**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

**KENNA BISHOP,**

**Plaintiff,**

**v.**

**CIVIL ACTION NO.: 21-C-820**
**JUDGE: Honorable Tera L. Salango**

**AMPLER BURGERS OHIO LLC d/b/a BURGER KING, LESLEY MCLAUGHLIN, SHEILA SPAULDING, TERESA STEPHENS, and ROBERT FALLS,**

**Defendants.**

## [PROPOSED] ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR STAY AND COMPEL ARBITRATION

Pending before the Court is a Motion filed on behalf of Defendant Ampler Burgers Ohio, LLC, Sheila Spaulding, Leslie McLaughlin, and Teresa Stephens to dismiss or stay and compel arbitration filed on November 9, 2022. Plaintiff Kenna Bishop served her response to the Motion on December 12, 2022. Defendants Ampler Burger Ohio, LLC ("Ampler Burger Ohio"); Sheila Spaulding; Leslie McLaughlin; and Teresa Stephens filed their reply on December 15, 2022. The Court held a hearing on this Motion on December 16, 2022, at which time the parties were provided an opportunity to argue their respective positions.[1] This matter is ripe for the Court's consideration. For the reasons stated herein, and for reasons appearing to the Court, the Court **DENIES** the Motion to Dismiss or Stay and Compel Arbitration.

## FINDINGS OF FACTUAL AND PROCEDURAL BACKGROUND

The Court makes the following findings of facts relating to the pending Motion:

[1] *Pro Se* Defendant Robert Falls did not file any response or reply relating to the issue pending before the Court. However, Defendant Falls appeared for oral arguments, but did not state a position as to issue pending before the Court even though given the opportunity to do so.

## I. FACTUAL BACKGROUND.

1. This matter arises out of allegations relating to sexual harassment, aiding and abetting sexual harassment, retaliation, and constructive discharge under the West Virginia Human Rights Act. W. Va. Code § 5-11-1 *et seq.*

2. Kenna Bishop was in high school while working for Ampler Burgers Ohio in Spring 2021. [Docket No. 1. ¶ 13].

3. Ms. Bishop alleges that while she was working for Ampler Burgers Ohio LLC she was subjected to sexual harassment by Defendant Robert Falls.

4. Ms. Bishop also alleges that Defendants aided and abetted the sexual harassment, retaliated against her, and that she was constructively discharged from her job at Ampler Burgers LLC.

5. On March 23, 2021, Plaintiff received and signed employment documents titled "Dispute Resolution and Arbitration Policy and Agreement." ("Arbitration Agreement")

6. In that document, Plaintiff agreed to arbitrate any and all claims and disputes that relate in any way to her employment or the termination of her employment with Ampler Burgers, LLC—not Ampler Burgers Ohio.

7. The Arbitration Agreement defines "Company" and "QSR Burgers" as meaning "Ampler Burgers, LLC," but not Ampler Burgers Ohio.

8. In the Application and Coverage Section, the Arbitration Agreement states, "Your decision to accept employment or continue employment with the Company [Ampler Burgers, LLC] constitutes your agreement to be bound by this policy. Likewise, the Company [Ampler Burgers, LLC] agrees to be bound by this policy."

9. The Arbitration Agreement states, "I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute. . . ."

10. Plaintiff also received an Employee Handbook that states, "It is our pleasure to welcome you to Ampler, LLC d/b/a Burger King."

## II. DEFENDANTS ACTIVELY LITIGATED THIS CASE.

11. Plaintiff filed her Complaint on September 15, 2021, naming as a defendant Ampler Restaurant Group instead of Ampler Burgers Ohio. [Docket No. 1]

12. She served the Complaint on Ampler Burger Ohio on October 12, 2021.

13. After extensions to answer the Complaint and Discovery served on Defendants, Defendants Ampler Burgers Ohio, Sheila Spaulding, Leslie McLaughlin, and Teresa Stephens filed their Answer on January 5, 2022.

14. In their Civil Cover Sheet, Defendants Ampler Burgers Ohio, Sheila Spaulding, Leslie McLaughlin, and Teresa Stephens demanded a jury trial. [Docket No. 4].

15. Additionally, in its Answer, Defendants identified Ampler Burgers Ohio as the proper corporate defendant and admitted that Ampler Burgers Ohio was Plaintiff's employer.

16. Defendants also raised the following Affirmative Defenses: "Bishop's purposed claims against Defendants are or may be governed by a mandatory arbitration provision."

