No. 1022063
IN THE SUPREME COURT OF ALABAMA

GARY LEEMAN AND KATHRYN LEEMAN,

Appellants,

v.

COOK'S PEST CONTROL, INC., a corporation; *et al*,

Appellees.

After an Order by the Circuit Court of Jefferson County, Civil Action No. CV-02-4976, Granting Appellee's Motion to Compel Arbitration and Stay Proceedings, The Honorable Joseph A. Boohaker

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SUMMARY OF ARGUMENT

It used to cost Alabamians around $200 to resolve termite cases. As this Court knows, homeowners with termite bonds must now go to AAA arbitration. For the first time, this Court now has unrebutted evidence that doing so costs around $16,000. This Court has clear discretion to rule that this cost is too unfair to be enforceable under generally applicable Alabama law. The Court should do so.

Defendant Cook's Pest Control ("Cook's") advances a vision of contract law with two remarkable features. Cook's first effectively suggests that the protections that Alabama contract law provides against unconscionable contracts are not available to literate middle class persons. It argues, for example, that since the Leemans are a teacher and a principal, they should have figured out the arbitration costs that would be imposed upon them in the event of a future dispute with Cook's. This argument conveniently ignores the facts that the majority of the costs of arbitration — the fees of the arbitrator — are not disclosed in the contract or in the rules of the American Arbitration Association ("AAA"), and can *only* be learned by discovering what consumers with similar disputes paid in the past, as the Leemans have done here. *See*

Appellants' Opening Brief ("OB") at 36-39. Cook's similarly argues that since the Leemans are educated, they should have made a futile search for a termite bond including no or lower arbitration costs, even though Cook's itself doesn't know of such a bond. This Court should flatly reject Cook's notion that there is nothing that it can put into a contract of adhesion with a school teacher that would be unconscionable, and should make clear that Alabama contract law does not sanction forcing middle class Alabamians to pay undisclosed fees of $12,000 - $16,000 to enforce their rights as citizens of this state.

Cook's also suggests that Alabama law provides no protection for middle class consumers by arguing that no arbitration clause may be deemed "prohibitively expensive" if it would be possible (even if completely economically irrational) for a consumer to pay the arbitration fees. Thus, according to Cook's, there is nothing unfair about requiring a middle class family to pay $16,000 up front to raise a claim that used to cost our citizens only $200, because the family might conceivably raise $16,000 by raiding its retirement accounts or borrowing money. In *Leonard v. Terminix*, 854 So.2d 529 (Ala. 2002), however, this Court rejected the idea

that arbitration clauses are only prohibitively expensive as applied to the destitute. In *Leonard*, this Court recognized that where the costs of arbitration are very large relative to the likely value of a claim, those costs are prohibitive, even with respect to middle class people. Cook's suggests that the rationale behind *Leonard* only applies in cases where it can be proven to a "certainty" that the costs of arbitration will literally be greater than the highest possible recovery that consumers might recover, an impossibly high standard for which it cites no authority.

Cook's second proposal is for the Court to change Alabama contract law. Cook's would like this Court to hold that if the actual terms of a mandatory arbitration clause are unenforceable and the drafting party faces a challenge to those terms, the drafting party may just unilaterally replace those terms on the fly at any time before a state's high court reaches a decision.

This case involves a written contract that was drafted by Cook's. The unambiguous terms of this document required the Leemans (as persons with claims for injunctive relief) to pay arbitral fees in accordance with the AAA's Commercial Rules, just as all others who have arbitrated claims against Cook's

have had to do. While the import of that requirement is not evident from the contract, the evidence shows that those fees, which a half a dozen federal courts have held to be unconscionably expensive, are typically $12,000 to $16,000 for persons with claims such as the Leemans'.[1] Throughout the trial court, and in every previous case that has actually gone through arbitration, Cook's stood on its rights under the language of its contract and insisted that the Leemans and its other customers pay these costs.

After receiving the Leemans' opening brief in this appeal, however, Cook's apparently recognized that it had been caught with its hand in the cookie jar, and that consequences might actually flow from its actions. Accordingly, on the day it filed its answering brief, Cook's for the first time offered to pay a small portion of the arbitral fees.[2]

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[1] Cook's makes a few half-hearted arguments against this evidence. It suggests, for example, that the documentation of the exact fees in every known case in which a consumer has arbitrated claims against Cook's or any other pest control company in Alabama is merely "anecdotal" evidence. Appellee's Answering Brief ("AB") at 11.

