No. 1210010

IN THE SUPREME COURT OF ALABAMA

EX PARTE WARREN AVERETT COMPANIES, LLC

(GERRIANN FAGAN,

Plaintiff,

v.

WARREN AVERETT COMPANIES, LLC, ET AL

Defendants.)

PETITION FOR WRIT OF MANDAMUS
FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
CIVIL ACTION NO. CV-19-901956

RESPONDENT'S ANSWER AND BRIEF IN OPPOSITION TO WARREN AVERETT COMPANIES, LLC'S PETITION FOR WRIT OF MANDAMUS

ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

The right to a jury trial is a significant right in our jurisprudence. Oral argument is requested to facilitate the discussion of any questions that the Court might have regarding this very important issue.

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STATEMENT OF THE CASE

The right to a jury trial is a significant right in our jurisprudence. When Gerriann Fagan filed her Complaint against Defendants Warren Averett Companies, LLC ("Warren Averett") and April Harry in Jefferson County Circuit Court on April 30, 2019, Fagan sought a trial by jury. (Petitioner's Ex. 2). Fagan was ultimately forced to file this Complaint in state court because Warren Averett refused to pay its filing fees after Fagan had filed an arbitration demand with the American Arbitration Association (the "AAA") in February 2019 in accordance with her employment contract with Warren Averett and the AAA closed its file. On April 19, 2021, approximately two years after the filing of Fagan's Complaint in Jefferson County Circuit Court, Defendant Warren Averett moved to strike the jury demand. (*Id.* at Ex. 11). The trial court correctly denied Warren Averett's Motion to Strike Jury Demand. (*Id.* at Ex. 15). Warren Averett breached the arbitration provision in the employment contract it had with Fagan and cannot now seek to enforce the jury waiver provision in that same section of the contract. Moreover, the jury waiver is not invoked because this Court never declared that the arbitration provision was unenforceable, but, rather, found that Warren

Averett defaulted in proceeding with the arbitration. In addition, as shown by Warren Averett's rejection of any edits made by Fagan to the employment contract, Fagan had unequal bargaining power as to the jury waiver. The jury waiver would not extend to Fagan's tort claims or the claims against Defendant April Harry. Finally, based on the doctrine of laches, Warren Averett's Motion to Strike Jury Demand was untimely. For these reasons and more, Warren Averett's Petition for Writ of Mandamus is due to be denied.

PROCEDURAL HISTORY/STATEMENT OF FACTS

Prior to the Spring of 2015, Fagan owned and successfully operated a human resource consulting company. She was approached by Warren Averett to sell her company to Warren Averett and join Warren Averett to run a human resources company that Warren Averett planned to form. In the Spring of 2015, Warren Averett hired Fagan to be President of the newly formed Warren Averett Workplace and Fagan was made a Member of Warren Averett. (Petitioner's Ex. 4 at ¶13).

The compensation schedule (entitled "Compensation Plan") agreed upon by Fagan and Warren Averett was drafted by April Harry, then Chief Financial Officer (and current Chief Operating Officer) of Warren

Averett, and was attached to the Standard Personal Services Agreement executed by the parties (the "Employment Contract"). (*Id.*) Fagan entered into the Employment Contract with Warren Averett at a very low salary ($60,000), but with a commission arrangement that would reward her productivity. (*Id.* at ¶14).

After her employment started, Fagan achieved excellent sales results through her intense sales efforts in both Atlanta and Birmingham. (*Id.* at ¶23). However, Warren Averett failed to compensate Fagan in accordance with the Compensation Plan outlined in the Employment Contract. (*Id.*) Instead of paying incentives based on topline billings as shown in the Compensation Plan, Warren Averett improperly deducted "pass-through costs" and referral fees with other entities. (*Id.*) Fagan attempted to resolve the compensation issues with Warren Averett but was unsuccessful in her efforts. Fagan ultimately resigned, with her last day of employment on August 30, 2018. (*Id.* at ¶ 25-27).

Fagan realized after her separation from employment that she was not paid all of her base salary, in accordance with salary increases provided to Fagan. More specifically, Fagan's December 31, 2016 Compensation Summary provided Fagan's base salary was being

increased to $80,000. However, Fagan never received this increase in compensation from Warren Averett. (*Id.* at ¶ 31).

Fagan engaged legal counsel and, through her counsel, starting on August 23, 2018, attempted to resolve the compensation issues with Warren Averett without having to resort to arbitration or litigation. Fagan even participated in a mediation of her compensation issues with a mediator on January 18, 2019 but the mediation was unsuccessful. (*Id.* at ¶ 32).

Section 19 of the Employment Contract provides:

> **19. DISPUTE RESOLUTION**. All controversies, claims, issues and other disputes arising out of or relating to this Agreement or the breach thereof (collectively, the "Disputes") shall be subject to the applicable provisions of this Section 19.

(*See* Petitioner's Ex. 1 at §19; *See also* Petitioner's Ex. 13 at Ex. A).

Section 19 (b) of the Employment Contract provides:

> **(b) Arbitration.** Except as provided in Section 19(a) hereof [regarding employer initiated disputes over non-solicitation and confidentiality provisions], all Disputes shall be settled by arbitration in Birmingham, Alabama in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . The arbitrator(s) shall have the power to grant all legal and equitable relief and remedies and award compensatory damages as provided for by law but shall not award any damages other than, or in excess of, compensatory damages. In the event that the amount in question of such arbitration is over $200,000, the

> Company, in its sole discretion, may require a panel of three independent arbitrators.

(*See* Petitioner's Ex. 1 at §19(b); Petitioner's Ex. 13, Ex. A at §19(b)).

Section 19 (c) of the Employment Contract provides:

> **(c) Waiver of Jury Trial**. The parties desire to avoid the time and expense related to a jury trial of any Dispute in the event that the arbitration provisions of Section 19(b) hereof **are declared by a court of law to be unenforceable** for any reason. Therefore, the parties, for themselves and their successors and assigns, hereby waive trial by jury of any Dispute. The parties acknowledge that this waive is knowingly, freely, and voluntarily given, is desired by all parties and is the best interests of all parties.

(*See* Petitioner's Ex. 1 at §19(c); Petitioner's Ex. 13, Ex. A at §19(c)) (emphasis added).

In accordance with the Employment Contract, on February 28, 2019, Fagan filed an employment arbitration demand with the AAA against Warren Averett, alleging, in pertinent part: "Warren Averett Companies, LLC breached its employment contract with Gerriann Fagan by failing to compensate her and provide her commission in accordance with the contract. Ms. Fagan also brings claims of bad faith, fraud, unjust enrichment, minority shareholder oppression, and breach of fiduciary duty against Warren Averett." (*See* Petitioner's Ex. 4 at ¶ 34; *see also*

Petitioner's Ex. 1 at 16).[1] Fagan also paid the $300 filing fee required by the AAA (Petitioner's Ex. 4 at ¶ 34).

Despite repeated reminders from the AAA, Warren Averett failed to pay its portion of the AAA filing fees and, on April 18, 2019, the AAA ultimately closed its file related to Fagan's arbitration demand. (*See* Ex. G to Doc. 51, Pl.'s Response in Opp. to Motion to Compel).

On April 30, 2019, Fagan filed her Complaint in Jefferson County Circuit Court, alleging breach of contract, unjust enrichment/restitution, and oppression/squeeze out against Warren Averett, misrepresentation and fraudulent suppression against Warren Averett and Harry, and breach of fiduciary duty against Harry. (Petitioner's Ex. 2). On July 31, 2019, Fagan filed her First Amended Complaint. (Petitioner's Ex. 4).

Warren Averett and Harry filed motions to dismiss several of Fagan's claims based on the statute of limitations and made additional

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[1] Warren Averett inaccurately claims that Fagan improperly filed her claim under the Employment Fee Schedule in its petition and fails to acknowledge that the AAA found that the commercial rules were applicable, and that the Alabama Supreme court found no breach on the part of Fagan. (Petitioner's Brief at 4). *Fagan v. Warren Averett Companies, LLC*, Case No. 1190285, ___ So.____, at 16-18 (Ala. Oct. 23, 2020).

arguments related to the unjust enrichment claims and the oppression claims. (Docs. 10, 17, 67, 74). Warren Averett also moved to compel arbitration. (Petitioner's Ex. 3).

On October 3, 2019, the trial court entered an order granting the Defendants' motions to dismiss as to the oppression claims, denying the Defendants' motions to dismiss as to all other claims, and granting Warren Averett's Motion to Compel Arbitration. (Petitioner's Ex. 5).

On January 2, 2020, Fagan timely appealed to the Alabama Supreme Court. On October 23, 2020, the Alabama Supreme Court, held, among other things, that "Warren Averett's failure to pay the filing fee constituted a default under the arbitration provision. Accordingly, the trial court erred when it granted Warren Averett's Motion to Compel Arbitration." *Fagan*, Case No. 1190285, at 21. The Alabama Supreme Court reversed and remanded the case back to the trial court. *See id.*

On April 19, 2021, Warren Averett filed its Motion to Strike Jury Demand. (Petitioner's Ex. 11). On August 27, 2021, the trial court denied Warren Averett's Motion to Strike Jury Demand. (Petitioner's Ex. 15). On October 7, 2021, Warren Averett filed its Petition for Writ of Mandamus.

STATEMENT OF THE STANDARD OF REVIEW

The Alabama Supreme Court noted in *Ex parte Mardis*, 628 So.2d 605 (Ala. 1993), regarding the standard of review for a petition of writ of mandamus:

> Mandamus is a drastic and extraordinary writ to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. *Ex parte Ben-Acadia, Ltd.*, 566 So.2d 486, 488 (Ala. 1990).
>
> Because "mandamus is an extraordinary remedy, the standard of review for a writ of mandamus is whether there has been a clear abuse of discretion by the trial judge." *Ex parte Rudolph*, 515 So.2d 704, 706 (Ala. 1987); *Ex parte Ward*, 448 So.2d 349 (Ala. 1984).

Id; *see also Mobley v. Moore*, 350 So.2d 414, 416 (Ala. 1977) ("In the absence of showing the trial court abused its discretion [in permitting a jury trial] we will not issue a writ of mandamus.")

STATEMENT OF THE ISSUE

The issue presented is whether the trial court abused its discretion when it denied Warren Averett's Motion to Strike Jury Demand when (1) Warren Averett breached the arbitration provision; (2) the plain language of the Employment Contract expressly required a court to declare the arbitration provision unenforceable and this Court never

declared the arbitration provision unenforceable, but, rather, found that Warren Averett's failure to pay the filing fee constituted a default under the arbitration provision; (3) the jury waiver was not validly made in light of the standard established in *Gaylord Department Stores of Alabama, Inc. v. Stephens*, 404 So.2d 586 (Ala. 1981); (4) the jury waiver would not extend to Fagan's tort claims or the claims against Harry; and (5) Warren Averett's Motion Strike Jury Demand is barred by the doctrine of laches.

STATEMENT OF WHY THE PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED

"Article I, § 11, Constitution 1901, provides that **the right of trial by jury shall remain inviolate.** Moreover, Rule 38(a), ARCP, provides that the right of trial by jury as declared by the Constitution of Alabama, or as given by statute of this State shall be preserved to the parties inviolate." *Gaylord Dept. Stores of Alabama, Inc.*, 404 So.2d at 588 (emphasis added). "The right to a jury trial is a significant right in our jurisprudence." *Ex parte Bankcorpsouth*, 109 So.3d 163, 166 (Ala. 2012). "Public policy, the Alabama Rules of Civil Procedure, and the Alabama Constitution all express a preference for a trial by jury." *Ex parte AIG Baker Orange Beach Wharf, L.L.C.*, 49 So.3d 1198, 1200-01 (Ala. 2010) (citing *Ex parte Cupps*, 782 So.2d 772, 775 (Ala. 2000)). **"Because jury**

trials are strongly favored in the law, there is a presumption against denying a jury trial based on a contractual waiver, and a waiver of a right to a jury trial must be strictly construed, giving deference to the constitutional guarantee of the right to a trial by jury." *Ex parte Acosta*, 184 So.3d 349, 352 (Ala. 2015) (emphasis added); *see also Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937) ("[A]s the right of a jury trial is fundamental, courts indulge every reasonable presumption against waiver.")

The jury waiver in the instant matter is not applicable because the Alabama Supreme Court never declared the arbitration provision to be unenforceable. For this reason and more, Warren Averett has failed to establish that it is entitled to the issuance of this extraordinary remedy.

