitive damages to individual growers like Gatlin. As a further indication of how one-sided this arbitration clause is, Sanderson Farms gave itself unilateral power to prevent Gatlin from bringing or taking part in any class action proceedings against Sanderson Farms. It is well established under the Federal Arbitration Act that generally applicable state contract law may prevent the enforcement of a specific arbitration clause, and it is settled Mississippi law that a contractual provision whose formation is controlled by one party and whose terms are unreasonably favorable to that same party is unconscionable and should not be enforced.

A. THIS COURT MAY REFUSE TO ENFORCE THE SANDERSON FARMS ARBITRATION CLAUSE IF IT IS UNCONSCIONABLE AS A MATTER OF MISSISSIPPI CONTRACT LAW.

As a preliminary matter, this Court has jurisdiction to decide whether or not Sanderson Farms' arbitration clause is unconscionable even though the trial court did not find it necessary to reach this issue. The Gatlins argued in the trial court that the arbitration clause is unconscionable because it imposes prohibitive forum costs and deprives them of legal remedies that would be available if not for the arbitration clause. (R. at 5-6). As appellees, the Gatlins may defend the judgment below on grounds not reached by the trial court, and indeed this Court may affirm for any reason that would sustain the trial court's disposition refusing to enforce Sanderson Farms' arbitration clause. *See Askew v. Askew*, 699 So.2d 515, 519 n.3 (Miss. 1997) ("it is clear that a trial court judgment may be affirmed on grounds other than those relied upon by the trial court"); *Kirksey v. Dye*, 564 So.2d 1333, 1336 (Miss. 1990) ("this Court may affirm the lower court's grant of summary judgment on grounds other than that which the trial court

used"); *Stewart v. Walls*, 534 So.2d 1033, 1035 (Miss. 1988) ("It is a familiar rule that this Court will affirm the lower court where the right result is reached, even though we may disagree with the reason for the result.") This Court may thus affirm the judgment of the trial court on the ground that Sanderson Farms' arbitration clause is unconscionable and cannot be enforced in this case.

It has long been settled that this Court's appellate jurisdiction provides for review of a trial court's judgment and not merely the reasons the trial court gives in support of its judgment. The Court has explained:

> Appellate courts are not in the business of reversing a trial court when it has made a correct ruling or decision. We are first interested in the result of the decision, and if it is correct we are not concerned with the route–straight path or detour–which the trial court took to get there. *An appellee is entitled to argue and rely upon any ground sufficient to sustain the judgment below*.

Hickox by and through Hickox v. Holleman, 502 So.2d 626, 635 (Miss. 1987) (citations omitted) (emphasis added); *see also Yazoo & M. V. R. Co. v. Adams*, 32 So. 937, 943 (Miss. 1902) ("It has been the uniform practice of this court...that the decision of the first judge on the merits brings up the whole case.") While the trial court's finding that Sanderson Farms breached and waived its rights under the arbitration clause rendered the clause unenforceable and thus prevented the court from reaching the issue of unconscionability, the Gatlins have preserved this argument for this appeal and it is an appropriate basis for this Court to affirm the trial court's judgment.

Furthermore, federal arbitration law explicitly allows this Court to find that Sanderson Farms' arbitration clause is unconscionable and cannot be enforced against the Gatlins. The Federal Arbitration Act expressly preserves all "grounds as exist at law or in equity for the

revocation of any contract" as bases for courts to deny enforcement of specific contractual arbitration provisions. 9 U.S.C. §2. The FAA's primary purpose is to do no more than "place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 121 S. Ct. 513, 521 (2000) (quoting *Gilmer*). The U.S. Supreme Court has stated explicitly that the defense of unconscionability is available to a party challenging the enforcement of a contractual arbitration clause just as it is available to parties challenging other contractual provisions. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]"); *Gilmer*, 500 U.S. at 33 ("courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'") (citation omitted); *see also Raesly v. Grand Housing, Inc.*, 105 F. Supp.2d 562, 568 (S.D. Miss. 2000) ("Plaintiff may prove substantive unconscionability if she proves the terms of the arbitration clause were oppressive.")[12] A finding by this Court that Sanderson Farms' arbitration clause is unconscionable based on the company's control over formation of the clause and its imposition of terms circumscribing the Gatlins' legal rights would thus be consistent with

[12]A host of courts around the country have refused to enforce arbitration clauses that were found to be unconscionable. *See, e.g., Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230 (10th Cir. 1999); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087 (W.D. Mich. 2000), *appeal pending* (6th Cir.); *Graham v. Scissor-Tail*, 623 P.2d 165 (Cal. 1990); *Powertel v. Bexley*, 743 So. 2d 570 (Fla. Ct. App. 1999); *Iwen v. U.S. West Direct*, 977 P.2d 989 (Mont. 1999); *Williams v. Aetna Finance Co.*, 700 N.E.2d 859 (Ohio 1998), *cert. denied*, 119 S.Ct. 1357 (1999); *In re Turner Bros. Trucking Co.*, 8 S.W.3d 370 (Tex. Civ. App. 1999), *writ denied* (May 11, 2000); *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996); *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W. Va. 1998).

the policy goals and purposes of the Federal Arbitration Act.