17. From the time Defendants identified Ampler Burgers Ohio as the appropriate legal entity in its Answer, it actively participated in written discovery, both answering Plaintiff's discovery requests and propounding discovery requests of its own as Ampler Burgers Ohio.

18. On October 6, 2021, Plaintiff served Defendant Spaulding with the Complaint and discovery.

19. On February 9, 2022, Ampler Burgers Ohio answered discovery identifying itself as Ampler Burgers Ohio and producing the Arbitration Agreement.

20. On February 22, 2022, Ampler Burgers Ohio served discovery on Ms. Bishop.

21. Then, on March 30, 2022, Plaintiff's counsel sought to confirm that Ampler Burgers Ohio is the correct entity, which Ampler Burgers Ohio's counsel confirmed.

22. On April 8, 2022, Plaintiff served discovery on Defendants Stephens and Defendant McLaughlin.

23. On April 8, 2022, Plaintiff served her answers and responses to Ampler Burgers Ohio's first set of discovery.

24. On April 12, 2022, Plaintiff's counsel sent a proposed *Agreed Order for Substitution of Party* substituting Defendant Ampler Burgers Ohio as the appropriate Defendant.

25. On April 19, 2022, Ampler Burgers Ohio sent Plaintiff proposed revisions to the *Agreed Order for Substitution of Party.* The nine (9) substantive proposed edits identify the appropriate Defendant as Ampler Burgers Ohio.

26. On June 1, 2022 , The Court then entered an *Agreed Protective Order* identifying Ampler Burgers Ohio as a party.

27. When Ampler Burgers Ohio agreed to entered into the *Agreed Protective Order* it was aware that Defendants Spaulding and Stephens were named as defendants in *Yoxtheimer v. RMS Inc.*, C.A. No. 20-c-41 (Kanawha County, W.Va. 2020) and testified in that case. As such, the *Agreed Protective Order* provided for the disclosure of documents or information from that matter and the opportunity to designate such evidence as confidential.

28. Then on June 23, 2022, the Court conducted a Second Scheduling Conference in this matter in which Defendants participated.

29. On July 22, 2022, Ampler Burgers Ohio sent the Court the proposed Scheduling Order identifying itself as Ampler Burgers Ohio in its cover letter to the Court.

30. On August 15, 2022, Plaintiff sent Defendants' counsel an email checking on the status of the proposed Agreed Order to Substitute Parties.

31. On August 31, 2022, the Court entered the *Agreed Order of Substitution of Party*.

32. On September 1, 2022, Plaintiff sent a second set of discovery to Ampler Burgers Ohio.

33. On September 2, 2022, Plaintiff supplemented her Responses to Ampler Burgers Ohio's First Set of Discovery.

34. On September 15, 2022, Defendants and Plaintiff filed their respective Fact Witness Disclosures. [Docket Nos. 37; 38].

35. On September 16, 2022, Plaintiff served a second supplement to Defendant Ampler Burgers Ohio's Discovery.

36. On September 16, 2022, Plaintiff sent an extensive meet-and-confer letter addressing deficiencies in Ampler Burgers Ohio's discovery responses and inquiring into the Answers and Responses to the first sets of discovery served upon Defendants Spaulding, Stephens, and McLaughlin.

37. On October 12, 2022, Defendants' counsel reiterated that they refused to have Defendants Spaulding, McLaughlin, and Stephens produce discovery responses until 30 days after Ms. Bishop produced the extensive deposition transcripts from the *Yoxtheimer* matter.

38. On October 28, 2022, Ampler Burgers Ohio supplemented its Answers and Responses to Plaintiff's First Set of Discovery.

39. On November 1, 2022, Plaintiff provided 1271 pages of deposition transcripts and 635 pages of exhibits from the *Yoxtheimer* matter, which were marked as confidential and include testimony by each of the individual Defendants in this case.

40. On November 4, 2022, Ampler Burgers Ohio served responses to Plaintiff's second set of discovery.

41. Finally, 399 days after Ampler Burgers Ohio was served with the Complaint, Defendants filed their *Motion to Dismiss or Stay and Compel Arbitration*.

