DOCKET NO. _____

IN THE SUPREME COURT OF ALABAMA

WARREN AVERETT COMPANIES, LLC

Petitioner.

(GERRIANN FAGAN,
Plaintiff,

v.

WARREN AVERETT COMPANIES, LLC and APRIL HARRY,
Defendants.)

On Appeal from the Circuit Court of Jefferson County, Alabama
Case No.: CV-2019-901956

PETITION FOR WRIT OF MANDAMUS

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested as this case involves straightforward interpretation of the plain terms of the agreement between the parties to waive their right to a jury trial. The parties agreed to waive their right to a jury trial in the event that the arbitration clause is determined to be unenforceable for any reason by a court of law. After this Court held the arbitration clause to be unenforceable, the jury waiver provision became applicable and prohibits Plaintiff from obtaining a jury trial. This Court has established clear guidelines regarding the enforceability and applicability of jury trial waivers in situations such as this one. *See, e.g., Ex parte BancorpSouth Bank*, 109 So. 3d 163 (Ala. 2012); *Ex parte AIG Baker Orange Beach Wharf, LLC*, 49 So. 3d 1198 (Ala. 2010). Therefore, Warren Averett does not believe oral argument is necessary. However, should the Court deem oral argument helpful to the resolution of this issue, Warren Averett is ready and willing to present the same.

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STATEMENT OF THE CASE

The central issue to this Petition is whether a valid jury waiver agreement should be enforced between an experienced business professional and an accounting firm.

Plaintiff Gerriann Fagan ("Fagan") was the owner of a human resources consulting firm. She contracted with Warren Averett to wind down her operations and build a human resources consulting practice with Warren Averett. Fagan entered into a Personal Services Agreement ("PSA") with Warren Averett that detailed her compensation and included both an arbitration clause and a separate waiver of the right to trial by jury. Ex. 1. A dispute arose concerning Fagan's compensation under her PSA, which resulted in Fagan filing an arbitration demand with AAA. *See* Ex. 4 at ¶34. The arbitration fees were not charged to parties as agreed to in the PSA, so Warren Averett objected to paying more than what it believed the parties agreed to in the arbitration provision, resulting in AAA closing its file. *Id.*

Fagan then filed a lawsuit in Jefferson County Circuit Court. Ex. 2. Warren Averett moved to compel arbitration pursuant to the PSA, *see* Ex. 3, which the Circuit Court granted. Ex. 5. Fagan appealed that

decision to this Court, which reversed the order compelling arbitration after finding that Warren Averett's failure to pay the fees of the initial arbitration constituted a "default" of the arbitration provision, thereby holding that the arbitration provision was unenforceable in this case. *See* Ex. 8, *Fagan v. Warren Averett Companies, LLC*, No. 1190285, 2020 WL 6252771, at *6 n.3 (Ala. Oct. 23, 2020) ("some courts have viewed a party's failure to pay its share of the arbitration fees as a breach of the arbitration agreement, which precludes any subsequent attempt by that party to enforce that agreement") (citations omitted).

On remand, Warren Averett filed a Motion to Strike Fagan's Jury Demand, Ex. 11, pursuant to the jury waiver provision of the PSA, which provides that the parties intended to avoid the expense of a jury trial in the event the arbitration provision is not enforced, and therefore "hereby waive trial by jury of any Dispute." Ex. 1 at §19(c). The Circuit Court denied Warren Averett's Motion on August 27, 2021. Ex. 15.

Warren Averett now timely [1] files this Petition for Writ of Mandamus respectfully requesting that this Court grant the Petition and direct the trial court to vacate its order denying Warren Averett's Motion to Strike Jury Demand and to enter an order striking Fagan's jury demand in this case.