B. SANDERSON FARMS' ARBITRATION CLAUSE IS UNCONSCIONABLE UNDER MISSSISSIPPI LAW.

Mississippi courts will not enforce unconscionable contractual provisions. Miss. Code Ann. § 75-2-302. As it is adopted into Mississippi law, the Official Comment to the Uniform Commercial Code provision authorizing courts to invalidate unconscionable contracts for the sale of goods suggests the following analysis: "The basic test is whether...the clauses involved are so one-sided as to be unconscionable. . . The principle is one of the prevention of oppression and unfair surprise." *Id*., Uniform Commercial Code Comment. Like courts in numerous other states,[13] courts applying Mississippi law determine unconscionability by examining both procedural issues in the formation of the contractual provision and substantive issues in the provision's actual terms: "'Unconscionability has been defined as an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.'" *Entergy Mississippi, Inc. v. Burdette Gin Co.*, 726 So.2d 1202, 1207 (Miss. 1998) (internal quotations omitted), *quoting Bank of Indiana, Nat'l Ass'n v. Holyfield*, 476 F. Supp. 104, 109 (S.D. Miss. 1979). Under these rules, the explicit restrictions that Sanderson Farms' unilaterally imposed arbitration clause places on the Gatlins' enforcement of their rights render it unconscionable.

1. The Gatlins had no Meaningful Choice about the Arbitration Clause.

Sanderson Farms unilaterally drafted the arbitration clause, which appears in a contract

[13] *See, e.g., Williams v. Aetna Finance Co.*, 700 N.E.2d at 866-67; *Arnold v. United Companies Lending Corp.*, 511 S.E.2d at 861 n.6; *Sosa v. Paulos*, 924 P.2d at 361; *Madden v. Kaiser Foundation Hospitals*, 552 P.2d 1178, 1185-86 (Cal. 1976).

that references the company by name repeatedly while it includes Mr. Gatlin's name only in filled in blank spaces and otherwise refers to him simply as "the grower." (Record at 29-36). Mr. Gatlin has testified without any contradiction that Sanderson Farms presented the arbitration clause in its 1997 Boiler Production Agreement on a take-it-or-leave-it basis and that he was told the company would discontinue its delivery of chickens to him if he refused to sign. (Record at 436). Furthermore, the 1997 contract was a renewal of earlier agreements which contained no arbitration clause and under which the Gatlins had been receiving chickens from Sanderson Farms since 1980. (Record at 436). At the time of this renewal, the Gatlins owed more than $250,000 on a mortgage of their chicken farm and their house. (Record at 435-36). Sanderson Farms was thus in a position to force Mr. Gatlin to decide between waiving his right to jury trial by signing on to the arbitration clause or

losing his primary source of income by cutting off the supply of chickens to his farm.[14]

Sanderson Farms' control over the formation of the arbitration clause with Roy Gatlin establishes the procedural component of unconscionability which would require this Court to examine closely the substantive fairness of the terms of the arbitration clause. This Court and other courts applying Mississippi law have recognized that procedural unconscionability in contract formation may be established by a significant disparity in bargaining power which results in one party either involuntarily or unknowingly being bound by contractual provisions.

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[14] This case thus involves facts that are almost the polar opposite of those where the U.S. Supreme Court definitively upheld the enforcement of contractual forum selection clauses. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) ("The choice of that forum was made in an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and counterveiling reason it should be honored by the parties and enforced by the courts.")

Entergy Mississippi, Inc., 726 So.2d at 1207, *quoting Holyfield*, 476 F. Supp. at 109-10; *OMP v. Security Pacific Business Finance, Inc.*, 716 F. Supp. 239, 249 (N.D. Miss. 1989). This Court in *Entergy Mississippi* recently found a contract between a public utility company and a private business to be procedurally unconscionable where the utility refused to negotiate the terms of the contact, explaining that "[p]rocedural unconscionability 'is most strongly shown in contracts of adhesion presented to a party on a 'take it or leave it basis.'" *Id*. at 1208, *quoting Holyfield*, 476 F. Supp. at 108. Even though *Entergy Mississippi* involved an agreement between two businesses, this Court found the contract to be procedurally unconscionable after noting evidence that the private company's signatory was "a farmer by trade and no match for Entergy's team of attorneys" and concluding that "it is reasonable to assume that a large company such as Entergy holds the advantage [regarding comparative business savvy]." *Id*. at 1207. This Court's finding that a contract presented to a farmer by a utility company on a non-negotiable basis is procedurally unconscionable should direct the Court to reach the same conclusion regarding Sanderson Farms' arbitration clause here.

