IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
(HOUSTON DIVISION)

JAMIE LEIGH JONES	§	
Plaintiff,	§	
	§	
vs.	§	**CIVIL ACTION NO. 4:07-cv-2719**
	§	
HALLIBURTON COMPANY d/b/a KBR KELLOGG BROWN & ROOT (KBR); KELLOGG BROWN & ROOT SERVICES, INC.; KELLOGG BROWN & ROOT INTERNATIONAL, INC.; KELLOGG BROWN & ROOT, LLC; KELLOGG BROWN & ROOT, INC.; KELLOGG BROWN & ROOT, S. de R.L.; KELLOGG BROWN & ROOT (KBR), INC.; KBR TECHNICAL SERVICES, INC.; OVERSEAS ADMINISTRATIVE SERVICES, LTD.; ERIC ILER, CHARLES BOARTZ; and SEVERAL JOHN DOE RAPISTS,	§	
Defendants.	§	**JURY TRIAL DEMANDED**

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

COMES NOW, Plaintiff, Jamie Leigh Jones, and files this Response to the Motion to Compel Arbitration and Stay Proceedings made by the corporate defendants herein, and states the following in support thereof:

1. Jamie Jones denies that she agreed at the time she was hired that any potential claims she would ever have against the corporate defendants, Halliburton and KBR would be subject to final and binding arbitration. Jamie does not deny that she initialed a document with language purporting to mandate arbitration at the time that she agreed to accept employment with a subsidiary of Halliburton and KBR in Iraq. However, for the following reasons, she is not bound to arbitrate the claims in this lawsuit:

* In cannot be said, as a factual matter, that Jamie agreed to final and binding arbitration. Jamie was not provided the substance of the "Employee Dispute Resolution Program" at the time of her execution of the employment documents. The language of the agreement purports do deal only with employment disputes, and clearly does not constitute an unambiguous waiver of a right to trial by jury.
* Any alleged agreement fails for lack of mutuality where the Defendant has chosen not to pursue arbitration in other cases, when it elected not to do so.
* The proposed arbitration provisions are void because they were fraudulently induced.
* The proposed arbitration provisions do not apply to the allegations in this case, as these were intentional incidents which occurred outside the work environment, and living conditions which were created by the defendant.
* The arbitration in this instance in unconscionable both procedurally and substantively.
* The proposed arbitration provision is voidable because the defendants have breached their *quid-pro-quo* obligations used to entice Jamie into the arbitration provision.

2. Jamie was severely beaten, sexually assaulted, raped and then falsely imprisoned by this defendant, and/or its agents. Defendant, who created the sexually lawless environment, failed to disclose it, then attempted to cover up the obvious results of its actions would like to now submit the case to an arbitrator who will receive repeat business from this corporate giant – but not from its victim. That victim seeks one thing – justice by a jury of her peers – just as the Constitution envisions.

3. For the reasons set forth more fully in the accompanying brief, Jamie denies that she is barred from bringing suit.

WHEREFORE Jamie requests that this Court deny Defendant's motion in its entirety, order the Arbitration proceedings stayed until the resolution of this case, and award sanctions in the form of attorney's fees and costs for the preparation of this response.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF, TRACY BARKER

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Plaintiff,	§	
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Defendants.	§	**JURY TRIAL DEMANDED**

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

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I. Introduction

We were "aware that a lot of sexual harassment went on – that was our major complaint." Those are the words of a Halliburton Human Resources Supervisor describing the environment in Iraq at the time that Jamie Jones was getting ready to go to Iraq in support of Iraqi Freedom.[1] Totally uninformed of that crucial fact, Jamie dutifully signed the pre-printed, boilerplate employment contract ("the Contract") with Overseas Administrative Services, LTD. ("OAS"), a subsidiary of Halliburton. And Halliburton was very aware of the sexually lawless environment that permeated Iraq, on July 21, 2004. Buried deep in the bowels of the contract was a provision pertaining to employment disputes **in the workplace** – a unilateral provision intended to circumvent Jamie's Seventh Amendment Rights. Jamie signed this document, along with dozens of other pages of documents she signed as she prepared for her overseas duty. She did so, of course, without the benefit of counsel, or of any knowledge about the sexually lawless environment she was about to enter. At the time of the signing of this contract, Halliburton/KBR (the parent company of OAS) was aware of sexual harassment complaints and assaults by its employees and others in Iraq.[2] Jamie, however, was not.[3] Thereafter, she was sent to Iraq, in support of operation Iraqi Freedom,[4] where "she was assigned to all male living quarters and subsequently was drugged and sexually assaulted by several employees of" Halliburton/KBR.[5] This abusive conduct culminated in her brutal gang rape by Halliburton employees, who had

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1 Affidavit of Letty Surman, Human Resources Supervisor for Halliburton in the Green Zone from May, 2004 – September, 2006, dated October 10, 2007, attached hereto as Exhibit 1.

2 *Id.* See also Halliburton/KBR's Response to Requests for Admission, Exhibit 2, Number 2.

3 "No one ever discussed the brutality of women or the severe sexual harassment that occurred in Iraq by Halliburton/KBR's own people." Affidavit of Jamie Jones, Attached hereto as Exhibit 3.

4 See Jamie's Identification Card, attached hereto as Exhibit 4.

5 *Id.* See also, the EEOC Determination attached hereto as Exhibit 5.

enjoyed the freedom from justice for far too long, on July 28, 2005.[6] After a "rape kit" medical examination was performed confirming the brutal attack, Jamie was falsely imprisoned and placed under armed guard. Only after convincing a guard to let her sneak a phone call out to her father, who then enlisted the help of Congressman Ted Poe's office, was Jamie finally sent home with a diagnosis of rape induced Post-Traumatic Stress Disorder (PTSD),[7] and her other physical injuries from the brutality of her Halliburton attackers.

In February of 2006, Jamie's original attorney filed a demand for arbitration against all Defendants for various violations of employment law. In December of 2006, Jamie retained undersigned counsel (and co-counsel) who immediately thereafter conducted a preliminary investigation into the facts. Considerable additional information was discovered. A civil action was then filed in this Court asserting additional claims against both the original parties, and against additional parties, as well as the claims originally raised in the demand for arbitration. Among them is the claim for fraud in the inducement to enter into the arbitration provision rendering the arbitration invalid and/or unenforceable.[8] Jamie does not dispute that **some** of the claims asserted may fall within the **annunciated** terms of the arbitration provision of her employment contract with Defendant OAS. However, the civil complaint lists several torts that are clearly not within the scope of the arbitration agreement – including intentional ones -,[9]

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6 Though the *mens rea* of this attack is apparently denied by the assailant. His actions were never punished, or reprimanded by Halliburton, according to Halliburton's own position paper to the EEOC, attached hereto as Exhibit 6. This is a sterling example of the environment of Halliburton's men doing whatever they wanted without consequence, in that Charles Boartz, one of her brazen rapists, did not even bother to leave the room until the next morning when Jamie awoke.

7 See, e.g. the medical reports of Nicole Dockter, LCSW, Diana Guest, MFT, Michael Ciaravino, M.D., Sabrina Lahiri, M.D., and Elizabeth Reicheck, LCSW, attached hereto, collectively, as Exhibit 7

8 See, e.g. the Plaintiff's Second Amended Petition, filed October 9, 2007

9 *e.g.* assault, battery, rape, intentional infliction of emotional distress, fraud, among others

several parties who are not signatories to the arbitration provision,[10] and fraud in the inducement to arbitrate which invalidates the entire arbitration provision. Therefore, proper jurisdiction for those claims and parties is the district court.[11]

As stated previously, the facts surrounding the signing of the contract and arbitration provision will prove that the Halliburton/KBR Defendants acted fraudulently by knowingly and materially misrepresenting the living and working conditions in Iraq. As evidenced in the contract, the Defendants misrepresented to Jamie that sexual harassment and inappropriate behavior would not be tolerated and that proper policies and procedures, as mandated by federal law, were in place to protect her from such abuse.[12] Such representations were material to both the contract in general and to the arbitration provision, in particular. But for these material misrepresentations, Jamie would have agreed to neither the terms of the contract nor of the arbitration provision, in particular.[13]

The basis of Jamie's civil claims is that the Defendants created a sexually lawless environment in which they placed her after failing to warn her of the impending dangers before she signed the contract and arbitration agreement, indeed, actively concealing that information from Jamie and others. They brought the rabbit to the wolves den, then turned their backs on the situation they created. The results were predictable. Jamie is not asserting that the Defendants failed to warn her of the impending dangers associated with war (dangers that she understood,

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10 Charles Boarts, the "John Doe Rapists, and the United States Government (which will be brought back in following the expiration of the 180 day waiting period).