PROCEDURAL HISTORY/STATEMENT OF RELEVANT FACTS

This dispute arises from Fagan's employment with Warren Averett. From 2001 to 2015, Fagan was the owner of a human resources consulting firm called Prism Group, LLC. In 2014, Fagan entered into a Transaction Agreement with Warren Averett, where she agreed to wind down her operations with the Prism Group, LLC and form a human resources consulting practice for Warren Averett. Ex. 2 at ¶11. Pursuant to this agreement, Fagan signed and executed a PSA with Warren Averett that included, among other things, a compensation schedule outlining how she would be compensated during her employment. Ex. 1. The PSA also included an arbitration provision, requiring all disputes arising out of the contract to be arbitrated in accordance with the

[1] *Ex parte Meadowbrook Ins. Grp., Inc.,* 987 So. 2d 540, 546 (Ala. 2007) ("a petition for a writ of mandamus must ordinarily be filed within 42 days of the challenged order").

Commercial Arbitration Rules of the American Arbitration Association ("AAA"). Ex. 1 at §19(b). The parties agreed to bear their own costs and to share equally in the fees and expenses of the arbitrator and any facility used in the arbitration. Ex. 1 at §19(d).

A dispute arose regarding Fagan's compensation under the PSA which resulted in Fagan filing a demand for arbitration with AAA. Ex. 4 at ¶34. However, Plaintiff filed the demand under AAA's Employment Arbitration Rules rather than the Commercial Arbitration Rules, as was required under the PSA. *See* Ex. 1 at §19(b). Under the Employment Arbitration Rules fee schedule, AAA required Warren Averett to pay the full fees and costs associated with the arbitration, rather than half the fees as the PSA required. Warren Averett objected to paying more than its half of the fees, as requiring it to pay the full fees was contrary to the express terms of the PSA. AAA notified the parties that it was administratively closing the file in the matter as the required fees were not paid. Ex. 4 at ¶34.

Fagan subsequently filed suit in Jefferson County Circuit Court. Ex. 2. Warren Averett moved to compel arbitration pursuant to the arbitration provision in the PSA, Ex. 3, which was granted by the Circuit

Court. Ex. 5. Fagan appealed this decision after the Circuit Court denied her motion to alter, amend, or vacate. Ex. 7. On appeal, this Court reversed the Circuit Court's order compelling arbitration, finding that Warren Averett's failure to pay the fees in the initial arbitration constituted a "default" of the arbitration provision, making the arbitration provision unenforceable. Ex. 8.

That finding then triggered the jury waiver clause in the PSA, which provides the following:

> **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 waiver is knowingly, freely, and voluntarily given, is desired by the parties and in the best interests of all parties.

Ex. 1 at §19(c). The PSA defines Dispute to be "All controversies, claims, issues and other disputes arising out of or relating to this Agreement or the breach thereof." Ex. 1 at §19.

Warren Averett moved to strike Fagan's jury demand pursuant to Section 19(c) of the PSA, arguing that the jury waiver is valid and enforceable and that it became applicable when this Court held the

arbitration provision to be unenforceable. Ex. 11; *see also* Exs. 12 and 14. The Circuit Court denied Warren Averett's motion on August 27, 2021. Ex. 15.

STATEMENT OF THE ISSUES/RELIEF SOUGHT

The substantive question presented is whether the contractual waiver of the right to a jury trial, as contained in the parties' contract, bars Fagan from seeking a jury trial regarding her claims in this case. Warren Averett respectfully petitions the Court for a writ of mandamus directing the trial court to vacate its order denying Warren Averett's Motion to Strike Jury Demand and to enter an order striking Fagan's jury demand as to *all* claims asserted in her First Amended Complaint.[2]

STATEMENT OF WHY THE WRIT SHOULD ISSUE

> "'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 Mardis, 628 So.2d 605, 606 (Ala. 1993) (citations omitted). This Court has held that mandamus is the proper remedy when a trial court

[2] This includes the claims against co-defendant April Harry, a Warren Averett executive, as more fully explained in Section IV below.

denies a motion to strike a jury demand. *See Ex parte BancorpSouth Bank*, 109 So. 3d 163, 170 (Ala. 2012). Mandamus is proper in this case because Warren Averett has a clear legal right to enforce the jury waiver provision contained in the PSA. *See* Ex. 1 at §19. Fagan signed a valid and enforceable jury waiver that meets the requirements established by this Court: the jury waiver was not buried deep in a long contract, the parties had equal bargaining power, and the waiver was intelligently and knowingly made. The jury waiver was triggered when this Court held that the parties' arbitration clause was unenforceable. Additionally, Fagan's claims relate to the contract between the parties and therefore fall under the jury waiver provision. Finally, Warren Averett is not barred from enforcing the jury waiver under the doctrine of laches because there has not been an inexcusable delay that prejudiced Fagan. For these reasons, explained in greater detail below, this Court should issue a writ of mandamus directing the trial court to vacate its order denying Warren Averett's Motion to Strike Jury Demand and to enter an order striking Fagan's jury demand in this case.