Especially informative to the procedural unconscionability determination in this case should be the holding of the U.S. District Court for the Southern District of Mississippi in *Holyfield* that a lease between a bank and two dairy farmers to provide cows for their farm was procedurally unconscionable. *See Holyfield*, 476 F. Supp. at 111-12. *Holyfield* applied Mississippi's law of unconscionability, explaining that

> A lack of voluntariness is demonstrated in contracts of adhesion where there is a great imbalance in the parties' relative bargaining power, the stronger party's terms are unnegotiable, and the weaker party is prevented by market factors, timing or other pressures from being able to contract with another party on more favorable terms or to refrain from contracting at all.

Id. at 110. The court in *Holyfield* found these conditions to be present where the farmers' unstable financial condition placed the bank in an "unquestionably...superior bargaining position" and the bank refused to negotiate over the lease. *Id*. at 111. The virtually identical circumstances faced by the Gatlins in signing Sanderson Farms' Broiler Production Agreement warrant a finding that the arbitration clause in this case is procedurally unconscionable.

Such a finding by this Court would be consistent with a significant body of case law from courts in other states addressing adhesive arbitration clauses in contracts between businesses and individual parties. In *Arnold v. United Companies Lending Corp.*, 511 S.E.2d 854 (W.Va. 1998), the West Virginia Supreme Court found procedurally unconscionable and ultimately refused to enforce an arbitration clause in a lending company's home equity loan agreement with two borrowers. The *Arnold* court based its finding of procedural unconscionability on the disparity in bargaining power between a national corporate lender and the elderly unsophisticated consumers, on the absence of evidence that the consumers were given any choice as to arbitration in the lending agreement, and on the fact that the consumers had no legal representation during the transaction. *Id*. at 861; *see also Sosa v. Paulos*, 924 P.2d 357, 362-63 (Utah 1996) (finding arbitration clause in physician-patient agreement presented to patient shortly before she was scheduled to undergo orthopedic surgery to be procedurally unconscionable); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171-72 (Cal. 1981) (striking down as unconscionable arbitration clause in contract between individual concert promoter and performing artists whose trade association requires arbitration as condition of doing business); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574-75 (Fla. Dist. Ct. App. 1999) (finding cellular telephone service provider's arbitration clause inserted into consumer agreements to be

procedurally unconscionable where provision was not bargained for and consumers had to accept arbitration in order to do business with company).

The procedural unconscionability of an arbitration clause in a business's contract of adhesion by itself may not necessarily render the clause unenforceable. The California Supreme Court has recognized that there is an inverse relationship between the procedural and substantive elements of unconscionability, so that a party challenging a highly adhesive contract has a lesser burden in attacking the substantive terms of the contract and a party attacking a heavily one-sided contract has a lesser burden as regards the facts of contract formation. *See Armendariz v. Foundation Health Psychare Services, Inc.*, 6 P.3d 669, 690 (Cal. 2000) (holding one-sided arbitration clause imposed by employer as condition of individual worker's employment to be unconscionable).[15] Thus, a finding that the arbitration clause in Sanderson Farms' was drafted unilaterally and presented on a non-negotiable basis may not be enough render it unenforceable. But such a finding would require this Court to examine closely the substantive terms of the arbitration clause to determine whether Sanderson Farms used its control over contract formation to impose terms that are unreasonably favorable to itself.

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[15] *See also* Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. Rev. 857, 933-34 ("Generally, both procedural and substantive unconscionability must be present in order for a court to decline to enforce an agreement; however 'courts have suggested...a large amount of one type of unconscionability can make up for only a small amount of the other.'") *(*quoting Stephen J. Ware, *Arbitration and Unconscionability after Doctor's Associates, Inc. v. Casarotto*," 31 WAKE FOREST L. Rev. 1001, 1016-17 (1996); *Williams v. Aetna Finance Co.*, 700 N.E.2d 859, 867 (Ohio 1998) (finding arbitration clause in home equity loan papers between lending institution and single homeowner unconscionable after recognizing that "the presumption in favor of arbitration should be substantially weaker... when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature"), *cert. denied*, 526 U.S. 1051 (1999).