## CONCLUSIONS OF LAW

The Court makes the following conclusions of law:

### I. The Court's Consideration of a Motion to Compel Arbitration

42. The United States Supreme Court recently clarified that the Federal Arbitration Act's ("FAA"), 9 U.S.C. § 2, "policy favoring arbitration" is "merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts." *Morgan v. Sundance, Inc.*, 596 U.S. ____, 142 S. Ct. 1708 (2022). In other words, the "policy" is "to place such agreements upon the same footing as other contracts, but not more so." *Id.* (citation omitted).

43. West Virginia law is clear that arbitration agreements, like contracts, require assent. Arbitration is a matter of contract, and a party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *U-Haul Co. of W. Va. v. Zakaib,* 752 S.E.2d 586, 593 (W. Va. 2013). "Nothing in the [FAA] overrides normal rules of contract interpretation. Generally applicable contract defenses—such as laches, estoppel, waiver, fraud, duress, or unconscionability—may be applied to invalidate an arbitration agreement. Syl. Pt. 3, *Richmond American Ho. v. Sanders*, 717 S.E.2d 909 (W. Va. 2011).

44. In West Virginia, "[t]he fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent . . . ." Syl. Pt. 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W. Va. 559 (1926); *See also* Syl. Pt. 4, *Beckley Health Partners v. Hoover*, No. 20-0689 (W. Va. June 15, 2022) (quoting the same). Further, "parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate." Syl. Pt. 10, *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646 (2011) ("*Brown I*") (overruled on other grounds).

45. The Supreme Court of Appeals of West Virginia has made clear that "[a]n agreement to arbitrate will not be extended by construction or implication." *Id.* (quoting Syl. Pt. 10, *Brown I.* "It is well settled that any ambiguity in a contract must be resolved against the party who prepared it." *Bass v. Coltelli-Rose*, 207 W. Va. 730, 735 (2000). For there to be a valid, binding contract compelling arbitration, the party moving to compel must show a clear manifestation of an agreement between the parties to arbitrate the dispute at issue. *See U-Haul,* 232 W. Va. at 439.

## II. Defendants Cannot Enforce the Arbitration Agreement for Five Independent West Virginia Contract Issues.

46. The Court **FINDS** that Defendants cannot enforce the Arbitration Agreement due to five dispositive West Virginia contract law issues. The Court holds that each of the five reasons articulated below is an independent and sufficient reason to conclude that that Defendants have irrevocably waived their right to enforce any Arbitration Agreement.

### *A. Defendants Waived the Right To Arbitrate Plaintiff's Claims Against Them.*

47. "Under section 3 of the FAA, a party loses its right to stay a course of proceedings in order to arbitrate if it is 'in default in proceeding with such arbitration.'" *Coleman-Reed v. Ocwen Loan Servicing LLC,* Nos. 2:15-13687, 2:15-13708, 2016 WL 6469329 (S.D.W. Va. Oct.

28, 2016) (citing *Forrester v. Penn Lyon Homes, Inc.*, 553 F.3d 240 (4th Cir. 2009). "Nothing in the Federal Arbitration Act . . . overrides normal rules of contract interpretation" and, therefore, "[g]enerally applicable contract defenses . . . such as . . . waiver . . . may be implied to invalidate an arbitration agreement." *Schumacher Homes of Circleville, Inc. v. Spencer*, 235 W. Va. 335, 774 S.E.2d 1, 5 (2015) (emphasis added), *cert. granted, judgment vacated,* 136 S. Ct. 1157, 194 L. Ed. 2d 164 (2016).

48. The West Virginia Supreme Court has held:

> The right to arbitration, like any other contract right, can be waived. To establish waiver of a contractual right to arbitrate, the party asserting waiver must show that the waiving party knew of the right to arbitrate and either expressly waived the right, or, based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language.

*Dan Ryan Builders, Inc. v. Williams*, No. 18-0579, 2020 WL 6538832, at *4–5 (W. Va. Nov. 6, 2020) (citation omitted); *see also Williams v. Tucker*, 801 S.E.2d 273 (W. Va. 2017) (holding that waiver "may be implied from the conduct of the party who is alleged to have waived a right.").

49. Importantly, the United States Supreme Court has recently found that courts evaluating whether a party waived its right to arbitrate cannot consider prejudice but instead must focus on conduct. *Morgan v. Sundance*, 596 U.S. __, 142 S. Ct. 1708 (2022). In other words, "Did [Ampler Burgers Ohio] knowingly relinquish the right to arbitrate by acting inconsistently with that right?" *Id.*; *see also Parsons v. Halliburton Energy Servs., Inc.*, 785 S.E.2d 844, 853 (W. Va. 2016) ("There is no requirement that the party asserting waiver show prejudice or detrimental reliance.").