I. Breach or repudiation of a contract by one party excuses nonperformance by the other.

The Alabama Supreme Court held that "Warren Averett's failure to pay the filing fee constituted **a default** under the arbitration provision." *Fagan*, Case No. 1190285, at 21 (emphasis added). Warren Averett materially breached the Employment Contract when it failed to pay the filing fee and to participate in the arbitration proceedings Fagan had initiated with the AAA. *See Winkleblack v. Murphy*, 811 So.2d 521, 529

(Ala.2001) (noting, "A plaintiff can establish a breach-of-contract claim by showing (1) the existence of a valid contract binding the parties in the action, (2) his own performance under the contract, (3) the defendant's nonperformance, and (4) damages.") (internal citations and quotations omitted). It is a fundamental principle of contract law that breach or repudiation of a contract by one party excuses nonperformance by the other. *Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339 (Ala. 1987) ("Under general principles of contract law, a substantial breach by one party excuses further performance by the other."); *Pattans Ventures, Inc. v. Williams*, Case No. 2040648, at 15 (Ala. Civ. App. June 2, 2006) ("The law can properly excuse a promisor from performing whenever justice requires it if the failure of performance was caused by the fault, actions, or inactions of the other party."); *Smith v. Clark*, 341 So.2d 720, 721 (Ala. 1977) ("[T]his Court should not enforce an agreement where the party seeking to enforce the agreement has failed to perform his part of the bargain."). In addition, there was no savings clause or severability clause in the Employment Contract. (*See* Petitioner's Ex. 1; Petitioner's Ex. 13, Ex. A). *See Ex parte Thicklin*, 824 So.2d 723, 734 (Ala. 2002) (striking only the portion of the arbitration clause that prohibited the arbitrator

from awarding punitive damages because the contract contained a severability clause); *see also Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1058 (11th Cir. 1998) ("[T]he presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable, not just subject to judicial reformation.")

Thus, in breaching the Employment Contract, and the arbitration provision within paragraph 19 on "Dispute Resolution", Warren Averett can no longer require Fagan to waive a jury trial also contained in paragraph 19. *See Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 838 (Miss. 2003) ("We do however add that not only did Sanderson Farms default and waive the application of the arbitration provision**, but also other provisions which are referenced therein which assert to limit damages**.") (emphasis added). Warren Averett chose to disregard the arbitration provision in the "Dispute Resolution" section but now wants to enforce the jury waiver provision in the very same section. As this Court has recognized, "a person cannot merely pick and choose the provisions in a contract that he wants to apply." *Delta Constr. Corp. v. Gooden*, 714 So.2d 975, 981 (Ala.1998).

II. The arbitration provision was never declared unenforceable by any court.

The jury waiver provision explicitly states:

> The parties desire to avoid the time and expense related to a jury trial of any Dispute **in the event that the arbitration provisions of Section 19(b) hereof <u>are declared by a court of law to be unenforceable</u>** for any reason. Therefore, the parties, for themselves and their successors and assigns, hereby waive trial by jury of any Dispute. The parties acknowledge that this waiver is knowingly, freely, and voluntarily given, is desired by all parties and is the best interests of all parties.

(*See* Petitioner's Ex. 1 at 16) (emphasis added). The waiver is expressly contingent upon a court's declaration that the arbitration provision is unenforceable. (*See id.*) It does not provide that in the event a party breaches the arbitration provision that the parties agree to waive a jury trial. (*See id.*) The plain language of the provision does not provide for a jury waiver regardless of the cause; it is ONLY in the event that the arbitration provision itself is declared unenforceable. (*See id.*) *Ryan v. Warranty Services, Inc. v. Welch*, 694 So.2d 1271 (Ala. 1997) ("General rules of contract interpretation require that the intent of the parties be derived from the words of the contract, unless an ambiguity exists."); *Flowers v. Flowers*, 334 So.2d 856, 857 (Ala. 1976) (absent evidence to the contrary, "the words of an agreement will be given their ordinary

meaning."); *Black Diamond Development, Inc. v. Thompson*, 979 So.2d 47, 52 (Ala. 2007) ("the best evidence of the intent of the parties is the written contract itself; if an agreement is complete, clear, and unambiguous on its face, it must be enforced according to the plain meaning of its terms.") (internal quotations and citations omitted); *Ex parte Acosta*, 184 So.3d at 355 ("the jury waiver provision here is far from broad and the *plain language* of the jury-waiver provision limits the waiver . . .").

Warren Averett makes the specious argument that because it could not enforce the arbitration provision after it defaulted, the court declared it unenforceable. (Petitioner's Brief at i, 2, 5, 6, 7, 17, 19, 27). The Alabama Supreme Court made no such declaration and its Order finding that Warren Averett's failure to pay the filing fee constituted a default is not a declaration that *the provision is unenforceable*. The Supreme Court reversed the trial court's granting of Warren Averett's Motion to Compel Arbitration because Warren Averett was in default of the arbitration provision which precluded Warren Averett from then attempting to compel Fagan to do exactly what Warren Averett refused to do. *See Fagan*, Case No. 1190285, at 21 ("Warren Averett's failure to pay the

filing fee constituted a default under the arbitration provision."). It is also worth noting that the arbitration provision arguably would still have been enforceable by Fagan had she sought to compel arbitration, rather than seek relief in state court following Warren Averett's default.

In *Ex parte Thicklin*, 824 So.2d 723 (Ala. 2002), the Alabama Supreme Court addressed its authority to deal with the enforceability of contract terms:

> This Court has limited authority to deal with the enforceability of contract terms. It can nullify or reform a contract on the basis of fraud; it can also nullify or reform a contract to eliminate any unconscionable provisions or terms that violate public policy.

Id. at 732.[2] If the Alabama Supreme Court had held that the arbitration provision in the instant matter was procedurally and substantively unconscionable, then the arbitration provision would be unenforceable. *See Ex parte Thicklin*, 824 So.2d at 732 (finding arbitration provision denying punitive damages was unconscionable and thus void) (overruled

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[2] Warren Averett's reliance on Black's Law Dictionary definition of "unenforceable" is misplaced because it assumes a valid contract and does not contemplate unenforceability due to fraud or unconscionability. (*See* Petitioner's Brief at 21-22) ("[Of a contract] valid but incapable of being enforced.")

on other grounds by *Patriot Mfg., Inc. v. Jackson*, 929 So.2d 997 (Ala. 2005)); *Paladino*, 134 F.3d at 1060 (holding that arbitration agreement which proscribed award of Title VII damages was "fundamentally at odds with the purposes of Title VII" and affirming the district court's order declining to compel arbitration); *see also Blue Cross Blue Shield of Alabama v. Rigas*, 923 So.2d 1077, 1087 (Ala. 2005) ("To avoid an arbitration provision on the ground of unconscionability, the party objecting to the arbitration must show both procedural and substantive unconscionability.") In fact, Fagan argued in her appeal to the Alabama Supreme Court that the arbitration provision was both procedurally and substantively unconscionable. (Respondent's Ex. 1 at 48-55). However, the Alabama Supreme Court made no such finding in this matter and pretermitted those arguments. *Fagan*, Case No. 1190285, at 21, FN 2. Rather, the Alabama Supreme Court found that that Warren Averett's failure to pay the filing fee constituted a default under the arbitration provision. *Id.* at 21.

Warren Averett's arguments relating to the enforceability of the jury waiver provision glosses over the plain language of the provision. (Petitioner's Brief at 17-23). Warren Averett even argues that the

arbitration provision and the jury waiver are separate clauses that should not be read together. (*Id.* at 19).[3] That argument fails on its face because the jury waiver provision itself references the arbitration provision and makes it contingent on a court's declaration of unenforceability of the arbitration provision. (*See* Petitioner's Ex. 1 at 16); *Ryan Warranty Services, Inc.*, 694 So.2d at 1273 (citing *Yu v. Stephens*, 591 So.2d 858 (Ala. 1991)) ("a contract is to be construed in its entirety and not solely on a single provision.") As noted above, the arbitration provision and the jury waiver provision are *both* in the "Dispute Resolution" section of the Employment Contract. (*See* Petitioner's Ex. 1 at 16).

None of the cases relied on by Warren Averett apply with respect to the facts of this case because none of the jury waivers in the cases cited required a finding that an arbitration provision be declared unenforceable. For example, the jury waiver in *Regions Bank v. Baldwin*

[3] On the same page of its Motion to Strike Jury Demand but in the next paragraph, Warren Averett contradicted itself when it argued that "the jury waiver provision must be read *in pari materia* with the agreement as a whole." (Petitioner's Ex. 11 at 5).

County Sewer Service, 106 So.3d 383 (Ala. 2012), a case cited by Warren Averett at the trial court level, stated:

> Each party hereby irrevocably waives, to the fullest extent permitted by applicable law, any and all rights it may have to trial by jury in respect to any proceedings arising out of or relating to this Agreement or any Transaction and acknowledges that it and the other party have been induced to enter into this Agreement by, among other things, these mutual waivers.

Id. at 387. It did NOT make the jury waiver contingent upon a judicial declaration that the arbitration provisions were not enforceable. *Id.* at 392. As stated by this Court in *Homes of Legend, Inc. v. McCollough*, 776 So.2d 741 (Ala. 2000): "Under those established rules of contract construction, where there is a choice between a valid construction and an invalid construction the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms." *Id.* at 746. The "valid construction" in this instance is the plain meaning of the of the terms: "declared by a court of law to be unenforceable." (*See* Petitioner's Ex. 1 at 16).

In the case at bar, the jury waiver only becomes effective "in the event" that Section 19(b) of the Employment Contract is declared unenforceable. Unlike the contract in the *Regions Bank* matter, Warren

Averett did not draft a blanket jury waiver. (*See id*). *See Regions Bank*, 106 So.3d at 387. Furthermore, the Employment Agreement allows Warren Averett to seek a jury trial for the enforcement of some of its rights under the Employment Agreement. (*See* Petitioner's Ex. 1 at §19(a)). For these reasons, Warren Averett's petition should be denied.

III. Any ambiguity in the agreement must be resolved against the party that drafted the agreement.

Although the plain language of the provision makes the jury waiver contingent upon a court declaring the arbitration provision unenforceable, if, for any reason this Court finds the language in Section 19(c) to be ambiguous, the ambiguity must be resolved in favor of Fagan. Warren Averett drafted the Employment Contract. Under long established Alabama law, any ambiguity in a contract is construed against the drafter. *See Homes of Legend, Inc.*, 776 So.2d at 746 (citing *Lackey v. Central Bank of the South*, 710 So.2d 419, 422 (Ala. 1998)) ("under the rule of *contra proferentem,* any ambiguity must be construed against the drafter of the contract."); *see Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So.2d 95, 99 (Ala. 1977) (indicating that ambiguities must be interpreted against the party drawing the

contract if the circumstances surrounding the contract do not make the terms clear).

IV. The jury waiver must be narrowly and strictly construed.

Jury waivers are strongly disfavored in the law and must be narrowly construed. *See Ex parte Acosta*, 184 So.3d at 352 ("there is a presumption against denying a jury trial based on a contractual waiver, and a waiver of a right to a jury trial must be strictly construed, giving deference to the constitutional guarantee of the right to a trial by jury"). Because the plain language of the section states that the jury waiver is contingent upon the judicial declaration that the arbitration provision is unenforceable, the jury waiver must be construed to be subject to that condition and narrowly construed in favor of Fagan's right to a jury trial.

V. Not only is the jury waiver not applicable because a court never declared the arbitration provision unenforceable, the jury waiver is also unenforceable because the waiver was not validly made.

While the jury waiver is not applicable because a court never declared the arbitration provision unenforceable, the jury waiver also is unenforceable because the waiver was not validly made. The court in *Gaylord Department Stores of Alabama, Inc. v. Stephens*, 404 So.2d 586 (Ala. 1981) established "three factors in determining whether to enforce

a contractual waiver of the right to a trial by jury: (1) whether the waiver is buried deep in a long contract; (2) whether the bargaining power of the parties is equal; and (3) whether the waiver was intentionally and knowingly made." *Mall, Inc. v. Robbins*, 412 So.2d 1197, 1199 (Ala. 1982) (citing *Gaylord Department Stores of Alabama, Inc.*, 404 So.2d at 586). In *Gaylord*, the Court specifically found:

> The contract between Stephens and Gaylord appears to be a New Jersey form contract with boiler plate provisions. The jury waiver provision is buried in paragraph thirty-four in a contract containing forty-six paragraphs; the equality of the bargaining power of the parties is questionable; and it does not appear that the waiver by Stephens was intelligently or knowingly made.