2. The Arbitration Clause is Unreasonably Favorable to Sanderson Farms.

Sanderson Farms drafted the terms of its arbitration clause to benefit itself mightily at the expense of Roy Gatlin's ability to enforce his legal rights against the company. First, the arbitration clause prohibits arbitrators from ever awarding exemplary or punitive damages in cases between Sanderson Farms and individual growers like Gatlin. (R. 34). The contract also gives Sanderson Farms veto power to prevent growers from bringing or participating in multiple party proceedings, such as class actions, against it in arbitration. (R.34) On top of these waiver provisions, the requirements that Gatlin pay half the cost arbitration and that all claims be heard by a panel of three arbitrators, (R. 34-35), impose under Sanderson Farms' own interpretation of the contract an admission fee of at least $11,000 for Mr. Gatlin to get a hearing on his legal claims. (R. 82-84 and 462) (American Arbitration Association request for payment of $2,000 filing fee; letter from Sanderson Farms refusing to pay any part of filing fee; $8,250 billing statement from AAA to Roy Gatlin, showing separate payment of $750 for mediator's compensation). Mr. Gatlin has stated that these costs prevented him from pursuing his claims in arbitration. (R. 436-37). The requirements of Sanderson Farms' arbitration clause thus have combined to wipe out or at least severely impair Roy Gatlin's ability to enforce his legal rights against the company and should not be enforced.

The exemplary and punitive damages prohibition renders the arbitration clause substantively unconscionable under Mississippi contract law. The arbitration clause explicitly declares that "the arbitrators shall not have the authority to award exemplary or punitive damages, and the parties expressly waive any claimed right to such damages." (R. 34). In its

recent *Entergy Mississippi* decision, this Court held that a utility company's contractual exculpatory clause requiring customers to indemnify the utility for injuries resulting from equipment stored near high voltage power lines was substantively unconscionable. *Entergy Mississippi*, 726 So.2d at 1208. In finding this exculpatory clause to be "unreasonably favorable to the [drafting] party," *Id*. at 1207 (quoting *Holyfield*, 476 F. Supp. at 109), the Court explained:

> Since it is possible that both the employer and the utility could be jointly liable in an accident such as the one at issue in this case, it is not reasonable to allow Entergy, with its significantly greater bargaining power, to essentially unilaterally impose the indemnity clause upon its customers such as Burdette Gin.

Id. at 1208. While the exculpatory clause found unconscionable in *Entergy Mississippi* focused on a particular type of accident, the fact that Sanderson Farms' contract singles out a particular form of relief in denying arbitrators the power ever to award exemplary or punitive damages to claimants should not make it any more enforceable. The Gatlins have a separate claim for punitive damages against Sanderson Farms, (R. 7), and enforcement of the arbitration clause would prohibit them from obtaining relief on this claim. Under *Entergy Mississippi*, Sanderson Farms cannot use its arbitration clause with individual farmers to shield itself from liability on claims that could be brought in court.

Neither the punitive damages waiver nor the unilateral veto provision regarding multiple party proceedings is rendered any less unconscionable by its facial neutrality in applying to claims by both Gatlin *and* Sanderson Farms. The practical effect of the waiver and unilateral veto provisions in this adhesion agreement is to require the Gatlins alone to give up these rights in order to do business with Sanderson Farms. In *Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla. Dist. Ct. App. 1999), *rev. denied*, 763 So.2d 1044 (Fla. 2000), a Florida Appellate Court held that a punitive damages waiver in the arbitration clause to a consumer contract for cellular

telephone services is unconscionable because it is effectively a one-way limitation of remedies. Noting first that "[o]ne indicator of substantive unconscionability is that the agreement requires the customers to give up other legal remedies," *Powertel* found that:

> The arbitration clause expressly limits Powertel's liability to actual damages, thereby precluding the possibility that Powertel will ever be exposed to punitive damages, no matter how outrageous its conduct might be. Powertel argues that this limitation works both ways, but as a practical matter, it is difficult to imagine any situation in which a telephone company would have an action for punitive damages against its customers.

Id. at 576.[16] So it is in this case that the contract's prohibition of punitive damages in arbitration, while neutral between the parties on its face, would operate almost solely to the benefit of Sanderson Farms by prohibiting growers from bringing claims for punitive damages as the Gatlins are attempting to do. The one-sided effect of the arbitration clause's unilateral veto provision for multiple party actions is even more apparent since Sanderson Farms as drafter of the standard form Broiler Production Agreement is virtually guaranteed to be the defendant in any class action or other multiple party claims relating to the agreement. Both of these provisions make the arbitration clause "unreasonably favorable" to Sanderson Farms.