11 *See, e.g. Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1066 (5th Cir.1998)

12 Despite the clearly defined terms of the agreement, as set forth in the Complaint, defendants had a policy of "circling the wagons" to protect their images and financial resources rather than protecting their employees. See Exhibits 1 and 3 attached. Furthermore, the Employment Agreement, attached as Exhibit 8, clearly sets forth rules upon which Jamie relied in accepting the terms of employment, including protection from sexual harassment.

13 Affidavit of Jamie Jones, Exhibit 3

and accepted – in large part because she felt that she could trust the world's largest military contractor to protect her), but rather the dangers associated with the grossly negligent hiring, mismanagement, supervision and retention of Defendants' employees which caused the oppressive, abusive and dangerous living environment.[14] To require Jamie to resolve these types of disputes in arbitration would be unconscionable because of the facts surrounding the signing of the agreement, the imbalance of bargaining power (referring to the concealed knowledge of the defendant corporations about the sexually lawless environment) and the resulting oppressive and unfair surprise with which Jamie was burdened, intentionally and/or with reckless disregard for her welfare.

Defendants have used the arbitration provision at issue to repeatedly violate United States' employment law (by permitting, excusing and/or encouraging the sexually lawless environment to exist) and to escape liability and accountability, entirely inconsistent with public policy, by hiding behind an arbitration provision which is shrouded in secrecy when it purports to provide just remedies for these types of abuse.[15] The unfair arbitration agreement is invalid, revocable and unenforceable based upon fraudulent misrepresentation, unconscionability, and selective enforcement.

Several tort issues presented in the case at bar are capable of adjudication **only** in a United States District Court, as they did not occur "in the workplace," which is a necessary element for compelling arbitration – even by the arbitration provision's own terms. Furthermore,

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[14] As examples, photographs of animals having sex and the "Billeting Motto" from one of the barracks offices are attached, collectively, as Exhibit 9.

[15] Exhibit 1 and 3. See also, the EEOC Determinations in the matters of Jamie Jones (Exhibit 5) and Tracy Barker, attached hereto as Exhibit 10. Additionally, see Exhibit 11, KBR's Dispute Resolution Program Human Resources educational materials, which boast that despite the number of sexual harassment complaints, Halliburton has paid a mere $75,000 in compensation to these victims, while denying compensation to most.

several of the parties to this suit are not capable of being brought before the arbitrator because they were not signatories to the arbitration provision in the first place. Because those non-arbitable issues are so inextricably interwoven with those that are (for the sake of argument here only) properly before the arbitrator, the same facts will be presented in support of each claim against all parties. To litigate the claims in two separate forums and duplicate the adjudication process would completely eviscerate the very purpose of the arbitration provision, by forcing this issue to be **both** litigated and arbitrated, creating an overly costly and burdensome process on Jamie, would very likely lead to inconsistent results, and would therefore be unfair and oppressive to Jamie. Under the Federal Arbitration Act, a court is the proper authority for determining if an arbitration provision is void based on fraud in the inducement and/or unconscionability.[16]

Incredibly, though she goes so far as to request that sanctions be levied against Jamie and her attorneys for "multiplying" the proceedings, counsel for Defendants ignores the reality: that it is Jamie and her attorneys who are attempting to streamline this process, and defendants who are advocating multiple proceedings. It makes one wonder why she would take that approach. . .

a. Background

On July 22, 2004, Jamie signed an agreement[17] with her employer, Overseas Administrative Services, Ltd. (OAS). Paragraph twenty-six (26) of that contract contains the arbitration provision at issue, which provides in pertinent part:

> You [] agree that you will be bound by and accept as a condition of your employment the terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference. You understand that the Dispute Resolution Program requires, as its last

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16 *See, e.g. Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1066 (5th Cir.1998)

17 Exhibit 8

> step, that any and all claims, that you might have against Employer **related to your employment**, including your termination, and any and all personal injury claim arising **in the workplace**, you have against other parent or affiliate of Employer, must be submitted to binding arbitration instead of the court system. (*emphasis added*)
>
> It is expressly understood that, in the case of any controversy described above, all parent, subsidiary and affiliate or associated corporations of Employer, and of their officers, directors, employees, insurers and agents are third party beneficiaries to this provision and are entitled to invoke, enforce and participate in arbitration pursuant to this provision.

Paragraph sixteen (16) of the contract, entitled "Standards of Conduct," mandated that each employee observe the standards of conduct and other requirements of the Halliburton Code of Business Conduct. Paragraph sixteen (16) states, in pertinent part, the following;

> Actions that may require discipline or discharge include but are not limited to the following:
>
> (b) Misconduct
>
> Fighting, threatening or inflicting bodily harm on another person; gambling; committing immoral acts or using abusive language; displaying or distributing lewd or obscene pictures or other materials, viewing, downloading or distributing pornographic material from the Internet . . .
>
> (n) Sexual Harassment
>
> Sexual advances, requests for sexual favors, or the verbal or physical conduct of a sexual nature that is unwelcome or that creates an intimidating, hostile, or offensive work environment. Sexual harassment also occurs if submission to the conduct is either an explicit or implicit condition of employment or if submission to or rejection of the conduct is used as a basis for employment decisions.
>
> (o) Discrimination
>
> Unlawful discrimination, harassment, or other disparaging activity, such as slurs or gestures, based on race, religion, age, sex, sexual orientation, national origin, disability or veteran's status.

If an employee feels as if she is being harassed or discriminated against, she is encouraged to:

> [c]onsider telling the offending party that she or he objects to that conduct. This often solves the problem. However, if an employee is not comfortable confronting the offending party (or if the offending party's unwelcome conduct continues), the employee should advise his or her immediate supervisor of the offending conduct. If the employee is more comfortable discussing the issue with someone other than his or her immediate supervisor, or if the immediate supervisor has not taken what the employee regards as appropriate action to solve the problem, the employee should contact a Human Resources or Law Department representative.
>
> Reports of harassment will be investigated promptly and discreetly.
>
> Any employee who reports any act of harassment in good faith, including sexual harassment, will not be retaliated against because of such report.[18]

This proposition is repeatedly reinforced in the Halliburton Company Dispute Resolution Program Brochure.[19] Defendants never lived up to their obligations to Tracy to abide by its own terms under the DRP and to protect her from sexual harassment and abuse while she was overseas, and now, they argue she must be bound by arbitration to resolve her claims here in the U.S., under a cloak of secrecy guaranteed by the confidentiality provision found in the DRP which states the following:

> 5. Confidentiality
>
> A. The Dispute Resolution Program ("Program"), its Administrator, any subordinate administrators, the staff of the Program and any other person conducting conferences or serving as an impartial third party on behalf of the Program in any in-house dispute resolution process conducted under the auspices of the Program, will hold

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18 Halliburton Company "Code of Business Conduct" Summary Pamphlet

19 The Halliburton Company Dispute Resolution Program Brochure is attached to the Defendant's Motion to Compel Arbitration, Exhibits H & I.

matters reported under the Program and related communications in confidence, in keeping with the Standards of Practice and the Code of Ethics of The Ombudsman Association. The Code of Ethics of The Ombudsman Association are incorporated into this Plan by reference and appended.

For purposes of requests by or subpoenas from any Party that the Program Administrator or any subordinate administrators, or any member of the staff of the Program or person conducting conferences or serving as an impartial third party on behalf of the Program in any in-house dispute resolution process conducted under the auspices of the Program, provide testimony in any internal or external investigation, administrative hearing, or arbitration or litigation proceeding, the confidentiality standards described in this section attach to the Dispute Resolution Program, rather than any individual disputant. This means that only the Program, rather than any individual disputant, may waive confidentiality, even upon request or subpoena by a disputant, under circumstances consistent with The Ombudsman Association Code of Ethics and Standards of Practice. (emphasis provided)

B. No employee shall be subject to any form of discipline or retaliation for initiating or participating in good faith in any process or proceeding under this Plan.

Beginning on July 25, 2005, Jamie was in the "Green Zone"[20] in Baghdad, Iraq, working in the Procurement Department. She was housed in a predominantly male barracks, which was under the direct management and control of the defendant corporations herein.[21] For four days, she repeatedly and constantly endured sexually explicit comments causing her to feel harassed and extremely unsafe. Jamie complained about this to her immediate supervisors and to

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[20] "Green," as opposed to "Red," is a military designation intended to denote "safe." *A Visitor's Guide to Baghdad's International Zone*, Richard H. Houghton, III, Colonel, USMC (Ret.) and Patrick J. McDonald, May 1, 2006, P. 2. "The contrasting "Red Zone" – "red" signifying danger -- refers to anything outside the Green Zone, in practical terms these days the whole of Iraq with the exception of parts of Kurdistan." This distinguishing characteristic becomes significant when considering the retaliatory measures employed by Halliburton and KBR in this case, as in so many other cases.

