CAUSE NO. 2018-27762

STEFANI BAMBACE,	**IN THE**
Plaintiff,	**DISTRICT COURT**
vs.	**HARRIS COUNTY, TEXAS**
BERRY Y&V FABRICATORS, LLC.,	**234TH JUDICIAL DISTRICT**
Defendant.	

PLAINTIFF'S RESPONSE TO DEFENDANT'S PLEA IN ABATEMENT AND MOTION TO COMPEL CONTRACTUALLY AGREED ADR

I. SUMMARY.

The #MeToo[1] and #TimesUp[2] movements have provided a voice to victims of sexual assault and harassment and a platform to raise awareness of their experiences. However, many of the allegations raised by these victims have been quietly resolved behind closed doors by means of confidential arbitrations[3] and/or settlements that prohibit victims from speaking publicly about

[1] In 2006, Tarana Burke coined the phrase "Me Too" as a way to help women who had survived sexual violence. Fast-forward more than 10 years, and the phrase has been reignited as the slogan of the anti-sexual harassment movement. *See* https://metoomvmt.org.

[2] Time's Up is a movement against sexual harassment and was founded on January 1, 2018, by Hollywood celebrities in response to the Weinstein effect and #MeToo. *See* https://www.timesupnow.com.

[3] The American Arbitration Association's employment rules provide that "[t]he arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." Employment Arbitration Rules and Mediation Procedures, Am. Arb. Ass'n 23 (2009),https://www.adr.org/sites/default/files/Employment%20Rules.pdf.The JAMS employment rules provide that it and the arbitrator "shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision."

their case. Consequently, harassers carry on undetected and without punishment. In the wake of #MeToo and #TimesUp, nationwide public policy calls for transparency with the objective of remedying what is an epidemic[4] in the workplace and holding accountable those who are responsible. As such, the enforcement of laws designed to keep sexual harassment and assault confidential have fallen in disfavor. Nonetheless, Defendant's motion to compel a private arbitration is motivated by the Company's desire to keep this matter a secret. Because public policy no longer favors enforcement of confidential arbitration agreements in sexual harassment cases, the Court should deny Defendant's motion.

II. PUBLIC POLICY AGAINST CONFIDENTIAL ARBITRATION OF SEXUAL HARASSMENT CASES.

In response to recent cases, like those against Harvey Weinstein,[5] which have brought to light the problem of sexual harassment in the workplace; federal, state, and local governments are reexamining their approach to ending sexual harassment in the workplace. For example, the federal government has focused on settlements[6] and arbitration agreements.[7] State governments are

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JAMS Employment Arbitration Rules & Procedures, JAMS (2014), https://www.jamsadr.com/rules-employment-arbitration.

[4] "60% of women experience unwanted sexual attention or sexual coercion, OR sexually crude conduct or sexist comments in the workplace." https://www.eeoc.gov/eeoc/task_force/harassment/upload/rebooting_harassment_prevention.pdf (Rebooting Workplace Harassment Prevention, at Pg. 14) (last visited on 8/9/18).

[5] https://www.rollingstone.com/culture/culture-news/harvey-weinstein-sexual-assault-allegations-a-timeline-628273/

[6] "Ending Secrecy About Workplace Sexual Harassment Act" (H.R. 4729 (115th Congress) 2017-18). This bill would require that employers disclose in their Employer Information Report EEO-1 the number of settlements the employer signed with an employee to resolve claims pertaining to, amongst other things, sexual harassment.

[7] "Ending Forced Arbitration of Sexual Harassment Act of 2017" (H.R. 4570 (115th Congress) 2017, Related Bill 4734, Related Bill S.2203). This act would make pre-dispute agreements that require arbitration of a sex discrimination dispute invalid and unenforceable.

considering legislation ranging from new sexual harassment training requirements,[8] to protecting employees from retaliation when they are the victims of sexual harassment.[9]

Notwithstanding the current political divide in this country, there is bipartisan support to end forced arbitration of sexual harassment cases. On February 12, 2018, fifty-six attorneys general (including Mr. Ken Paxton from Texas), signed an open letter to Congress calling for an end to forced arbitration in sexual harassment cases. *See* Exhibit A. In their letter, the attorneys general wrote:

> "While there may be benefits to arbitration provisions in other contexts, they do not extend to sexual harassment claims. Victims of such serious misconduct should not be constrained to pursue relief from decision makers who are not trained as judges, are not qualified to act as courts of law, and are not positioned to ensure that such victims are accorded both procedural and substantive due process."

Id. at pg. 2. Particularly, the attorneys general rely on public policy in support of ending forced arbitration in sexual harassment cases:

> "**Additional concerns arise from the secrecy requirements of arbitration clauses, which disserve the public interest by keeping both the harassment complaints and any settlements confidential**. This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief. Ending mandatory arbitration of sexual harassment claims would help to put a stop to the culture of silence that protects perpetrators at the cost of their victims."

Id. (emphasis added). The push towards change is not limited to government officials. Employers, like Microsoft, and law firms that traditionally defend employers like Munger, Tolles & Olson LLP, have discontinued the use of mandatory arbitration provisions in sexual harassment cases.[10]

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[8] *See e.g.*, New York Labor Law § 201-g.