At least as unreasonably favorable to Sanderson Farms is the provision of the arbitration clause requiring Roy Gatlin to pay half the arbitration costs in order to enforce his legal rights. Under this provision, Gatlin was required to pay $2,000 to file his case in arbitration (after

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[16]S*ee also Worldwide Insurance Group v. Klopp*, 603 A.2d 788, 791 (Del. 1992) (holding that arbitration clause in automobile insurance policy is unconscionable where it allows appeals only of awards exceeding specified dollar values because "[w]hile high awards may be appealed by either party, common experience suggests that it is unlikely that an insured would appeal such an award."); *Zak v. Prudential Property & Casualty Ins. Co.*, 713 A.2d 681, 684 (Pa. Super. Ct. 1998) (finding insurance contract arbitration clause provision allowing either party to appeal award over $15,000 "completely unconscionable" as clearly favoring insurer over claimant).

Sanderson Farms refused to pay *any* part of this fee), $750 for a mediation fee, and was billed an additional $8,250 mostly in compensation to the arbitrators for a total of at least $11,000 in costs before he could have his claims heard. (R. 82-84, 462). Since the arbitration clause requires individual growers like Gatlin to bring their claims to a panel of three arbitrators and to pay half the costs of proceedings, the clause virtually guarantees that growers will never be able to enforce their legal rights. The arbitration clause by its express terms closes the courthouse doors to individual growers and imposes excessive costs that prohibit growers from obtaining relief through arbitration, effectively leaving the growers with no recourse for the company's violations of their legal rights.

While this Court has not yet addressed the effect of prohibitive arbitration costs, one federal court in Mississippi found a far smaller cost burden imposed on an individual employee in a Title VII case to be "a factor weighing against enforcement of the [arbitration] agreement at issue." *See Patterson v. Red Lobster*, 81 F. Supp.2d 681, 687-88 n.8 (S.D. Miss. 1999) (arbitration clause requiring parties to split costs, capping bartender employee's contribution at equivalent of two weeks' salary). Inasmuch as the arbitration clause here requires a single farmer to pay at least $11,000 in arbitration fees to preserve his legal claims, the clause is unreasonably favorable to Sanderson Farms.

Moreover, courts applying Mississippi law have found substantive unconscionability in contracts generally "when there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach" or when there is "a price far in excess of that prevailing in the market price." *Holyfield*, 476 F. Supp. at 110. Under either of these measures, the arbitration clause's requirement that the

Gatlins pay $11,000 in order to pursue their legal claims is unconscionable. Mr. Gatlin has testifed that these costs would prevent him from pursuing his claims if the arbitration clause were to be enforced. Record at 436-37. Sanderson Farms has not disputed this fact in any way. Furthermore, the $11,000 price tag for arbitration fees dwarfs the $94 filing fee the Gatlins paid to file their claims in the Jones County Circuit Court. *See* (R. 2). As this is likely the only cost the Gatlins would have to pay to the decision-maker in court, there is no reasonable relationship between the price imposed by Sanderson Farms' arbitration clause and the most comparable prevailing market price for dispute resolution.[17] Sanderson Farms cannot unilaterally impose such prohibitive and unreasonable forum costs on individual farmers like Roy Gatlin, effectively making them sacrifice the enforcement of their legal rights as a pre-condition for doing business with Sanderson Farms.

The explicit remedial waiver provisions combined with the imposition of prohibitive forum costs render Sanderson Farms' unilaterally imposed arbitration clause unconscionable under well-established principles of Mississippi contract law.

C. COURTS ACROSS THE NATION HAVE STRUCK DOWN ARBITRATION CLAUSES BASED ON PROVISIONS LIKE THOSE THAT SANDERSON FARMS SEEKS TO ENFORCE.

Numerous federal and state courts have held that individuals may not be forced into arbitration when they will not be afforded access to the same remedies that would be available in court. This doctrine applies both to arbitration clauses that rig the procedure so that individuals will be deterred from or unable to pursue their claims (e.g., arbitration clauses requiring

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[17] In this regard, this case is worlds apart from *Smith v. Equifirst Corp.*, 117 F. Supp.2d 557, 563-64 (S.D. Miss. 2000) (enforcing arbitration clause that is silent as to allocation of fees and costs where arbitrator's filing and administrative fees for consumer did not exceed $500).

individuals to pay excessive fees to have their claims heard) and to clauses that seek to rewrite underlying substantive law (e.g., arbitration clauses denying individuals access to statutory or common law remedies). As is discussed above, both problems afflict Sanderson Farms' arbitration clause here – it imposes enormous arbitration costs on individual farmers like Roy Gatlin, effectively denying him access to any redress for his legal claims, and it purports to re-write the remedies that would otherwise be available under Mississippi contract and tort law.