[21] See the attached barracks roster produced by counsel for the defendants, attached hereto as exhibit 12.

Halliburton in Houston, Texas.[22] Jamie experienced harassing and unnerving "cat-calls" as she walked past two floors of barely clothed men on her way to the only female restroom in the building. This was a far cry from the safe and secure, two-woman living quarters she had been promised:

 [23]

Jamie, as well as several other employees before her, reported this abusive, lawless conduct to supervisors employed by OAS/Halliburton/KBR and/or its subsidiaries.[24] Complaints about the same sexually abusive environment were made by other employees directly to OAS/Halliburton/KBR and/or its subsidiaries prior to the date she signed her

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22 See attached e-mail correspondence requesting a transfer of housing attached hereto as exhibit 13.

23 Exhibit 14 (also inserted into the body of this motion) is an actual photograph provided to Jamie that represented the living arrangements she had been promised.

24 Affidavit of Letty Surman, Exhibit 1

employment contract with SEII.[25] However, these complaints of sexual harassment and sexual exploitation were repeatedly ignored or swept under the rug by Defendants.[26] In fact, the Defendants encouraged this type of behavior and abusive environment by taking retaliatory action against Jamie and other female coworkers (including sending them to more dangerous locations) for reporting the abuse and by failing to discipline the actors.[27]

Moreover, despite assurances that the reporting of such incidents would be handled discretely, copies of prior complaints were intentionally distributed to management in an effort to incite retaliatory action.[28]

Jamie was transported from the hospital directly to a secluded trailer with no means of communication. She was falsely imprisoned, not permitted to leave, and interrogated by several management and human resource personnel for hours the day after the rape. Jamie was told that if she chose to return to the United States she would no longer have a job with the company. This was, apparently, a widespread company "strategy" of risk management by punishing and intimidating the victims.[29] When she requested permission to use a telephone to call home, this was specifically denied. Jamie had to coerce one of the armed "Ghurka" guards to borrow his

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25 See the written statement of SSG Kevin Rogers, dated 25 August, 2006, attached hereto as Exhibit 15, written about the "companion" case to this one, involving Tracy Barker, who had complained about these very barracks (and, she believes – ***this very room***) to Halliburton almost a year prior to Jamie's arrival in the Green Zone.

26 See the affidavit of Letty Surman, Exhibit 1.

27 *Id.* See also, the affidavit of Linda Lindsey, attached hereto as Exhibit 16.

28 See, e.g. Exhibit 3, the EEOC Determination in reference to the findings related to this case, and Exhibit 10, the EEOC Determination in Tracy Barkers' case.

29 See the similar treatment of Tracy Barker in her affidavit, attached hereto as Exhibit 17-17(a), the affidavit of Julie Lafranca, attached hereto as Exhibit 18, the affidavit of Linda Lindsey, attached hereto as Exhibit 16 and the EEOC Determination in this case, Exhibit 5.

phone in order to finally get assistance to be freed from her false imprisonment.[30] Eventually, Jamie was turned over to the state department and finally returned to the United States so that she could receive appropriate medical treatment for her devastating injuries (torn pectoral muscles, deformed breast implants, tears and abrasions to her vagina and anus). None of the rapists she identified were disciplined for their criminal acts.

The companion case of Tracy Barker,[31] whose attempted rape occurred the same month that Jamie was raped, is instructive. Following her complaints of mistreatment in the Green Zone, Tracy was eventually sent from Baghdad, to the more hostile city of Bahsra, where the environment was even more openly unprofessional and sexually hostile, with daily offensive verbal and physical sexual conduct. Pornography was openly displayed by project leaders, corporate managers, and co-workers.[32] Tracy filed a complaint with her direct supervisor, Craig Grabien, but again, no action was taken to correct the situation. Instead, he also began to sexually harass her on a daily basis, constantly reminding Tracy that he was the "camp manager" and that because there was no human resources personnel on the camp for her to lodge a complaint, she had nowhere to turn.[33] Tracy persisted and sent formal complaints to human resources personnel both in Baghdad and in Houston,[34] but as usual for these contractors, no action was taken to correct the situation. Ultimately, Grabien forced himself upon Tracy while she suffered post traumatic stress disorder ("PTSD").

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30 See, Exhibit 3

31 *Barker, et al v. Halliburton Company, et al*, C.A. No. H-07-2677

32 Exhibits 1, 9-9(b), 17 and 17(a)

33 See, Exhibit 17-17(a), and the statement of Tracy Barker, Attached hereto as Exhibit 19. Also, see the Affidavit of Letty Surman Exhibit 1, which confirms that there was an attitude regarding Employment Relations Issues from Basra that "what happened in Basra Stayed in Basra."

34 See exemplary e-mail correspondence attached hereto as Exhibit 20.

As set forth herein, Defendants repeatedly and knowingly failed to provide proper human resources personnel, policies and procedures to protect Jamie and other employees from this type of abuse – to these two women, and others.[35] Defendants had knowledge that the abuse existed and failed to take any action to protect Jamie and other similarly situated female employees. By failing to properly manage, hire competent supervisors and employees and implement policies and procedures to protect female employees from this sexual lawlessness, Defendants created a sexually oppressive and dangerous environment for female employees. Furthermore, at the time that the arbitration provision was executed, defendants were well aware of the environment that they had created, and in which Jamie would soon find herself.[36] They simply elected to conceal that critical (life-threatening) information from her.

On July 25, 2005, Jamie was raped by Boartz and others, having first been handed a drink believed to contain the date rape drug, Rohypnol (based upon the rapidity with which she lost consciousness, the statements made by her assailants as they handed the drink to her, and her complete inability to recall the incidents later).[37] Boartz' and his co-conspirators' behavior was the type that Defendants permitted, and even tacitly encouraged, by placing females in this hostile living environment without proper security measures necessary for their protection, and by continuously refusing to discourage and curtail such morally debase abuses.

Adding insult to injury, Jamie was retaliated against for reporting her rape. She was placed under armed guard in a prison-like container and not permitted to leave.[38] She was able to sneak a phone call out which brought Congressman Poe's office into the picture, and likely

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35 Exhibit 1

36 *Id.* and Exhibit 2, Number 2.

37 Exhibit 5

38 Exhibit 3

saved her life. Finally, after several days of suffering emotional distress and what was later diagnosed as PTSD, Jamie was allowed to return to the United States for proper medical care.[39]

By ignoring numerous, repetitive complaints of sexual harassment and mistreatment, and by allowing Jamie's abuse and the abuse of others to continue, the Defendants created, tolerated and/or fostered a sexually hostile living environment that produced an atmosphere conducive to her exploitation as a woman and ultimately led to her physical attack. Even after the attack was reported, Defendants continued to promote the very type of hostile environment that contributed and/or caused Jamie to be the subject of verbal and physical abuse. Indeed, that conduct remains commonplace in 2007.

b. Procedural History

Upon Jamie's return to the United States, she hired an attorney, who dutifully filed a demand for arbitration as set forth in the DRP on February 15, 2006[40] claiming sexual harassment and hostile work environment, among other things, against the Defendants. That attorney, clearly recognizing that several different types of claims existed here, and that multiple forums would be necessary, wrote to Jamie, and informed her that he would only be handling the "Title VII claims," but that she would need other counsel to pursue her non-arbitrable claims.[41]

On or about December of 2006, Jamie hired new (undersigned) counsel to represent her regarding all of her claims against these Defendants. After careful review of the facts and pertinent law, new evidence and additional parties and claims were discovered, including fraud in the inducement of the arbitration provision, breach of the employment contract, and

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39 Exhibit 7

40 This Request was later amended by George Cire on July 20, 2006.

41 See the letter from George Cire, dated January 19, 2006 and attached hereto as Exhibit 21.

intentional torts. Thereafter, counsel filed a complaint on behalf of Jamie in federal Court on or about May 18, 2007 against the Defendants named herein, and against the United States.[42] Included in the allegations against the Defendants, are assertions they knew or should have known of the abusive and harassing environment Jamie would be exposed to upon her arrival in Iraq at the time when they enticed her to agree to the arbitration provision.[43]

II. The Arbitration Agreement

a. Relevant Law & Procedure

Paragraph twenty-five (25) of the OAS Contract states that Texas law shall govern the terms of the Contract "***except with respect to the matters or disputes related to the validity or enforceability of the provision 26 below***, all issues shall be governed by and construed in accordance with the Federal Arbitration Act." Jamie, of course, had no lawyer to explain that oppressive language to her. Any ground that exists in law or equity for the revocation of any contract will be enforceable against arbitration agreements.[44] Under Texas law, a contract should be strictly construed against the author of that contract.[45] The Texas Supreme Court stated that "the [FAA]'s pro-arbitration policy does not operate without regard to the wishes of the contracting parties."[46] Federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate; instead, ordinary contract principles are

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42 The United States is not currently a party to this cause because the 180-day waiting period from the filing of the SF-95 (the Federal Tort Claims Act claim form) has not expired. The United States will be re-served with its complaint upon the expiration of that 180-day period.