[2] Specifically, Cook's offered to pay the AAA's Administrative Fees, but refused to pay the fees of the actual arbitrator. AB at 41. As the facts set forth in the Leemans' Opening Brief establish, the upshot of this is that Cook's is offering to amend its contract so that it will pay about one third or one fourth of the $12,000 to $16,000 costs of arbitration. Apparently, having confused the trial

This Court should reject Cook's effort to evade judicial review and have this Court re-write its contract to render it enforceable. Cook's argument runs counter to the U.S. Supreme Court's direction that courts should enforce arbitration clauses "as written"; to the rule that courts should not re-write contracts of adhesion in favor of the drafting party; and to the rule that the conscionability of a contract is to be judged at the time of signing.

The timing of Cook's sudden ostensible generosity is transparent at best. Under the U.S. Supreme Court's decision in *Green Tree Financial Corp. v. Randolph*, 513 U.S. 79 (2000), consumers can only challenge an arbitration clause as prohibitively expensive *if* they put forth an extensive evidentiary record. As this Court's own cases in this area demonstrate, creating such a record is difficult, time-consuming, and rarely done. In this case, the record reflects that counsel have expended tens of thousands of dollars over a period of years actually arbitrating cases where the economics of the cases themselves did not justify that effort.

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court into incorrectly imagining that the only cost of arbitration is the AAA's filing fees, and that the actual arbitration itself is free, Cook's is hoping that this Court will also overlook that Cook's 11th hour offer ungenerously ignores the far larger fees of the arbitrator himself.

Despite the creation of this record, Cook's did not make its offer to pay about a fourth of the Leemans' fees until the last possible moment before this Court. If this ploy works, then corporations can use prohibitively expensive arbitration clauses to bar any kind of legal challenge from being raised, and then in the handful of cases where consumers are actually about to have those clauses struck down, suddenly offer to pay. This Court should not permit, much less encourage, such gamesmanship.

ARGUMENT

I. THE PROVEN HIGH COST OF ARBITRATION UNDER COOK'S CONTRACT RENDERS THE ARBITRATION CLAUSE GROSSLY FAVORABLE TO COOK'S.

A. Notwithstanding Cook's Factual Quibbles, the Evidence Establishes the Leemans Face Costs of $12,000 to $16,000 Under the Terms of Cook's Arbitration Clause.

Cook's misrepresents that the arbitration provision at issue in this case does not actually require the AAA to arbitrate this case, but only specifies that the AAA's Commercial Rules will be used in arbitration. AB at 49. Thus, Cook's argues, the high costs that are paid to AAA arbitrators themselves may not be relevant here. *Id.*

However, in the only two cases that have ever been brought against Cook's in arbitration, both involving claims

identical to the Leemans' claims here, Cook's has indeed chosen to use AAA arbitrators. In *Porter v. Cook's Pest Control*, and *Wunderlich v. Cook's Pest Control*, these arbitrators billed $9,000 and $10,000 respectively. C111-14; 225-28. These costs were over and above the filing fees charged by the AAA. Throughout this case's pendency in the trial court, Cook's offered no evidence or reason to suppose that in this case, unlike all of the other cases that have gone forward in the past, they would suddenly be using new and cheaper arbitrators.

Furthermore, the AAA Commercial Rules themselves — Rules that Cook's admits would govern this dispute if it were sent to arbitration — require consumers to pay one-half the arbitrators' compensation up-front, whoever the arbitrator may be. There is no evidence to support Cook's apparent assumption that AAA arbitrators are paid considerably more than non-AAA arbitrators and no evidence identifying the cheap arbitrators Cook's now proposes to use.

The upshot of the AAA Commercial Rules is that the consumer must pay an enormous sum for arbitrator compensation up front. The Leemans presented unrebutted evidence that this sum runs to around $9000-$10000 in cases involving claims

identical to their own. The identity of the precise arbitrators who might hear the Leemans' case is not material.

B. This Court Should Not Disregard the Proof that the Costs of Arbitrating Claims Against Cook's in the Past Have Been High, Simply Because Consumers Presented Strong Evidence and Witnesses in Those Proceedings.

Cook's claims that the Leemans have not proved that arbitration of their claims under the AAA Commercial Rules will be prohibitively expensive. AB at 36-52. According to Cook's, the Leemans could easily avoid the kind of high arbitration costs assessed against plaintiffs in previous cases against pest control companies by 1) asking for only "modest" damages and no equitable relief, 2) not putting on a complete case, or 3) trusting the arbitrator to, at the conclusion of the case, allocate fees in such a way that the Leemans would recover some of their costs.

In arguing that the Leemans could have access to affordable arbitration if only they would curtail their own claims, Cook's has lost sight of the fundamental principle that arbitration clauses are only enforceable under the Federal Arbitration Act ("FAA") so long as they allow claimants to effectively vindicate their rights. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26

(1991) (citation omitted) ("[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."). The U.S. Supreme Court's decision in *Randolph* provides a good illustration of this principle, holding that "the existence of large arbitration costs may well preclude a litigant . . . from effectively vindicating [its] rights." *Randolph*, 531 U.S. at 81. That decision underscores the fact that arbitration is only acceptable as an alternative to litigation in court because it is simply a "different forum" – one with somewhat different and simplified rules, but nonetheless one in which the basic mechanisms for obtaining justice permit a party to "effectively vindicate" his or her rights. *See, e.g., EEOC v. Waffle House Corp.* 534 U.S. 279, 295 n. 10 (2002).