1. Sanderson Farms Cannot Require Gatlin to Pay $11,000 to Enforce His Legal Rights in Arbitration.

There is no dispute over the fact that the excessive arbitration costs described herein would effectively prohibit Gatlin from enforcing his legal rights against Sanderson Farms. The U.S. Supreme Court has stated repeatedly that arbitration must allow a party to "effectively vindicate" its rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi*). In a wave of cases decided in recent years, federal and state appellate courts have refused to enforce arbitration clauses that compelled individual claimants to pay fees that might discourage or prevent them from bringing a claim. Among the leading cases is *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), where the court, in a carefully reasoned opinion by Chief Judge Edwards, held that an individual worker cannot be required as a condition of employment to pay arbitrator's fees, which the court estimated to range from $500 to $1000 or more per day, in pursuing discrimination claims. *Id*. at 1485. The court explained:

> Arbitration will occur in this case only because it has been mandated by the employer as a condition of employment. Absent this requirement, the employee would be free to pursue his claims in court without having to pay for the services of a judge. In such a circumstance—where arbitration has been imposed by the employer and occurs only at the option of the employer—arbitrators' fees should

be borne solely by the employer.

Id. at 1484-85. Although the court in *Cole* was able to enforce the arbitration clause by interpreting an ambiguity to require the employer to pay all of the arbitrator's fees, Roy Gatlin in the instant case has been billed $11,000 (mostly for arbitrator's fees) pursuant to the provision in the Sanderson Farms arbitration clause requiring him to pay half the costs if he attempts to enforce his legal rights.

The California Supreme Court in *Armendariz v. Foundation Health Psychare Servs., Inc.*, 6 P.3d 669 (Cal. 2000), adopted similar limitations on the imposition of arbitration costs as a matter of state law of conscionability in a case involving an individual employee's state law claims. The court in *Armendariz* found the arbitration clause before it unconscionable on other grounds, *Id*. at 683 and 692, but discussed the issue of arbitration costs at length and concluded that a mandatory arbitration agreement covering state law employment discrimination claims "impliedly obliges the employer to pay *all* types of costs that are unique to arbitration." *Id*. at 689. Although the *Armendariz* plaintiff's claims arose out of a state statute, the California Supreme Court explained more generally that:

> [C]onsistent with the majority of jurisdictions to consider this issue, we conclude that when an employer imposes mandatory arbitration as a condition of employment, the arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expense that the employee would not be required to bear if he or she were free to bring the action in court.

Id. at 687. The same protection should be afforded in the instant case to Roy Gatlin, a single poultry grower who depended on his contract with Sanderson Farms to maintain his farm, his home, and his livelihood. If the protections provided in *Armendariz* were required here, nearly all of the arbitration costs that have been charged to Gatlin would be prohibited.

Following the D.C. Circuit's decision in *Cole*, the Eleventh Circuit found an arbitration clause unenforceable based on cost provisions that were nearly identical to those in the instant case, requiring employment discrimination claimants to pay a $2,000 arbitration filing fee and a share of the arbitrator's fees. "[C]osts of this magnitude [are] a legitimate basis for a conclusion that the clause does not comport with statutory policy [enabling people subjected to workplace discrimination to vindicate their rights]." *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J., concurring for majority of the court).[18] Just as the employer in *Paladino* could not require a single worker as a condition of her employment to pay

[18]*See also Shankle v. B-G Maintenance Management of Colorado*, 163 F.3d 1230, 1235 (10th Cir. 1999) (refusing to compel arbitration where the claimant would be required to pay one-half of the arbitrator's fees – an amount projected to total between $1875 and $5000 – to resolve a discrimination claim against his employer. The court found the agreement was unenforceable, "plac[ing] Mr. Shankle between the proverbial rock and a hard place – it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum."); *Giles v. City of New York*, 41 F. Supp.2d 308, 313 (S.D.N.Y. 1999) ("mandatory arbitration provision featuring fee-splitting is unenforceable because it deprives individuals of their required 'reasonable right of access to neutral forum'") (citing *Cole v. Burns*); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 255-56 (S.D.N.Y. 1998) (stating that "arbitration agreement cannot impose financial burdens on plaintiff access to the arbitral forum" including steep filing fees and arbitrators' fees); *In re Knepp*, 229 B.R. 821, 838 (Bankr. N.D. Ala. 1999) (arbitration clause requiring bankrupt party to pay fees of $500 to $7,000 is unconscionable); *Brower v. Gateway 2000*, 667 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (arbitration fees of $500 to $1,000 for modest consumer claims are unconscionable); *Teleserve Systems, Inc. v. MCI Telecommunications Corp.*, 659 N.Y.S.2d 659, 664-665 (N.Y. App. Div. 1997) (arbitration clause in agency contract between businesses requiring party to pay filing fee of $4,000 plus .5% of claim value, giving rise to $204,000 fee, is unconscionable because the "practical effect of such an oppressive and burdensome fee is to bar arbitration of petitioner's claims against MCI"); *Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563, 566-67 (Cal. Ct. App. 1993) (refusing to compel arbitration of modest consumer claims where claimants were required to pay $800 infees on grounds of unconscionability), *review denied*, 1993 Cal. LEXIS 4322 (Aug. 12, 1993), *cert. denied*, 510 U.S. 1176 (1994); *Williams v. Aetna Finance Co.*, 700 N.E.2d 859, 866 (Ohio 1998) (citing *Patterson* on similar facts), *cert. denied*, 526 U.S. 1051 (1999); *Myers v. Terminix Int'l Co.*, 697 N.E.2d 277, 281 (Ohio Ct. Common Pleas 1998) (undisclosed arbitration filing fee of $7,000 for consumer's $250,000 punitive damages claim is unconscionable).