I. Mandamus is the Proper Remedy When a Valid Jury Waiver is Not Enforced by the Trial Court.

"Mandamus is an appropriate remedy where the availability of a jury trial is at issue, as it is in this case." *Ex parte Cupps*, 782 So. 2d 772, 775 (Ala. 2000) (quoting *Ex parte Merchants Nat'l Bank of Mobile*, 60 So. 2d 684, 686 (Ala. 1952)).

In *Ex parte BancorpSouth Bank*, this Court granted a petition for mandamus premised on the denial of a motion to strike a plaintiff's jury demand. 109 So. 3d 163, 170 (Ala. 2012). The plaintiff was a member of an LLC that built a house for resale using a loan from the defendant. *Id.* at 165. In connection with this loan, plaintiff signed a personal guaranty that included a bold, capitalized jury waiver provision. *Id.* When the purchaser defaulted on the loan, the defendant sought payment from the plaintiff and plaintiff in turn sued the defendant challenging the guaranty. *Id.* The plaintiff demanded a jury trial, but the defendant moved to strike the same, relying on the jury waiver provision in the guaranty. *Id.* at 164-65. The trial court denied the defendant's motion to strike the jury demand. *Id.* at 165.

This Court analyzed the validity of the jury waiver provision under well-established Alabama precedent. *Id.* at 166 (citing *Mall, Inc. v. Robbins*, 412 So. 2d 1197 (Ala. 1982) and *Gaylord Dep't Stores of Ala. v.*

Stephens, 404 So. 2d 586 (Ala. 1981)). This Court found that the jury waiver provision was valid and applied to plaintiff's claims because of the broad language applying to claims "arising out of or relating to" the contract, which included the tort claims at issue in the case. *Id.* at 168 (citing *Ex parte AIG Baker Orange Beach Wharf, LLC*, 49 So. 3d 1198 (Ala. 2010)).

Finding that the jury waiver provision was valid and enforceable against the plaintiff and that the requirements for mandamus relief were met, this Court granted the petition and issued a writ directing the trial court to vacate its order denying the motion to strike the jury demand and to enter an order granting the same. *Id.* at 170.

As explained in greater detail below, the jury waiver provision at issue in this case is valid and enforceable against Fagan, and it applies to the claims brought by Fagan in her First Amended Complaint. Warren Averett has a clear legal right to have the jury waiver provision enforced and mandamus is the proper remedy to enforce this right. Therefore, this Court should grant the Petition and direct the trial court to vacate its order denying Warren Averett's Motion to Strike Jury Demand and to enter an order granting Warren Averett's Motion.

II. The Jury Waiver Is Valid and Enforceable Under Alabama Law.

While preferred, the right to a jury trial is not absolute. *BancorpSouth*, 109 So. 3d at 166. In Alabama, "no constitutional or statutory provision prohibits a person from waiving his or her right to a jury trial." *Mall, Inc.*, 412 So. 2d at 1199.

This Court has established three factors to determine whether to enforce a contractual jury waiver: "(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 intelligently and knowingly made." *BancorpSouth*, 109 So. 3d at 166 (citing *Gaylord*, 404 So. 2d at 588).

A. The jury waiver was not hidden.

The present jury waiver was not "buried deep in a long contract." *Id.* Rather, it was prominently labelled as "**(c) <u>Waiver of Jury Trial</u>**," located in a section with the heading "**<u>DISPUTE RESOLUTION</u>**." Ex. 1 at §19. "Since the section is titled so as to call attention to the waiver of jury trial in the [agreement], the waiver is not inconspicuously buried deep in the contract." *Mall, Inc.*, 412 So. 2d at 1199 (holding that a waiver in a lease entitled "Waiver of Trial by Jury: Tenant Not To Counterclaim"

sufficiently called attention to the jury waiver). Indeed, Fagan did not even attempt to argue below that the jury waiver was somehow hidden. *See* Ex. 13.