404 So.2d at 588.

Because there is a presumption against waiver, the party seeking the enforcement of the waiver has the burden of proving that the waiver of the right to a jury trial was validly made in light of the standard established in *Gaylord Department Stores of Alabama, Inc.*, 404 So.2d 586 (Ala. 1981). *Ex parte John P. Coble*, 72 So.3d 656, 659 (Ala. Civ. App. 2011).

Warren Averett argues that "[t]he present jury waiver was not 'buried deep in a long contract.'" (Petitioner's Brief at 10). However, the jury waiver was buried in the middle of page 16 of a 28-page contract

(including exhibits) and in the middle of the section on "Dispute Resolution" which started on page 14. (Petitioner's Ex. 1). There was no additional language immediately before the signatures in the contract, reminding the parties of any such waiver. (*Id.* at 18-19).

Furthermore, Fagan had unequal bargaining power in the Employment Contract and a lack of meaningful choice as to the jury waiver. Fagan was told by General Counsel Monica Fischer that the agreement including the arbitration provision was the standard agreement provided to all members. (Petitioner's Ex. 4 at 9, note 2). *See Gaylord Dept. Stores of Alabama, Inc.*, 404 So.2d at 586. Fagan, as a condition of her employment, was required to waive the jury trial of any dispute arising from the Employment Contract. (*See* Petitioner's Ex. 1 at 16). Fagan even tried to negotiate certain terms of her Employment Contract, as shown by the copy of the Employment Contract she submitted to AAA with her arbitration demand. (*See* Petitioner's Ex. 13, Ex. A). However, as shown by the Employment Contract attached to Warren Averett's Motion to Compel, Warren Averett ultimately did not accept any of Fagan's proposed changes to her Employment Contract. (*See* Petitioner's Ex. 3 at Ex. 2; *see also* Petitioner's Ex. 1). Such a refusal

to accept Fagan's proposed changes underscores her unequal bargaining power and her lack of meaningful choice about whether and how to enter into the transaction. *See National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2nd Cir. 1977) ("it is clear that Hendrix did not have any choice but to accept the NER contract as written [with a jury waiver clause] if he was to get badly needed funds. This gross inequality in bargaining power suggests, too, that the asserted waiver was neither knowing nor intentional."). Thus, such a waiver was not knowingly and intentionally made.

Collins v. Countrywide Home Loans, Inc., 680 F.Supp.2d 1287 (M.D. Fla. 2010), a case cited by Petitioners where a jury waiver was enforced, is inapposite because, in that matter, there was no evidence that the plaintiffs had to sign the contract as written. *Id.* at 1295-96 (stating "nothing in the filings before this Court indicate that Plaintiffs had to sign the mortgage agreement as it was originally written" and "[n]othing indicates that Plaintiffs could not have negotiated the terms of the contract, or that they were forced to sign the mortgage documents in a situation where they had no bargaining power.") (*See* Petitioner's Brief at 12).

Warren Averett also relies on *Ex parte BankcorpSouth Bank*, 109 So.3d 163 (Ala. 2012), comparing Fagan to the plaintiff Busby in that matter. (Petitioner's Brief at 14). However, unlike Fagan, the plaintiff Busby in *Ex parte BankcorpSouth Bank*, had both a **business degree and a law degree**. *See* 109 So.3d at 167. Fagan had no such degrees and, thus, no clear understanding of the meaning and consequences of such a waiver. Moreover, Busby never even attempted to edit the contract at issue in his dispute. *See id.* Thus, unlike Fagan, he did not have any proposed edits uniformly rejected and he was unable to provide such evidence of unequal bargaining power. *See id.* As noted above, when Fagan attempted to edit the Employment Contract to be more applicable to her employment situation, Warren Averett completely rejected any changes that Fagan attempted to make to the Employment Contract, which clearly underscores her vastly unequal bargaining power. (*See* Petitioner's Ex. 3 at Ex. 2; *see also* Petitioner's Ex. 1).

VI. Even if the waiver were effective as to the violations of the contract, the waiver could not be extended to Fagan's Tort Claims or the Claims against Harry.

Even if the waiver were effective as to the violations of the contract, the waiver could not be extended to the tort actions stated in Count II

alleging Misrepresentation and Count VI alleging Fraudulent Suppression against Warren Averett and Harry of Fagan's Complaint or the Count V Breach of Fiduciary Claim against Harry. (*See* Petitioner's Ex. 4 at 10-11, 13-14). *See Gaylord Dep. Stores of Alabama, Inc.*, 404 So.2d at 588 ("even if we were of the opinion that the waiver was effective as to the violations of the contract, the waiver could not be extended to the tort action stated in Count III of Stephens's complaint."); *see also Ex parte Cupps*, 782 So.2d 772 (Ala. 2000) (finding that the "fraudulent-inducement claim and the suppression claim allege torts relating to the formation of the contract and not to the contract itself . . ." and finding that Cupps did not contractually waive his right to a jury trial as to these tort claims); *see also First Alabama Bank*, 681 So.2d 134 (Ala. Civ. App. 1994) (noting that the trial court found the jury waiver in the loan agreement was inapplicable to the plaintiff's claim of conversion related to cash left in her repossessed car).

Nor could the waiver be extended to the claims against April Harry, since she was not a party to the Employment Contract.[4] *See Ex parte*

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[4] Note that Defendant April Harry is represented by separate counsel and she did not file a motion to strike the jury demand and is not a party to this petition.

Elizabeth Roper Carter, et. Al, 66 So.3d 231, 239 (Ala, 2010) (refusing to find the jury waiver applicable to an employee of the bank/defendant and noting, "We cannot rewrite the loan documents to give the jury provisions a broader effect when our standard of review requires strict construction of such provisions in deference to the constitutional guarantee of a the right to trial by jury."); *Ex parte Lincare Inc.*, 218 So.3d 331 (Ala. 2016); *Ex parte Taylor*, ___ So.____, at FN 2 (Ala. Sept. 30, 2021). As noted on page 1 of the Employment Contract, this Agreement was "by and between WARREN AVERETT COMPANIES, LLC, an Alabama limited liability company (the "Company"), and Gerriann Fagan, a resident of the State of Alabama (the "Member")", and **not April Harry** or any other employees of Warren Averett. The jury waiver is made by "the parties" and does not include any other individual or entity. (Petitioner's Ex. 1 at 1, 16).

VII. Warren Averett is barred under the doctrine of laches from striking the jury demand.

Warren Averett waited almost two years after the filing of the Complaint to move to strike the jury demand and is barred under the doctrine of laches from striking the jury demand. Warren Averett moved to dismiss certain claims of Fagan when it filed its Motion to Dismiss in

June 2019 and again in August 2019 when it filed its Motion to Dismiss certain claims in the July 2019 First Amended Complaint, but it failed to move to strike the jury demand until almost two years after the filing of the Complaint. Such a delay is prejudicial to Fagan. *See Ex parte First Exch. Bank*, 150 So.3d 1010, 1014 (Ala. 2013) (Moore, Chief Justice concurring specially) ("Because of their lengthy delay in moving to strike the Henry's jury demand, the petitioners in my view are not entitled to a writ of mandamus ordering the trial court to strike the Henry's jury demand."); *see also Rivercenter Assoc. v. Rivera*, 858 S.W.2d 366 (Tex. 1993) (denying petition for writ of mandamus seeking to reverse denial of motion to strike jury demand because of unjustified delay in asserting contractual jury waiver); *see also Breckenridge v. Leslie*, 115 So.2d 493, 494 (Ala. 1959) ("In the absence of any showing of abuse of discretion on the part of the trial court on a matter which is left largely to the discretion of that court, we do not issue writs of mandamus.")

CONCLUSION

Jury trials are strongly favored in the law and there is a presumption against denying a jury trial based on a contractual waiver. Warren Averett breached the arbitration provision in the Employment

Contract it had with Fagan and cannot now seek to enforce the jury waiver provision in the same section of the contract. In any event, the jury waiver is not invoked because the court never declared the arbitration provision unenforceable, but, rather, found that Warren Averett defaulted in proceeding with the arbitration. Moreover, the jury waiver was not validly made in light of the standard established in *Gaylord Department Stores of Alabama, Inc. v. Stephens*, 404 So.2d 586 (Ala. 1981). In addition, the jury waiver would not extend to Fagan's tort claims or her claims against Harry. Finally, Warren Averett's Motion Strike Jury Demand is barred by the doctrine of laches.

The writ of mandamus is a drastic and extraordinary remedy. It should be issued only where the petitioner has demonstrated a clear legal right to the relief sought below. Because Warren Averett has not demonstrated a clear legal right to the writ, Warren Averett's Petition for Writ of Mandamus is due to be denied.

Respectfully submitted this 13th day of January, 2022.

/s/ *Susan N. Han*
One of the Counsel for Respondent
Gerriann Fagan

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Ala. R. App. P.28 because it contains 5,973 words, excluding the parts of the brief exempted by Ala. R. App. P. 32(b)(5)(c), as counted by the word count function of Microsoft Word word-processing software.

This brief complies with the typeface requirement of Ala. R. App. P. 32 because it has been prepared in a proportionately spaced typeface using the Microsoft word-processing software in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I do hereby certify that on January 13, 2022, I electronically filed the foregoing with the Alabama Supreme Court and sent electronic notification of such filing to the following via e-mail and also certify that a copy of the Response was served via U.S. Mail:

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Of Counsel

APPENDIX

Appendix to Respondent's Answer and Brief in Opposition to Warren Averett Companies, LLC's Petition for Writ of Mandamus

EXHIBIT 1

No. 1190285

IN THE SUPREME COURT OF ALABAMA

GERRIANN FAGAN,

Appellant,

v.

WARREN AVERETT COMPANIES, LLC,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
CIVIL ACTION NO. CV-19-901956

APPELLANT'S BRIEF

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ORAL ARGUMENT IS REQUESTED.

March 5, 2020

STATEMENT REGARDING ORAL ARGUMENT

This case involves multiple issues of first impression, the resolution of which will have significant statewide impact, including: (1) whether the trial court erred in failing to find that Warren Averett Companies, LLC ("Warren Averett") is in default under 9 U.S.C. § 3 and materially breached its employment contract when it refused to pay the filing fees and participate in the arbitration initiated by Gerriann Fagan ("Fagan") in the contractually agreed upon arbitral forum, the American Arbitration Association (the "AAA"); (2) whether the trial court erred in failing to find that Warren Averett waived its right to compel arbitration when it refused to pay its filing fees and participate in the AAA arbitration proceeding initiated by Fagan; and (3) whether the trial court erred in failing to find that the arbitration provision in the employment contract was invalid based on the effective vindication exception to the Federal Arbitration Act ("FAA").

Oral argument would assist the Court in better understanding the pertinent facts and law.

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STATEMENT OF JURISDICTION

This matter involves an appeal from an order granting a motion to compel arbitration. Pursuant to Rule 4(d) of the Alabama Rules of Appellate Procedure:

> An order granting or denying a motion to compel arbitration is appealable as a matter of right, and any appeal from such an order must be taken within 42 days (6 weeks) of the date of the entry of the order, or within the time allowed by an extension pursuant to Rule 77(d), Alabama Rules of Civil Procedure.

Ala. R. App. P. 4(d). The trial court entered an order on October 3, 2019 granting Defendant Warren Averett's motion to compel arbitration. (C. 447.)

On October 31, 2019, Fagan timely filed her Motion to Alter, Amend or Vacate the Portion of the Trial Court's Order Granting the Motion to Compel (C. 449-478), which was denied by the trial court on December 10, 2019. (C. 511.) On January 2, 2020, within 42 days of the trial court's December 10, 2019 order, Fagan timely appealed to the Alabama Supreme Court. (C. 512-519.)*See also Bowater Inc. v. Zager*, 901 So.2d 658 (Ala. 2004) (We hold that Bowater's Rule 59(e) motion to alter, amend, or vacate that portion of the trial court's September 17, 2003, order requiring that the arbitrators be duly licensed attorneys served, under Rule 4(a)(3), Ala. R.

App. P., to suspend the running of the time for filing a notice of appeal from that order. Because, under Rule 4(d) Bowater was entitled to appeal the trial court's order "as a matter of right," the order was due recognition as a "judgment" under Rule 54(a), Ala. R. Civ. P.,and Rule 59(e) [Ala. R. Civ. P.] is operative with respect to a "judgment.")

