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IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

**JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, PLLC**

PLAINTIFF

V.

CIVIL ACTION NO. L07-135

**RICHARD SCRUGGS, Individually; DON BARRETT, Individually;
SCRUGGS LAW FIRM, P.A.; BARRETT LAW OFFICE, P.A.;
NUTT & McALISTER, PLLC; and LOVELACE LAW FIRM, P.A.**

DEFENDANTS

**PLAINTIFF'S REPLY TO DEFENDANTS'
RESPONSE TO MOTION TO STAY ARBITRATION**

Federal and state law provide this Court authority to determine whether the Defendants waived their right to arbitrate. Mississippi law is clear that a party who, when requested, has refused to go to arbitration, thereby waives his rights to arbitration. By repeatedly failing to agree with the Plaintiff to submit their dispute to arbitration and by openly stating to the Plaintiff that arbitration was not an option, the Defendants took actions inconsistent with the right to arbitrate. Therefore, by their express actions, the Defendants waived their right to arbitrate. This Court should stay arbitration and allow these proceedings to move forward in the Lafayette County Circuit Court.

I. THIS COURT SHOULD DECIDE THE ISSUE OF ARBITRABILITY .

It is undisputed and incontrovertible that federal and state law recognizes that this Court can and should decide the issue of arbitrability, specifically whether the Defendants waived their right to arbitration. The Federal Arbitration Act ("FAA") authorizes this Court to do so when it states the following:

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**

**LAFAYETTE COUNTY
FILED**

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Mary Alice Busby
CIRCUIT CLERK

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D.C.

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).

Contrary to Defendants' assertions, the Mississippi Supreme Court cited the U.S. Supreme Court, in finding that the "the presumption in favor of arbitration does not apply to the question of who should decide arbitrability, because the purpose of the FAA was to make arbitration agreements as enforceable as other contracts, not more so." Greater Canton Ford Mercury, Inc. v. Ables, 948 So. 2d 417, 422 (Miss. 2007), (citing First Options of Chicago Inc. v. Kaplan, 514 U.S. 938, 945, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)). "Whether a party is bound by an arbitration agreement is generally considered an issue for the courts, not the arbitrator, 'unless the parties clearly and unmistakably provide otherwise.'" Id. (citing AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). "In other words, when the parties have **explicitly agreed** that the question of arbitrability is to be decided by an arbitrator rather than the court, that agreement must be interpreted by an arbitrator." Id. (emphasis added).

In the instant case, there is no express or explicit agreement to arbitrate issues of arbitrability. The provision in the Joint Venture Agreement provides in full:

Disputes - Any dispute arising under or relating to the terms of this agreement shall be resolved by mandatory binding arbitration, conducted in accordance with the guidelines of the American Arbitration Association. The site of the arbitration shall be Oxford, MS.

Joint Venture Agreement, p. 3.

An express provision is one such as the Court found in the Greater Canton Ford Mercury case, in which the pertinent part of the arbitration provision reads as follows:

Either you or Creditor (“us” or “we”) (each, a Party) may choose at any time, including after a lawsuit is filed, to have any Claim related to this contract decided by arbitration. Such claims include, but are not limited to the following: (1) claims in contract, tort, regulatory, or otherwise; (2) **claims regarding the interpretation, scope or validity of this clause or arbitrability of any issue**

Id. Greater Canton Ford Mercury, Inc. v. Ables, 948 So. 2d 417, 423 (Miss. 2007) (emphasis added). There is no such provision in the Joint Venture agreement at issue. Within the “four corners” of the contract, the parties did not agree to express terms regarding the arbitrability of any issue. This Court is the authority to decide whether the Defendants waived their right to arbitrate.

II. THE DEFENDANTS WAIVED THEIR RIGHT TO ARBITRATION .

“In Mississippi, a party waives the right to arbitrate when it ‘actively participates in a lawsuit or **takes other action inconsistent with the right to arbitration.**’” Pass Termite and Pest Control, Inc., v Walker, 904 So. 2d 1030, 1034 (Miss. 2004) citing Cox v. Howard, Weil, LaCousse, Frederichs, Inc. 619 So. 2d 908, 913-14 (Miss. 1993) (emphasis added). The Mississippi Supreme Court has stated the following regarding what constitutes waiver:

Waiver presupposes full knowledge of a right existing, and an intentional surrender or relinquishment of that right. It contemplates something done designedly or knowingly, which modifies or changes existing rights or varies or changes the terms and conditions of a contract. It is the voluntary surrender of a right. To establish a waiver, **there must be shown an act or omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right alleged to have been waived.**

Titan Indemnity Co. v. Hood, 895 So. 2d 138, 150-51 (Miss. 2004) (citing Ewing v. Adams, 573 So. 2d 1364, 1369 (Miss. 1990)) (emphasis added).

