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### **THIS COURT HAS PROPERLY EXERCISED JURISDICTION OVER THIS APPEAL**

This Court has the authority and jurisdiction to adjudicate Andria Sawyers's interlocutory appeal from the Circuit Court of Wayne County's July 30, 2008, Order granting Herrin-Gear Chevrolet Company, Inc.'s (Herrin-Gear) and American Bankers Insurance Company of Florida's (American) Motions to Compel Arbitration. On August 13, 2008, pursuant to Miss. R. App. P. 5(a), Sawyers filed her Petition for Permission to Appeal, which was granted by this Court on September 17, 2008.

This Court has the authority to adjudicate interlocutory appeals from a circuit court's decision to compel a party to arbitrate, and has exercised this authority in the past. *Smith v. Captain D's, LLC*, 963 So. 2d 1116 (Miss. 2008); *In re Tyco Int'l (US) Inc.*, 917 So. 2d 773 (Miss. 2005); *Sullivan v. Protex Weatherproofing, Inc.*, 913 So. 2d 256 (Miss. 2005); *Sullivan v. Mounger*, 882 So. 2d 129 (Miss. 2004); *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719 (Miss. 2002); *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002).

American cites *Banks v. City Fin. Co.*, 825 So. 2d 642 (Miss. 2002), for the proposition that an order granting a motion to compel arbitration is not appealable under any circumstances. This is not what *Banks* held. *Banks* held that the Mississippi Supreme Court had no jurisdiction over a Miss. R. App. P. 4 appeal from an order granting a motion to compel arbitration that was not a final adjudication. However, the instant case is distinguishable from *Banks* in that Sawyers filed a timely Miss. R. App. P. 5 appeal that was granted by this Court. Accordingly, American and Herrin-Gear's contention that this Court has no jurisdiction to entertain this appeal is without merit.

### **THE ARBITRATION AGREEMENT IS UNENFORCEABLE**

American contends that this court can rewrite the arbitration agreement drafted by Herrin-

Gear and take out the portion that permits Herrin-Gear to sue Andria Sawyers in court. American cites *Vicksburg Partners, L.P. v. Stevens*, 911 So.2d 507, 525 (Miss. 2005), for the proposition that this Court should “strike any substantively unconscionable terms [in an arbitration agreement] and compel arbitration.” Notably, American misrepresents the holding in *Stevens*. The holding in *Stevens* is consistent with Miss. Code Ann. § 75-2-302. Although this Court may strike a “clause” in the arbitration agreement, it may not strike single “terms” of the arbitration agreement as represented by American. *Stevens* and Miss. Code Ann. § 75-2-302 establish that this Court may strike an entire clause of the arbitration agreement. Were this Court to strike the clause that requires only Andria Sawyers to arbitrate, it would also be striking the language that requires Andria Sawyers to arbitrate in the first place.<sup>1</sup> This court has never held, as suggested by American, that it has the authority to pick and choose the words to strike in the arbitration clause that make the clause unconscionable. This Court must either strike the entire clause, as required by Mississippi statute, if it finds enforcement of the arbitration agreement proper notwithstanding its unconscionability. This court should not slice and dice the one-sided arbitration agreement that Herrin-Gear forced Andria Sawyers to execute.

American cannot have it both ways. In Mississippi, a party to a contract, particularly when that party is in an unequal bargaining position, cannot include the most oppressive terms it can fathom in an arbitration agreement with a consumer, then expect this Court to rewrite the agreement so it passes muster under Mississippi law. Because the subject arbitration agreement is unfair, unconscionable, one-sided, and oppressive, while depriving Andria Sawyers of important constitutional and property rights, this Court should refuse Herrin-Gear’s and American’s invitation to enforce it. Accordingly, this Court should reverse the Circuit Court of

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<sup>1</sup>See paragraph three of the arbitration agreement. Record - 38, Appellant’s R.E. Tab 5.

Wayne County's Order compelling arbitration and remand this case to the Circuit Court of Wayne County so the court and, if necessary, a jury can adjudicate her claims.

### **THE ARBITRATION AGREEMENT AIDS HERRIN-GEAR'S ILLEGAL ENTERPRISE**

Herrin-Gear, a car dealership, sold Andria Sawyers an insurance policy. Herrin-Gear, in addition to selling cars, insures its own customers for damage caused to those cars. Essentially, Herrin-Gear acts as an excess casualty insurer in case its customers - or insureds - are "underwater" on their auto loan when they have a total loss to their automobile. The Mississippi Department of Insurance strictly regulates Mississippi insurers. However, Herrin-Gear and American contend that they should not be regulated by the Mississippi Department of Insurance.

Herrin-Gear and American contend their criminal violations of Mississippi insurance law should be overlooked. They contend that this Court should void the insurance contract Andria Sawyers purchased from Herrin-Gear, and this Court should dismiss this case. Understandably, Herrin-Gear and American cite no authority in support of their contention in this regard. Herrin Gear entered into a contract with Andria Sawyers, and Herrin-Gear's status as an unauthorized insurer in this state does not relieve Herrin-Gear from its contractual obligations.