B. The parties held equal bargaining power.

Additionally, the bargaining power of the parties was equal as Fagan is an experienced and educated business professional who contracted with an accounting firm. *See Mall, Inc.*, 412 So. 2d at 1199 (where "the parties were both businessmen" it could not "be said that the parties had unequal bargaining power.").

Fagan's arguments below that there was not equal bargaining power because the jury waiver was a condition of her employment or that her proposed revisions were rejected are unavailing. Before accepting employment with Warren Averett, Fagan was for 14 years the owner of The Prism Group, LLC, a human-resources consulting firm with offices in Alabama and Georgia. Ex. 4 at ¶10. According to her contract with Warren Averett, Fagan would become president of "Warren Averett Workplace" to start a human-resources consulting practice within Warren Averett. *Id.* at ¶11. Fagan joined Warren Averett willingly and of her own accord; she was not subject to any pressure or other

circumstances that forced her to sign an agreement against her will. This Court has not found a lack of bargaining power in such circumstances. *See Mall, Inc.*, 412 So. 2d at 1199.

Furthermore, "[u]nequal bargaining power does not exist merely because one party is a company and the other party is an individual in need of the company's services." *Ex parte Coble*, 72 So. 3d 656, 661 (Ala. Civ. App. 2011) (citing *Collins v. Countrywide Home Loans, Inc.*, 680 F. Supp. 2d 1287, 1295-96 (M.D. Fla. 2010)). In the *Collins* case cited with approval by the Alabama Court of Civil Appeals, the court found as follows:

> In this case, nothing in the pleadings leads this Court to believe that balance of bargaining power tipped heavily against Plaintiffs. It does not appear that Plaintiffs signed the document under any kind of extreme pressure. Nothing in the pleadings even hint that Plaintiffs could not have simply walked away from the deal—a strong bargaining chip—if they found it to be unacceptable. Plaintiffs were living in the condo and, while they may have *wanted* to go through with the condo mortgage as a step to qualifying for the single-family house mortgage, nothing in the pleadings indicates that Plaintiffs were in dire straits and truly *needed* to go through with the condo loan.

Collins, 680 F. Supp. 2d at 1296. Similarly here, there is no evidence Fagan could not have simply continued in the apparently successful

business she owned for 14 years rather than accepting employment at Warren Averett.

Fagan's argument below that she proposed changes to the PSA which were not accepted is similarly unpersuasive. Ex. 13 at 11-12. First, the proposed revisions cited by Fagan to the trial court reveal she made no edits whatsoever to the jury waiver. *See* Ex. 13 at Ex. A. In other words, she read the contract, made proposed changes, but proposed no changes to the jury waiver which explicitly states her acknowledgement "that this waiver is knowingly, freely, and voluntarily given, is desired by the parties and in the best interests of all parties." Ex. 1 at §19(c).

Moreover, a nearly identical argument has already been rejected by this Court. In *Ex parte BancorpSouth Bank*, the Court was faced with a jury waiver in a standard form contract between an individual (Busby) and the Bank. Busby was "an experienced businessman," but argued he lacked bargaining power because he was unable to make any changes to the Bank's form contract:

> "He had no bargaining power when it came to the language in the guaranty. The form was prepared by [the Bank] and was its standard form of guaranty. . . . He did not have any

> opportunity to negotiate changes but was presented with a completed guaranty at one [branch of the Bank] that had been prepared at another."

109 So. 3d at 167 (quoting Busby's argument). This Court squarely rejected this argument:

> If we accepted Busby's argument, however, every form contract drafted and presented by a business institution and signed by an individual, no matter how educated the individual was, would be subject to being disavowed by the signatory on the basis of "unequal bargaining power." Busby and the Bank contracted with each other for Busby to guarantee the Sims loan, and each party clearly had equal bargaining power in entering into that contract. We will not rewrite the contract for either party.

Id.