43 See the Second Amended Complaint in this lawsuit. See also, Exhibit 11, KBR's Dispute Resolution Program Human Resources educational materials used at a professional HR meeting, only.

44 *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, (1991); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)

45 *See Solis v. Evins*, 951 S.W.2d 44, 50 (Tex.App.1997) *citing Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984)

46 *Volt v. Info. Sciences*, 489 U.S. at 474

applied.[47] Courts, rather than arbitrators, decide whether and what issues a party can be compelled to arbitrate.[48] Furthermore, a court cannot compel a party to arbitrate a dispute beyond the scope of its arbitration agreement.[49] The merits of the claims are immaterial but the Court is to consider the terms of the arbitration agreement and the factual allegations pertinent to the claim.[50]

In determining whether a claim is subject to arbitration, the court should view the dispute through a two step inquiry: (1) whether a valid arbitration agreement exists, and (2) if so, whether the claims asserted fall within the scope of the agreement.[51] If the material facts raised in support of the invalidity of the arbitration provision are in dispute, the court must conduct an evidentiary hearing to determine the disputed facts.[52] Furthermore, fraud and unconscionability are defenses to enforcement of arbitration provisions under the Texas General Arbitration Act.[53]

b. No Valid Arbitration Provision Exists

In adjudicating a motion to compel arbitration under the Federal Arbitration Act, courts must begin by determining whether the parties actually agreed to arbitrate the dispute, which is

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47 *J.M. Davidson, Inc. v. Webster,* 128 S.W.3d 223, 227 (Tex.2003)

48 *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1066 (5th Cir.1998)

49 *AT & T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)

50 *In re Great Western Drilling , LTD,* 211 S.W.3d 828, 836 (Tex.App.- Eastland, 2006)

51 *Leander Cut Stone Co., Inc. v. Brazos; Nationwide of Fort Worth, Inc. v. Wigington,* 945 S.W.2d 883, 884 (Tex.App.-Waco 1997)

52 *Carlin v. 3 V Inc.,* 928 S.W.2d 291, 293 (Tex.App.- Houston 1996)

53 *Hearthshire Braeswood Plaza Ltd. Partnership v. Bill Kelly Co.,* 849 S.W.2d 380, 386 (Tex.App.-Houston, 14th Dist. 1993)

generally made on the basis of ordinary state-law principles that govern the formation of contracts.[54] In order to have a valid contract, the following elements must be met:

(i) an offer;

(ii) an acceptance;

(iii) a meeting of the minds;

(iv) each party's consent to the terms; and

(v) execution with the intent that it be mutual and binding.[55]

The arbitration provision at issue and its adoption by Halliburton and Jamie does not meet the criteria for the formation of a valid agreement to arbitrate. First, there absolutely was no meeting of the minds. Jamie signed an arbitration provision to arbitrate her **employment** disputes, not a sexual attack and harassment of the magnitude she experienced.[56] Also, Jamie agreed to an arbitration provision to arbitrate her employment disputes and signed a document which also purported to guarantee certain obligations upon Halliburton, which defendant had knowingly failed to ensure even prior to the execution here.[57] Furthermore, Halliburton did not feel bound to this agreement, as it has selectively chosen to enforce arbitration, or not, as it sees fit.[58] Accordingly, the arbitration provision was never executed with the intent to be mutually binding from the point of view of the Defendants herein. Moreover, the Defendants had no intention of upholding the other contractual provisions, which were a significant consideration, if

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54 *Fleetwood Enterprises Inc., v. Gaskamp*, 280 F.3d 1069, 1073 (5th Cir. 2002)

55 *Beverick v. Koch Powers, Inc.*, 186 S.W.3d 145, 150 (Tex.App. – Houston 1st, 2005)

56 See Jamie Jones' Affidavit, Exhibit 3

57 Exhibit 1

58 *See, e.g., In the Matter of Anthony Menendez v. Halliburton*, No. 6-3280-06-911, Department of Labor Office of the Administrative Law Judge and *Fisher v. Halliburton, et al., Southern District, Texas (Houston) CA No. 4:05-cv-01731*

not the *quid-pro-quo* for any agreement to this provision,[59] and they actually knew they were violating these provisions at the time Jamie executed the arbitration provision in this case.[60] Halliburton obviously determined that the decision of whether to arbitrate should be left in their own hands, making the "mutual and binding" element unobtained here as well. "When illusory promises are all that support a purported bilateral contract, there is no contract." [61]

Furthermore, it would be contrary to Texas public policy to allow a party to "exculpate itself with respect to intentional torts." *See Solis v. Evins,* 951 S.W.2d 44, 49-50 (Tex.App.-Corpus Christy 1997) (*citing Allright, Inc. v. Elledge*, 515 S.W.2d 266, 267 (Tex. 1974). In *Abou-Khalil v. Miles*, 2007 WL 1589456 (Cal.App. 4 Dist.) (unpublished opinion), the court held that intentional torts do not fall with in a broad arbitration provision because intentional torts do not normally arise out of the employment context, in that "they would be actionable even if plaintiff did not work with the defendant. Further, the law is clear that sexual assault is not normally within the course and scope of employment." *Id.* at 2. Here, there was clearly no meeting of the minds; no intent that the arbitration provision be mutual and binding, no consent to all terms, and no agreement to arbitrate intentional acts by Halliburton or its fraud. Without these requirements, no valid contract was formed. Thus, it cannot be enforced by Hallilburton here – selectively or otherwise.

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59 Exhibits 3 and 8

60 Exhibit 1

61 *Tenet Healthcare, Ltd. v. Cooper,* 960 S.W.2d 386, 388 (Tex. App. - Houston [14th Dist.] 1998, writ dism'd w.o.j.)

c. ***Even if a Valid Arbitration Provision Existed, Defendant Breached That Agreement***

In order to prove a breach of contract the following elements must be met:

(i) a valid contract between the plaintiff and defendant existed;
(ii) the Plaintiff performed or tendered performance;
(iii) the Defendant breached the contract; and
(iv) the Plaintiff sustained damages as a result of the breach[62]

Incredibly the Defendants' argue that the only breach recognizable under an agreement to arbitrate is a flat-out refusal to submit to such proceedings by one of the parties. Defendants then proceed to argue that the breach under the employment contract is limited to review by the arbitrator. While there is absolutely no doubt that Defendants breached the employment contract as a whole, they also breached the arbitration provision specifically (as plead), which, as even the Defendants agree, is reviewable by this Court only.

Jamie's assertions are clear. Defendants failed to perform their part of the bargain under the terms of the arbitration provision which incorporated both the DRP and the Code. Defendants promised a harassment and abuse-free environment and that additional policies and procedures would be in place to protect her from such acts if they occurred. Once Jamie and other female employees were confronted by the sexually abusive environment the Defendants' created and fostered they were retaliated against for their attempts to utilize the procedures under the DRP. Defendants created and fostered the sexually lawless society in Iraq by failing to provide the measures set forth under the Code and DRP, and as a result, Jamie was brutally raped.

Defendants never intended to perform their part of the bargain ***except*** to compel arbitration. And why not? Defendants have successfully manipulated the justice system in so far

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62 *Beverick*, 186 S.W.3d at 150

as they are able to ignore this country's employment and human rights laws (as well as those involving taxation by creating offshore subsidiaries such as SEII). Now, they attempt to never be held accountable under our judicial system. Of course the Defendants are willingly submitting to arbitration proceedings- especially in light of the fact that they win the vast majority of the cases submitted to arbitration.[63] Defendants breached the arbitration provision by failing to perform, as promised, under the terms of the DRP and the Code as incorporated in the arbitration provision.

Again, Defendants' flagrant and knowing misrepresentations and lack of action once Jamie instituted the procedures necessary under the arbitration agreement constituted a clear breach of the arbitration provision. Jamie initially attempted to perform her obligations (as she perceived them at that time) under the agreement, at least as to those claims which may have been arbitrable, including filing for arbitration when she returned to the United States. However, as soon as information came to light regarding the actual knowledge of the Defendants before, during and after the execution of the contract and the abuse experienced by Jamie, it becomes clear that Defendants breached any purported contract, if it is determined that one existed at all. Finally, the consideration for the arbitration provision was never provided – as found by the EEOC in its determination.[64]

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[63] *See* Attached Exhibit 3, Arbitration Fairness Act of 2007: Hearing on H.R. 3010, before the House Judiciary Subcommittee on Commercial and Administrative Law, Cong. (Oct. 25, 2007), Ventrell Mossees Testimony at 4.

