THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable, Circuit Court Judge

Appeal No. 2020-001095

Joseph Abruzzo,..... Respondent,

v.

Bravo Media Productions LLC; Haymaker Media, Inc.; NBCUniversal Media, LLC; Comcast Corporation; Craig Conover; Chelsea Meissner; and Madison LeCroy,..... Appellants.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER TO THE EXTENT THE CIRCUIT COURT LIMITED ITS REVIEW TO THE FOUR CORNERS OF THE AMENDED COMPLAINT, THAT WAS MANIFEST LEGAL ERROR?

II. WHETHER UNDER NEW YORK AND SOUTH CAROLINA LAW, PUBLIC POLICY STRONGLY FAVORS HOLDING PARTIES TO THE TERMS OF THEIR AGREEMENTS?

III. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO ENFORCE THE PARTIES' VALID EXCLUSIVE FORUM SELECTION CLAUSE OF THE RELEASE AND ARBITRATION AGREEMENT?

IV. WHETHER, IN THE EVENT THIS COURT FINDS THAT THE PARTIES' ARBITRATION AGREEMENT IS NOT ENFORCEABLE, PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED BASED ON THE VALID AND ENFORCEABLE EXCLUSIVE FORUM SELECTION CLAUSE?

This appeal concerns the denial of Appellants' Bravo Media Productions LLC, Haymaker Media, Inc., NBCUniversal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner and Madison LeCroy's, Defendants below,[1] Motion to Dismiss Plaintiff's Amended Complaint and for Order Compelling Arbitration, and their subsequent motion for reconsideration. Appellee Joseph Abruzzo, Plaintiff below ("Abruzzo" or "Plaintiff") is a well-educated, sophisticated, and self-proclaimed successful Florida politician and consultant, who resides in Florida and, at all times relevant to this appeal, was a director for public relations for a major Florida law firm. In the fall of 2018, Abruzzo pursued a romantic relationship with Kathryn Dennis ("Dennis"), one of the main cast members on the long-running hit reality television show, *Southern Charm* ("the Program" or "*Southern Charm*"), with full knowledge that Season Six of the Program was being filmed at the time. Prior to being filmed for the Program, Abruzzo voluntarily signed a three-page Appearance Release, Voluntary Participation, and Arbitration Agreement ("Release and Arbitration Agreement" or "Agreement"), which contains both a prominent and unambiguous agreement to arbitrate any disputes that arose out of the Agreement ("Arbitration Agreement") and a separate exclusive forum selection clause, both of which are valid and enforceable, and require dismissal of Plaintiff's claims in South Carolina state court.

STATEMENT OF THE CASE

Plaintiff filed a Complaint and Summons on January 28, 2020 ("Complaint") in the Charleston County Court of Common Pleas, alleging ten causes of action against Defendants, including: Outrage/Intentional Infliction of Emotional Distress; Fraud; Constructive Fraud;

[1] Where necessary for clarification, Appellants Bravo Media Productions LLC, Haymaker Media, Inc., NBCUniversal Media, LLC, and Comcast Corporation are referenced herein as the "Corporate Defendants," and Appellants Craig Conover, Chelsea Meissner, and Madison LeCroy are referenced herein as the "Individual Defendants."

Negligent Misrepresentation; Fraudulent Inducement; Civil Conspiracy; Defamation; Violation of the South Carolina Unfair Trade Practices Act; Negligence; and, Unjust Enrichment. Plaintiff sought damages in excess of $10,000,000, treble damages and costs and fees. (Complaint, filed Jan. 28, 2020, R. pp. 7-37).[2]

Defendants filed a Motion to Dismiss on May 12, 2020, (R. pp. 38-51), and a corresponding Defendants' Memorandum in Support of Motion to Dismiss Plaintiff's Complaint and for Order Compelling Arbitration on June 19, 2020. (R. pp. 52-92). On that same date, Plaintiff filed a 50-page Amended Complaint, which realleged his earlier causes of action and added seven additional, and often duplicative, purported causes of action entitled: Wrongful Appropriation of Personality/Infringement on the Right of Publicity; Wrongful Publicizing of Private Affairs; Public Nuisance; Private Nuisance; Fraudulent Inducement of Arbitration Agreement/Unconscionability of Arbitration Agreement; and, Fraudulent Inducement of Release/Unconscionability of Release; and Rescission of "Release and Arbitration Agreement," again seeking damages in excess of $10,000,000, treble damages and costs and fees. (Amended Complaint, filed June 19, 2020, R. pp. 94-143). Plaintiff also filed a one-paragraph response to Defendants' Motion to Dismiss, arguing that that Motion was moot in light of his Amended Complaint. (Plaintiff's Response to Defendants' Motion to Dismiss, filed June 19, 2020, R. p. 93).

Defendants filed a Motion to Dismiss Plaintiff's Amended Complaint and for Order Compelling Arbitration on June 22, 2020, (R. pp. 144-162), and a corresponding Memorandum in Support on June 29, 2020 ("Memo in Support"). (R. pp. 163-250). Plaintiff filed a Memorandum in Opposition to Defendants' Motion to Dismiss Amended Complaint also on June 29, 2020, (R.