Here, Fagan was an experienced businessperson who signed a contract in which she expressly acknowledged "that this waiver is knowingly, freely, and voluntarily given, is desired by the parties and in the best interests of all parties." Ex. 1 at §19(c). She had operated her own business for 14 years and presented no evidence to the trial court of any pressure or compulsion she was under to accept employment with Warren Averett. Ex. 4 at ¶10. Furthermore, her argument that she lacked bargaining power because the PSA was a form contract is not sufficient under this Court's precedent. Fagan simply presented no

justifiable reason for the trial court to decline to hold Fagan to her own agreement and representation that she "knowingly, freely, and voluntarily" agreed to the jury waiver.

C. The jury waiver was entered "knowingly, freely, and voluntarily."

Finally, the jury waiver was entered into knowingly and intelligently. Absent ambiguity, the rules of "contract interpretation require that the intent of the parties be derived from the words of the contract." *Ryan Warranty Servs. Inc. v. Welch*, 694 So. 2d 1271, 1273 (Ala. 1997) (citing *Loerch v. National Bank of Com.*, 624 So.2d 552 (Ala.1993)). Indeed, the best evidence of Fagan's intent comes from the language of the contract itself. *Black Diamond Dev., Inc. v. Thompson*, 979 So. 2d 47, 52 (Ala. 2007) ("Ordinarily, 'the best evidence of [the] intent [of the parties] is the [written] contract itself'") (alterations in original, citations omitted).

In the jury waiver, Fagan explicitly agreed: "The parties acknowledge that this waiver is knowingly, freely, and voluntarily given, is desired by the parties and in the best interests of all parties." Ex. 1 at §19(c). Courts have found express contractual stipulations similar to this one to be compelling evidence of the parties' actual intent. *See, e.g., Ex*

parte Caribe, U.S.A., Inc., 702 So. 2d 1234, 1241 (Ala. 1997) (relying on an express contract representation to determine information was indeed considered confidential: "Romano, in executing the employment agreement acknowledged that the information and documentation received by him, including information concerning Caribe customers, were confidential business and financial information."); *E.A. Renfroe & Co. v. Moran*, 249 F. App'x 88, 92 (11th Cir. 2007) (in rejecting the Rigsbys' argument that the plaintiff would not suffer irreparable damage, holding, "This, however, ignores the fact that the Rigsbys actually acknowledged in their employment agreements that Renfroe would suffer 'immediate and irreparable damage and loss' upon the breach of the non-disclosure provision, which is why the provision was included to begin with.").

As discussed above, Fagan is an experienced business professional who knowingly entered into a contract stating her intent to waive her right to seek a trial by jury. The language of the contract makes clear the fact that the parties knowingly and voluntarily agreed to waive the right to a jury trial. Fagan presented no evidence below of compulsion, pressure, or any other circumstance which would tend to show she did

not voluntarily agree to the jury waiver, or that permits her to avoid her express contractual stipulation that she waived a jury trial "knowingly, freely, and voluntarily."

III. The Jury Waiver Has Been Triggered.

Fagan argued below that Warren Averett's failure to pay the arbitration fees not only prevented Warren Averett from enforcing the arbitration provision, but also prevented enforcement of the jury waiver. Ex. 13 at 7-8. But this argument is directly contrary to the expressed intent of the parties, which was to waive a jury trial in the event the arbitration provision was not enforced. In the jury waiver, the parties agreed that they "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.*" Ex. 1 at §19(c) (emphasis added). As this Court held that the arbitration provision is unenforceable, that is the precise scenario in which the parties agreed the jury waiver would come into play.

In support of her argument, Fagan cited, *inter alia*, *Brown v. Dillard's, Inc.*, 430 F.3d 1004 (9th Cir. 2005) for the proposition that a party's default under an arbitration provision precludes that party from

enforcing the *arbitration provision*. Ex. 12 at 7. But she did not cite any law for the proposition that a default under an arbitration provision affects the enforceability of any provision of the contract *other* than the arbitration provision. *Cf. In re CenturyLink Sales Pracs. & Sec. Litig.*, No. CV 17-2832, 2020 WL 7129889, at *7 (D. Minn. Dec. 4, 2020) (citing *Brown v. Dillard's* and holding, "Contrary to Movants' argument, these cases do not look to whether the party seeking to compel has materially breached the entire contract, but rather, look to whether they have specifically breached the agreement to arbitrate. **If a material breach occurred, the entire contract is not rescinded. Rather, the breaching party is simply unable to compel arbitration**.") (emphasis added).