When they argue that the Leemans should have specified their monetary damages and dropped their claim for equitable relief (AB at 38), or that the Leemans could cut costs by putting on a drastically curtailed, potentially incomplete case in arbitration (AB at 42), Cook's ignores the above cases and asks this Court to require the Leemans to submit to an arbitration process in which they cannot effectively vindicate

their rights.

For example, as we discussed in the Opening Brief, equitable relief is an important remedy in termite control cases, as these cases often require specific performance remedies. *See* OB at 11, n.5. The Leemans, like all the other consumers who have gone to AAA arbitration against Cook's and similar companies, included a prayer for equitable relief in their Complaint. C1-14. Asking the Leemans to drop this claim would not actually reduce the AAA filing fee, unless the Leemans also gave up the claim that the fact finder should use its full discretion to set the amount of damages. It would also require the Leemans to give up their substantive right to equitable relief merely in order to access affordable arbitration. Such a result is counter to everything the U.S. Supreme Court has said about the proper role of arbitration.

Furthermore, even if the Leemans were to drop their equitable relief claim, scale back their requested damages and reduce their Initial Filing and Case Management Fees, they would still be required to pay arbitrator compensation costs — costs that ran into the thousands of dollars in all five cases brought in arbitration in the record. Cook's argues that the amount of arbitrator compensation charged to the plaintiffs in those cases was a direct consequence of the kind

of case that plaintiffs put forward. Specifically, Cook's argues without evidence that plaintiffs in the two earlier cases against Cook's itself, *Porter v. Cook's Pest Control* and *Wunderlich v. Cook's Pest Control*, "unnecessarily inflated" the costs by putting on extensive evidence in arbitrating their cases. AB at 44.

Cook's argument essentially boils down to a contention that the plaintiffs in these earlier cases against Cook's would have saved money had they put forward less evidence and fewer witnesses. The fact is that the plaintiffs won both cases after presenting that evidence and those witnesses. Nothing in this record provides factual support for Cook's implicit allegation that it would have lost both cases even if its customers had presented less evidence, or that plaintiffs in those cases threw money away in order to present deceptive evidence to this court on behalf of the Leemans. Cook's cites no authority which allows it to dictate what claims, evidence and witnesses its customers can present.

Cook's final attack on the Leemans' evidence relating to cost revolves around Cook's contention that the AAA Commercial Arbitration Rules allow the arbitrator to, at her discretion, shift costs from one party to another at the time of the award. AB at 40-41. This argument is spurious for two

reasons. First, in order for the arbitrator to be in a position to shift costs away from the plaintiff, there has to be an arbitration proceeding in the first place. As the Leemans have shown through empirical evidence, lawyers throughout Alabama currently refuse to represent consumers in arbitration proceedings under the AAA Commercial Rules, precisely because the *up-front* cost of arbitration are so high. C680-96. If consumers are deterred from ever bringing these cases in the first place, the fact that an arbitrator might, after the plaintiff has already paid thousands of dollars to the AAA, agree to shift some of those costs back onto the defendant, is meaningless. *See Gutierrez v. Autowest, Inc.*, 2003 WL 22890611 at *6 (Cal.App. Dec. 9, 2003) (finding that the possibility that a plaintiff may recover AAA fees and costs at the conclusion of the arbitration under the Commercial Rules "provides little comfort to consumers like the plaintiffs here, who cannot afford to initiate the arbitration processes in the first place."). This sort of *speculation* about arbitration costs is exactly the guess work that courts have refused to engage in when considering prohibitive cost arguments.

Second, the arbitrator's ability to shift costs at the time of the award is completely discretionary under the AAA

Rules. As one court has stated, in rejecting precisely the argument Cook's puts forward here, "[D]efendants note that the arbitrator at his or her discretion can assess all expenses to one party at the conclusion of the case. But that is nothing more than an argument that there exists some possibility that [the plaintiff] ultimately may not have to bear a prohibitively expensive portion of the arbitration costs." *Phillips v. Associates Home Equity Services, Inc.*, 179 F.Supp.2d 840, 846-47 (N.D. Ill. 2001).

C. Notwithstanding Cook's Claims, Plaintiffs Did Argue to the Trial Court that the Costs of Arbitration Include the Arbitrators' Fees, and Are not Merely Limited to the Filing Fees.