Jurisdiction lies with this Court pursuant to Alabama Code 1975 § 12-2-7(1) which provides that the Supreme Court shall have the authority:

> (1)To exercise appellate jurisdiction coextensive with the state, under such restrictions and regulations as are prescribed by law; but, in deciding appeals, no weight shall be given the decision of the trial judge upon the facts where the evidence is not taken orally before the judge, but in such cases the Supreme Court shall weigh the evidence and give judgment as it deems just.

Ala. Code § 12-2-7(1) (1975).

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

STATEMENT OF THE CASE

When Gerriann Fagan realized that Warren Averett had not paid her in accordance with an agreed upon compensation plan and tried to resolve things amicably, Warren Averett failed to adequately address the issue and never allowed Fagan an audience with the Compensation Committee, despite her requests over a one year period. (C. 200-202.) When Fagan attempted to resolve the matter via her attorneys through negotiations and mediation over an almost six month period, Fagan again was unsuccessful. (C. 203.) Then when Fagan filed an arbitration demand on February 28, 2019 with the AAA pursuant to her employment contract with Warren Averett regarding Warren Averett's failure to pay her in accordance with the agreed upon compensation plan, Warren Averett again stalled and refused Fagan's attempts to resolve the matter through AAA arbitration. (C. 204.) Despite repeated requests by the AAA, Warren Averett failed to participate in the arbitration and pay its required filing fee. (*Id.*) Warren Averett took issue with the AAA's preliminary determination that the employment fee schedule applied and refused to allow an arbitrator to determine the applicable fee schedule. (C. 216-218, 295-298, 303-307, 312-314.) The AAA ultimately

closed its file on April 18, 2019 due to Warren Averett's refusal to participate in the arbitration. (C. 321.)

Fagan promptly filed her April 30, 2019 complaint in circuit court, alleging breach of contract, unjust enrichment/restitution, and oppression/squeeze against Warren Averett, misrepresentation and fraudulent suppression against Warren Averett and former CFO April Harry, and breach of fiduciary duty against Harry. (C. 12-25.) Warren Averett and Harry filed motions to dismiss several of Fagan's claims based on the statute of limitations and made additional arguments related to the unjust enrichment claims and the oppression claims. (C. 33-78; 80-197.) Warren Averett also filed its Motion to Compel Arbitration and to Dismiss or Stay this Action ("Warren Averett's Motion to Compel Arbitration"). (C. 99-181.)[1] In Warren Averett's Motion to Compel Arbitration, Warren Averett requested the following relief: "that Plaintiff's claims (to the extent not dismissed by this Court) be compelled to arbitration, and that the Court direct the parties to submit such claims *to an arbitrator*

[1] Defendant Harry did not file a motion to compel arbitration.

that will enforce the cost-splitting terms of the parties' arbitration agreement." (C. 111) (emphasis added).

The trial court held a hearing on the pending motions on August 29, 2019. (R. 1-78.) On October 3, 2019, the trial court entered an order granting the Defendants' motions to dismiss as to the oppression claims, denying the Defendants' motions to dismiss as to all other claims, and simply granting Warren Averett's Motion to Compel Arbitration, without an opinion. (C. 447.)

On October 31, 2019, Fagan timely filed her Motion to Alter, Amend or Vacate the Portion of the Court's October 3, 2019 Order Granting Defendant's Motion to Compel Arbitration ("Motion to Alter, Amend, or Vacate"). (C. 449-478.) On December 5, 2019, Warren Averett filed its Response in Opposition to Plaintiff's Motion to Alter, Amend, or Vacate the Court's Order Compelling the Case to Arbitration. (C. 482-510.) On December 10, 2019, the trial court denied Fagan's Motion to Alter, Amend or Vacate.(C. 511.)

On January 2, 2020, within 42 days of the trial court's December 10, 2019 order, Fagan timely appealed to the Alabama Supreme Court. (C. 512-519.)

STATEMENT OF THE ISSUES

1. Whether the trial court erred in failing to find that Warren Averett is in default under 9 U.S.C. § 3 and materially breached its employment contract with Fagan when it refused to pay its filing fees and participate in the arbitration initiated by Fagan in the contractually agreed upon arbitral forum, the American Arbitration Association?

2. Whether the trial court erred in failing to find that Warren Averett has waived its right to compel arbitration when it refused to pay its filing fees and participate in the arbitration initiated by Fagan with the American Arbitration Association?

3. Whether the trial court erred in granting the motion to compel arbitration when Warren Averett refused to allow the American Arbitration Association arbitrator to decide the issue of fee allocation?

4. Whether the trial court erred in granting Warren Averett's motion to compel arbitration when Warren Averett's motion to compel in effect sought arbitration in a forum other than the American Arbitration Association, contrary to Alabama case precedent that provides that a court cannot

compel a party to arbitrate a matter in a different arbitral forum than the contractually agreed upon forum?

5. Whether the trial court erred in failing to find that the arbitration provision in the employment contract between Fagan and Warren Averett is substantively and procedurally unconscionable?

6. Whether the trial court erred in failing to find that the arbitration provision in the employment contract between Fagan and Warren Averett is invalid based on the effective vindication exception to the Federal Arbitration Act?

7. Whether the trial court erred in placing the entire case on the administrative docket when the claims against Defendant April Harry are still pending in circuit court?

STATEMENT OF THE FACTS

I. Fagan's Employment with Warren Averett and Warren Averett's Failure to Compensate Fagan in Accordance with the Agreed Upon Compensation Plan

From February 2001 to March 2015, Fagan was the owner of the Prism Group, LLC ("the Prism Group"), a human resources ("HR") consulting firm, which provided assessments, career development, career transition support, facilitation, leadership development and coaching solutions to its clients. (C. 197.) In the Fall of 2014, Warren Averett approached Fagan and asked her if she would join Warren Averett to build an HR consulting practice for Warren Averett. (*Id.*) In February 2015, Fagan ultimately agreed to join Warren Averett and, as part of the agreement, wound down the operations of the Prism Group and sold the equipment and furniture of the Prism Group to Warren Averett. (*Id.*)

In the Spring of 2015, Warren Averett hired Fagan as a Member of Warren Averett and hired Fagan to be President of the newly formed Warren Averett Workplace. (C. 198.) The compensation schedule (entitled "Compensation Plan") agreed upon by Fagan and Warren Averett was drafted by April Harry, then Chief Financial Officer of Warren Averett (and current Chief Operating Officer), and was attached to the Standard

Personal Services Agreement executed by the Parties (the "Employment Contract"). (*Id.*) The Employment Contract was effective April 1, 2015. (*Id.*)

Fagan entered into the contract with Warren Averett with a low salary draw ($60,000), but with a commission agreement, as outlined in the Compensation Plan, that would reward her productivity. (*Id.*) During the negotiations between Fagan and Warren Averett, Fagan and Harry met to discuss the Compensation Plan in March of 2015. (*Id.*) They agreed that Fagan's compensation would be based on gross sales with no deductions for expenses with the exception of those listed in the Compensation Plan that included federal and state tax withholdings, social security, and 401K. (C. 199.) The incentives provided for in the Compensation Plan were central to Fagan's decision to join Warren Averett as a member and as President of Warren Averett Workplace. (*Id.*)

As part of her pre-employment negotiations with Warren Averett, Fagan provided the financial information of the Prism Group. The Prism Group had been a CPI Partner since 2002. (C. 200.) CPI is an international association of different HR consulting businesses that provides administrative support, marketing assistance, on-line

resources and structure for referring and fulfilling business among partners. (*Id.*) The Prism Group's partnership with CPI enabled the Prism Group to provide services nationally and internationally. (*Id.*) Fagan explained to Harry during her pre-employment negotiations the financial arrangement between the CPI partners and how money flowed to and from CPI. (*Id.*)

Harry and Fagan also met with the then-CEO of CPI, Dave Hemmer, when he toured the Atlanta Warren Averett office, to secure CPI approval for the transfer of the CPI license from The Prism Group to Warren Averett and to gain expansion rights for Warren Averett in Atlanta. (*Id.*) The Atlanta CPI license was especially desirable to Warren Averett as it would afford significant growth potential for Warren Averett's HR consulting business in the Atlanta market. (*Id.*)

CPI invited Fagan and Harry to present for an expanded license in the Atlanta market at its Miami CPI meeting. (*Id.*) Harry and Fagan attended and co-presented at the March 2015 Miami CPI meeting. (*Id.*) CPI vetted other contenders but based on Fagan's history with CPI, Warren Averett's other businesses in Atlanta, reference checks, and a site visit by CPI's CEO, Warren Averett was confirmed as a CPI Partner at the March 2015 CPI Annual Meeting. (*Id.*) This was a huge

opportunity for Warren Averett. (*Id.*) The Prism Group license for CPI was transferred to Warren Averett (as outlined in the Side Letter Agreement executed by Warren Averett) and an expansion to the Atlanta market was approved by CPI. (*Id.*)

After her employment started, Fagan achieved excellent sales results through her intense sales efforts in both Atlanta and Birmingham. (*Id.*) However, Warren Averett failed to compensate Fagan in accordance with the Compensation Plan outlined in the Employment Contract. (C. 200-201.) Instead of paying incentives based on gross billings as explicitly shown in the Compensation Plan, Warren Averett improperly deducted "pass-through costs" and referral fees with other entities. (C. 201.) Fagan repeatedly attempted to resolve these compensation issues with Warren Averett but was unsuccessful in her attempts and she was unable to even gain an audience with the compensation committee. (C. 201-202.) Fagan ultimately resigned, with her last day of employment on August 30, 2018. (C. 202.) Warren Averett currently owes Fagan over

$464,092.23[2] in past-due incentive payments and interest. (C. 203.)

Fagan realized after her separation from employment that she was not paid all of her base salary, in accordance with salary increases provided to Fagan. (*Id.*) More specifically, Fagan's December 31, 2016 Compensation Summary provided Fagan's base salary was being increased to $80,000. (*Id.*) However, Fagan never received this increase in compensation from Warren Averett. (*Id.*)

II. The Failed Mediation.

Fagan engaged legal counsel and, through her counsel, starting on August 23, 2018, attempted to resolve the compensation issues with Warren Averett without having to resort to arbitration or litigation. (*Id.*) Fagan even participated in a mediation of her compensation issues with a mediator on January 18, 2019 but the mediation was unsuccessful. (*Id.*)

[2] This is the amount with interest owed through July 31, 2019 (the date of the filing of the Amended Complaint).(C. 203.)

III. Warren Averett's Refusal to Comply with the Arbitration Provision in the Employment Contract

Section 19 (b) of the Employment Contract between Fagan and Warren Averett provides:

> Except as provided in Section 19(a) hereof [regarding employer initiated disputes over non-solicitation and confidentiality provisions], all Disputes shall be settled by arbitration in Birmingham, Alabama in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . . The arbitrator(s) shall have the power to grant all legal and equitable relief and remedies and award compensatory damages as provided for by law but shall not award any damages other than, or in excess of, compensatory damages. In the event that the amount in question of such arbitration is over $200,000, the Company, in its sole discretion, may require a panel of three independent arbitrators.

(*Id.*; C. 130, 162.) As to costs and fees, paragraph 19(d) of the Employment Contract provides: "The parties shall bear their respective costs in connection with the dispute resolution procedures described in this Section 19 except that the parties share equally the fees and expenses of any arbitrator(s) and the costs of any facility used in connection with such dispute resolution procedures." (*See id.*).

On February 28, 2019, Fagan filed an employment arbitration demand with the AAA against Warren Averett, alleging, in pertinent part:

> Warren Averett Companies, LLC breached its employment contract with Gerriann Fagan by failing to compensate her and provide her commission in accordance with the contract. Ms. Fagan also brings claims of bad faith, fraud, unjust enrichment, minority shareholder oppression, and breach of fiduciary duty against Warren Averett.

(C. 145-146, 203.) In accordance with AAA requirements, a copy of the Employment Agreement was submitted to the AAA with the demand for arbitration. (C. 143-170.) Fagan also paid the $300 filing fee required by the AAA. (C. 203.)

