

IN THE SUPREME COURT OF MISSISSIPPI

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CASE No. 2008-~~15~~1-00323-SCT

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REGIONS BANK  
as successor to AMSOUTH BANK

APPELLANT

VS.

JIMMY WALKER and  
BIG SHOT INDOOR SHOOTING RANGE, LLC

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT  
OF JONES COUNTY, MISSISSIPPI

**BRIEF OF APPELLEE - JIMMY WALKER**

**ORAL ARGUMENT NOT REQUESTED**

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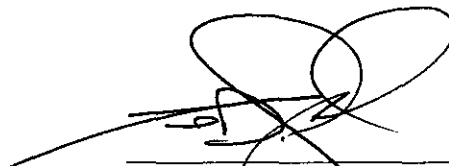
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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

- 1) Regions Bank, as successor to AmSouth Bank, *Appellant*
- 2) Jimmy Walker and Big Shot Indoor Shooting Range, LLC, *Appellees*
- 3) Luther Tyrome Russell, a Co-Defendant of Regions Bank in the trial court
- 4) Paul J. Delcambre, Jr., Esq., Julie Jarrell Gresham, Esq. of Balch & Bingham, LLP (Gulfport, MS) Attorneys for Appellant
- 5) Thomas T. Buchanan, Esq. and John D. Smallwood, Esq. of TUCKER BUCHANAN, PA (Laurel, MS), attorneys for Appellee, Jimmy Walker
- 6) Honorable Billy Joe Landrum, Circuit Court Judge of Jones County, Mississippi



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JOHN D. SMALLWOOD

Attorney for Appellee – Jimmy Walker

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**Rules**

Uniform Circuit and County Court Rules, Rule 2.04 . . . .

## **RE-STATEMENT OF THE FACTS**

This suit arises from a commercial transaction in which Regions Bank [as AmSouth Bank was purchased by Regions Bank, heretofore it will be designated as "Regions"] agreed to loan funds for a new business to be opened, that being Big Shot Indoor Shooting Range, LLC ["Big Shot"]. One of the defendants in the trial court, Luther Tyrome Russell ["Russell"], contacted the Plaintiff, Jimmy Walker ["Mr. Walker"], to solicit financial help in opening this business. Mr. Walker, in turn, had Russell contact Will Easterling at Regions in Hattiesburg. However, Easterling and Regions would not agree to make the loan to Russell without additional security. As such, Easterling and Russell solicited Mr. Walker to personally guaranty the loan to the prospective business. As an incentive for Mr. Walker to agree to guaranty the loan, Easterling, an employee of Regions, represented that if Mr. Walker would co-sign a loan for the new business, Regions would hire a local certified public accountant, John Havard, to monitor the business's books on a monthly basis and would notify Mr. Walker if Havard reported any irregular, abnormal or adverse transactions or activity. Based on that oral representation, Mr. Walker agreed to personally guaranty a \$250,000.00 loan from Regions to the new business. As a result of said representation, Mr. Walker signed a "Note", "Guaranty Agreement" and "Security Agreement". Mr. Walker maintained 51% ownership interest in Big Shot.

Big Shot opened for business in January of 2002. Beginning in May of 2002, Havard began monitoring the business's books. In September 2002, Harvard reported to

Regions that Russell had stopped paying the premium on one or more of the business' insurance policies. Regions, however, failed to relay that information to Mr. Walker.

In April of 2003, Havard reported to Regions that Russell had stopped making payments on the lease for Big Shot's building. Regions, again, did not relay that information to Mr. Walker. Russell defaulted on the note to Regions in November 2003. Mr. Walker filed his Complaint [R. at 3] against Regions and Russell on June 28, 2004. The claims asserted are: (1) Breach of Contract, (2) Breach of Fiduciary Duty, (3) Misrepresentations and Omissions, (4) Negligence, (5) Breach of Duty of Good Faith and Fair Dealing, (6) Conversion, (7) Injunctive Relief, and (8) Punitive Damages.