Cook's argues that plaintiffs have presented "for the first time on appeal" their argument that the trial court erred in imagining that the costs of arbitration include the arbitrators' fees. AB at 66. In fact, the plaintiffs put extensive evidence before the trial court of the exact quantum of the arbitrators' fees, and provided the trial court with detailed evidentiary breakdowns of fees that conclusively demonstrated that these fees represent the Lion's Share of the costs of arbitration under Cook's arbitration clause. OB at 13-18 (citing to the record).

Cook's says that there is no proof that the trial court's

error caused the Leemans "substantial prejudice." AB at 66. This argument is somewhat bizarre. The Leemans' argument here is that Cook's arbitration clause is unduly favorable to Cook's because it imposes prohibitive costs. If this Court were to accept the trial court's confused and incorrect notion that the only fees in arbitration are the filing fees, this would have the effect of reducing the Court's estimate of the fees involved by about 66% to 75%. The trial court's error is like evaluating the cost of a meal by only looking at the tip. It is self-evident that it is prejudicial to the Leemans for this Court to ignore 75% of the actual costs of arbitration.

D. This Court Should Reject Cook's Request that it Re-write the Arbitration Clause to Rescue Defendants from the Consequences of Writing an Unconscionable Arbitration Clause that Imposes Prohibitive Costs.

Cook's asks this Court to speculate that the costs of arbitration in this case will be lower than they were proven to be in all of the previous cases involving it and other similar companies, because two weeks ago Cook's offered to amend its contract with the Leemans. Cook's belated offer to pay a small portion of plaintiffs' costs of arbitration is merely a tactical ploy, allowing Cook's to preserve the advantages of an arbitration clause to itself at a moment when those advantages are threatened because of an effective

challenge to that clause's unconscionable provisions. Cook's sudden change of heart is merely an effort to foil judicial scrutiny of a practice that it will repeat against the vast majority of its consumers who are not represented by counsel or who are otherwise unlikely to effectively challenge the costs imposed by its arbitration clause.

Cook's ploy represents an entirely new argument on appeal. Cook's last minute request that the Court rule in its favor based upon a letter written a few weeks ago and filed in court for the first time with its Answering Brief is totally inconsistent with Cook's own declaration in this case that "This Court does not consider matters outside the record." AB at 64. It is understandable that Cook's would wish to avoid the powerful record on costs developed in this case, but the rules of practice simply do not permit it to invent new arguments and construct new self-serving evidence for the first time halfway through an appeal to this Court.

Even if the argument had been made below, this Court should not re-write Cook's defectively drafted arbitration clause to render it legal. First, it is contrary to the FAA for courts to re-write an arbitration clause in such a way as to make it enforceable. The U.S. Supreme Court has said that arbitration agreements must be enforced "according to their

terms." *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 479 (1989). Accordingly, if a particular agreement to arbitrate cannot be enforced according to its terms because it falls afoul of generally applicable state contract law, a court should refuse to enforce it. If a court strikes illegal provisions or adds new provisions to an arbitration clause, this is not enforcing an agreement according to its terms, and thus violates the FAA.

Second, Cook's request to rewrite its arbitration clause is merely a unilateral offer to amend the contract, and need not be accepted. As a federal district court has explained, reviewing a similar offer:

> McDonald's has now offered to pay the arbitration fees to the extent they exceeded those provided for by the AAA's Consumer Rules, which were reasonable but which, we found, did not apply to Popovich's claim. This is not a basis for reconsideration of the Court's ruling. We agree with Popovich that McDonald's offer, which is inconsistent with the parties' contract, amounts to an offer for a new contract. Popovich is under no obligation to accept McDonald's offer, and the court is in no position to impose it. As a matter of elementary contract law, McDonald's cannot unilaterally modify the existing agreement.

Popovich v. McDonald's Corp., 189 F. Supp. 2d 772, 779 (N.D. Ill. 2002). *See also Flyer Printing Co. v. Hill*, 805 So. 2d 829, 833 (Fla. Ct. App. 2001) (ruling that corporation may not amend an unenforceable arbitration clause by offering during

litigation to pay all costs, because this was "a unilateral offer to amend the agreement," and, "we are not authorized to remake the parties' contract."); *Lelouis v. W. Directory Co.*, 2001 WL 34046279 at *8 (D. Or. Aug. 10, 2001) (refusing to allow a defendant to "voluntarily pay" the costs of arbitration, noting that "the fairness of a contract must be viewed as of the time the contract was formed" and "this court may not re-write the contract for the parties.").