50. In this case, Defendants waited more than a year to file their Motion to Compel Arbitration.

51. Ampler Burgers Ohio was served with Ms. Bishop's Complaint on October 12, 2021, and filed its Answer on January 5, 2022, in which it raised the Affirmative Defense of "Bishop's purported claims against Defendants are or may be governed by a mandatory arbitration provision." In their civil cover sheet, the Defendants checked a box indicated they wanted a jury trial.

52. As a result, Ampler Burgers Ohio clearly knew of the Arbitration Agreement, but chose not to seek to compel arbitration at that time and indicated an interest in pursuing a jury trial.[2] On February 9, 2022, Ampler Burgers Ohio confirmed its knowledge of the Arbitration Agreement by producing the Agreement along with its first discovery responses. Again, Ampler Burgers Ohio did not seek to compel arbitration at that time, but continued to litigate this matter.

53. From January 5, 2022 until November 9, 2022—308 days—Defendants collectively engaged in extensive litigation, including answering and responding to two sets of discovery, supplementing discovery, responding to meet-and-confer emails and letters, entering an *Agreed Protective Order*, attending two scheduling conferences, negotiating an *Agreed Order for Substitution of Party,* participating in several emails and telephone calls, asking for deadline extensions, and making repeated requests for all of the deposition transcripts in the earlier matter.

54. Understandably Ms. Bishop relied on Ampler Burgers Ohio's extensive litigation in this matter by actively engaging in written discovery (both propounding and responding to discovery requests), engaging in extensive fact witness development (including the production of ten affidavits), and producing ten deposition transcripts with exhibits from the *Yoxthemer* matter.

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[2] Defendants have argued that because they did not demand a jury trial in their answer that the checking of the "jury trial" box on the civil cover sheet is irrelevant. The Court makes no determination regarding this issue. The Court, however, observes that noting on the Civil Cover Sheet that a jury trial is desired is an act that is contrary to an intent to arbitrate this matter.

55. Even though Ms. Bishop is not required to show prejudice, her active litigation of this matter is relevant because Ampler Burgers Ohio was aware of Plaintiff's litigation activities and permitted Plaintiff to engage in the fact witness development and other discovery without seeking to compel arbitration. Although Defendants' conduct alone demonstrates an intent to litigate instead of arbitrate, Defendants' full knowledge of Plaintiff's active litigation and permitting such conduct without seeking to compel arbitration is further conduct by Defendants that is inconsistent with an intent to arbitrate.

56. Defendants' conduct shows that they had knowledge of the Arbitration Agreement, and instead of seeking to compel arbitration months ago elected to waive their rights under the Agreement and to actively litigate in this Court.

57. Worth noting, the Defendant has not provided a sufficient explanation for why they waited approximately a year before electing to file their Motion to Dismiss or to Stay and Compel Arbitration.

58. The Court holds that that this conduct constitutes waiver under West Virginia law and is an independent basis to deny the Defendants' Motion.

### *B. Defendant Ampler Burger Ohio, LLC Cannot Enforce the Arbitration Agreement Because it is not a Party to the Agreement.*

59. Defendant Ampler Burgers Ohio, LLC's status as a non-signatory to the Arbitration Agreement also requires that the Motion to Compel Arbitration be denied.[3]

60. Defendant Ampler Burgers Ohio concedes in its Answer and in its Motion to Compel Arbitration that it—and not Ampler Burgers, LLC—employed Plaintiff.

[3] Defendants do not assert that Defendants McLaughlin, Spaulding, or Stephens are signatories, and the Court **FINDS** that they are not.

61. As explained below, the identity of the employer is dispositive on the issue before the Court because Ampler Burgers, LLC—and not Ampler Burgers Ohio—is a party to the Arbitration Agreement.

62. Ampler Burgers Ohio is not mentioned a single time in the Arbitration Agreement. Rather, as made clear through the following Arbitration Agreement provisions, Ampler Burgers, LLC is the only entity that is a signatory to the Arbitration Agreement:

- Critically, the Arbitration Agreement defines "**Company**" and "QSR Burgers" as meaning "**Ampler Burgers, LLC**."[4]

- In the "Application and Coverage" Section, the Agreement provides, "Your decision to accept employment or continue employment with the **Company** [meaning Ampler Burgers, LLC] constitutes your agreement to be bound by this policy. Likewise, the **Company** [meaning Ampler Burgers, LLC] agrees to be bound by this policy."