On **August 2, 2004**, Regions filed a Motion to Stay Proceedings and for an Order Compelling Arbitration [R. at 28]. Mr. Walker responded and a hearing was held on February 28, 2005. On **January 31, 2008** the trial Court entered an Order [R. at 93] denying Regions Motion to Compel Arbitration. Aggrieved, Regions filed a Petition for Interlocutory Appeal by Permission.

## **SUMMARY OF THE ARGUMENT**

Regions failed to pursue a decision on its original motion in a timely manner. The Circuit Court of Jones County, Mississippi was correct in finding that the subject Arbitration clauses in the "Note", "Guaranty Agreement" and "Security Agreement" are not applicable to the claims made by Jimmy Walker in his Complaint. Each and every claim brought by Mr. Walker in his Complaint are based, in whole or in part, upon oral promises made before and outside of the written contracts which include the arbitration clauses sought to be enforced against Mr. Walker.

## **ARGUMENT**

### **STANDARD OF REVIEW**

"We apply a *de novo* standard of review regarding a decision to grant or deny a motion to compel arbitration." *Community Care Center of Vicksburg v. Mason*, 966 So.2d 220, 225 (Miss. 2007); *EquiFirst Corp. v. Jackson*, 920 So.2d 458, 461 (Miss. 2006). The Mississippi Supreme Court has recognized that "arbitration is favored and firmly embedded in both our federal and state laws." *Community Care Center of Vicksburg v. Mason*, 966 So.2d 220, 225 (Miss. 2007); *Vicksburg Partner, L.P. v. Stephens*, 911 So.2d 507 (Miss. 2005). However, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Pre-Paid Legal Services v. Battle*, 873 So.2d 79, 84 (Miss. 2004).



**I. WHETHER THE CIRCUIT COURT ERRED IN DENYING REGION'S MOTION TO COMPEL ARBITRATION.**

**A. Laches/Failure to Pursue Decision**

Mr. Walker filed his original Response to Motion for Arbitration on September 29, 2004 [R. at 54]. The hearing on the matter was heard on February 28, 2005. The Order [R. at 93] denying the Motion was rendered on January 31, 2008, almost three (3) years after the hearing. Uniform Circuit and County Court Rules, Rule 2.04, states: “[i]t is the duty of the movant, when a motion or other pleading is filed, including motions for a new trial, to pursue said motion to hearing and decision, by the court.”. Regions admits in the footnote of page 3 of Appellant's Brief “neither party sought to force a ruling by the Court.”. Pursuant to UCCR Rule 2.04, it was the duty of Regions to pursue a decision on its Motion to Compel Arbitration. Regions admits it failed to do so. This appeal should be denied as a result.

**B. The Claims arise from acts/inaction and misrepresentations made outside of the contracts.**

Throughout Appellant's Brief, Regions maintains that because the subject “arbitration agreement includes ‘any alleged tort related to the arbitration agreement or arising out of the note or Loan’” [A<sup>t</sup> Brief at 10], the claims made in the Complaint are covered by the arbitration clauses. As Regions did in its argument before the trial court, Regions again uses a broad brush to support enforcement of the arbitration clauses.

The claims made by Mr. Walker have their origin in the promises, inducements

and misrepresentations made by Regions before any of the documents at issue were signed. Those same promises, inducements and misrepresentations are not contained anywhere in the Note, Guaranty Agreement nor Security Agreement. Regions has not argued this fact otherwise.

The Complaint includes:

As an incentive for Walker to agree to guaranty the loan, Easterling represented that if Walker would co-sign a loan for the new business, Regions would hire a local certified public accountant, John Havard ("Havard"), to monitor the business's books on a monthly basis and would notify Walker if Havard reported any irregular, abnormal or adverse transactions or activity. (R. at 5 - ¶8)

Though Regions "vehemently denies" they made such a promise (*see* Petition for Interlocutory Appeal, ¶16, pg. 6) and asserts that this claim 'is based solely upon the unsubstantiated naked allegations of the Complaint" (A<sup>1</sup> Brief at 11), said promises are the basis of the claims. Whether Regions made such promises is a question of fact for the jury, however, just because Regions denies it does not bring the allegation under the umbrella of the arbitration clauses. If the jury finds that there were no oral promises or that there were and Regions did not violate the promise, then so be it, but those issues are for the jury to decide. Regions does not dispute that the written contracts are silent as to the alleged oral promises, it merely disputes that there were any oral promises. Nonetheless, each and every claim brought by Mr. Walker is based upon these oral promises.