Third, it would be improper and unfair for this Court to interject itself into the parties' bargain and re-write Cook's adhesion contract to fix the unconscionable provisions in order to make the contract enforceable. *See* Restatement (Second) of Contracts § 184 cmt. b ("[A] court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable.") As one court has stated, "[I]t strikes us as woefully unfair to allow Homefirst at this late date — after a dispute has arisen and after the reverse mortgage has terminated — to refute the unconscionable aspects of the arbitration agreement which Homefirst itself drafted and from which Homefirst stood to benefit over the life of the loan." *Flores v. Transamerica*

Homefirst, Inc., 93 Cal. App. 4th 846, 857 (2001). *See also Browne v. Kline Tysons Imports, Inc.*, 190 F. Supp. 2d 827 (E.D. Va. 2002).

Fourth, it is poor public policy for courts to step in to fix illegal contracts, thereby taking away any disincentive that corporations might have to drafting unfair and unconscionable contracts in the first place. *See Cooper v. MRM Inv. Co.*, 199 F. Supp. 2d 771, 782 (2002):

> The Defendants will not be allowed, at this point, to abandon a provision that KFC's attorneys carefully drafted, in order to "save" the Arbitration Agreement. If Defendants could sever invalid provisions from their contracts, the Court would create an incentive for employers to craft questionable arbitration agreements, require plaintiffs to jump through hoops in order to invalidate those agreements, and ultimately allow the defendants to jettison questionable provisions from the arbitration agreements. Allowing Defendants to do so at this point would be inequitable.

See also Lelouis, 2001 WL 34046279 at * 8 (to the same effect).

Fifth, unconscionability is to be viewed at the time a contract is created, so subsequent changes to contract should not be considered in evaluating conscionability. The doctrine that unconscionability is to be judged at the outset is well established as a standard rule of contract law. *See Lelouis*, 2001 WL 34046279 at *8 (refusing to "re-write" an arbitration clause, in part, on the grounds that "the fairness of a

contract must be viewed as of the time the contract was formed. . . .”). Cook’s admits this general principle of construction when it recognizes at page 20 of its brief that unconscionability should be judged “under the circumstances existing at the time of making the contract. . . .”

Cook’s incorrectly suggests later in its brief that this Court has already approved the practice of re-writing arbitration clauses on the fly, citing to *Stevens v. Phillips*, 852 So.2d 123 (Ala. 2002). In that case, this Court briefly mentioned that the defendant had paid all of the costs of arbitration and that the plaintiff had made no response to this fact. It is not clear from the case if the payment of costs was a modification of the parties’ contract, or merely an action based upon an ambiguous contract. In *Stevens*, the defendant apparently paid all of the costs – not merely one-fourth of the costs, as Cook’s offers here – up front, and the issue was not a new argument on appeal based on non-record evidence. And because the plaintiffs in *Stevens* made no response relating to the issue, that case includes no discussion of (and thus does not resolve) the arguments under the FAA and contract law set forth above.

E. The Enormous Costs Facing the Leemans Are Indeed Prohibitive Within the Meaning of the *Randolph* and

***Leonard* Cases.**

In *Green Tree Financial Corp. v. Randolph*, 513 U.S. 79 (2000), the U.S. Supreme Court stated that prohibitively expensive arbitration clauses should not be enforced. Because the plaintiff in that case had put forward no evidence relating to the cost of arbitration, her challenge was not successful. The Court gave little guidance as to what constitutes "prohibitive costs," however. Notwithstanding Cook's insinuation, AB at 30-31, the Court never suggested that arbitration costs are only "prohibitive" with respect to impoverished people.

In *Leonard v. Terminix*, 854 So.2d 529 (Ala. 2002), this Court held that an arbitration clause that prohibited class actions was unconscionable because consumers would be deterred from vindicating their rights by the prospect of arbitration costs that were likely to be quite high relative to the value of their claims. 854 So.2d at 539. Cook's suggests that *Leonard* does not apply here because this case is not a class action. AB at 34. This point is true, but it unreasonably confines the rationale of *Leonard* to its facts, and ignores the overall spirit of that case. If this Court concludes from the factual record the Leemans have compiled that the costs of

arbitration here would likely preclude them from pursuing their claims, even if valid, then the rationale of *Leonard* dictates that this Court should hold the arbitration clause here invalid. The key point here is that *Leonard* undermines Cook's main argument, which is that no costs, no matter how large, can be found to be prohibitive with respect to the Leemans unless they prove themselves to be poor. In *Leonard*, this Court did not examine accounting records to determine if each class member was poor. Instead, this Court compared the cost of arbitration to the likely value of the claims at issue and held that those costs were prohibitive. In this case the record evidence is unrebutted that lawyers will not take cases with such high up-front costs.

Cook's argues that *Leonard* is irrelevant here because Cook's arbitration clause does not prohibit claims for consequential damages. It is true that this issue, which was one of several addressed in *Leonard,* is not present here. However, that point does not detract from the point for which the Leemans rely on *Leonard*.