these considerable arbitration costs in order to preserve her rights under federal law, Sanderson Farms should not be able to impose the same cost burden on a single farmer's exercise of his rights under state law as a condition of doing business.

The U.S. Supreme Court's recent decision in *Green Tree Financial Corp. v. Randolph*, 513 U.S. 79, 121 S. Ct. 513 (2000), is not to the contrary and in fact provides strong support for the arguments set forth herein regarding prohibitive arbitration costs. In *Randolph*, the Supreme Court addressed the question of whether an arbitration clause that was silent as to the allocation of forum costs would undermine a plaintiff's ability to enforce her rights under the federal Truth In Lending Act. *Id*. at 521. The court began by emphasizing that "[i]t may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum," but found that the plaintiff had not satisfied her burden of showing the likelihood of incurring such prohibitive costs because "the record contains hardly any information on the matter." *Id*. This holding in no way dampens the Gatlins' objections to Sanderson Farms' arbitration clause in the instant case. First, *Randolph* does not address the issue of unconscionability because the Federal Arbitration Act makes this a matter of state law. More important, though, is the Supreme Court's recognition that excessive costs may preclude enforcement of an arbitration clause where the challenging party presents sufficient evidence. *This is such a case*. The evidentiary record contains an arbitration clause that explicitly requires individual growers like Roy Gatlin to pay half the costs of arbitration, that guarantees these costs will be considerable by requiring a three arbitrator panel for resolution of all claims, and the record includes billing statements from the American Arbitration Association charging Gatlin $11,000 for a hearing on his state law claims. Consistent with

Randolph and a substantial body of federal and state case law, this arbitration clause should not be enforced.

2. Sanderson Farms Cannot Use Arbitration to Diminish the Remedies that are Available to Gatlin under Applicable Substantive Law.

The prohibition of punitive damages awards in the Sanderson Farms arbitration clause also is impermissible under a long line of federal and state court precedent. The U.S. Supreme Court has conditioned its approval of arbitration on the requirement that arbitration provide all remedies that would be available in court. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*); *Randolph*, 121 S. Ct. at 521 (same). Accordingly, arbitration must offer "all of the types of relief that would otherwise be available in court" before a court will compel arbitration. *Cole*, 105 F.3d at 1482. As the Sixth Circuit recently held:

> [E]ven if arbitration is generally a suitable forum for resolving a particular statutory claim, the specific arbitral forum provided under an arbitration agreement must nevertheless allow for the effective vindication of that claim. Otherwise, arbitration of the claim conflicts with the statute's purpose of both providing individual relief and generally deterring lawful conduct through the enforcement of its provisions.

Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 313 (6th Cir. 2000). These principles have been enunciated and applied by a host of courts.[19] Taken together, these cases stand for a

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[19]*See*, *e.g.*, *Paladino*, 134 F.3d at 1062 (Cox, J., concurring for majority of the court) (arbitrability of Title VII claims "rests on the assumption that the arbitration clause permits relief equivalent to court remedies. . . . When an arbitration clause has provisions that defeat the remedial purpose of the statute . . . the arbitration clause is not enforceable.") (citing *Cole*); *Perez v. Globe Airport Security Services*, - -F.3d- -, 2001 WL 649497 at *4-5 (11th Cir. June 12,

simple but powerful proposition: Courts should not compel arbitration unless the arbitrator is empowered under the contractual arbitration clause to provide a claimant with all of the relief to which he or she would otherwise be entitled.[20]

The Sanderson Farms arbitration clause states that "the arbitrators shall not have the authority to award exemplary or punitive damages." (R. 34). This is an impermissible limitation on the remedies that would be available to the Gatlins in court. In *Graham Oil v. ARCO*