- The "Application and Coverage" Section similarly provides, "The DRAP applies to all employees . . . and covers all disputes relating to or arising out of an employee's employment with the Company [meaning Ampler Burgers, LLC] or the termination of employment."

- The "Application and Coverage" Section similarly provides, "This mutual agreement to arbitrate claims means that both you and the **Company** [meaning Ampler Burgers, LLC] are required to use arbitration as the only means of resolving employment-related disputes . . . and to forego any right either may have to a jury trial on issues covered by this policy."

- The "Arbitration Process" Section also makes clear that Ampler Burgers, LLC is the corporate party to this Agreement by stating that the submission of the Request for Arbitration Form would confirm "your and the **Company's** [meaning Ampler Burgers, LLC's] prior mutual agreement to submit the dispute to final and binding arbitration."

- The Arbitration Agreement uses the term "Ampler Burgers" throughout but does not define the term. However, it is clear through the use of the term in the Agreement that "Ampler Burgers" means Ampler Burgers, LLC. The paragraph where the Arbitration Agreement

[4] The first sentence in the Employee Handbook produced in discovery makes clear that it is not intended for Ampler Burgers Ohio employees, stating, "It is our pleasure to welcome you to Ampler LLC, d/b/a Burger King." (Ex. 39, Ampler_000058). Admittedly, the Handbook is not the model of clarity. It uses the term "**companies'**" in a number of instances but frequently uses the possessive tense with the remainder of the sentences referring to a singular entity. For instance, "The companies' . . . reserves the right" (Ampler_000137); "The companies' is an equal opportunity employer (Ampler_000138). Worth noting, the term "company" is used frequently in the same section, making it appear that the use of the term "companies'" can be attributed to poor drafting.

defines the terms "QSR Burgers" and "Company" immediately precedes the following language:

- "**Ampler Burgers** sincerely hopes that you will never have a dispute relating to your employment with the **Company**. However, **QSR Burgers** recognizes that disputes sometimes arise between an employer and its employees relating to the employment relationship. **Ampler Burgers** believes that it is in the best interests of both its employees and the **Company** to resolve those disputes in a forum that provides the fastest, least expensive and fairest method for resolving them. Therefore, if disputes cannot be resolved informally through the open door process **Ampler Burgers** and its employees are required to resolve disputes through final and binding arbitration as discussed in this Dispute Resolution and Arbitration Policy."

63. These excerpts from the Arbitration Agreement make clear that Ampler Burgers, LLC, and not Ampler Burgers Ohio, is the corporate entity that is a party to the Arbitration Agreement.

64. The Arbitration Agreement also provides: "I understand that final and binding arbitration will be the sole and exclusive remedy for any such claim or dispute against [Ampler Burgers, LLC] or any affiliated entities, and each of their employees, officers, directors or agents . . . ."

65. However, as made clear in the previous sentence in the Agreement, "any such claim" only applies to claims brought against "Ampler Burgers," which is used through the Agreement to mean Ampler Burges, LLC, and not Ampler Burgers Ohio.

66. Therefore, the Court **FINDS**, because Ms. Bishop was an employee of Ampler Burgers Ohio, this language does not apply or limit Ms. Bishop's rights in any way.

67. Generally, non-parties to arbitration agreements have no rights to compel a signatory to arbitrate claims. *Bluestem Brands, Inc. v. Shade*, 805 S.E.2d 805, 813 (W. Va. 2017). However, the West Virginia Supreme Court has adopted the Fourth Circuit's estoppel theory of arbitration enforcement by a non-signatory. Under that equitable theory, "a non-signatory to a

written agreement requiring arbitration may utilize the estoppel theory to compel arbitration against an unwilling signatory when the signatory's claims make reference to, presume the existence of, or otherwise rely on the written agreement." *Id.*

68. The Court **FINDS** that Plaintiff's claims do not fall within this equitable exception to the general rule that a non-signatory cannot enforce an arbitration agreement because Plaintiff's Complaint asserting claims brought pursuant to the West Virginia Human Rights Act (1) in no way refers to the Arbitration Agreement; (2) does not presume the existence of the Agreement, and (3) does not otherwise rely on the Agreement.