Finally, Cook's argues that the comparative costs of arbitration to litigation were greater in *Leonard* than they are here, because the claims here are larger. Cook's argues that the only way that this Court can find that an arbitration

clause is prohibitively expensive is if the consumer demonstrates that there is a "certainty" that the cost of arbitration will exceed the value of their claims. AB at 35. This ridiculous proposed standard could rarely be met, and would encourage corporations to use arbitration costs that are overwhelmingly likely to be prohibitive in the real world to eliminate claims against themselves. Cook's suggestion of a standard of proof amounting to "certainty" would make it easier to convict a criminal of murder (which only requires a showing beyond a reasonable doubt) than to demonstrate that an arbitration clause is unconscionable.

Cook's argument that costs are only effectively prohibitive when they actually exceed the exact value of the plaintiffs' claims ignores the facts here. The record establishes that the empirical reality in the market in Alabama is that no attorneys are willing to bring claims against pest control companies using the AAA Commercial Rules. OB at 18-19. Cook's never seriously controverted this evidence (it didn't even bother deposing these experts), and it certainly never identified any cases where consumers had pursued arbitration other than for the five cases brought by the Leemans' counsel as the only means possible of creating the evidentiary record in this case.

Before Cook's adopted this arbitration clause, it was accountable for its mistakes, like any other business in the United States. On those occasions where Cook's breached its duties to its customers under Alabama law and made significant errors that harmed its customers, they could and did hold Cook's liable in court. As the evidence in the record demonstrates, in the period since Cook's has adopted this arbitration clause that requires homeowners to put up more than $10,000 to have their claims heard, no claims have been brought against Cook's in arbitration whatsoever, with the two exceptions in the record here. Cook's might want this Court to imagine that no one has brought a claim in arbitration against it because at the same time that it adopted the clause, Cook's suddenly became a perfect and error-free company, but such an assumption would be credulous in the extreme. The actual empirical record of what has happened in the last several years proves the point that the Leemans are making here: the high fees imposed by Cook's arbitration clause are in fact keeping people in the real world from vindicating their rights against Cook's.

II. COOK'S ARBITRATION CLAUSE IS THE PRODUCT OF OVERWHELMING BARGAINING POWER.

A. Notwithstanding Cook's Misreading of the *Branch* case, the Leemans Had No Meaningful Choice About this Arbitration Clause.

Cook's maintains that the Leemans have not adequately demonstrated that they had no real choice but to enter into a pest control services contract containing an arbitration clause. AB at 53-54, AB at 59. The crux of Cook's argument is its contention, based on its reading of *American General Finance, Inc. v. Branch*, 793 So.2d 738 (Ala. 2000) and a number of decisions interpreting *Branch*, that a consumer must affirmatively show that she or he has actually "shopped around" to find other service providers and has found none that provide a contract without an arbitration clause. AB at 56-57.

However, as this Court recently clarified in *Anderson v. Ashby*, 2003 WL 21125998 (Ala. May 16, 2003) — decided after every one of the cases cited by Cook's on this point — the language in *Branch* does not actually require such "shopping around." Instead, this Court's decision in *Branch* rested on a number of "affidavits and stipulations regarding the practices of nearby lenders that were in the business of making loans comparable to the one Branch sought to obtain."

Anderson at *10. These "sample responses" of nearby lenders led this Court to determine that enough lenders included arbitration clauses in their contract that Branch "*would have had* to expend considerable time and effort even to *find*" any company that did not require arbitration. *Id.*, emphasis in original.

Further clarifying its earlier position, this Court went on in *Anderson* to state:

> Thus, our holding in *Branch* was not based upon evidence showing that Branch had actually gone out and traveled a particular geographical area of the state in an unsuccessful attempt to obtain a loan free from the restriction of an arbitration clause. We concluded that American General Finance possessed overwhelming bargaining power because 'Branch *would have had* to expend considerable effort even to *find*' the 1 or 2 of the 16 companies that would not have required arbitration.

Id., emphasis in original, *quoting Branch* at 751.

It is true that Justice Stuart, writing separately in *Anderson*, did argue that plaintiffs should prove that they actually searched for an alternate service provider. *Anderson* at *19 (Stuart, J. concurring in part and dissenting in part). However, the majority of this Court specifically rejected this position, noting that in the cases cited by Justice Stuart where this Court had required such a showing, this was due to the plaintiffs' utter failure to provide any evidence whatsoever of the business practices of other service

providers in the area. *Id.* at *11. This Court's rejection of Justice Stuart's position is consistent with the view that the law does not require the doing of a useless thing. *City of Mobile v. Jackson*, 474 So.2d 644, 650 (Ala. 1985).