2001) (holding employer's arbitration clause unenforceable where it would prevent prevailing Title VII plaintiff from recovering attorney fees); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 256 (S.D.N.Y. 1998) ("arbitration must allow remedies central to the statutory scheme . . . [and] sufficient to satisfy statutory purposes"); *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459, 469 (S.D.N.Y. 1997) (voiding provision of arbitration clause disallowing attorneys' fees for prevailing Title VII plaintiff after concluding that "contractual clauses purporting to mandate arbitration of statutory claims . . . are enforceable only to the extent that the arbitration preserves the substantive protections and remedies afforded by the statute."); *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177, 185 (D. Mass. 1997) (allowing plaintiff to sue in court under Americans with Disabilities Act where arbitration clause did not authorize arbitrator to provide 'reasonable accommodation' remedy provided by ADA); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp.2d 1087, 1105 (W.D. Mich. 2000) (finding as to consumer Truth In Lending Act and state consumer protection act claims that "both federal and Michigan case law support a conclusion that an arbitration provision is substantively unconscionable because it waives class remedies, as well as declaratory and injunctive relief"); *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. 1533 (D. Md. 1999) (arbitration clause capping punitive damages and back pay remedies under Section 1981 is unenforceable), *aff'd*, 203 F.3d 821 (4th Cir.) (table), *cert. denied*, 530 U.S. 1276 (2000).

[20]*See* Harding, "The Redefinition of Arbitration...," 1999 UTAH L. Rev. at 938 ("An arbitration clause in an adhesion contract limiting statutory remedies is both procedurally and substantively unconscionable.") The opinion in *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp.2d 1026 (S.D. Miss. 2000) is consistent with this rule since it upheld an arbitration clause with a punitive damages waiver in a consumer case brought under the federal Truth In Savings Act, which the court held does not authorize recovery of punitive damages. *Id*. at 1032-33. The court's separate assertion that "a punitive damages waiver is not a valid ground for refusing to compel arbitration," *Id*. at 1032, is contrary to a substantial body of federal and state case law and is irrelevant to the instant case since there was no argument in *Herrington* that the arbitration clause was unconscionable as a matter of state contract law and since the arbitration clause there was governed by Tennessee law. *Id*. at 1028-29.

Products Co., 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995), the court invalidated an oil company's arbitration clause that required gas station franchisee claimants to forfeit various rights under the Petroleum Marketing Practices Act, including the right to recover exemplary damages. *Id*. at 1247. Recognizing "the purpose of exemplary damages [] to deter franchisers from engaging in improper terminations of franchise agreements," *Id*. at 1248, the Ninth Circuit concluded that "the fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily-mandated rights and benefits Congress intended them to have." *Id*. at 1247.[21] In the instant case, Sanderson Farms has attempted to make the same impermissible use of its dominant economic power to force the Gatlins to surrender their right to seek exemplary or punitive damages for their common law claims.[22]

Finally, the California Supreme Court's decision in *Armendariz* ties limitations on statutory *and common law contractual* remedies in arbitration clauses like that imposed by Sanderson Farms back to the issue of the contract's substantive unconscionability. After finding

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[21]*See also In re Managed Care Litig.*, 132 F. Supp.2d 989, 1000-01 (S.D. Fla. 2000) (finding provision in arbitration clause between HMOs and individual physicians limiting arbitrator's authority to award of contractual damages unconscionable as it applies to claims under statutes authorizing claims for punitive damages); *Armendariz*, 6 P.3d at 682 ("The principle that an arbitration agreement may not limit statutorily imposed remedies such as punitive damages and attorney fees appears to be undisputed.")

[22]The fact that the Gatlins raise common law rather than statutory claims for punitive damages should not make the contractual prohibition any more permissible. The Seventh Circuit suggested as much in holding that a labor arbitration system violated due process where it failed to provide a constructively discharged public employee access to the full range of common law remedies to which he was entitled or otherwise to protect him from the immediate harm of the tort. *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 697 (7th Cir. 1984) (Posner, J.), *cert. dismissed*, 469 U.S. 1185 (1985).

that an arbitration clause imposed as a condition of employment was a contract of adhesion where there was no opportunity for the individual employee to negotiate, the court in *Armendariz* turned to the substantive terms of the arbitration clause and found that its restrictions on statutory *and contractual damages* contributed to its unconscionability. *Armendariz*, 690 and 694 ("Even if the limitation on FEHA damages is severed as contrary to public policy, the arbitration clause in the present case still does not permit full recovery of ordinary contract damages.") The same rule should apply here. Sanderson Farms has required Roy Gatlin to submit to an arbitration process that will cost him at least $11,000 and does not even afford him full relief on his contractual and other legal claims. Under a substantial body of case law from around the country addressing specific arbitration clauses and under established principles of unconscionability in Mississippi contract law, the Sanderson Farms arbitration clause should not be enforced in this case.

CONCLUSION

For all of the foregoing reasons, the judgment of the Circuit Court of the Second Judicial District of Jones County, Mississippi should be affirmed.

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