The specific claims made by Mr. Walker leave no doubt that they are based upon oral promises made outside of the written contracts are:

First Claim: Breach of Contract

A specific condition precedent to Walker's guaranty of the \$250,000.00 loan from Regions to Big Shot was Regions' representation that it would hire Havard to monitor the monthly books of Big Shot and relay any and all irregular, abnormal or adverse transaction or activity to Walker. Regions failed, as promised, to notify Walker of the material, irregular, abnormal and adverse transactions and activities. Therefore, Regions breached a material condition precedent to Walker's agreement to provide the guaranty, for which Regions is liable. (R. at 7-8 - ¶14).

Second Claim: Breach of Fiduciary Duty

Further in agreeing to guaranty the \$250,000.00 loan, Walker reposed in Regions justifiable confidence and trust that it would, as represented, make him aware of any irregular, abnormal or adverse transaction or activity that were reported by Havard to the bank. Regions had effective control over that information; it did not, as promised, notify Walker about the irregular, abnormal and adverse transactions and activities observed and reported by Havard, and as a result, breached fiduciary duties to Walker, for which Regions is liable. (R. at 7 - ¶16).

Third Claim: Misrepresentations and Omissions

Russell and Regions, collectively and individually, intentionally and negligently misrepresented or omitted facts, to or from Walker and Big Shot, on which they detrimentally relied. If those facts had been truthfully represented or made known, Walker would not have guaranteed the note or become involved with Russell or Big Shot. (R. at 8 - ¶19).

See also Complaint ¶¶ 21, 23, 25

These are the claims which are the basis of the Complaint [R. at 3]. There are no claims made in the Complaint which are based upon Regions breach of the written contracts.

The Mississippi Supreme Court has made it clear that there is a strong federal policy favoring arbitration. *Adams v. Greenpoint Credit, LLC*, 943 So. 2d 703, 708 (Miss. 2006); *Pre-Paid Legal Services v. Battle*, 873 So.2d 79, 84 (Miss. 2004). Despite that policy, however, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Id.* See *Pre-Paid Legal* at 83. In the case at hand, the oral promises upon which Mr. Walker basis his Complaint are outside of the written contracts. Mr. Walker did not submit to arbitration on these oral promises.

The crux of Regions argument is that the written contracts, including the arbitration clauses shall be considered by an arbitrator. Mississippi law is clear that judicial review and/or quasi judicial review of a written contract shall be done by considering the language of the contract or the "four-corners" of the documents. *Harris v. Harris*, 988 So.2d 376 (Miss. 2008); *Rotenberry v. Hooker*, 864 So.2d 266 (Miss. 2004). The difference in the case at hand is that all claims made by Mr. Walker in his Complaint are based upon an oral contract made outside of the written documents. Judicial review of Mr. Walker's claims will necessitate considering whether there were oral agreements made outside of the written contracts and if so, whether they were breached. These oral agreements are not a part of the written contracts and thus not possibly contemplated by the arbitration clauses nor within the scope of the arbitration clauses. Any review will consider evidence other than the written documents. As such, the written contracts, including the arbitration clauses will not apply to any oral contracts.