As previously discussed in the Plaintiff's Motion, from December 2006 until March 2007, Plaintiff sought time after time to arbitrate its dispute with the Defendants. Although the Defendants recognized Plaintiff's right to arbitrate, they consistently and repeatedly refused to submit the dispute to an arbitrator.

Defendants challenge Jones' statement by Affidavit that no response was received to the 11 separate *written* demands or requests for arbitration of the fee-allocation dispute by reference to one (1) reply e-mail from Sid Backstrom (of the Scruggs firm) dated January 24, 2007, in which Backstrom simply disagreed that arbitration as requested by Jones was then appropriate, positing instead that "if 4 of 5 agree then we must abide by that." Backstrom goes on to report that other matters relating to "common benefit expenses" and payment of "checks to clients" would have to be dealt with "and then worry about fees shortly after that." In conclusion, Backstrom responded to Jones' demand for arbitration by merely reporting: "Let me see if this timeframe is what everyone wants to do – pay the clients then us – and I will let you know." Such is scarcely a response to any one of Plaintiffs' repeated demands and requests, and Jones' affidavit is un rebutted.

Defendants' additional challenges to Jones' "False Affidavit" address issues admittedly "not relevant to the pending motions." (Defendants' Reply Memorandum, p. 10). The allegations are irresponsible where they are not irrelevant, and Plaintiffs reserve response on the merits to such irrelevant personal attacks to the appropriate time. The merit *vel non* of Defendants' position on the relevant issues should be judged by such *ad hominem* arguments.

At the March 2, 2007, meeting of the Joint Venture, the Defendants' position on arbitration was crystal clear. Arbitration was no longer an option. Steven Funderburg, a Plaintiff partner, asked Mr. Barrett why arbitration was not an option. Barrett stated flatly that there would be no arbitration. (See Affidavit of Steven H. Funderburg, p. 2, attached as Exhibit A). Barrett said, "What would an arbitrator arbitrate? The only question an arbitrator would ask is did you sign this agreement?" [pointing to the joint venture agreement in front of him] and "Is that your signature?" [pointing his finger at John G. Jones's signature on the Joint Venture agreement] (Ex. A, pp. 2-3). Funderburg asked Defendant Nutt if he agreed with Barrett's statement to which Nutt replied, "These issues are just too important to delay with arbitration or anything like that" (Ex. A, p. 3).

The Defendants never wanted to arbitrate any dispute because, in their opinion, there was nothing to arbitrate. According to the Defendants, the only issue was whether the Plaintiff signed the Joint Venture agreement, which the Plaintiff acknowledged, so their position was that there were no issues to arbitrate. This is contrary to the Joint Venture agreement which allows arbitration for any dispute, not just for disputes for which the Defendants felt were "ripe" (see Barrett affidavit) or for which Defendants pre-judged as being meritless.

The dispute arose between the Plaintiff and Defendants regarding the attorneys fees from the State Farm settlement. The Defendants proposed to the Plaintiffs that the Defendants receive 96% and then 94% of \$26.5 million. When the Plaintiff balked at this suggestion and asked that this dispute be placed in arbitration, the Defendants delayed and repeatedly told the Plaintiff that they could not invoke arbitration. The Defendants suggested that the attorneys fee issue be "negotiated." At the "negotiation, the Defendants told the Plaintiff that the Defendants would take ninety-four percent (94%) of the attorneys fees from the State Farm settlement and if the

Plaintiff did not like it, the Plaintiff would be ‘kicked out’ of the joint venture and forfeit its rights to anything.” (Ex. A). Given the fact that the Defendants had previously refused to arbitrate and stated that there was nothing to arbitrate, the Plaintiff had no choice in protecting its interest except by filing suit.