In a letter dated March 4, 2019, the AAA gave Warren Averett a deadline of March 18, 2019 to pay its share of the filing fee and stated, in pertinent part:

> The outcome of our preliminary administrative review, which is subject to review by the arbitrator, is that this dispute will be administered in accordance with the American Arbitration Association ("AAA") Commercial Arbitration Rules and Employment/Workplace Fee Schedule, which can be found on our website, www.adr.org.
>
> In cases before a single arbitrator, a non-refundable filing fee, of $300.00, is due from the employee when a claim is filed, unless the arbitration agreement provides that the employee pay less. A non-refundable fee of $1,900.00 is due from the employer, unless the arbitration agreement provides that the employer pay more.
>
> We have received the employee's portion of the filing fee in the amount of $300.00. **Accordingly, we request that the employer pay its share of the filing fee in the amount of $1,900.00 on or before**

> **March 18, 2019.** Upon receipt of the balance of the filing fee, the AAA will proceed with administration.
>
> Payment may be submitted via check, money order, or credit card. Money orders and checks should be made payable to the American Arbitration Association and sent to Case Filing Services, 1101 Laurel Oak Road, Suite 100, Voorhees, NJ 08043. Please notify me if you wish to pay by credit card and I will provide instructions for submitting payment through our website. When submitting payment, please reference the above case number to ensure that payment is properly applied.
>
> Payment should be submitted **on or before March 18, 2019.**

(C. 215, 238-239, 242-243) (emphasis in original).

On March 20, 2019, the AAA sent another letter to Warren Averett which provided in pertinent part:

> We have not yet received payment from the respondent to cover their portion of the filing fee, as described in our letter dated March 4, 2019. The respondent is requested to pay **$1,900** to the AAA by **March 28, 2019.** The respondent's share of the fee is due regardless of whether the case settles. If payment was already sent, please accept our apologies and disregard this letter. If this non-payment is simply an oversight on the respondent's behalf, we trust payment will be made promptly.

(C. 215-216, 299-301) (emphasis in original).

On March 28, 2019, Trey Wells, as counsel for Warren Averett, wrote via e-mail to the AAA:

> Hello,
> My firm is outside counsel for Warren Averett. We are confused about this invoice. The arbitration

> agreement specifies the parties will split the costs of arbitration equally but this invoice does not appear to acknowledge this fact. Please advise.
> Thanks,
> Trey

(C. 174-177.)

On March 29, 2019, a representative from the AAA responded to Mr. Wells' e-mail via e-mail:

> Hello,
>
> The outcome of our preliminary administrative review, which is subject to review by the arbitrator, is that this dispute will be administered in accordance with the American Arbitration Association ("AAA") Commercial Arbitration Rules and Employment/Workplace Fee Schedule. (Please see attached)
>
> Additionally, please provide your complete contact information (law firm, address, etc.) in order to properly update our records.
>
> Thank you

(C. 302-307.)

On April 2, 2019, the Employment Filing Team of the AAA wrote via e-mail to counsel for Claimant and counsel for Respondent:

> Good Afternoon,
>
> The AAA has not received the respondent's portion of the filing fee. Absent receipt of the

> respondent's portion on or before April 8, 2019, the AAA will close its file.
>
> Thank you

(C. 308-310.)

On April 8, 2019, counsel for Warren Averett wrote via e-mail to the AAA, copying counsel for Claimant:

> Hi, with whom do we dispute AAA's decision as to the fee split? We do not want to pay more than our ½ of fees as contractually agreed without having that dispute decided first.
> Thanks,
> Trey

(C. 311-314.)

On April 8, 2019, counsel for Fagan wrote to Counsel for Warren Averett and the AAA:

> Trey,
> The American Arbitration Association made its determination at this stage that the attached employment fee schedule will apply. Is Warren Averett refusing to pay the arbitration fee?
>
> It is our position that their determination is appropriate, in keeping with their rules and regulations, and consistent with applicable law.
>
> Best Regards,
>
> Susan

(C. 174-177.)

On April 9, 2019, the AAA wrote to counsel for the parties:

> Good Afternoon,
>
> Any dispute regarding filing fee allocation should be raised to the arbitrator for a determination once the full filing requirements, including fee, are satisfied.
>
> Thank you

(C. 315-318.)

On April 16, 2019, counsel for Warren Averett wrote to counsel for Fagan, copying the AAA:

> Susan, apologies for the delayed response. I was out of town all of last week. Warren Averett is asking that the parties' contract be enforced as written. The contract provides the parties will equally share the mediation costs. It also says it will be conducted pursuant to the AAA Commercial Rules, which nowhere include the application of an employment dispute fee schedule. The agreement does not state the arbitration has to be conducted by the AAA (only that the AAA Commercial Rules be applied). We would be agreeable to a different forum than AAA that will enforce the terms of the parties' arbitration agreement.
>
> If there is law you believe applies which supports a departure from the parties' agreement, I will certainly review it.
>
> Thanks,
> Trey

(C. 174-177.)

On April 18, 2019, the AAA wrote, in pertinent part, in a letter attached to an e-mail to counsel for the parties:

> The Respondent has failed to submit the previously requested filing fee; accordingly, we have

> administratively closed our file in this matter. Any filing fees received from the Claimant will be refunded under separate cover.

(C. 319-321.)

IV. The Litigation.

On April 30, 2019, Fagan filed her Complaint, alleging breach of contract, unjust enrichment/restitution, and oppression/squeeze out against Warren Averett, misrepresentation and fraudulent suppression against Warren Averett and Harry, and breach of fiduciary duty against Harry. (C. 12-25.)

On June 5, 2019, Defendant Warren Averett filed Warren Averett's Motion to Compel Arbitration, seeking an order to compel arbitration before "an arbitrator that will enforce the cost-splitting terms of the parties' arbitration agreement." (C. 99-113.) Warren Averett and Defendant Harry also filed Motions to Dismiss based on the statute of limitations and made additional arguments related to the unjust enrichment claims and the oppression claims. (C. 33-78; 80-97.)

Following Fagan's Unopposed Motion to Continue the July 11th Hearing (C. 186-188) and Fagan's Unopposed Motion to Extend the July 8th Response Deadline (C. 192-194), Fagan

filed her response to Warren Averett's Motion to Compel Arbitration on July 31, 2019. (C. 211-321.)

On July 31, 2019, Fagan filed her First Amended Complaint. (C. 196-210.) On August 8, 2019, Harry filed her motion to dismiss certain claims made in the First Amended Complaint. (C. 324-374.) On August 26, 2019, Warren Averett filed its motion to dismiss certain claims made in the First Amended Complaint. (C. 376-383.) On August 27, 2019, Fagan filed her Response in Opposition to Defendant's Motions to Dismiss. (C. 386-407.)

On August 29, 2019, the trial court held a hearing on the pending motions. (R. 1-78.)

On October 3, 2019, the trial court entered an order without an opinion, simply granting Defendant Warren Averett's Motion to Compel, granting Defendants' Motions to Dismiss as to the oppression claims, and denying Defendants' Motions to Dismiss as to all other claims. (C. 444.)

On October 31, 2019, Fagan timely filed her Motion to Alter, Amend or Vacate the Portion of the Court's October 3, 2019 Order Granting Defendant's Motion to Compel Arbitration ("Motion to Alter, Amend, or Vacate"). (C. 449-478.) On December 5, 2019, Warren Averett filed its Response in

Opposition to Plaintiff's Motion to Alter, Amend, or Vacate the Court's Order Compelling the Case to Arbitration. (C. 482-510.) On December 10, 2019, the trial court denied Fagan's Motion to Alter, Amend or Vacate.(C. 511.)

On January 2, 2020, within 42 days of the trial court's December 10, 2019 order, Fagan timely appealed to the Alabama Supreme Court. (C. 512-519.)

STATEMENT OF THE STANDARD OF REVIEW

In *Elizabeth Homes, L.L.C. v. Cato*, 968 So.2d 1,3 (Ala 2007), this Court provided the following standard of review on appeals of a trial court's ruling on a motion to compel arbitration:

> "'"[T]he standard of review of a trial court's ruling on a motion to compel arbitration at the instance of either party is a de novo determination of whether the trial judge erred on a factual or legal issue to the substantial prejudice of the party seeking review." *Ex parte Roberson*, 749 So.2d 441, 446 (Ala. 1999). Furthermore:
>
> "'"A motion to compel arbitration is analogous to a motion for summary judgment. *TranSouth Fin. Corp. v. Bell*, 739 So.2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. *Id.* 'After a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the

> dispute in question."'
>
> "'*Fleetwood Enters., Inc. v. Bruno*, 784 So.2d 277, 280 (Ala. 2000) (quoting *Jim Burke Auto., Inc. v. Beavers*, 674 So.2d 1260, 1265 n. 1 (Ala. 1995) (emphasis omitted.)'

(citing *Vann v. First Cmty. Credit Corp.*, 834 So.2d 751, 752-53 (Ala. 2002).)

SUMMARY OF THE ARGUMENT

In refusing to pay the filing fees and participate in the arbitration proceeding Fagan filed with the AAA, Warren Averett materially breached the Employment Contract as to the arbitration provision and is in default under 9 U.S.C. § 3. Thus, Warren Averett is precluded from enforcing the arbitration provision. By failing to participate in the AAA arbitration initiated by Fagan, Warren Averett has also waived its right to arbitrate the matter. Moreover, the employment contract, drafted by Warren Averett, requires arbitration governed by the AAA's Commercial Rules, which clearly state that an agreement to arbitrate under the Commercial Rules invokes the authority of the AAA. The AAA has closed its file on this matter due to the noncompliance of Warren Averett, arbitrating this matter in a different arbitral forum is not in compliance with the employment contract between Fagan and Warren Averett, and this Court cannot compel Fagan to arbitrate this matter in a different arbitral forum. *See Northcom, Ltd v. James*, 848 So.2d 242, 247-48 (Ala. 2002); *see also McDonald v. H & S Homes,* LLC, 822 So.2d 385 (Ala. 2001). Moreover, is prejudicial to Fagan for the Warren Averett to be allowed to engage in forum-

shopping. For these reasons, the trial court erred in granting Warren Averett's Motion to Compel Arbitration.

In addition, the arbitration provision in the employment contract is unconscionable and the arbitration agreement is invalid based on the effective vindication exception to the Federal Arbitration Act.

The trial court also placed the entire case on the administrative docket but Plaintiff's claims against Defendant April Harry are still pending in circuit court. With Plaintiff being compelled to arbitration as to her claims against Warren Averett, she is forced to try her claims against Warren Averett in arbitration and her claims against April Harry in circuit court so as to avoid any potential statute of limitations issues with her claims against April Harry. Such a result is inefficient, duplicative, and cost-prohibitive.

For these reasons, Fagan respectfully requests this Court reverse the portion of the trial court's October 3, 2019 Order granting Warren Averett's Motion to Compel Arbitration, and direct the trial court to lift the stay on Plaintiff's claims against both Defendants.

ARGUMENT

I. The issues of default, waiver, non-substitution of the arbitral forum, unconscionability, and the effective vindication exception were properly before the trial court.

As a threshold matter, the issues raised by Fagan of default, waiver, non-substitution of the arbitral forum, unconscionability, and the effective vindication exception were properly before the trial court for determination. This court specifically noted in *Dean Witter Reynolds Inc. v. McDonald*, 758 So.2d 539, n. 4 (Ala. 1999) that ""default" in the sense in which that term is used in § 3 of the FAA . . . is a matter for the court to decide." *See also Hernandez v. Acosta Tractors Inc.*, 898 F.3d 1301, 1305 (11th Cir. 2018) ("Once [the employer] defaulted in the arbitration [by failing to pay the arbitration fees], the District Court would have been within its power to find that [the employer] could no longer require [the employee] to proceed in the arbitration."); *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197, 1201 (9th Cir. 2003) ("Because Aden is in default, and the FAA no longer permits a stay of the court proceedings in favor of arbitration, the FAA commensurately does not require the district court to order the parties to return to arbitration.").

In *Ocwen Loan Servicing, LLC v. Washington*, 939 So.2d 6, 14 (Ala. 2006) this Court held that the issue of waiver is an issue for the court and not an arbitrator. *Id.* ("[T]he issue whether a party has waived the right to arbitration by its conduct during litigation is a question for the court and not the arbitrator"). While this Court also held in *Anderton v. The Practice-Monroeville, P.C.*, 164 So.3d 1094, 1098 (Ala. 2014) that the incorporation into the arbitration provision of the commercial arbitration rules of the AAA constituted clear and unmistakable evidence of the parties' intent to submit issues of arbitrability to the arbitrator, that holding is not applicable to the case at bar because Warren Averett refused to proceed with the AAA arbitration filed by Fagan on February 28, 2019 and, thus, was in default pursuant to Section 3 of the FAA. *See Pre-Paid Legal Services, Inc. v. Cahill*, 786 F.3d 1287, 1294 (holding "a party's failure to pay its share of arbitration fees breaches the arbitration agreement and precludes any subsequent attempt by that party to enforce the agreement."). Due to the fact that Warren Averett has breached the Employment Contract, it can no longer argue that claims of waiver **are still governed by** the AAA Commercial Rules and must be submitted to an arbitrator.