### **C. Waiver**

A party can waive their right to arbitrate when they "actively participate(s) in a lawsuit or takes other action inconsistent with [the right to arbitration]." *Century 21 v. Smith*, 965 So. 2d 1031, 1036 (Miss. 2007), citing, *Cox v. Howard, Weil, Labouisse, Friedrichs, Inc.*, 619 So. 2d 908, 914 (Miss. 1993). Our Supreme Court also found that "we will not hesitate to find a waiver of the right to compel arbitration" for a "delay in pursuing the right, coupled with active participation in the litigation process." *Century 21* at 1036, citing *MS Credit Center v. Horton*, 926 So. 2d 167 (Miss. 2006). "[E]ither active participation or substantial invocation of the litigation process which results in detriment or prejudice to the other party, or engaging in conduct inconsistent with timely enforcing the arbitration agreement, constitutes waiver." *Id.* In the case at hand, Regions admitted that it did not pursue a decision on its Motion to Compel Arbitration and that the Motion languished for almost 3 years from the time it was argued until an Order was entered. Regions failure to pursue a decision has prejudiced Mr. Walker and is inconsistent with timely enforcement of the subject arbitrations agreement, all of which constitutes Regions waiver.

### **D. Fraudulent Inducement.**

Should this Court find against Mr. Walker on those issues raised hereinabove, then the arbitration clauses should not be enforced due to fraudulent inducement. Assuming *arguendo* that the arbitration clauses at issue are valid and that the oral agreements

alleged are within the scope of the arbitration clauses, Mr. Walker would show that Regions fraud induced him into signing those contracts.

Contract defenses "such as fraud, duress, or unconscionability, can be used to invalidate arbitration provisions." *Vicksburg Partner, L.P. v. Stephens*, 911 So.2d 507, 514 (Miss. 2005), citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

The trial court in the case at hand specifically found that

As addressed by the Plaintiffs in response to the pending motions, viable claims for fraudulent inducement and future torts exist. Furthermore, as in the *Blakeney* case, no reasonable person would agree to arbitrate frauds and intentional torts later committed upon him after formation of an agreement. see also, *Smith v. Captain D's, LLC*, No. 2006-CA-00024-SCT (Miss. 06/14/2007). The scope of the arbitration agreement at issue does not contemplate fraud by one party or intentional torts by one party after the parties contracted.

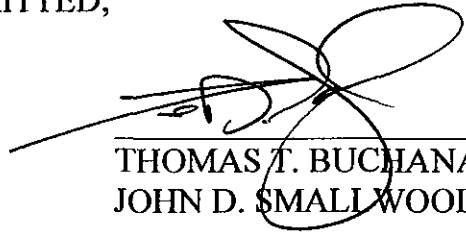
[R. at 95].

As shown in the claims from the Complaint cited hereinabove, Mr. Walker's complaint is based upon the oral promises made by Regions as incentives for him to sign the written contracts at issue. Without the oral promises, Mr. Walker would not have executed the contracts. To permit Regions to make oral promises to induce a customer to sign contracts, then breach those oral promises yet enforce the arbitration clause of the written contracts would be against public policy and should not be sanctioned by this Court.

**CONCLUSION**

Based upon the foregoing, this Court should affirm the decision of the trial court and remand this matter back to the Circuit Court of Jones County, Mississippi for trial.

RESPECTFULLY SUBMITTED,

  
\_\_\_\_\_  
THOMAS T. BUCHANAN, [REDACTED]  
JOHN D. SMALL WOOD, [REDACTED]

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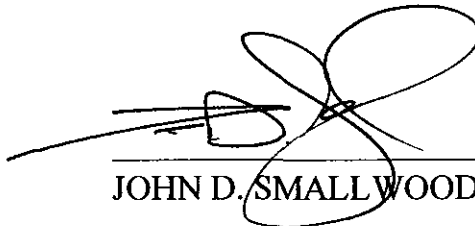
**CERTIFICATE OF SERVICE**

I do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

Honorable Billy Joe Landrum  
CIRCUIT COURT JUDGE  
PO Box 685  
Laurel, MS 39441

Paul J. Delcambre, Jr., Esq.  
BALCH & BINGHAM, LLP  
1310 Twenty-Fifth Ave.  
Gulfport, MS 39501

This the 25<sup>th</sup> day of November, 2008.

  
\_\_\_\_\_  
JOHN D. SMALLWOOD