69. As such, The Court **FINDS** that Defendants cannot avail themselves of the estoppel theory of arbitration enforcement.

70. The Court further **FINDS** that as non-signatories, Ampler Burgers Ohio, and the other Defendants have no standing to enforce the Arbitration Agreement.

71. Finally, the Court **FINDS** that because Ampler Burgers Ohio is a non-signatory, this reason is independently and separately sufficient to deny the Defendants' Motion.

### *C. Defendants Cannot Enforce the Arbitration Agreement Because the Dispute is not Subject to the Arbitration Agreement.*

72. Defendants also cannot enforce the Arbitration Agreement because Plaintiff's claims do not fall with the scope of claims subject to the Arbitration Agreement.

73. The Arbitration Agreement provides, "The DRAP applies to all employees . . . and covers all disputes relating to or arising out of an employee's employment with the **Company** [meaning Ampler Burgers, LLC] or the termination of employment."

74. The Agreement then carves out certain "exclusions and exceptions" that are not subject to the Agreement. The Agreement expressly excludes the following, among other claims, "Arbitration . . . does not apply to claims by the **Company** for injunctive relief and/or other

equitable relief for unfair competition and/or the use of unauthorized disclosure of trade secrets or confidential information, relief for which may be sought in court."

75. These carve outs by Ampler Burgers, LLC (i.e., "Company") reinforce that only claims related to employment with Ampler Burgers, LLC are arbitrable under the Agreement.

76. Based on the totality of the language in the Arbitration Agreement, the Court **FINDS** that only employment-related claims against Ampler Burgers, LLC are subject to the Arbitration Agreement.

77. The Court further **FINDS** that Plaintiff's claims against Ampler Burgers Ohio are outside of the scope of the Arbitration Agreement and is an independent reason to deny the Defendants' Motion.

### *D. Defendant Cannot Enforce the Arbitration Agreement Because There is Not Mutual Consideration.*

78. A mutual arbitration agreement is only enforceable if there is sufficient consideration to support the agreement. *See Hampden Coal, LLC v. Varney* 810 S.E.2d 286, 293 (W. Va. 2018).

79. Defendants claim that "because both Bishop and Ampler Burgers agreed to be bound by the DRAP, there was adequate consideration for the Agreement to arbitrate."

80. As noted, however, the only possible signatories to the Agreement are Plaintiff and Ampler Burgers, LLC. Defendant Ampler Burgers Ohio is not even mentioned in the Agreement, much less consented to be bound it. Nor are Defendants McLaughlin, Spaulding, or Stephens mentioned in the Arbitration Agreement. Defendants have failed to argue that any of these individual defendants either provided or received any consideration as a result of the Arbitration Agreement.

81. Therefore, Defendant Ampler Burgers Ohio and the other Defendants failed to provide any consideration for the Agreement.

82. Second, Plaintiff likewise failed to receive the stated consideration in the Arbitration Agreement.

83. As the Agreement provides, "Your decision to accept employment or continue employment with the **Company** [meaning Ampler Burgers, LLC] constitutes your agreement to be bound by this policy.

84. Likewise, the **Company** [meaning Ampler Burgers, LLC] agrees to be bound by this policy."

85. Through this language, the drafter unsuccessfully attempted to create mutuality of consideration between Plaintiff and Ampler Burgers, LLC.

86. Plaintiff did not accept employment with Ampler Burgers, LLC, so her "employment or continued employment" with the "Company" could not possibly be sufficient consideration for the enforcement of the Agreement.

87. The Court **FINDS** that due to a lack of mutual consideration, the Arbitration Agreement is unenforceable and this is an independent reason to deny the Defendants' Motion.

### *E. The Arbitration Agreement is Unenforceable Because it is a Procedurally and Substantively Unconscionable Adhesion Contract.*

88. "A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it." Syl. Pt. 11, *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382 (2012) ("*Brown II*"). When considering an adhesion contract, a court "in its equity powers is charged with the discretion to determine, on a case-by-case basis, whether a contract provision is so harsh and overly unfair that it should not be enforced under the doctrine of

unconscionability." Syl. Pt. 9, *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281 (2012). Contracts of adhesion are subject to "greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person." Syl. Pt. 11, *Brown II,* 229 W. Va. 382.

89. West Virginia recognizes both procedural and substance unconscionability. Substantive unconscionability "involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party." Syl. Pt. 12, *Brown II,* 229 W. Va. 382.