Moreover, Warren Averett had its opportunity to submit these issues to the arbitrator for a determination in the arbitration proceeding initiated by Fagan but it unequivocally and undisputedly refused participate in the arbitration. Warren Averett cannot have another bite at the apple by forcing Fagan to file yet another arbitration proceeding.

In addition, the First Circuit in *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 3 (1st Cir. 2005), considered whether the appellant had waived its right to arbitrate due to inconsistent activity in another litigation forum. The court analyzed this waiver issue under Section 3 of the FAA because "default" in Section 3 includes "waiver." *Id.* at 13. Citing Section 3's default language, the First Circuit found, "[t]his language would seem to place a statutory command on courts, in cases where a stay is sought, to decide the waiver issue themselves" and further noted in a footnote, "[t]he "default" language in Section 3 of the FAA . . . perhaps gives courts a duty, which cannot be shifted by contract between the parties, to determine whether waiver has occurred." *Id.* at 13, 14 n.10.

Because Warren Averett has breached the Employment Contract and the commercial rules of the AAA no longer apply, the issues of non-substitution of the arbitral forum, unconscionability, and the effective vindication exception are also issues to be determined by the trial court. Warren Averett did not give Fagan the option to address these issues before the arbitrator because it refused to pay the filing fee and participate in the arbitration. In addition, courts have routinely considered claims of unconscionability and the effective vindication exception. *See also Ex parte Thicklin*, 824 So.2d 723, 732 (Ala. 2002) (hearing claims of unconscionability and finding arbitration provision denying punitive damages was unconscionable); *Northcom, Ltd. v. James*, 848 So.2d 242, 246 (Ala. 2002) (finding the trial court erred when it ordered the plaintiffs to appoint an arbitrator); *Rollins, Inc. v. Foster*, 991 F.Supp. 1426 (M.D. Ala. 1998) (noting that the court had the power to hear claims of unconscionability as to the arbitration clause itself); *FAA. Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310, 186 L.Ed.2d 417 (2013) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, FN 19 (1985) (expressing a willingness to invalidate, on "public policy"

grounds, arbitration agreements that "operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies.")).[3]

II. The trial court erred in failing to find that Warren Averett is in default under 9 U.S.C. § 3 and materially breached its employment contract with Fagan when it refused to pay its filing fees and participate in the arbitration initiated by Fagan in the contractually agreed upon arbitral forum, the AAA.

It is undisputed that Warren Averett refused to pay its portion of the AAA filing fees and participate in the AAA arbitration. This refusal was a material breach of the Employment Contract. Substantial case law supports the finding that Warren Averett is now precluded from enforcing the very arbitration provision it breached and Fagan properly brings this action in Jefferson County Circuit Court. *See Hernandez v. Acosta Tractors Inc.*, 898 F.3d 1301, 1305 (11th Cir. 2018) ("Once [the employer] defaulted in the arbitration [by failing to pay the arbitration fees], the District Court

[3] This instant matter is distinguishable from the recent Alabama Supreme Court case *Blanks v. TDS Telecommunications LLC*, Case No. 1180311 (September 6, 2019 Ala. 2019) because, in that matter, the plaintiff, who filed the arbitration demand, was also the party seeking to compel arbitration when the defendant refused to comply with the arbitration provision and the plaintiff was not raising issues of default, waiver, unconscionability, and non-substitution of arbitral forum.

would have been within its power to find that [the employer] could no longer require [the employee] to proceed in the arbitration."); *Garcia v. Mason Contract Prods., LLC*, No. 08-23103-CIV, 2010 WL 3259922, at *3 (S.D. Fla. Aug. 18, 2010) (unpublished) (holding "[b]y failing to timely pay its share of the arbitration fee, Defendant materially breached its obligations, thereby 'scuttling' [its] opportunity" to insist on arbitration); *Roach v. BM Motoring LLC,* 228 N.J. 163 (N.J. March 9, 2017) ("Here, plaintiffs satisfied their obligations under the DRA, and defendants' non-payment of filing and arbitration fees amounted to a material breach of the agreement. Defendants are therefore precluded from enforcing the arbitration provision, and the case will proceed in the courts."); *Pre-Paid Legal Services, Inc. v. Cahill*, 786 F. 3d at 1287 (holding that a failure to pay arbitration fees qualified as a default under Section 3 of the FAA, and allowing the dispute to proceed in court); *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1010 (9th Cir. 2005) (holding that "the district court acted properly in denying Dillard's motion to compel arbitration" when "Dillard's breached its agreement with [the plaintiff, a former employee,] by refusing to participate in the arbitration proceedings [the plaintiff]

initiated"); *Sink v. Aden Enterprises, Inc.*, 352 F.3d 1197, 1201 (9th Cir. 2003) ("[F]ailure to pay required costs of arbitration was a material breach of its obligations in connection with the arbitration."); *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d 828, 838 (Miss. 2003) ("By failing to pay its half of the required arbitration fees under the broiler contract, Sanderson Farms has breached the arbitration provision and therefore waived its right to compel its protections. The circuit court did not err in denying Sanderson Farms' motion to dismiss and its motion to reconsider.")

Warren Averett cited to the FAA in support of its arguments that the trial court should dismiss this action and/or stay the court proceedings, pending arbitration. However, Section 3 of the FAA mandates a stay of court proceedings pending arbitration, **with one key exception:**

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, ***providing the applicant for the stay is not in default in proceeding with such arbitration.***

9 U.S.C. § 3 (emphasis added).

The Court in *Garcia v. Mason Contract Prods., LLC*, No. 08-23103-CIV, 2010 WL 3259922, (S.D. Fla. Aug. 18, 2010) provides a well-reasoned explanation of the application of Section 3 in a default:

> . . . Federal law favors the enforcement of arbitration agreements, and allows for a stay of federal court proceedings, but only if the party seeking arbitration has not itself "defaulted." The plain language of this statute, like all other statutes that are similarly clear and unambiguous, governs. We cannot change it simply to benefit our docket by closing this case or to benefit the Defendant by forcing the Plaintiff, once again, to jump through additional hoops to obtain relief.
>
> We are mindful, as well, that the federal interest here is not arbitration per se. Instead, as Justice Rehnquist explained in the Court's opinion in Volt, "there is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability,

according to their terms, of private agreements to arbitrate." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 475 (1989). As a result, "§ 4 of the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that 'arbitration proceed in the manner provided for in [the parties'] agreement.' 9 U.S.C. § 4." Id. at 474-75 (emphasis in original).

Applying that interest here, the parties' arbitration agreement provided explicitly for "binding arbitration in New York, New York in accordance with the arbitration rules of American Arbitration Association applicable to employment arbitration . . . as then in effect." [D.E. 63, Exh. A]. This is the contractual provision that the FAA requires the Court to enforce absent a default. The Court cannot do so any longer because the designated arbitration body, the AAA, has closed and will not reopen its case. The parties' agreed-upon

> contractual dispute resolution mechanism, hence, is no longer possible. Plaintiff did not agree or assent to a AAA-like procedure; he agreed to a AAA-enforced procedure. Defendant's failure to comply with the contractual rules agreed to by the parties clearly constitutes a "default" as that term is used in § 3 of the FAA.
>
> **Moreover, the record shows that this default was not simply a bureaucratic error; it was instead an intentional and/or reckless act because the AAA provided repeated notices to the Defendant that timely payment of the fee had not been received.** Not taking that seriously, Defendant did not try and cure that default until after the AAA closed its case. By that point, however, the AAA – exercising the rules that these parties agreed to abide by – refused to reopen the case. There is no other description the Court can find for this self-created situation other than "default."

Garcia, 2010 WL 3259922 at *6-7 (emphasis added).

Likewise, in the instant matter, Warren Averett's failure to pay the filing fees was not simply a bureaucratic error, it was an intentional act after the AAA provided repeated notices to Warren Averett that the timely payment of the fee had not been received. (*See* C. 172-177, 300-321.) Warren Averett clearly chose not to participate in the AAA arbitration. (*Id.*) By refusing to pay its portion of the arbitration fees to the point where the AAA closed its file, Warren Averett was in "default in proceeding with [the] arbitration." *See* 9 U.S.C. § 3. Thus, the trial court's order compelling arbitration following Warren Averett's default is due to be reversed. *See* 9 U.S.C. § 3; *Pre-Paid Legal Services, Inc.*, 786 F. 3d at 1294 ("Mr. Cahill breached the arbitration agreement by failing to pay his fees in accordance with AAA rules and was not entitled to maintain the stay under § 3"); *Rapaport v. Soffer*, No. 2:10-cv-00935-KJD-RJJ, 2011 WL 1827147, at *2 (D. Nev. May 12, 2011) (unpublished) (finding the defendant was in default under § 3 because the AAA "closed" or "terminated" the case because of his failure to pay fees); *Sanderson Farms, Inc. v. Gatlin*, 848 So.2d at 837-38 (finding the defendant refused to pay its one-half of the

costs pursuant to an arbitration agreement and that this constituted "default" under § 3).

III. The trial court erred in failing to find that Warren Averett has waived its right to compel arbitration when it refused to pay the filing fees and participate in the arbitration initiated by Fagan with the AAA.

Not only did Warren Averett materially breach the Employment Contract, it also waived its right to participate in the arbitration process when it refused to participate in the AAA proceeding. The Alabama Supreme Court has provided guidance regarding waiver of a right to arbitrate a dispute:

> It is well settled under Alabama law that a party may waive its right to arbitrate a dispute if it substantially invokes the litigation process and thereby substantially prejudices the party opposing arbitration. Whether a party's participation in an action amounts to an enforceable waiver of its right to arbitrate depends on whether the participation bespeaks an intention to abandon the right in favor of the judicial process, and, if so, whether the opposing party would be prejudiced by a subsequent order requiring it to submit to arbitration. No rigid rule exists for determining what constitutes a waiver of the right to arbitrate; the determination as to whether there has been a waiver must, instead, be based on the particular facts of each case.

Companion Life Ins. Co. v. Whitesell Mfg., Inc., 670 So.2d 897, 899 (Ala. 1995).[4]

[4] This case and the other Alabama cases on waiver have been concerning whether a party has waived its right to arbitrate after litigation has been filed rather than whether

In the instant matter, Warren Averett abandoned the arbitration process when it chose not to proceed with the AAA arbitration and let the AAA arbitrator decide the arbitration fee allocation issue. (*See* C. 172-177, 300-321.) Due to Warren Averett's refusal to pay the AAA filing fees, the AAA closed the file. (C. 321.) In failing to participate in the arbitration proceeding initiated by Fagan, Warren Averett waived its right to now pursue arbitration.

Warren Averett's failure to cooperate with the arbitration provision also has prejudiced Fagan with the delay in having her claims heard. Such delay may result in a loss of potential evidence and witnesses due to the passage of time. In addition, Fagan has incurred additional costs and attorney's fees as a result of Warren Averett's refusal to participate in the AAA proceeding and subsequent Motion to Compel Arbitration. (C. 239-240). *See Menorah Ins. Co. v. INX Reinsurance* Corp., 72 F.3d 218, 222 (1st Cir.1995) (observing in context of international, non-FAA arbitration case that "[a]rbitration clauses were not meant to be another weapon in

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a party has waived its right to arbitrate due to a failure to participate in arbitration.

the arsenal for imposing delay and costs in the dispute resolution process").

Furthermore, in the Defendants' Motions to Dismiss, both Defendant Warren Averett and Defendant April Harry relied on statute of limitations defenses that they claim expired in April 2019, just weeks before Fagan filed the instant matter in circuit court and months after her arbitration demand. (C. 324-335; 376-383.) Fagan is clearly being prejudiced by the trial court's order requiring her to submit to arbitration *again* after Warren Averett's clear waiver of its right to arbitrate this matter. *See Brown*, 430 F.3d at 1012-13 (finding, when the Defendant failed to pay the arbitration fees after Plaintiff initiated arbitration proceedings and Plaintiff then filed suit in circuit court, "we have no trouble concluding the delay and costs incurred by [the plaintiff] are prejudicial for the purpose of waiver analysis."); *see also Marie v. Allied Home Mortgage Corp.*, 402 F.3d at 3.