It is clear since *Anderson* that this Court requires only that consumers must show that the state of the market was such that any effort to "shop around" for a contract without arbitration would be timely, expensive, and potentially useless. The Leemans have met this requirement. First, the record below includes arbitration clauses from a number of major termite control companies in Alabama, all of which include arbitration clauses. Second, this Court's own case records show that at least two other companies providing pest control services when the Leemans contracted with Cook's, Sears and Security, also had arbitration clauses. *See* OB at 9, n.3. Third, this Court itself in the *Leonard* decision noted that the majority of "Terminix's competitors" — who are also Cook's competitors — include arbitration clauses in their contracts. And finally, Cook's itself has indicated that it cannot readily identify any of its competitors who have contracts without arbitration clauses. OB at 9 (citing record). If Cook's cannot identify any competitor whose contract does not contain an arbitration clause, surely its

customers could not do so without expending a great deal of time and expense.

Cook's has also argued that its contract is not an adhesion contract, suggesting that perhaps the Leemans could have negotiated out of the arbitration clause if they had asked Cook's to explain or modify the clause. AB at 59-60. This contention is frankly amazing, given Cook's admissions in the record that 1) its employees are not given any training in how to explain the arbitration clause and thus would not be able to do so even if asked (C421-22); 2) Cook's does not "as a general rule" allow consumers to negotiate the removal of the arbitration clause (C476); and 3) Cook's would *flat-out refuse* to transact business with any consumer who refused to sign the arbitration clause (C426).[3] Cook's own statements amply demonstrate that there is no way that the Leemans could have gotten out of this arbitration provision, even if a Cook's representative had been present at the time the contract was signed.

B. Notwithstanding Cook's Claims that the Issue of Surprise Is a New Argument on Appeal, The Leemans

[3] Cook's counsel also commented at oral argument in *Cook's Pest Control v. Rebar* that "the consumer is not in a bargaining position to alter the terms and conditions" of the Cook's contract. OB at 10, n.4.

Have Consistently Argued that They Were Surprised by the High Costs of Arbitration under the AAA Commercial Rules

The Leemans have argued that this Court's unconscionability analysis should include the question of whether the Leemans were unfairly surprised by the arbitration clause imposed by Cook's, due to their "ignorance of important facts" at the time they signed that clause. OB at 37. Cook's does not challenge the inclusion of surprise in the unconscionability analysis, but says only that the Leemans failed to include evidence in the record on this point, or to make this argument below. AB at 64.

In fact, this argument was squarely presented below. In their Supplemental Opposition to Defendants' Motion to Compel Arbitration, the Leemans stated: "no matter how sophisticated or educated [the Leemans] might have been, they could never have known about or foreseen the extremely high cost of arbitration unless Cook's disclosed this information to them. It is undisputed that Cook's made no such disclosures. . . . Even the sophisticated and educated can be tricked when they do not have all the facts upon which a knowing and intelligent decision regarding arbitration should be based." C604. The Leemans also argued that "Cook's never disclosed the actual

and excessive cost of submitting their claims to arbitration pursuant to AAA rules, and this failure renders the entire agreement unconscionable." C604-605.[4]

These arguments were based on specific facts in the record. The AAA Commercial Rules were not attached to Cook's arbitration clause. Even if they had been attached, the Rules do not actually indicate the full panoply of fees that must be paid to the arbitrator in any given case. *See* OB at 38. Furthermore, as Cook's has admitted, there was no Cook's representative present when the Leemans signed the contract, and therefore there was no way the Leemans could have even attempted to find out what kind of fees plaintiffs had paid in earlier arbitration proceedings against Cook's. The Leemans had not participated in any arbitration proceedings in the past (C559), and only became familiar with arbitration as a result of the instant dispute (C590).

Thus the issue of surprise, and the evidence supporting the Leemans' assertion that they had no notice of the

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[4] Addressing the same issue, one court, examining an arbitration clause specifying the AAA Commercial Rules in a very recent case, noted that "While arbitration may be within the reasonable expectation of consumers, a process that builds prohibitively expensive fees into the arbitration process is not." *Gutierrez v. Autowest, Inc.*, 2003 WL 22890611 at *5 (Cal.App. Dec. 9, 2003).

thousands of dollars they would have to pay to participate in arbitration under the AAA Commercial Rules, is a part of the record below and may properly be considered by this Court now.

C. The Protections of Alabama Contract Law Against Unconscionable Contracts Are Not Limited to the Uneducated.

In its Answering Brief, Cook's attempts again to insert an "education/sophistication" prong into this state's unconscionability analysis. However, this factor simply is not part of the 2-part *Branch* test. In *Branch*, the trial court's discussion of unconscionability included this language from *Layne v. Garner*: "'In addition to finding that one party was unsophisticated and/or uneducated, a court should ask [the following four questions]. . .'" *Branch*, 793 So.2d at 743, quoting *Layne v. Garner*, 612 So.2d 404, 408 (Ala. 1989). This Court, however, did not include any mention of education or sophistication in its own articulation of the four-factor *Layne v. Garner* test, and ultimately reduced the test to just two "essential elements": grossly favorable terms and overwhelming bargaining power. *Id.* at 748.