90. On the other hand, procedural unconscionability "is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all of the circumstances surrounding the transaction." *Id.* at Syl. Pt. 10. "These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract." *Nationstar Mortg., LLC v. West*, No. 15-0128, at *8 (W. Va. Apr. 7, 2016) (citation omitted).

91. For the reasons that follow, the Court **FINDS** that the Agreement is both procedurally and substantively unconscionable.

### *i. Enforcing the Arbitration Agreement Against Plaintiff Would be Procedurally Unconscionable.*

92. When Plaintiff purportedly entered the Arbitration Agreement, she was a high school student, had just reached the age of majority, and was presented a series of documents (including at least one that was presumably submitted to the federal government) identifying

Ampler Burgers, LLC as her employer. She was then presented with an Arbitration Agreement explaining that Ampler Burgers, LLC was her employer and the "Company" with the right to enforce the Arbitration Agreement.

93. Ampler Burgers Ohio, LLC now seeks to enforce the Arbitration Agreement and apparently claims that it is the "Company" referenced in the Arbitration Agreement. Even if this Court were to construe the Agreement as Defendants suggest, Plaintiff in no way had a "reasonable opportunity to understand" that she was entering an Agreement with Defendant Ampler Ohio to litigate claims against it. Therefore, the Court **FINDS** that the Arbitration Agreement is procedural unconscionability.

***ii. The Arbitration Agreement is Substantively Unconscionable.***

94. An arbitration agreement is substantively unconscionable if it "involves unfairness in the contract itself and [has contract terms that are] one-sided and will have an overly harsh effect on the disadvantaged party." Syl. Pt. 12, *Brown II,* 729 S.E.2d 217.

95. In this case, if the arbitration agreement is enforced, it has several terms that are exceptionally one-sided with an overly harsh effect on Plaintiff. For instance, the Arbitration Agreement requires complete confidentiality. This is a term that would shield the wrongdoing perpetrated on Plaintiff and require her to remain silent about the sexual harassment she was forced to endure. The Agreement also has extreme limitations on discovery that would undoubtedly favor Defendants.

96. The Agreement prohibits the parties from taking any depositions unless ordered by the arbitrator and limits written discovery to a "reasonable request for copies of relevant documents from each other." Given the nature of this sexual harassment case where the harasser has serially harassed Burger King employees with full knowledge of managers, these limitations would have

an overly harsh effect on Plaintiff and likely permit Defendants to shield important Rule 404(b) evidence from discovery and use at an arbitration.

97. The Arbitration Agreement is also exceptionally one-sided in that, if enforced, Plaintiff is required to arbitrate "all disputes relating to or arising out of [her] employment with the Company or the termination of employment." On the other hand, Ampler Burgers, LLC has carved out "claims by the Company for injunctive relief and/or other equitable relief for unfair competition and/or the unauthorized disclosure of trade secrets or confidential information, relief for which may be sought in court." By cherry picking the claims most important to the "Company," Ampler Burgers, LLC has created a scenario where aggrieved employees must arbitrate all employment claims against Ampler Burgers, LLC, but it has the option of avoiding arbitration for the claims it is most likely to assert against employees.

98. Because of these extreme inequities, the Court **FINDS** that the Arbitration Agreement is substantively unconscionable.

***iii. The Arbitration Agreement is Unenforceable Because of the Substantive and Procedural Unconscionability.***

99. In West Virginia, "a contract term is unenforceable if it is both procedurally and substantively unconscionable." Syl. Pt. 9, *Brown II*, 229 W. Va. 382. "However, both need not be present to the same degree." *Id.*

100. Applying that standard here, the Court must consider both the circumstances under which Plaintiff purportedly entered the Arbitration Agreement and the terms of the Agreement. For the reasons stated, the Court **FINDS** that the agreement is unenforceable because it is unconscionable, which is an independent reason to deny the Defendants' Motion.

For the reasons stated herein, Defendants Ampler Burgers Ohio, LLC's, Sheila Spaulding's, Leslie McLaughlin's, and Teresa Stephen's Motion is **DENIED.** The Clerk of the

Court is **DIRECTED** to send a certified copy to counsel of records and the *pro se* Defendant Robert Falls to the following address: **70 Derby Drive, Elkview, WV 25071.**

Entered: The 22nd day of December 20___

Judge Tera L. Salango

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 12
DAY OF December 2022
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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