For these reasons, this Court should reverse the trial court's order compelling arbitration.

IV. The trial court erred in granting the motion to compel arbitration when Warren Averett refused to allow the AAA Arbitrator to decide the cost allocation.

When filing an action against a defendant, Plaintiffs choose the forum in which to file their complaints. Provided that the forum meets the jurisdictional and procedural requirements, the complaint is properly filed and the defendant is required to respond. *See Van Dusen v. Barrack*, 376 U.S. 612, 635, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) ("Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the "plaintiff's venue privilege.") In the instant matter, Fagan filed her complaint with the AAA, a nationally recognized arbitral forum and the one which was agreed to in the Employment Contract. Rather than responding to the matter as required under the AAA rules, Warren Averett refused to pay its filing fee. (C. 319-321.) Instead, Warren Averett took issue with the AAA's initial determination that, after reviewing the arbitration demand and the accompanying Employment Contract including the arbitration provision[5],

[5] The arbitration provision in the Employment Contract is internally inconsistent and thus ambiguous regarding the costs, fees, and remedies. On the one hand, the Arbitration

Agreement expressly states that each party shall bear their own costs, that the parties should share equally the fees and expenses of the arbitrator(s) and that damages may be limited to compensatory damages by the Agreement. (*See* C. 162.) On the other hand, the Arbitration Agreement incorporates the AAA's Commercial Rules and the applicable substantive law at issue. (*See id.*) AAA's Commercial Rules would appear to authorize the arbitrator, should Fagan prevail, to include fees in his or her award and Fagan's tort claims under Alabama law would allow for punitive damages, despite language in the arbitration contract to the contrary. *See id.*

Rule 53 of the AAA Commercial Rules, entitled "Administrative Fees," states:

> As a non-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, **subject to final apportionment by the arbitrator in the award.** The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

AAA, Commercial Arbitration Rules, Rule 53 (2019) (emphasis added) (C. 273.) In turn, Rule 54, entitled " Expenses," provides:

> The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise **or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.**

AAA, Commercial Arbitration Rules, Rule 54 (2019) (C. 274-275) (emphasis added). *See Nesbitt v. FCNH, Inc.*, 811 F.3d 371, (10th Cir. 2016) (noting similar ambiguities in an

that the arbitration should be administered by the Commercial Arbitration Rules *and the Employment/Workplace Fee Schedule*. (C. 174-177).[6]

The Employment/Workplace Fee Schedule provides that the employer should pay the costs of the arbitration. (C. 291-294.) When Warren Averett raised the issue to the AAA of the costs of arbitration being split between the parties, the AAA reaffirmed its initial determination that both the Commercial Arbitration Rules and the Employment/Workplace Fee Scheduled would still apply:

> The outcome of our preliminary administrative review, which is subject to review by the arbitrator, is that this dispute will be administered in accordance with the American Arbitration Association ("AAA") Commercial Arbitration Rules and Employment/Workplace Fee Schedule.

(C. 302-307)(emphasis added). When Warren Averett's counsel later asked, "with whom do we dispute AAA's decision as to the fee split? We do not want to pay more than our ½ of fees

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employment arbitration agreement, and stating, "it is unlikely that an employee in [the plaintiff's] position, faced with the mere possibility of being reimbursed for arbitrator fees in the future, would risk advancing those fees in order to access the arbitral forum" and finding the arbitration provision unenforceable).

[6] The arbitration provision in the employment contract does not reference a fee schedule. (*See* C. 162.)

as contractually agreed without having that dispute decided first?", the American Arbitration Association replied that, "**[a]ny dispute regarding filing fee allocation should be raised to the arbitrator for a determination** once the full filing requirements, including fee, are satisfied." (C. 311-318) (emphasis added).

Likewise, Rule 4 (c) of the AAA Commercial Arbitration Rules provides: "It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. **Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.**" (C. 255); AAA, Commercial Arbitration Rules, Rule 4(c) (2019) (emphasis added); *see also Federal Ins. Co. v. Reedstrom*, 197 So.3d 971, 976 (Ala. 2015) (noting that when the AAA commercial rules are incorporated into an arbitration agreement, the AAA arbitrator is to decide objections with respect to the existence, scope or validity of an arbitration agreement); John *Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 556-59, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) (issue of whether party failed to abide by procedural prerequisites to arbitration,

including requirement that notice of any grievance be given within four weeks, was for arbitrator and not court).

Thus, as the AAA explained in its e-mails to counsel and in accordance with its Commercial Rules, Warren Averett would have had an opportunity to submit its complaint about the fee allocation to the arbitrator and the arbitrator would have resolved the fee allocation dispute.

Warren Averett apparently did not like the response from the AAA and wanted a predetermined outcome as to the enforceability and meaning of that particular provision of the Employment Agreement, taken out of context and without argument of the parties, before it would agree to participate. Warren Averett opted to *not wait for the arbitrator* to determine the issue and ultimately refused to participate in the AAA proceeding. (C. 175.)

Following the response from the AAA that the arbitrator would determine the issue, Warren Averett suggested to plaintiff's counsel, almost seven weeks after Plaintiff filed her arbitration demand, that the matter be arbitrated **in a different forum**: "We would be agreeable to a different forum than AAA that will enforce the terms of the parties' arbitration agreement." (C. 185.) Warren Averett clearly was

engaging in forum shopping. *See Hernandez*, 898 F.3d at 1306 ("A calculated choice to abandon arbitration after getting adverse rulings from the arbitrator certainly looks like forum shopping.")

Importantly, it was the Employment Contract *drafted by Warren Averett* that provided that "all Disputes *shall be* settled by arbitration in Birmingham, Alabama in accordance with the Commercial Arbitration Rules *of the American Arbitration Association*." (*See* C. 162) (emphasis added). Thus, an insistence that the matter be arbitrated in a different forum was not in compliance with the Employment Contract and cannot be enforced against Fagan. *See id.; see also Roach*, 155 A.3d 985 (N.J. 2017) ("By requiring the arbitration be conducted pursuant to the AAA's rules, defendants reasonably should have expected that customers would file claims directly with the AAA.") It is reversable error for Fagan to be compelled to seek a different arbitral forum.

By refusing to participate in the AAA arbitration and allow the AAA arbitrator to determine any fee allocation issue, Warren Averett is in default. Because Warren Averett is in default, the part of trial court's October 3, 2019 Order

granting Warren Averett's motion to compel should be reversed. *See Brown*, 430 F.3d at 1006 ("Dillard's cannot compel Brown to honor an arbitration agreement of which it is itself in material breach.") As the New Jersey Supreme Court persuasively noted in *Roach v. BM Motoring LLC,* 228 N.J. 163 (N.J. March 9, 2017), "We share the concerns of the Ninth Circuit as expressed in *Brown* [*v. Dillard's, Inc.*, 430 F.3d 1004 (9th Cir. 2005)] that, without a finding of material breach, the result would be a 'perverse incentive scheme'—a company could ignore an arbitration demand and, if the claimant did not abandon the claim, later compel arbitration." 155 A.3d at 995 (citing *Brown*, 430 F.3d at 1012).

V. The trial court erred in granting Warren Averett's Motion to Compel Arbitration when Warren Averett's Motion to Compel in effect sought arbitration in a different forum than the AAA, contrary to Alabama case precedent that provides that a court cannot compel a party to arbitrate a matter in a different arbitral forum than the contractually agreed upon forum.

Warren Averett requested in its Motion to Compel Arbitration that, "the Court direct the parties to submit such claims to an arbitrator that will enforce the cost-splitting terms of the parties' arbitration agreement." (C. 111.) Warren Averett was clearly requesting a different forum

than the AAA, as it had in its correspondence with Fagan's counsel at the AAA stage. (C. 185.) The trial court simply granted Warren Averett's motion to compel without an opinion, thereby granting Warren Averett's requested relief. (C. 447.) Requiring Fagan to arbitrate in a different forum is reversable error. "Because the contract between [Warren Averett] and [Fagan] refers to the AAA's rules governing the arbitration of disputes, those rules are made applicable to this case by the contract, and they govern this dispute, including the procedures for initiating the arbitration proceedings." *See Northcom, Ltd v. James*, 848 So.2d 242, 246 (Ala. 2002). The Commercial Arbitration Rules of the AAA, which govern the transaction in this case, provide:

> R-2 AAA and Delegation of Duties
> When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

(C. 255.)

Moreover, they specifically provide that the arbitration demand is to be filed ***with the AAA***:

> R-4. Filing Requirements
> (a) Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing **with the AAA** a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.
>
> (b) Arbitration pursuant to a court order shall be initiated by the initiating party filing **with the AAA** a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.

(*Id.*) Fagan filed her demand for arbitration with the AAA, paid the administrative filing fee, and attached a copy of the arbitration agreement. (C. 143-170, 203.)

In *Northcom, Ltd v. James*, 848 So.2d 242, 247-48 (Ala. 2002), the Alabama Supreme Court found that the trial court erred when it ordered the plaintiffs to appoint an arbitrator when the arbitration was to be governed by the AAA Rules. Likewise, this Court cannot compel Fagan to arbitrate this matter in a different arbitral forum. *See also McDonald v. H & S Homes,* LLC, 822 So.2d 385 (Ala. 2001) ("Because the trial court's . . . order directs the parties to select an arbitrator in a manner that is inconsistent with the terms of

the parties' agreement to arbitrate, we reverse that order."); *Southern Energy Homes Retail Corp. v.* McCool, 814 So.2d 845 (Ala. 2001) (trial court was directed to vacate its order because it failed to compel arbitration in a manner consistent with the terms of the agreement between the parties); *Luckie v. Smith Barney, Harris Upham & Co.*, 999 F.2d 509 (11th Cir. 1993) (per curiam) (finding "the appellants have agreed to arbitrate their disputes with Smith Barney "before" and/or 'in accordance with the rules of' the NYSE, AMEX or NASD. Appellants, therefore, cannot compel Smith Barney to submit to arbitration before the AAA."); *Flagg v. First Premier Bank*, 644 Fed. Appx. 893, 2016 WL 703063, at *4 (11th Cir. 2016) (unpublished opinion) (holding that "[b]ecause the choice of the NAF as the arbitral forum was an integral part of the agreement to arbitrate, we conclude that the district court properly denied First Premier's motion to compel arbitration and appoint a substitute for NAF"); *Moss v. First Premier Bank*, 835 F.3d 260 (2d Cir. 2016) (affirmed the district court's decision to vacate an order compelling arbitration after the arbitral body chosen by the parties in their arbitration agreement refused to accept the arbitration); *Ranzy v. Tijerina*, 393 Fed. Appx. 174, 176 (5th

Cir. 2010) (unpublished opinion) (finding the district court properly denied motion to compel arbitration given NAF's unavailability); *In re Salomon Inc. Shareholder's Derivative Litig.*, 68 F.3d 554 (2d Cir. 1995) (finding the judge properly declined the defendant's invitation to appoint substitute arbitrators and stating, "Although the federal policy favoring arbitration obliges us to resolve any doubts in favor of arbitration, we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate disputes only before the NYSE and the NYSE, in turn, exercising its discretion under its Constitution, has refused the use of its facilities to arbitrate the dispute in question.").

Plaintiff did not agree to an AAA-like procedure; she agreed to a AAA enforced procedure and the AAA has since closed its filed. *See Garcia*, 2010 WL 3259922, at *7 ("the AAA, has closed and will not reopen its case. The parties' agreed-upon contractual dispute resolution mechanism, hence, is no longer possible. Plaintiff did not agree or assent to a AAA-like procedure; he agreed to a AAA-enforced procedure. Defendant's failure to comply with the contractual rules agreed to by the parties clearly constitutes a "default" as

that term is used in § 3 of the FAA."); *see also Roach*, 155 A.3d at 995 ("A failure to advance required fees that results in the dismissal of the arbitration claim deprives a party of the benefit of the agreement. Therefore, the failure to advance fees "got to the essence" of the DRA [arbitration contract] and amounts to a material breach.")

Warren Averett cannot compel Fagan to arbitrate in a different arbitral forum than the contractually agreed upon forum. Accordingly, the part of the trial court's October 2019 order granting Warren Averett's Motion to Compel Arbitration is due to be reversed.

VI. The trial court erred in failing to find that the arbitration provision in the employment contract between Fagan and Warren Averett is substantively and procedurally unconscionable.