Fagan claimed below that *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828 (Miss. 2003) stands for the proposition that default under an arbitration provision affects other provisions outside of the arbitration provision, *see* Ex. 13 at 8, but a reading of this case reveals the court made no such holding. In that case, the arbitration provision itself included a damages limitation stating that "the arbitrators shall not have the authority to award exemplary or punitive damages, and the parties

expressly waive any claimed right to such damages." *Id.* at 831. The single quotation relied upon by Fagan below simply holds that the arbitration provision in its entirety was unenforceable, including the above damages limitation. *Id.* at 838 ("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). Here, the jury waiver is not included in the arbitration provision; rather, they are two distinct sections of the PSA. *See* Ex. 1 at §19.

Moreover, Fagan's argument that this Court's prior holding that the arbitration provision was unenforceable also precludes Warren Averett from enforcing the jury waiver violates the cannons of contract construction. A finding that the arbitration provision is unenforceable is the very circumstance the parties envisioned would bring the jury waiver into play. *See* Ex. 1 at §19(c) ("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."). Under "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." *Homes of Legend, Inc. v. McCollough,* 776 So. 2d 741, 746 (Ala. 2000). The meaning and effect of all of the terms of the PSA is that *if* the arbitration provision is not enforced "for any reason," *then* the parties agreed to waive a jury trial.

Fagan also argued below that this Court's prior holding in this case was not a determination that the arbitration provision was "unenforceable." Ex. 13 at 8-10. In making this strained argument, Fagan completely ignored the allegations of her own Complaint that Warren Averett's default under the arbitration provision means Warren Averett "is now precluded from enforcing the arbitration provision." Ex. 4 at ¶35. She also ignored this Court's discussion of the cases Fagan cited for that proposition: "some courts have viewed a party's failure to pay its share of the arbitration fees as a breach of the arbitration agreement, which precludes any subsequent attempt by that party to enforce that agreement." Ex. 8 at *6 n.3 (citations omitted).

Fagan cited no cases to the trial court adopting Fagan's proposed definition of "unenforceable." Indeed, the cases she did cite, and those interpreting them, lead to the contrary conclusion. The *Brown v. Dillard's* case cited by Fagan has been described as standing for "the concept that an arbitration agreement can be rendered *unenforceable* owing to a breach of its provisions by a party." *In re Pfeiffer*, 2011 WL 4005504, at *7 (Bankr. E.D. Pa. Sept. 8, 2011) (emphasis added); *see also Page v. GPB Cars 12, LLC*, 2019 WL 5258164, at *4 (D.N.J. Oct. 17, 2019) (citing *Brown v. Dillard's, Inc.* in discussing the proposition that "[t]he FAA also provides that arbitration agreements may be found *unenforceable* 'upon such grounds as exist at law or in equity for the revocation of any contract.'") (emphasis added). Similarly, *Sanderson Farms* discussed above has been cited in "analyz[ing] whether the arbitration clause was waived, and is therefore *unenforceable*." *Cain v. Midland Funding, LLC*, 452 Md. 141, 154, 156 A.3d 807, 814–15 (2017) (emphasis added).

Furthermore, Black's Law Dictionary defines "unenforceable" as follows: "(Of a contract) valid but incapable of being enforced." UNENFORCEABLE, Black's Law Dictionary (11th ed. 2019). This is

consistent with this Court's prior holding in this case. This Court did not find the arbitration provision to be invalid, just that it was incapable of being enforced by Warren Averett due to the circumstances of the case. *See* Ex. 8.