[64] See the EEOC Determination, Exhibit 5

d. *The Arbitration Provision is Invalid, Revocable, and Unenforceable Because of Unconscionability and Fraud*

i. *The Halliburton Company Dispute Resolution Program*

The "Halliburton Company Dispute Resolution Program."[65] That's what it's called. No one ever gets to see it before a dispute arises, but the company sure wants to sweep this mess under the arbitration rug in the back room with the door closed—and dead-bolted.

It's amazing. The centerpiece of the Defendant's motion is the "Halliburton Company Dispute Resolution Program" (DRP), but all that's attached to the motion is a brochure. The second page (un-numbered) of the brochure states that it is ". . . intended as a summary of the major features . . ." of the DRP. The "formal" DRP Plan and Rules ". . . contains the controlling terms and conditions."

Nobody ever gets to see the "formal" Plan and Rules before a dispute arises. Not Jamie Jones. Not her co-workers. Not her lawyers. Not even the court. All we get is a brochure that says it ". . . is intended as a summary of the major features . . ." of the Plan and Rules.

On July 21, 2004, Jamie Jones did indeed sign the Employment Agreement[66]. Without question, that agreement told her that she agreed to be bound by the DRP which it incorporated by reference—but never showed to her. It said that any claims she had against her employer ***related to her employment*** must be submitted to binding and confidential arbitration. It included personal injury claims arising ***in the workplace.***

Related to your employment. Now that's a pretty broad phrase. That could include everything from being upset that your supervisor told you that you had trench breath to getting shorted on your paycheck. Obviously, there are two prerequisites required to activate the DRP:

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65 Defendants' Motion to Compel, Exhibit. H & I

66 Exhibit 8

1.) a dispute, and 2.) related to the employment. The first prerequisite is admittedly present in this case. There is—for sure—a dispute. But it's that *related to your employment* phrase that seems to be an attempt to jam a very square peg into a very round hole. Of all of the disputes *relating to the employment* that Jamie Jones could have anticipated (or that Halliburton/KBR wanted her to anticipate) - pay, overtime, promotion, demotion, discrimination, scheduling, etc.—one of the things that most certainly was *not* anticipated, foreseen or considered by either party was that she would be required to live in a sexually lawless environment and would, as a result of indifference, inaction and acquiescence of the defendants, be raped by several Halliburton firefighters in the room that she was not supposed to have been living in in the first place. Being raped hardly relates to ***anyone's*** employment. There was nothing about her job that would or should expose her to such a risk.

It is preposterous to argue that Jamie's rape was related to her employment. This case is most certainly *not* the type of dispute anticipated by the parties. Any attempt to stretch the phrase *relating to the employment* to the facts of this case distorts it beyond all recognition.

Workplace disputes. Was the living quarters of Jamie's room – where she lived - part of her "workplace"? Hardly. She lived there – in her off-duty hours. She was carried there by her rapists for the purpose of brutalizing her body. What happened in that bedroom wasn't part of her employment and most certainly wasn't "in the workplace." It is absurd to argue otherwise.

But the defendants' DRP—or at least the summary of it that we get to read—confines the claims or disputes it covers to those which happen in the workplace.

*almost every kind of **workplace** conflict (p. 2)*

*assistance with disputes in the **workplace** (p. 3)*

*resolving **workplace** disputes (p. 3)*

*to resolve all **workplace** disputes (p. 6)*

*applies to any **workplace** dispute (p. 6)*

*responding to a **workplace** dispute (p.7)*

*deal with a variety of **workplace** problems (p. 8)*

*This agreement covers any **workplace** dispute (20)*

Paragraph 25 of the DRP summary states that the governing law for the plan is "the laws of the State of Texas."

The Texas Workers Compensation Act is instructive. It defines *course and scope of employment* as:

"Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and ***that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer***. The term includes an activity conducted on the premises of the employer or at other locations. (*emphasis added*)[67]

How is being raped while unconscious from an involuntary drugging engaging "in or about the furtherance of the affairs or business" of Jamie Jones' employer? Were they so indifferent to the rights of their female employees that they included (without informing them) the role as targets of sexual crimes in their job descriptions? That role was not in the exhaustive employee contract provided to Jamie.

Even if the Court were to determine that a valid arbitration agreement (for some of the claims) exists, which has somehow neither been breached nor invalidated by its unconscionability or the fraud perpetrated on Jamie to agree to it, such an agreement would

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[67] TEX. WORKERS COMPENSATION ACT, § 401.011(12)

relate only to the employment issues that may arise **in the workplace** and is not applicable to the issue of false imprisonment or rape alleged in the complaint. Clearly, there was no meeting of the minds as to the arbitrability of the allegations in this case, including intentional acts, rape, assault, false imprisonment, and premises liability.

The cases cited by the Defendant are easily distinguishable from the present context. In *In re Halliburton,* 80 S.W.3d, the Court upheld an arbitration provision when an employee was demoted based on sex and age. These are clearly allegations involving a violation of United States federal discrimination laws in an employment context under Title VII. However, by citing this case, Defendants ignore the fact that the current dispute is not limited to disputes arising out of Jamie's employment, but raises issues of tort law arising out of premises liability, fraud, and other non-employment claims. While she may have agreed to arbitrate employment disputes (provided that this issue was mutually binding and that all consideration therefore was provided), the current issues are not simply employment related. Thus this case and its outcome are fully distinguishable from the present cause of action.

Defendants also cite *Dodds v. Halliburton Energy Servs.*, No. 01-40057 (5th Cir. 2001) for the proposition that its arbitration program has been upheld by the courts. Yet again, this case was about two employees who were terminated shortly before their pensions were vested – again, in a pure employment context.

The bottom line is this: Jamie Jones' rape did not arise out of her employment, nor did it happen in the workplace. Absent *either* of those prerequisites, the DRP has no application. No one contemplated that this so-called "agreement" would apply to an after-hours rape in the bedroom of the employee and a subsequent false imprisonment of the victim. Just as the Tenth

Circuit Court has previously found, Halliburton is not sued here because of their role as employer so much as their role as landlord over the living conditions of Jamie Jones.[68]

ii. ***The Arbitration Provision is Invalid Because it is Unconscionable***

An agreement to arbitrate is invalid where grounds are present for refusing to enforce it, such as unconscionability.[69] Courts should consider both procedural and substantive unconscionability of an arbitration agreement when evaluating the validity of that agreement.[70] "Unconscionable" is described as a contract "that is unfair because of its overall one-sidedness or the gross one-sidedness of one of its terms."[71] "Unconscionability" has no precise legal definition because it is not a concept but a determination to be made in light of a variety of factors.[72]

Analysis regarding whether an arbitration provision is unconscionable involves two questions: (1) how did the parties arrive at the terms in controversy; and (2) are there legitimate commercial reasons justifying the inclusion of the terms?[73] Courts often categorize the first question as procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision itself. The second question is categorized as substantive unconscionability, and refers to the fairness of the resulting agreement.[74] The purpose of this principle in law is to prevent oppression and unfair surprise and not to disturb allocation of risks

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68 *McCauley v. Halliburton Energy Services, Inc.*, 161 Fed. 760 (10th Cir. 2005)

69 TEX. CIV. PRAC. & REM. CODE §§171.00, 171.022

70 *In Re: Halliburton*, 80 S.W.3d 566 (Tex. 2002)

71 *See Pony Express v. Morris*, 921 S.W.2d 817 (1996) *citing Currey v. Lone Star Steel, Co.*, 676 S.W.2d 205, 213 (Tex.App.-Fort Worth 1984)

72 *See id. citing Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 498 (Tex. 1991)

73 *See id* at 498-499

74 *Pony Express* at 821

because of superior bargaining power.[75] The Restatement of Contracts states that unsconscionability includes weakness in the contracting process and public policy concerns.[76] Under the Texas Business Code, a court is permitted to disregard any unconscionable clause in a contract:

> The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . The principle is one of the prevention of oppression and unfair surprise. . . and not of disturbance of allocation of risks because of superior bargaining power.[77]

The arbitration provision is unconscionable, in part, because of the concealment and deception of the Defendants. Defendants deceptively enticed Jamie into agreeing to the arbitration provision to resolve claims arising out of her employment by falsely representing that sexual harassment and abusive behavior would not be tolerated in the workplace or on the premises despite their concealment and actual knowledge that Jamie was extremely likely to be exposed to such abusive treatments.[78] Defendants knew that Jamie had to rely on their representations regarding the nature of her employment and living conditions in Iraq prior to signing the Contract – she had never been there to view it for herself. They never told her of the multiple complaints of sexual harassment and abuse, and in fact actively concealed that from her.[79]

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75 *First Merit Bank, N.A.*, 52 S.W.3d at 756

76 RESTATEMENT (SECOND) OF CONTRACTS §208, comment (a)

77 TEX. BUS. & COM. CODE ANN. §2.302, comment 1

78 See the slide from the Human Resources presentation materials, attached hereto as Exhibit 11, which shows that despite the claims made on behalf of numerous women, including severe sexual harassment and rape, Halliburton paid, through 2006, a whopping $75,000 in compensation through its arbitration procedure.