[9] *See* S.B. 1038, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

[10] *See, e.g.*, https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html; https://www.law360.com/articles/1026032/munger-tolles-arbitration-dust-up-may-spark-biglaw-changes.

III. LEGAL AUTHORITY & ARGUMENT.

A party may revoke an arbitration agreement on a ground that exists at law or in equity for the revocation of a contract. TEX. CIV. PRAC. & REM. CODE ANN. § 171.001(b) (Vernon 2005). Here, the enforcement of Defendant's arbitration agreement violates public policy. Generally, if a contract violates public policy it is void, not merely voidable. *Lawrence v. CDB Serv, Inc.*, 44 S.W.3d 544, 555 (Tex. 2001) (citing, *e.g.*, *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex. 1990)). When a contract is void, neither party is bound thereby. *Ex parte Payne*, 598 S.W.2d 312, 317 (Tex.Civ.App.-Texarkana 1980, no writ), *overruled on other grounds*, *Huff v. Huff*, 648 S.W.2d 286 (Tex. 1983). Neither estoppel nor ratification will make a contract that violates public policy enforceable. *Lawrence*, 44 S.W.3d at 555–56 (Baker, J., dissenting) (citing *Richmond Printing v. Port of Houston Auth.*, 996 S.W.2d 220, 224 (Tex.App.-Houston [14th Dist] 1999, no pet.) and *Ex parte Payne*, 598 S.W.2d at 317). The appropriate test when considering whether a contract violates public policy "is whether the tendency of the agreement is injurious to the public good, not whether its application in a particular case results in actual injury." *Hazelwood v. Mandrell Indus. Co., Ltd.*, 596 S.W.2d 204, 206 (Tex.Civ.App.-Houston [1st Dist.] 1980, writ ref'd n.r.e.).

"[C]ourts will not enforce a contract whose provisions are against public policy." *Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d 177, 180 (Tex.App.-Dallas 1986, no writ). Indeed, "[o]n several occasions, [courts] have held otherwise freely-entered contracts void because they were contrary to public policy." *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 663 (Tex. 1990); *see, e.g., Id.* at 663 (unreasonable covenant not to compete); *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 680 (Tex. 1990) (same); *Puckett v. U.S. Fire Ins. Co.*, 678 S.W.2d 936, 938 (Tex. 1984) (policy allowing insurer to avoid plane crash liability due to insured's

technical breach); *Crowell v. Housing Auth. of Dallas*, 495 S.W.2d 887, 889 (Tex. 1973) (lease provision waiving landlord's tort liability to tenant); *National County Mut. Fire Ins. Co. v. Johnson*, 879 S.W.2d 1, 5 (Tex. 1993) (holding insurance policy with family-member exclusion void because it conflicts with public policy); *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex. 1985) (holding employment termination for refusal to perform illegal act contrary to public policy).

A. Enforcement of private arbitration agreements in sexual harassment cases is injurious to the public good.

This lawsuit concerns sexual harassment and retaliation allegations in violation of Chapter 21 of the Texas Labor Code. It is true that Ms. Bambace executed an arbitration agreement with Defendant. However, as discussed above, since executing the agreement, Texas, and the entire nation, including a number of major corporations, and even top nationwide law firms, have stood against arbitration agreements in sexual harassment cases, and have decided to do away with them altogether in sexual harassment cases.

It is no secret that employers have aggressively pushed for private arbitration agreements that protect them from, amongst other things, negative publicity. Not only do private arbitrations protect accused harassers from public scrutiny, they also negatively affect future cases brought against a company and repeat offenders. How? As an example, victims cannot readily access a company's or a harasser's history concerning sexual harassment when claims are filed in private arbitration. Consequently, victims cannot effectively litigate their claims because they have lost the ability to locate corroborating witnesses. This results in a "chilling effect" where fewer sexual harassment claims with merit are brought by victims. Moreover, this deficiency in evidence results in decreased value of settlements and/or jury verdicts/arbitrator awards, thus limiting the law's ability to deter workplace harassment. For example, without access to evidence demonstrating that

an employer and/or harasser is a repeat offender, a victim will have a more difficult time obtaining punitive damages intended to deter future harassment. If sexual harassment cases are silenced in arbitration, harassers will have no reason to stop harassing victims.

For these reasons, public policy favors transparency and the litigation of sexual harassment cases in an open judicial forum. Without public scrutiny, sexual harassers and the companies that protect them will have little incentive against sexual harassment in the workplace.

IV. CONCLUSION.

Defendant's motion to compel arbitration should be denied because its arbitration agreement is void based on public policy. Moreover, Plaintiff seeks this relief to protect future potential victims of sexual harassment. Defendant is not entitled to have this matter arbitrated in a private arbitration. Rather, this lawsuit should be litigated in a public forum subject to judicial and public scrutiny.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I certify that on Monday, August 13, 2018, I caused a true and correct copy of the above and foregoing to be filed with the Clerk of Court using the CM/ECF system that will send notification of such filing to all counsel of record.

/s/ Todd Slobin
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