The Defendants argue that the responsibility was on the Plaintiff to start the arbitration proceedings. That is contrary to clear Mississippi law that states that if a party, when requested, refuses to go to arbitration, then that party is in default. That is exactly the case here. The Plaintiff requested that the Defendants arbitrate their issues. The Defendants refused. Additionally, if forced to seek arbitration on its own, Plaintiff would solely have been burdened with an expensive, prejudicial arbitration fee. The AAA states: “An initial filing fee is payable in full by a filing party when a claim, counterclaim or additional claim is filed.” (See Commercial Arbitration Rules and Mediation, “Schedule of Fees,” available at <http://www.adr.org/sp.asp?id=22440#R4>). In this case, with Plaintiff asserting a recovery well above \$5 million, the arbitration filing fee at a minimum would have been \$10,000, clear evidence of prejudice by the actions of the Defendants in expressly refusing to arbitrate the issues.


CONCLUSION

For the foregoing reasons, Plaintiff Jones requests this Court grant the Plaintiff’s Motion to Stay Arbitration.

RESPECTFULLY SUBMITTED,

JONES, FUNDERBURG, SESSUMS,
PETERSON & LEE, PLLC
By and through its attorneys,

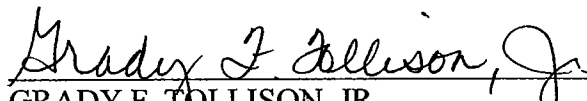
TOLLISON LAW FIRM, P.A.
100 Courthouse Square
Post Office Box 1216
Oxford, Mississippi 38655
662-234-7070 Telephone
662-234-7095 Facsimile


GRADY F. TOLLISON, JR., MB#8240

CERTIFICATE OF SERVICE

I, Grady F. Tollison, Jr., hereby certify that I have this date caused to be hand delivered, a true and correct copy of the foregoing document on this the 2nd day of May, 2007 to:

Mr. Wilton V. Byars, III
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Boulevard, Suite R
Oxford, Mississippi 38655


GRADY F. TOLLISON, JR.

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PLLC; and LOVELACE LAW FIRM, P.A.

DEFENDANTS

AFFIDAVIT OF STEVEN H. FUNDERBURG

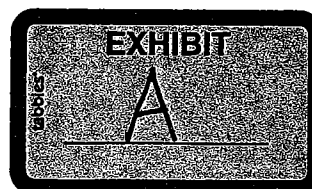
STATE OF MISSISSIPPI

COUNTY OF HINDS

Steven H. Funderburg after being duly sworn does state under oath:

1. On March 2, 2007 I attended a meeting at the offices of Nutt & McAllister. Present at the meeting were myself, John G. Jones, Dick Scruggs, Sid Backstrom, Don Barrett, and David Nutt. Sparky Lovelace was available by conference telephone. The meeting was conducted in David Nutt's conference room. Sid Backstrom organized and scheduled the meeting and the purpose was to allegedly meet as professionals and business partners to try and reach an agreement about the attorney fee splits from the State Farm settlement. John Jones and I were asked to attend the meeting by other members of the Scruggs Katrina Group to see if we could "work things out among ourselves" before pursuing arbitration or any other course of action. We attended the "negotiation" in good faith.

1



2. Don Barrett started the meeting by explaining how angry he was, personally, that my law firm had threatened arbitration and/or litigation in correspondence. He then advised that he had never even read the Joint Venture Agreement signed by the parties until the evening of March 1, 2007. However, he explained that having read the agreement it was his position, and that of the other joint venturers, that four out of the five joint venturers could vote on fee splits and disburse attorney fees and, moreover, that four of the five joint venturers could remove one of the partners and the removed party would "lose all rights." Mr. Barrett then proceeded to explain that the other members of the joint venture had voted, outside of our presence, and decided that my law firm should get six percent (6%) of the State Farm fees although Mr. Barrett advised that he, personally, felt that my firm's contribution was only worth three percent (3%). Mr. Barrett then explained that if my firm did not accept the six percent (6%) and "just go on" that the votes had already been taken to remove my firm from the joint venture and we would receive nothing.

3. I specifically asked Mr. Barrett why arbitration was not an option. My statement was, "... I don't see why you will not agree to arbitration. We don't want to question anyone's contribution and it seems that there is too much self interest for each of us to value the other. John and I have said before that if a neutral third party says we only get one percent (1%) that we would live with that because it would be a neutral. What is unfair about doing what the agreement says we will do?" The entire time I was speaking, Don Barrett was shaking his head and saying "No, no, no, no, no."