79 See, e.g. Exhibit 1

"Companies put mandatory arbitration provisions into employment applications, employment handbooks and employee benefit plans. Employees must sign those documents if they want to get the job or keep the jobs they already have, despite whatever theoretical due process protocols may bar imposing mandatory arbitration as a condition of employment."[80]

Where the plaintiff shows overreaching or sharp practices by the opposing party, and ignorance or inexperience on her own part, a clause or an agreement is procedurally unconscionable.[81] This, Jamie has clearly done.

iii. ***The Arbitration Provision is Invalid Because of Fraud/Misrepresentation***

The Texas Supreme Court has outlined the following elements to determine whether an arbitration provision was invalid based upon fraudulent misrepresentation:

(a) that a material representation was made;
(b) the representation was false;
(c) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion;[82]
(d) the speaker made the representation with the intent that the other party should act upon it;
(e) the party acted in reliance on the representation; and
(f) the party thereby suffered injury.[83]

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80 Cathy Ventrell-Monsees testimony to the House Judiciary Subcommittee on Commercial and Administrative Law at the Hearings on *H.R. 3010, the Arbitration Fairness Act of 2007*, dated October 25, 2007, attached hereto as Exhibit 22.

81 *Arkwright-Boston Mfrs, Mut. Ins. Co. v. Westinghouse Elec. Corp.*, 844 F 2d 1174, 1184 (5th Cir. 1988)

82 Silence can constitute a false representation under Texas law. The Texas Supreme Court has held that "[w]hen the particular circumstances impose on a person a duty to speak and he deliberately remains silent, his silence is equivalent to a false representation." *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986). This is a case where the silence of Halliburton, et al. has constituted the false representation. (e.g. *World Help v. Leisure Lifestyles, Inc.* 977 S.W.2d 662, 670 (Tex.App.-Fort Worth 1998 pet. Denied). As stated by the Texas Appellate Court in *New Process Steel Corp. v. Steel Corp. of Texas, Inc.*, 703 S.W.2d 209 (Tex.App.-Houston [1st Dist.] 1986, writ ref'd n.r.e.) and its progeny, "a 'misrepresentation' may consist of the concealment of a material fact when there is a duty to speak. The duty to speak or disclose arises when one party knows that the other party is relying on the councealed [sic] fact, provided that he knows the relying party is ignorant of the facts and does not have an equal opportunity to discovery the truth." *Id.* at 214

At no time prior to her signing the contract containing the oppressive arbitration provision did any defendant warn Jamie that she would be exposed to such horrendously abusive living or working conditions in Iraq and, in fact, actively concealed knowledge of those details from her. Leaving the U.S. to work in Iraq absolutely required Jamie to rely upon the Defendants' representations as to the nature of her employment and future living conditions: she certainly couldn't just hop over for a site inspection first. This representation was clearly material to her acceptance of the contractual terms.

On its face, the contract evidences the Defendants' false representations to Jamie: that sexual harassment and discrimination would not be tolerated by employees. Such representations were material to both the terms of the contract and to the acceptance of the arbitration agreement. These representations were false at the time they were made to Jamie, and their falsity was known to Defendants, and concealed from Jamie.[84] Even if these representations were not known to be false, they were clearly reckless under the circumstances which should have been known to Halliburton.[85] Under the circumstances presented to her, Jamie relied on the Defendant's misrepresentations that her workplace disturbances would be handled professionally and appropriately according to the guidelines she signed. That did not take place, nor was it ever Defendants' intention to treat her concerns professionally – their history speaks clearly to that. Defendants knew this environment existed before Jamie arrived in Iraq based on numerous complaints made by other females exposed to similar abuse.[86]

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83 *In re: First Merit Bank, N.A.* 52 S.W.3d 749 (Tex. 2001)

84 As stated by Letty Surman, the harassment was worse when she arrived in 2004 than when she left at the end of 2006, clearly the level of sexual harassment was known to Halliburton when Jamie signed her contract in 2005. Exhibit 1

85 See, e.g., the Affidavit of Letty Surman, attached hereto as Exhibit 1.

86 *Id.*

Defendants made the representation with the obvious intent to influence Jamie into signing the contract and the arbitration provision, and to place herself in harm's way without adequate warning or knowledge of the sexually lawless environment that they created. Defendants' misrepresentation as to the level of tolerance of sexual harassment, discrimination and the promise of confidentiality in the reporting of such abuses and the active concealment of the level of abuse in the sexually lawless environment to which they enticed her to go, were designed, undoubtedly, by Defendants to induce Jamie into signing the contract and its arbitration provision which would benefit only the Defendants and at Jamie's expense. No reasonable person would have agreed to arbitrate these claims against the Defendants, and Jamie would certainly not have so agreed.[87]

Jamie was sexually harassed, brutally raped, and then severely retaliated against, because of her reliance upon the misrepresentations and concealments of these Defendants. Harm is crystal clear.

The Defendants' misrepresentations and concealments were materially fraudulent and thus render the arbitration provision and contract invalid.

iv. ***Parallel Proceedings Would Defeat the Purpose of the Arbitration Provision and be Oppressive and Unfair to Plaintiff***

Texas appellate courts have established the following standard to be used to determine if a tort claim was intended to be arbitrated:

> Whether the particular tort claim is so interwoven with the contract that it could not stand alone or, on the other hand, is a tort completely independent of the contract and could be maintained without reference to the contract.[88]

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[87] Exhibit 3

[88] In *Fridl v. Cook*, 908 S.W.2d 507 (Tex.App.-El Paso 995), *citing Valero Energy Corp. v. Wagner & Brown*, 777 S.W.2d 564, 566 (Tex.App.-El Paso 1989)

When determining if a claim falls within the arbitration agreement, the court must look at the factual allegations in the complaint rather than the legal causes of action.[89]

The arbitration provision in the contract purports to be a broad arbitration provision designed to include "any and all claims that you might have against Employer related to your employment, including your termination, and any and all personal injury claim arising in the workplace, you have against other parent or affiliate of Employer, must be submitted to binding arbitration instead of the court system."[90] Clearly, Jamie's claims against the Defendants for intentional torts, and claims related to Defendant's grossly negligent hiring of sexual predators, lack of proper management, reckless supervision and acquiescence to the sexually lawless environment which caused and/or fostered the oppressive and abusive environment, false imprisonment, rape and fraud fall outside of the arbitration provision.[91]

Furthermore, the brutal and abusive acts of retaliation are so egregious they must fall outside of "the course of employment" because they do not exhibit an integral link to, the employment relationship.

While some authority exists for the proposition that tort claims arising out of alleged conduct either involving significant aspects of, or exhibiting an integral link to the employment relationship may be arbitrable,[92] no such support exists for the Defendant's position here: that

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89 *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 900 (Tex.1995)

90 LOGCAP OAS Employment Agreement, Para. 26, Attached as Exhibit 8.

91 These were listed as "Challenges" on Exhibit 11

92 *See e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey, 726 F.2d 1286, 1288-89 (8th Cir. 1984); Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 725 F.2d 192 (2d Cir. 1984); Feinberg v. Oppenheimer & Co., 658 F. Supp. 892 (S.D.N.Y. 1987); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moose, 365 Pa.Super. 40, 528 A.2d 1351 (1987), appeal denied, 518 Pa. 641, 542 A.2d 1370 (1988).*

claims arising outside the employment context, like gang-rape for instance, must be arbitrated without an express agreement and a meeting of the minds to that effect.[93]

c. THE PITFALLS OF ARBITRATION IN THIS CASE

i. *Purpose of Arbitration*

Texas courts have adequately addressed the purposes of arbitration and its use in an ***employment*** dispute situation is ***generally*** favored in the state of Texas.[94] The purpose of the Federal Arbitration Act (FAA) is to make arbitration agreements as enforceable as other contracts, ***but not more so***.[95] The purpose of arbitration is to avoid the formalities, delays and expense of ordinary litigation.[96] The purpose of arbitration is to streamline dispute resolution process and to minimize costs.[97] Indeed the "very purpose of arbitration is to avoid the time and expense of a trial."[98] Thus, the main purpose of arbitration is to provide a speedy and inexpensive alternative to litigation. Under Texas law, the courts do not favor a multiplicity of claims and suits in part to prevent multiple determinations of the same matter.[99] Here, Jamie has filed a civil complaint with parties and claims which are clearly not subject to arbitration. It is

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93 "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L.Ed.2d 1409. Furthermore, the "question of arbitrability is an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 1409. This is particularly applicable in this case, where there is disagreement about whether this arbitration clause applies to rape. *Id.* at 651-2.