Fagan also argued below that the term "unenforceable" was ambiguous and therefore any such ambiguity should be construed against Warren Averett. Ex. 13 at 10. In making this argument, however, Fagan cited no case finding the term "unenforceable" to be ambiguous, and Warren Averett is unaware of any court making such a finding. Furthermore, the rule of construction urged by Fagan (construing ambiguities against the drafter) is "a rule of *last resort* that should be applied only when other rules of construction have been exhausted." *Lackey v. Central Bank of the South,* 710 So. 2d 419, 422 (Ala. 1998) (emphasis added). "Under those [other] 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." *Homes of Legend,* 776 So. 2d at 746.

As explained above, this Court's determination that Warren Averett was precluded from enforcing the arbitration provision in this case was envisioned and provided for by the parties. The dispute resolution procedures in the PSA intended arbitration of any dispute, but if that arbitration provision was not enforced "for any reason" and the parties had to litigate their dispute in court, "the parties, for themselves and their successors and assigns, hereby waive trial by jury of any Dispute." Ex. 1 at §19(c).

IV. Fagan's Claims Are Encompassed by the Language of the Jury Waiver.

Fagan also argued below that even if the jury waiver were enforced in this case, it should not be applied to cover her tort claims (i.e., any claims other than for breach of the PSA) or her claims against co-defendant April Harry, a Warren Averett executive. This argument is a non-starter. The scope of a jury waiver depends on its language. Here, the parties agreed to "waive trial by jury of any Dispute." Ex. 1 at §19(c). "Dispute" is defined in the contract as "All controversies, claims, issues and other disputes **arising out of or relating to** this Agreement **or** the breach thereof." *Id.* at §19 (emphasis added).

In *Ex parte AIG Baker Orange Beach Wharf, L.L.C.*, 49 So. 3d 1198 (Ala. 2010), this Court was faced with an argument that while a jury waiver might apply to contract claims, it could not apply to associated tort claims, such as fraudulent inducement. The Court explained that the jury waiver language "arising out of or relating to" has broad application:

> [A] provision applying only to claims "arising from" or "arising under" a contract has a narrow scope and "exclude[d] claims that did not require a reference to, or a construction of, the underlying contract." On the other hand, a provision applying to claims " 'arising out of or relating to' " a contract—such as the provision in the instant case—"'has a broader application'" than a provision " 'that refers only to claims "arising from" the agreement.

Id. at 1201 (quoting *Ex parte Cupps*, 782 So.2d 772, 776 (Ala. 2000)). Given this broad language, this Court held the jury waiver covered not only the contract claims, but also the associated tort claims.

Similarly, in *Ex parte BancorpSouth Bank*, the Court found similar broad language in a jury waiver covered not only the breach of contract claim, but also the associated tort claims of misrepresentation, promissory fraud, breach of duty to inform, and failure to mitigate because such claims were at least "connected with" the guaranty agreements at issue. 109 So. 3d at 169.

Here, it is beyond clear that all of Fagan's claims "relate to" the PSA, which Fagan terms "the Contract" in her First Amended Complaint:

- Count I alleges breach of contract in that "Warren Averett agreed to pay Fagan in accordance with the Compensation Plan" and "Warren Averett materially breached the Contract by failing to pay Fagan in accordance with the Contract." Ex. 4 at ¶¶37, 39.
- Count II alleges "Harry and Warren Averett falsely represented to Fagan that Fagan would be paid compensation in accordance with the Compensation Plan" but "Harry and Warren Averett failed to pay Fagan in accordance with the agreed-upon Compensation Plan under the Contract." *Id.* at ¶¶44, 47.
- Count III alleges "Warren Averett wrongfully failed to pay Fagan her compensation and incentives in accordance with the Contract." *Id.* at ¶51.
- Count V[3] alleges "Harry intentionally breached this fiduciary duty by refusing to have Warren Averett pay the compensation owed to Fagan." *Id.* at ¶64.
- Count VI alleges Harry and Warren Averett had a duty to disclose but "suppressed their intent to . . . fail to pay Fagan in accordance with the Compensation Plan in the Contract." *Id.* at ¶¶68-69.

The language of the jury waiver at issue encompasses all the claims above, including those asserted against co-defendant April Harry, a Warren Averett executive. There is no limitation in the language as to who the "Disputes" must include for the jury waiver to apply. *Cf. Ex parte*

[3] Count IV (Oppression/Squeeze Out) has been dismissed by the trial court. Ex. 5.