Thus the "education and/or sophistication" question was never actually part of the unconscionability test in *Branch*, nor has this Court included it as a factor in recent cases. In

Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler, 825 So.2d 779 (Ala. 2002), for instance, this Court found an arbitration clause unconscionable because it allowed one party to select the arbitrator. There is no mention of Mr. Butler's education or sophistication level anywhere in the opinion. The same is true for *Commercial Credit Corp. v. Leggett*, 744 So.2d 890 (Ala. 1999), where this Court focused its unconscionability analysis on the two "most relevant" elements of the *Layne v. Garner* test, "'unreasonably favorable to [the defendants]'" and "'oppressive, one-sided, or patently unfair.'" *Leggett* at 898 (citation omitted). This Court's decision in *Leggett* did not, as Cook's argues, anywhere state that a finding that the plaintiff is uneducated and/or unsophisticated is a "threshold matter" in determining unconscionability. AB at 62. That formulation is entirely an invention of Cook's.

Finally, in the only other case cited by Cook's on this point, *Anderson v. Ashby*, this Court found the arbitration clause to satisfy the "overwhelming bargaining power" test based on a lack of meaningful choice, not based on the Ashbys' education level. The Ashbys' illiteracy came up only during the Court's discussion of whether the Ashbys should have been required to "shop around" for another lender without an

arbitration clause: the majority of the Court, after finding that there is no requirement that plaintiffs "shop around," noted that even if this were a requirement the Ashbys, due to their education level, were not in a good position to take such an affirmative step. *Anderson*, 2003 WL 21125998 at *11. The only other mention of the Ashbys' illiteracy was in this Court's discussion of the Ashbys' fraud claim, which was wholly separate from any question of unconscionability. *Id.* at *13-16.

III. COOK'S ARBITRATION CLAUSE CONTAINS STILL ANOTHER "GROSSLY FAVORABLE TERM."

As we argued in our Opening Brief, Cook's arbitration clause is unconscionably broad, covering as it does "any dispute, controversy or claim arising out of or relating to the agreement and guarantee or the breach thereof, or arising out of any prior or future dealings between Cook's and customer, . . ." OB at 43. Cook's claims that this clause is not overly broad, that overbreadth is not an indicator of unconscionability, and that even if it were, it is not a dispositive indicator. AB at 23-26.

In defending its clause, Cook's cites a number of cases in which courts have upheld clauses that are also broad. However, none of these clauses is as broad as the one at issue

in this case. Here, the clause not only covers "any dispute, controversy or claim arising out of or relating to the agreement," as do the clauses that Cook's cites, it also covers disputes and controversies arising out of all "*past and future* dealings between Cook's and the customer." Furthermore, Cook's clause, according to Cook's itself, also covers non-signatories.

The broad scope of this clause echoes the arbitration clauses in *Branch* and *Anderson* — clauses that this Court did find to be unconscionably broad. The clause in *Branch* applied to "every 'dispute[] or controversy[] . . . relating to' every actual or potential transaction — whether past, present, or future — and to every person, whether signatory or nonsignatory to any document, involved in such a transaction between the parties." *Branch*, 793 So.2d at 748. This Court found such breadth to be an important "indicium of unconscionability." *Id.* The clause in *Anderson* was "identical to the arbitration agreement this Court found unconscionable in Branch," and this Court invalidated it on the same grounds—including the "breadth of the arbitration clause." *Anderson*, 2003 WL 21125998 at *9.[5]

[5] Cook's quotes extensively from Justice See's dissent in *Anderson* in support of its contention that overly broad

Cook's arbitration clause contains all of the elements that led this Court to find the clause in *Branch* and *Anderson* overly broad. In both cases, this Court indicated that overbreadth is just one indicator of unconscionability, not the dispositive indicator. The Leemans' argument is no different: they urge this Court to take the sheer breadth of Cook's clause, *along with all the other factors discussed in the Opening brief*, into consideration in the unconscionability analysis in this case.

CONCLUSION

For the above reasons, this Court should hold that Cook's arbitration clause is unconscionable.

Respectfully submitted,

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arbitration clauses may be upheld. See AB at 24-25. However, the *majority* opinion in Anderson considers overbreadth to be an important part of the unconscionability analysis, and this Court should reaffirm that analysis.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by electronic mail and by placing a copy of same in the U.S. Mail, postage prepaid and properly addressed, on this the ___ day of December, 2003, as follows:

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