4. Don Barrett stated flatly that there would be no arbitration. Specifically, Mr. Barrett said, "What would an arbitrator arbitrate? The only question an arbitrator would ask is

did you sign this agreement?" (Pointing to the Joint Venture Agreement in front of him) and "Is that your signature?" (Pointing his finger at John G. Jones' signature on the Joint Venture Agreement and gesturing to John). Mr. Barrett then said, "That's the only question for an arbitrator, whether or not you signed this agreement and since you did, there is nothing to arbitrate."

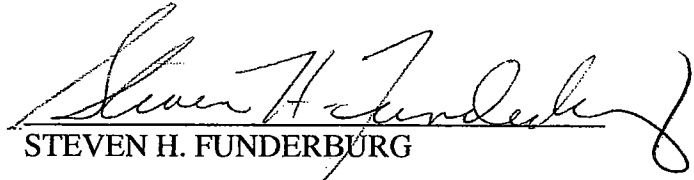
5. I made the statement to David Nutt, "... David, do you agree with that?" Mr. Nutt stated that, "These issues are just too important to delay with arbitration or anything like that ..."

6. I then asked what Mr. Lovelace's percentage would be now that a vote had been, apparently, taken. Mr. Barrett replied that Mr. Lovelace, a sole practitioner, would be receiving eight percent (8%). I asked Mr. Barrett whether the six percent (6%) for my law firm was on the State Farm fees only or "across the board." He responded that the six percent (6%) was only for the State Farm settlement and that we needed to just take that amount and put this behind us. I responded that John and I came to the meeting at the request of our law partners and stated, "... Believe it or not, we thought we were coming to a negotiation because that's what we were told." I explained that our law partners had no idea that any vote had been taken or that, more importantly, our fellow joint venturers were threatening to kick us out of the joint venture to resolve the dispute and did not intend to pay us a dime if we did not accept their allocation of six percent (6%). Mr. Barrett stated, "No. We are going to get this behind us right now. At this table." At that point, I protested and Mr. Barrett said, "There is a phone here. You can go call them." At that point, I asked Dick Scruggs whether he seriously went along with Mr. Barrett's statement that we would not even have an opportunity to meet with the other partners in my firm to explain what had happened. Both Mr. Scruggs and Mr. Nutt advised that they would have "no

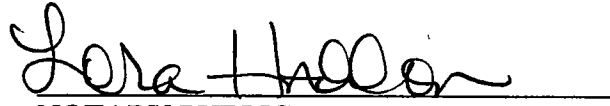
objection” to John and I meeting with our law partners. Mr. Barrett then said, “You aren’t just sneaking off to file a TRO or something are you?” I responded, “No. We’re going to go talk to our partners. If we were going to file something we would tell you.” Mr. Barrett then said “Well ... that’s fine. You go talk to them and we’re going to go to lunch. After you tell them, you call us right back with whatever you’re gonna do.” John and I then left to explain to our law partners what Mr. Barrett had said.

7. I have *Defendants’ Response to Plaintiffs’ Motion to Stay Arbitration and Defendants’ Reply Memorandum in Support of their Motion to Stay Proceedings and Compel Arbitration*. Because I was present at the meeting on March 2, 2007 I can swear with no reservation whatsoever that none of the people present at the meeting with the exception of John Jones and myself offered arbitration or considered arbitration an option. Rather, the other members of the joint venture had already made the decision - outside of our presence or knowledge - to dictate a fee interest to us and threaten us with removal if we did not accept the proposal. Arbitration was raised by me at that meeting and flatly rejected by all of them. As we know, later on March 2, 2007 that same group of partners made good on their threat to expel us from the joint venture if we did not take their “take it or leave it” deal. For any of those men present at that meeting to suggest that they had any intention to arbitrate the dispute on March 2, 2007 or before is wrong and a lie. The only reason they are pursuing arbitration now is because they have been named as defendants in this lawsuit and deem arbitration to give them more advantage and less risk than they are facing in the instant litigation.

8. And further affiant saith not.


STEVEN H. FUNDERBURG

SWORN TO AND SUBSCRIBED BEFORE ME this the 1st day of
may, 2007.


NOTARY PUBLIC

My Commission Expires:

MISSISSIPPI STATEWIDE NOTARY PUBLIC
MY COMMISSION EXPIRES MARCH 4, 2009
BONDED THRU STEGALL NOTARY SERVICE