Carter, 66 So. 3d 231, 234 (Ala. 2010) (where jury waiver was limited to disputes "brought by either Bank, Borrower, Accommodation Party or Guarantors against the other," it could not cover disputes involving the Bank's employees, and distinguishing a case that had applied a jury waiver to the corporate party's employees on the basis that "[t]here was no indication in *Credit Suisse* that the jury-waiver provision at issue there included language limiting the waiver to specifically defined parties against each other").

Here, the jury waiver applies to "any Dispute," Ex. 1 at §19(c), which includes: "All controversies, claims, issues and other disputes arising out of or relating to this Agreement or the breach thereof." *Id.* at §19 (emphasis added). Fagan's claims against Harry are premised on the theory that Harry wrongfully failed to pay Fagan in accordance with the Compensation Plan in the PSA, and such claims clearly "relate to" the PSA.

V. Fagan's Laches Argument Below Was Meritless.

Fagan's final argument below was that Warren Averett should be barred from enforcing the jury waiver under the doctrine of laches due to the time lapse between the initial filing of the complaint and Warren

Averett's motion. Ex. 13 at 12-13. This argument misses the mark and is significantly misleading.

Warren Averett responded to Fagan's complaint by immediately moving to compel arbitration. *See* Ex. 3. There was no need to move to strike the jury demand as Warren Averett had no intention of litigating this case in court. The trial court compelled arbitration, and Fagan appealed. Ex. 5. This Court reversed on October 23, 2020, finding the arbitration provision to be unenforceable due to Warren Averett's default under the provision. Ex. 8. Fagan moved for a scheduling conference on March 3, 2021, Ex. 9, and Warren Averett raised the issue of the jury waiver with Fagan's counsel less than three weeks later, Ex. 10.

While there was a length of time between the filing of the complaint and the motion to strike the jury demand, that was not due to any "delay" on Warren Averett's part. Rather, it was due to this case being on appeal before this Court to determine whether the case would be compelled to arbitration. It was only *after* this Court determined the arbitration provision was not enforceable that the jury waiver even became an issue ripe for resolution.

The only Alabama authority Fagan cited in support of her laches argument is a concurring opinion by former Chief Justice Moore in *Ex parte First Exch. Bank*, 150 So. 3d 1010 (Ala. 2013), which of course is not binding authority. Furthermore, it is not analogous to this case. There, the motion to strike the jury demand was made "[o]ver a year and a half after the complaint in this case was filed, and three months before the scheduled trial date." *Id.* at 1013 (Moore, C.J., concurring). In addition, the plaintiffs showed prejudice in that "this delay caused them needless expense because the case could have been heard much sooner had it been placed on the nonjury track." *Id.*

The circumstances in this case are much different. Warren Averett moved to strike the jury demand following the decision of this Court, when Fagan requested on remand that the trial court set a scheduling conference. At the time Warren Averett filed its motion, no trial date had been set, no scheduling order had been entered, and the parties had not even begun discovery. This is perhaps why Fagan did not even attempt to argue to the trial court, much less demonstrate, any prejudice—which is fatal to her attempt to invoke laches. *See Ex parte Grubbs*, 542 So. 2d 927, 929 (Ala. 1989) ("To establish the application of the doctrine of

laches, [a defendant] ha[s] to show that [the plaintiff] delayed in asserting his right or claim, that his delay was inexcusable, and that his delay caused the [defendant] undue prejudice.").

CONCLUSION

Warren Averett has shown that a valid and enforceable jury waiver agreement exists between the parties, and that the jury waiver applies to the claims at hand. Therefore, Warren Averett requests a writ of mandamus directing the trial court to vacate its order denying Warren Averett's Motion to Strike Jury Demand and to enter an order striking Fagan's jury demand as to all claims asserted in her First Amended Complaint.

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

1. This brief complies with the type-volume limitation of Ala. R. App. P. 28 because it contains 5,996 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.

2. 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 word-processing software in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I do hereby certify that on October 7, 2021, 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 Petition was served via U.S. Mail:

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