94 *See e.g., In re Merrill Lynch Trust Company, FSB*, -- S.W.3d --, 2007 WL 2404845, *3 (Tex. 2007); *See also 9 U.S.C.A. § 1 et seq.*

95 *Werline v. East Texas Salt Water Disposal Co., Inc.* 209 SW3d 888, Tx.App.Texarkana – 2006

96 *In re Luna*, 175 SW3d 315, Tx. App. Houston 1st – 2004

97 *In re MHI Partnership, Ltd.*, 7 SW3d 918, Tx.App. Houston 1st 1999

98 *Id.*

99 *Jack B. Anglin v. Tipps,* 842 S.W. 266, 271 (Tex. 1992)

important to note that Jamie filed a charge with the U.S. EEOC and a determination was made by that body that Halliburton did not follow *its own protocols* in resolving Jamie's complaints and was therefore incapable of providing an adequate remedy,[100] just as it failed to do in the companion case of Tracy Barker.[101] This is further evidence of the knowing breach of the agreement to arbitrate by Halliburton. By granting a motion to stay arbitration, pending the outcome of the litigation, the parties will avoid additional costs and potentially duplicate efforts that may result in conflicting outcomes.

The initial arbitration management conference was scheduled for June 8, 2007 and the arbitration proceedings have been stayed pending the outcome of this Court's ruling on this issue.[102] An order staying arbitration will not unduly prejudice the Defendants, but will rather afford Jamie an opportunity to present each and every argument she is entitled to bring forth – to one forum. Jamie has shown good cause to stay arbitration pending the outcome of the civil proceedings in the District Court.

Arbitration and trial by jury are not equal. The two proceedings do not afford a Plaintiff the same opportunities to have her case fully and properly adjudicated. Rules of civil procedure and evidence, absent a provision in the arbitration agreement, do not apply in arbitration proceedings.[103] Furthermore, even counsel for the defendant in this case recognizes the disparity in the substance of these proceedings.[104] As eloquently stated by Laura Maccleary, Director of Congress Watch Division of Public Citizen:

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100 EEOC Determination Letter attached hereto as Exhibit 5.

101 EEOC Determination Letter regarding Tracy Barker, attached hereto as Exhibit 10

102 See the Order from the Arbitrator, Lynn Gomez, attached hereto as Exhibit 23

103 *Crossmark, Inc, v. Hazar*, 124 S.W.3d 422 (Tex.App. – Dallas, 2004).

104 See the affidavit from Plaintiff's counsel regarding representations made by Defense counsel at the

> We oppose the use of pre-dispute binding mandatory arbitration for three main reasons. First, it is imposed on [employees] and is mandatory, rather than voluntary. Second, proceedings and decisions are shrouded in secrecy. And third, I utterly lacks due process and impartiality. For example, there are only very limited grounds for appeal of a decision. Under currently case law, decisions which are, in the words of the courts, 'silly,' 'wacky,' or 'contrary to law,' are routinely allowed to stand. Moreover, binding mandatory arbitration is poisoned by the fact that arbitrators and their firms have a direct financial stake in business-friendly outcomes.[105]

Clearly, with the results reached by Halliburton/KBR to date with their arbitration clause, there is good reason to see why they have filed this motion.[106] However, as Ms. MacCleery continued:

> The framers of our Constitution sought to create the public courts and to enshrine due process in our laws because they understood that secrecy is anathema to democracy and that unfettered power of any kind will become abuse. Binding mandatory arbitration, or BMA, in contrast, disregards fundamental notions of fairness. It is wrong by design.[107]

ii. ***The Initiation of this Arbitration:***

On or about February 15, 2006, Jamie, acting by and through her former counsel, filed a demand for arbitration with the American Arbitration Association. Since that time, Jamie has had a change in counsel which required a complete analysis and review of the basis for her claims. Upon review, an overwhelming amount of information surfaced and/or was discovered, making it necessary, and proper, to pursue this action through the federal court system. Among

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arbitration hearing, attached hereto as Exhibit 24.

105 Laura MacCleery's testimony to the House Judiciary Subcommittee on Commercial and Administrative Law at the Hearings on *H.R. 3010, the Arbitration Fairness Act of 2007*, dated October 25, 2007, attached hereto as Exhibit 22.

106 Exhibit 11

107 MacCleery Testimony, Exhibit 22

other findings, her new counsel discovered that there were multiple causes of action against persons and entities not related to Halliburton or any of its subsidiaries, which could not be arbitrated under the provisions.

iii. ***Halliburton's Selective Enforcement of the Arbitration Provision***

Defendant is quite adamant about upholding its arbitration provision – ***in this case.*** However, Defendant does not always invoke its "contractual right" to arbitration, but rather does so selectively, when it is convenient, or advantageous for them to do so. In other proceedings, which actually involved employment disputes (and therefore were clearly envisioned by the arbitration provision at issue here - and actually agreed to by the parties), the arbitration agreement was not enforced or invoked by Halliburton.[108] Therefore, Defendant decides when it will force arbitration and when it will not, removing the decision from not only the courts but also the employees themselves. This exposes the sham that the arbitration provision clearly is.

iv. ***Arbitration Proceedings are ill-equipped to handle claims of this nature:***

Under the Halliburton arbitration agreement, any proceedings are required to use "neutral" parties provided through the American Arbitration Association (AAA), the Center for Public Resources (CPR), or Judicial Arbitration and Mediation Services (JAMS). In the present case, AAA is the designated arbitration entity to be utilized. However, AAA is not qualified to adequately address the causes of action and concerns of this case. As discussed above, the issues to be addressed go beyond the ordinary employment disputes.

The AAA National Rules for the Resolution of Employment Disputes address such concerns as the Legal Basis of Employment ADR, AAA's Employment ADR Rules, and AAA's Policy on Employment ADR. The rules address the qualifications of an arbitrator. "Arbitrators

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[108] See, e.g., *Menendez v. Halliburton,* No. 6-3280-06-911, Department of Labor Office of the Administrative Law Judge

serving under these rules shall be experienced in the field of **employment law**."[109] There is no case law or arbitration ruling granting arbitration for a sexual assault – as Defendants would have here.[110]

Additionally, because of the manner in which arbitrators are compensated, and in which they retain future employment, there is a great disparity in positions of the parties to arbitration that prevents a fair administration of justice in a case like this one. Jamie will, in all likelihood, never again arbitrate in front of the arbitrator in this case. Halliburton, on the other hand, most likely will.[111] As stated by Cathy Ventrell-Monsees, in her testimony to Congress:

> What is wrong is that mandatory arbitration creates a modern-day version of separate and unequal justice for employees, and here is how. Under mandatory pre-dispute arbitration, employees lose their day in court before an impartial judge. They lose their right to a trial of their peers and their right to appeal.
>
> They lose the protection of our laws because arbitrators do not have to follow the law. They do not even have to know the law. Employees lose important remedies because mandatory arbitration programs and arbitrators can and do limit the damages an employee can get in court by federal or state law. An employer who forces its employees into this separate system can pick its favorite arbitrator and use that same arbitrator over and over again to rule in its favor in other cases brought by other employees of the company.[112]

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109 Rule 12(b)(i) Attached hereto as Exhibit 25

110 Despite an exhaustive search for any such case, Plaintiff's counsel were unable to find even one.

111 As Stated by Richard M. Alderman, of the University of Houston: "American arbitrators generally are well compensated, and many rely upon being selected as an arbitrator as their sole means of income. As discussed above, if an arbitrator were deemed to be "unfair" or "unfit" he or she would effectively lose all income because both sides to a dispute would "strike" him or her. In the context of consumer [or personal tort] arbitration, however, an arbitrator viewed as unfair by the [individual] loses little. The [individual] is involved with one arbitration and is not a repeat player. On the other hand, many businesses are involved in thousands of arbitrations a year. Being deemed unfair by business would preclude most future employment. Richard M. Alderman, *The Future of Consumer Law in the United States – Hello Arbitration, Bye-bye Courts, So-long Consumer Protection*, University of Houston Public Law and Legal Theory Series 2007-W-02, fn 65. Attached hereto as Exhibit 26.