Another reason this case is appropriately before this Court is that the arbitration provision in the Employment Contract was procedurally and substantively unconscionable. "General contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate an arbitration agreement without contravening the FAA." *Leeman v. Cook's Pest Control, Inc.*, 902 So.2d 641, 644 (Ala. 2004) (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995)).

"Unconscionability is an affirmative defense, *Green Tree Fin. Corp. v. Wampler*, 749 So.2d 409, 415 (Ala. 1999), and the party asserting the defense bears the burden of proof. *Ex parte Napier*, 723 So.2d 49, 52-53 (Ala. 1998)." *Fleetwood Enters., Inc.*, 784 So.2d at 281. In *Layne v. Garner*, 612 So. 2d 404, 408 (Ala. 1992) the Alabama Supreme Court set out four factors it considered important in determining whether a contract was unconscionable:

> In addition to finding that one party was unsophisticated and/or uneducated, a court should ask (1) whether there was an absence of meaningful choice on one party's part, (2) whether the contractual terms are unreasonably favorable to one party, (3) whether there was unequal bargaining power among the parties, and (4) whether there were oppressive, one-sided, or patently unfair terms in the contract.

"To avoid an arbitration provision on the ground of unconscionability, the party objecting to arbitration must show both procedural and substantive unconscionability." *Blue Cross Blue Shield of Alabama v. Rigas*, 923 So.2d 1077, 1087 (Ala. 2005) (emphasis added).

A. The arbitration provision in the Employment Contract was procedurally unconscionable.

Procedural unconscionability "deals with procedural deficiencies in the contract formation process, such as deception or a refusal to bargain over contract terms, today

often analyzed in terms of whether the imposed-upon party had meaningful choice about whether and how to enter into the transaction." *Rigas*, 923 So.2d at 1087 (internal citations and quotations omitted).

1. Fagan had unequal bargaining power.

Fagan had unequal bargaining power and was told by General Counsel Monica Fischer that the agreement including the arbitration provision was the standard agreement provided to all members. (C. 204.) Fagan, as a condition of her employment, was required to arbitrate any dispute arising from the Employment Contract. (*See* C. 162.) Fagan even tried to negotiate certain terms of her Employment Contract, as shown by the copy of the Employment Contract she submitted to AAA with her arbitration demand. (*See* C. 143-170.) However, as shown by the Employment Contract attached to Warren Averett's Motion to Compel, Warren Averett ultimately did not accept any of Fagan's proposed changes to her Employment Contract. (*See* C. 114-142.) Such a refusal to accept Fagan's proposed changes underscores her unequal bargaining power and her lack of meaningful choice about whether and how to enter into the transaction.

2. Fagan was never provided a copy of the AAA Commercial Arbitration Rules and any applicable fee schedule.

Moreover, Fagan was never provided a copy of the AAA Commercial Arbitration rules and any applicable fee schedule. (C. 204.) Thus, Fagan was not properly informed and given notice of the high costs of arbitration.

B. The arbitration provision in the Employment Contract was substantively unconscionable.

Not only was the arbitration provision procedurally unconscionable, it was also substantively unconscionable:

> Substantive unconscionability:
>
> > relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party, such as terms that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction.

Ex parte Thicklin, 824 So.2d at 731 (emphasis omitted) (quoting *Ex parte Foster*, 758 So.2d 516, 520 n. 4 (Ala. 1999), quoting in turn 8 Richard A. Lord, Williston on Contracts § 18:10 (4th ed. 1998)). *See also Leeman*, 902 So.2d at 641; *Rigas*, 923 So.2d at 1087 (Ala. 2005).

1. The arbitration provision limits damages for Fagan and, thus, unfairly precludes Fagan from seeking relief that would otherwise be available in court.

The arbitration provision limits damages for Fagan to compensatory damages and, thus, unfairly precludes Fagan from seeking relief that would otherwise be available in court. (C. 204.) *See Ex parte Thicklin*, 824 So. 2d at 732 (finding arbitration provision denying punitive damages was unconscionable) (overruled on other grounds by *Patriot Mfg., Inc. v. Jackson*, 929 So.2d 997 (Ala. 2005); *Cavalier Mgf., Inc. v. Jackson*, 823 So. 2d 1237, 1246 (Ala. 2001) (overruled on other grounds by *Ex parte Thicklin*, 824 So. 2d at 732 (holding same); *Sloan Southern Homes, LLC v. McQueen*, 955 So.2d 401, 404 (Ala. 2006) (holding same); *see also Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that arbitration agreement which proscribed award of Title VII damages was unenforceable because it was fundamentally at odds with the purposes of Title VII). As the Alabama Supreme Court held in *Ex parte Thicklin*: "It violates public policy for a party to contract away its liability for punitive damages, regardless whether the provision doing so was intended to operate in an arbitral or a judicial forum. Thus, enforcement of this portion of the

arbitration agreement violates public policy, and its enforcement would be unconscionable." 824 So. 2d at 733.

2. The Employment Contract unfairly requires Fagan to arbitrate all disputes arising from the contract but allows Warren Averett to litigate any employment issues arising from the non-solicitation covenant and the confidentiality provision in the Employment Contract.

The claims that Warren Averett was most likely to bring against an employee related to the non-solicitation covenant and the confidentiality provision were exempt from arbitration under the employment agreement. Thus, the agreement failed to bind Warren Averett to arbitrate its own employment-related claims in any meaningful sense and the agreement was unreasonably favorable to Warren Averett.

3. The arbitration provision requires the parties to bear their respective costs in connection with the arbitration which places an undue financial burden on Fagan.

As noted above, the arbitration provision in the Employment Contract also requires the parties to bear their respective costs in connection with the arbitration and share equally the fees and expenses of any arbitrator and the costs of any facility used for the arbitration, which places an unfair and unduly burdensome financial burden on Fagan as a

former employee.[7] (*See* C. 114-142, 143-170, 237-240.) The arbitration provision further allows the Company, in its sole discretion, to require a panel of three independent arbitrators in the event that the amount at issue in the arbitration is over $200,000 (which it is), and still requires Fagan to pay half of the arbitration costs (thereby potentially tripling the costs of arbitration and further making such an arbitration cost-prohibitive for Fagan). (*See* C. 162.)

Fagan testified in an affidavit regarding the AAA fee schedule:

> If the AAA had made a different determination and if the Commercial Fee Schedule had applied (rather than the Employment Fee Schedule), and I used the Commercial Fee Schedule's Standard Fee Schedule, I would have had to pay the AAA $5500, rather than $300 as my initial filing fee and another filing fee prior to the first hearing of $6,825. Those fees, coupled with an arbitrator's fees of approximately $250-$400 an hour, and the legal fees I am paying my attorneys would be cost-prohibitive for me. For example, if the arbitrator spent 50 hours on the case and charged $350 an hour, I would have to pay at least $21,075.00 for the arbitration alone (including filing fees but not including my attorney's fees). I could not afford to proceed with such an action. It would be even more cost-prohibitive for me if Warren Averett required a

[7] Fagan was never given then opportunity to raise these issues with the AAA Arbitrator because Warren Averett refused to participate in the AAA arbitration.

> three-arbitrator panel. In the example used above, if all arbitrators charged $350 an hour and each arbitrator worked 50 hours on the case, I would have to pay $38,575 for my part of the costs of the arbitration (again including filing fees but not including my attorney's fees).

(C. 239; *see also* 244-290, 291-294.) Such a financial burden is incredibly and unduly burdensome for a former employee and would deter any employee from bringing litigation against their employer.

VII. The trial court erred in failing to find that the arbitration provision in the employment contract between Fagan and Warren Averett is invalid based on the Effective Vindication Exception to the Federal Arbitration Act.

Courts have recognized what is referred to as "[t]he 'effective vindication' 811 F.3d 377 exception" to the FAA. *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310, 186 L.Ed.2d 417 (2013). This exception "originated as dictum in *Mitsubishi Motors [Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)], where [the Supreme Court] expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies.'" *Id.* (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19 (emphasis added in *Am. Express*)). The U.S. Supreme Court recently acknowledged that this exception

"would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights," and "would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* at 2310-11. *See Cole v. Burns Int'l Sec. Serv., Inc.*, 105 F.3d 1465 (D.C. Cir. 1997) (Holding in response to the question "can an employer require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrators' fees?", "Because public law confers both substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated, we find that employees cannot be required to pay for the services of a "judge" in order to pursue their statutory rights."); *Nesbitt v. FCNH, Inc.*, 811 F.3d 371 (10th Cir. 2016) (holding plaintiff met her burden on the effective vindication issue and affirming the district court's finding that the application of the Commercial Rules and the Commercial fee schedule along with the condition that the plaintiff bear her own costs "would effectively preclude [her] from pursuing her claims."); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1233-35 (10th Cir. 1999) (noting regarding an employment arbitration agreement with a

cost-sharing provision, "Essentially, B-G Maintenance required Mr. Shankle to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights" and holding the arbitration agreement was "unenforceable under the Federal Arbitration Act".); *see also Morrison v. Circuity City Stores, Inc.*, 317 F.3d 646, 663 (6th Cir. 2003) (holding that arbitration is not an effective or adequate substitute for litigation where a cost allocation provision would deter a "substantial number of potential litigants from seeking to vindicate their statutory rights" and invalidating and severing a cost-sharing provision that obligated an employee earning $54,060 per year to pay $1,622 in arbitration costs.); *Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 463-64 (N.Y. 2010) (requiring employer to bear fees and costs of arbitration).

The arbitration provision in the Employment Contract required Fagan to agree to mandatory arbitration as a term of employment, but, with its cost sharing provision and damages limitations, failed to provide an accessible forum in which she could resolve her legal rights. (*See* C. 162.) As such, the arbitration agreement is invalid based on the effective

vindication exception to the FAA and this Court should reverse the trial court's order compelling arbitration.

VIII. The trial court erred in placing the entire case on the administrative docket when the claims against Defendant April Harry are still pending in circuit court.

In its October 3rd Order, the trial also placed the entire case on the administrative docket but Fagan's claims against Defendant April Harry are still pending in circuit court. More specifically, Defendant April Harry did not file a motion to compel arbitration. *See Terminix Int'l Co. Ltd. Partnership v. Jackson*, 669 So.2d 893 (Ala. 1995) (noting that litigation of nonarbitrable claims is not ordinarily due to be stayed pending arbitration of arbitrable claims.)

With Fagan being compelled to arbitration as to her claims against Warren Averett, she is forced to try her claims against Warren Averett in arbitration and her claims against April Harry in circuit court so as to avoid any potential statute of limitations issues with her claims against April Harry. Such a result is inefficient, duplicative, and cost-prohibitive. Such a result also is prejudicial to Fagan in light of Warren Averett's default with the arbitration process.

CONCLUSION

The trial court erroneously ordered this case back to arbitration and impliedly ordered a different arbitral forum. Alabama law clearly provides that any arbitration must be conducted in the agreed-upon forum. The agreed-upon forum, the AAA, has already closed its file in this matter due to Warren Averett's refusal to pay the filing fee and refusal to participate in the arbitration proceeding initiated by Fagan.

Warren Averett breached the Employment Contract it had with Fagan when it failed to pay the AAA arbitration filing fees and declined to arbitrate the matter with the AAA. By refusing to participate in the AAA proceeding and to allow the AAA arbitrator to decide any fee allocation issue, Warren Averett defaulted and waived its right to the arbitration process.

Moreover, the arbitration provision in the Employment Contract is procedurally and substantively unconscionable. In addition, the arbitration agreement is invalid based on the effective vindication exception to the FAA.

The trial court has compelled arbitration as to Fagan's claims against Warren Averett and placed the entire case on the administrative docket, but the claims against Defendant

April Harry are still pending in Circuit Court. In light of Warren Averett's default with the arbitration process and, in the spirit of fairness, efficiency, and judicial economy, Fagan's claims against both defendants should be litigated before the trial court.

For these and all the other reasons as established in this brief, the order granting Warren Averett's Motion to Compel Arbitration should be reversed and this case remanded to the trial court where Fagan's claims can proceed to a trial by a jury.

Respectfully submitted this 5th day of March 2020.

/s/ Susan N. Han
One of the Counsel for Appellant

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been electronically filed via the Alabama Supreme Court's electronic filing system and served upon the following by e-mail under Rules 57(h)(5) and 25(c)(1)(D), Ala. R. App. P., on this 5th day of March, 2020, and by regular U.S. Mail, properly addressed and postage prepaid under Rule 25(c)(1)(B), Ala. R. App. P., on the 6th day of March:

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