Enforcement of the subject arbitration agreement directly furnishes aid and support to Herrin-Gear and American's apparent disregard of Mississippi criminal laws by keeping evidence of their misconduct out of the files meticulously kept by the Circuit Clerk of the Wayne County Circuit Court, which are publicly accessible records. This Court has held that if the "principal purpose of [a] contract directly furnishes aid and protection to an illegal enterprise" it cannot be enforced. *See Smith v. Simon*, 224 So.2d 565, 566 (Miss. 1969). The principal purpose of the subject arbitration agreement is to keep this case out of Wayne County Circuit Court. Keeping this case out of Wayne County Circuit Court directly aids Herrin-Gear's illegal

enterprise by keeping the evidence in this case out of the Circuit Court of Wayne County Clerk's office. On these grounds, following *Smith*, this Court cannot enforce the subject arbitration agreement. Accordingly, this Court should reverse the Order of the Circuit Court of Wayne County compelling Andria Sawyers to arbitrate her claims against Herrin-Gear and American, and direct the Circuit Court of Wayne County to adjudicate her claims and provide her with a jury trial, if applicable.

**AMERICAN DID NOT MEET ITS BURDEN OF PROVING EQUITABLE ESTOPPEL**

American argues that this Court should permit it to use the arbitration agreement between Andria Sawyers and Herrin-Gear to compel Andria Sawyers to arbitrate her claims against American. American argues that the equitable thing for this court to do is to estop Andria Sawyers from litigating her claims against American in the Circuit Court of Wayne County. Understandably, American fails to identify, in its lengthy brief, why it would be equitable to estop Andria Sawyers from pursuing her claims against American in the Circuit Court of Wayne County.

Equitable estoppel is a "principle by which a party is precluded from denying any material fact, induced by his own words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed." *Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So.2d 382, 384-385 (Miss. 2008). American has the burden of proving each element to benefit from equitable estoppel. *Id.* The record is devoid of one shred of proof that: (1) Andria Sawyers made a representation, (2) the representation was of a material fact, (3) American relied upon this representation, (4) American changed its position, or (5) American would suffer an injury if Andria Sawyers were permitted to deny that material fact.

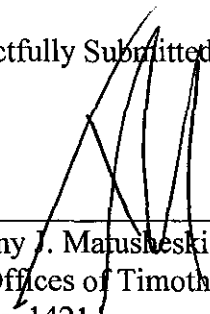
In fact, the evidence in the record is to the contrary. American is a stranger to the arbitration agreement. The arbitration agreement is crystal clear that it only applies to Andria Sawyers and Herrin-Gear. The arbitration agreement does not mention American. The insurance contract does not mention American. American has asserted no injury. Instead, American invites this Court to disregard its precedent on equitable estoppel, changing this firmly rooted doctrine, and allow a stranger to any arbitration agreement compel a plaintiff to arbitrate as long as a co-defendant had an arbitration agreement with the plaintiff.

The doctrine of *stare decisis* does not permit this Court to accept American's invitation to abrogate the doctrine of equitable estoppel unless the current law is not only manifestly wrong, but "pernicious", "impractical" or is "mischievous in its effect and resulted in a detriment to the public". *Caves v. Yarbrough*, 991 So. 2d 142, 151 (2008). Understandably, American has presented no argument as to why this Court should abrogate the doctrine of equitable estoppel. Accordingly, this Court should reverse the Wayne County Circuit Court's Order compelling Andria Sawyers to Arbitration her claims against American, and remand this case to the Circuit Court of Wayne County for an adjudication on the merits.

### **CONCLUSION**

Andria Sawyers prays that this Court reverse the Circuit Court of Wayne County's Order compelling Andria Sawyers to arbitrate her claims against Herrin-Gear and American, and remand this case to the Circuit Court of Wayne County for an adjudication on the merits.

Respectfully Submitted,

  
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**CERTIFICATE OF SERVICE**

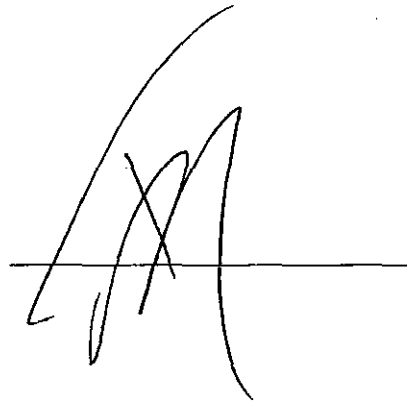
I hereby certify that I mailed a true and correct copy of the above and foregoing to the following, via U.S. mail, postage prepaid:

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This is the 30th day of April, 2009.

A handwritten signature, possibly reading 'M', is written over a horizontal line.