112 Ventrell-Monsees Testimony, Exhibit 22.

It is illustrative to note the observations of Julie Lafranca at her recent defeat at arbitration against not only Halliburton, but its counsel, Shadow Sloan, where she notes that:

> Furthermore, even my original complaints were destroyed by [a Halliburton subsidiary], yet somehow, the arbitrator did not find that Halliburton had destroyed evidence! I found it strange, and somewhat disheartening that the arbitrator was extremely friendly with Halliburton's defense attorney, Shadow Sloan. They kept talking (outside the presence of my attorney) about the price of the arbitrator's daughter's wedding. They certainly acted as if they had known each other prior to this event. They also discussed a number of common acquaintances throughout the breaks in the arbitration process.[113]

Similarly, in the case at bar, evidence of the rape kit was turned over to Halliburton's investigators,[114] yet that evidence has never been produced. Undersigned wonders if it ever will.

v. ***Arbitration Proceedings Provide no Deterrent for Harmful Conduct:***

Secrecy and limited awards protect a corporation, and prevent public oversight into egregious behavior. Perhaps that is the reason that undersigned counsel continues to receive calls about Halliburton's men raping its women.[115] As stated by Cathy Ventrell-Monsees:

> Halliburton in its cases won 32 out of 39 cases that went to a decision, a telling 82 percent win rate in arbitration.
>
> The result? Companies that routinely discriminate against their employees are never held accountable to the public because of this private separate system. Pre-dispute mandatory arbitration provides no deterrent effect to prevent employers from discriminating [or raping] again and again.[116]

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113 Affidavit of Julie Lafranca, attached hereto as Exhibit 18

114 See the Answers to Requests for Admission, attached hereto as Exhibit 2, Number 68

115 See the Affidavit of L. Todd Kelly, attached hereto as Exhibit 27

116 Ventrell-Monsees Testimony, Exhibit 22

d. Plaintiffs Actions Do Not Warrant Sanctions

Neither Jamie's actions, nor the actions taken on her behalf by her attorneys, rise to the the level of "unreasonable," which is the standard set forth under 28 U.S.C. § 1927 for the imposition of sanctions.[117] As stated above, Jamie and her counsel took appropriate steps to protect her claims and the statute of limitations after important information came to light. Furthermore, there is no attempt here, as obviously insinuated by Defense counsel to "multiply the proceedings," but rather a justifiable request to have all the proceedings brought to the one appropriate forum – this Court. Quite the contrary, it is Defendants who wish to force multiple proceedings, by forcing arbitration, then leaving Jamie to present this case to the federal courts against those parties who cannot be bound by arbitration. Indeed, they have moved to stay these proceedings recognizing just that likelihood. Apparently under the theory that "the best defense is a good offense," Defendants argue that it is Jamie and her counsel who are attempting to multiply the proceedings. Only one set of attorneys has any financial incentive to increase the litigation effort on these cases – and it's not plaintiffs. Plaintiffs' counsel should not be sanctioned for being an advocate for Jamie. Zealous representation is warranted in this situation and is what all injured Americans deserve in order to protect their legal rights. This company is allowing its own employees to be sexually victimized, and they have the audacity to seek sanctions against them when they seek vindication. Wow! This situation is wholly distinguishable from the case cited by Defendant.[118] In that case, the attorney had appeared at a hearing and did not bring a necessary witness; thus making it necessary for the hearing to be

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[117] As noted by the defense in its motion for sanctions, under 28 U.S.C. § 1927, "an attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

[118] Defendants point out that in *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002), the court sanctioned the attorney for unreasonably multiplying proceedings.

rescheduled at a later date, thus actually multiplying proceedings. That has not occurred in this case. Plaintiff has filed her case in court to protect her statute on her claims against Defendants once it became apparent that the arbitration agreement was not only inappropriate in this case, but utterly invalid, and that more defendants existed than just the defendant, herein. Furthermore, Jamie has requested that the arbitration be stayed pending the outcome of this case – which was granted only over defendant's objections.[119]

e. Conclusion

Halliburton wants this case in arbitration. It's motives are clear: if a jury of twelve impartial Americans, (who have no ties to Halliburton whatsoever, and who do not base any portion of their livelihood on Halliburton choosing them to hear such a dispute again) hear what this company has done to Jamie Jones, the financial stakes to Halliburton/KBR are high. On the other hand if an arbitrator (who must rely upon Halliburton and companies like it for repeat business) has to rule on behalf of an aggrieved person, who will only come before her once, the likelihood of an appropriate award to that one individual is not as good.[120] While the substantive aspect of unconscionability of an arbitration clause is concerned with the fairness of the resulting agreement,[121] Letty Surman, one of Halliburton's HR supervisors at the time of this attack, makes it clear: "I do not think that a person can get justice in the DRP."[122] Halliburton doesn't want justice now (nor did they want it for Jamie when she so desperately asked them to help her get it). They simply now, as then, want to circle the wagons and protect their "good ol' boys."[123]

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119 See the Order staying arbitration, executed by Lynn Gomez, and attached hereto as Exhibit 23.

120 Attachment 9 shows a total of $75,000 paid out for ALL sexual harassment claims through 2006.

121 *In re Luna*, 2004 WL at 3 (*citing In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002)

122 Exhibit 1

123 *Id.*

On the other hand, Jamie wants this case heard on a level playing field. Twelve Americans, none of whom have ties to each other, to her or to Halliburton should hear this case. They should hear it to make sure that the public hears it. They should hear it because they cannot be influenced by the system that retains them. They should hear it because justice demands it.

The arbitration provision in this case was a sham, selectively enforced, fraudulently presented, and abusively forced upon Jamie. Importantly, it was not adequately compensated for, as Halliburton/KBR failed to live up to the obligations set forth in their own documents by refusing to even investigate her complaints when made. To enforce arbitration here is to ensure that the ends of justice cannot be met and that big business, by simple virtue of its size, is what really matters regardless of the injuries it causes to individual people, or the deception with which it does so.

The "proof" of just how important arbitration is to Halliburton and KBR is, as they say, in the pudding. Halliburton went to great lengths to conceal the arbitration provision in a massive employment contract from the first moments of their interaction with Jamie – when the company wanted her to risk her life and go to work for them. Now, Halliburton continues to go to great lengths in its desperate attempt to force Jamie into arbitration for acts which were clearly not envisioned by at least one of the parties at the time of the execution of that provision. The question, then, is simply – Why? What is really at stake for Halliburton if this case is tried in this Court? Do they actually contend that they cannot get a fair forum here? Why are they fighting so hard for arbitration? The answer seems clear – they fear justice – as well they should in light of their actions.

Jamie prays for a denial of the Motion to Compel Arbitration, and requests, rather that this court order a Stay of the Arbitration pending the outcome of this trial. In the alternative, Jamie requests a hearing on the issues presented and for such other relief as this Court deems just and proper.

f. <u>Evidence Presented in Support of This Response</u>:

(a) Affidavit of Letty Surman - Exhibit 1.

(b) Halliburton/KBR Responses to Requests for Admission – Exhibit 2.

(c) Affidavit of Jamie Leigh Jones - Exhibit 3.

(d) Copies of Jamie Leigh Jones' Identification Badges - Exhibit 4.

(e) EEOC Determination Letter re: Jamie Jones - Exhibit 5.

(f) KBR Position Statement to the EEOC - Exhibit 6.

(g) Sample Letters from Medical Providers regarding injury – Exhibit 7

(h) Employment Agreement – Exhibit 8

(i) Photos depicting sexually hostile work environment - Exhibit 9.

(j) EEOC Determination Letter re: Tracy Barker - Exhibit 10.

(k) Halliburton/KBR DRP Presentation Slides - Exhibit 11.

(l) Barracks Roster provided by Halliburton/KBR – Exhibit 12.

(m) Sample e-mails from Jamie Jones requesting Transfer – Exhibit 13.

(n) Photo provided to Jamie Jones of the billeting she was promised – Exhibit 14.

(o) SSg Kevin Rodgers Letter - Exhibit 15.

(p) Affidavit of Linda Lindsey - Exhibit 16.

(q) Affidavits of Tracy Barker - Exhibit 17 and 17(a).

(r) Affidavit of Julie Lafranca - Exhibit 18.

(s) Investigative Interview Report of Tracy Barker - Exhibit 19.

(t) Exemplar e-mails regarding retaliation of Tracy Barker - Exhibit 20.

(u) Cire Letter recognizing other claims - Exhibit 21.

(v) Congressional Transcript of October 25, 2007, regarding the Arbitration Fairness Act of 2007 – Exhibit 22

(w) Arbitration Order Staying Arbitration – Exhibit 23.

(x) Affidavit of Stephanie Morris, Esq. - Exhibit 24.

(y) Federal Arbitration Association Rule 12 - Exhibit 25.

(z) The Future of Consumer Law in the United States – Hello Arbitration, Bye-bye Courts, So-long Consumer Protection – Exhibit 26.

(aa) Affidavit of L. Todd Kelly

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record were served by electronic means through the PACER; CM/ECF electronic filing system on this, the 3rd day of December, 2007.

/s/ L. Todd Kelly