[2] Plaintiff served the Defendants on different dates ranging from March 13, 2020 to April 13, 2020. Pursuant to the April 3, 2020 Order of The Supreme Court of South Carolina addressing Operation of the Trial Courts During the Coronavirus Emergency, the due dates for Defendants to respond were extended automatically.

pp. 251-285), and the parties were heard by the Honorable Bentley Price the following day, on June 30, 2020.

Judge Price issued a Form 4 Order on July 6, 2020, (R. pp. 4-6), ruling Defendants' "motion to Dismiss and Motion for order compelling arbitration are denied." Defendants first requested that the Circuit Court issue a detailed written order setting forth the reasons for its denial, (R. p. 334), which Plaintiff vociferously opposed. (R. pp. 335-336). Judge Price's law clerk advised, with respect to the initial Form 4 Order, "we did a form 4, and I believe it indicated that if the parties desired formal orders they could submit them to us. If it did not include that part I apologize." (R. pp. 337-339). Defendants then moved the Court for Reconsideration pursuant to Rule 59(e), SCRCP on July 16, 2020, (R. pp. 286-311), which the Court denied, again issuing a Form 4 Order on July 22, 2020 that simply stated, "The Defendant's Motion for Reconsideration is DENIED. A hearing is not necessary." (R. pp. 1-3).

Defendants timely appealed to this Court

BACKGROUND FACTS

A. Plaintiff's Amended Complaint.

Southern Charm (referred to herein interchangeably as "*Southern Charm*," or "the Program") is a hit, long-running reality television show that features the professional and personal lives of various Charleston residents "and reveals a world of exclusivity, money and scandal." Defendant Haymaker produces the Program. The Program airs on the Bravo network, which is indirectly owned by Defendant NBCUniversal.[3] The Individual Defendants are or were regular cast members on the Program. (R. pp. 94-96, 102-103, ¶¶ 2-10, 34).

[3] Defendant NBCUniversal is indirectly owned by Defendant Comcast.

The Amended Complaint details at length Plaintiff's education, extensive background in public office in Florida, and work in government relations, currently while employed at a major Florida law firm. After graduating from Lynn University with a Bachelors of Arts in International Communications and a Minor in International Business, Abruzzo served in the U.S. Coast Guard Reserve and then was elected to the Florida House of Representatives. Abruzzo served in various positions and boards, including but not limited to the Finance and Tax Counsel, the Economic Affairs Committee, the Business and Consumer Affairs Subcommittee, and has been a member of the Insurance, Business and Financial Affairs Policy Committee, the Economic Development & Community Affairs Policy Counsel, the Finance and Tax Counsel, and the Government Operations Appropriations Committee. Abruzzo presided over Palm Beach County Consumer Affairs cases involving alleged unfair and deceptive business practices. He alleges he received numerous awards and accolades. Abruzzo alleges that, for years he worked as a federal lobbyist for the Chesapeake Petroleum and Supply Company based in Gaithersburg, Maryland, for which service he was paid $15,000 per month. Abruzzo alleges he was terminated from that lobbying position "shortly after the airing of the Southern Charm episodes discussing and featuring Plaintiff Abruzzo." Although the Amended Complaint asserts that Plaintiff currently is "employed as a director of government relations for a major law firm in Florida," (R. pp. 96-102, ¶¶ 12-29), he is a nominee for and considered the presumptive winner of the race for Clerk of Court for Palm Beach County, Florida.[4]

Plaintiff alleges that *Southern Charm* is a "reality" television show that has aired nationally and internationally since 2014. (R. p. 102, ¶ 32). Plaintiff further alleges that, although promoted as a "reality" show, *Southern Charm* "consists of false conflict and scenarios that are fabricated and/or contrived by the Corporate Defendants," and that cast members "are directly provoked,

[4] https://gotowncrier.com/2020/06/abruzzo-likely-to-succeed-bock-as-county-clerk/

encouraged, instigated, and/or orchestrated by the Corporate Defendants, with the individual cast members[’] agreement, coordination, and cooperation, to elicit drama and conflict,” in order to promote a storyline. (R. pp. 102-103, ¶¶ 33-34). While earlier seasons depicted the relationship between long-time cast members Thomas Ravenel (“Ravenel”) and Dennis, Abruzzo alleges the “need for a new ‘storyline’ for Dennis became apparent,” after it was announced that Ravenel would not return to *Southern Charm* for the sixth season of the Program. According to Abruzzo, part of that “new storyline [for Dennis] was to include a new love interest.” (R. p. 103, ¶¶ 35-38).

Abruzzo alleges he met Dennis in the fall of 2018 at a Miami Dolphins game, after which they began a romantic relationship. (R. p. 104, ¶ 41). Abruzzo was aware that he was pursuing a romantic relationship with a current cast member on *Southern Charm* while the sixth season of the Program was being filmed, as “Dennis almost immediately began imploring Plaintiff Abruzzo to be on the show, telling Abruzzo that if she were to get married, she believed the Corporate Defendants would pay big money for rights to televise her wedding, honeymoon, an exclusive, and other things of that nature.” (*Id.* ¶ 42). Abruzzo agreed to be a voluntary participant on the Program and established the circumstances under which he would participate. He alleges that, although the Corporate Defendants wanted him to go on a “guy’s trip,” or to go on a dinner date with Dennis at a “public and crowded restaurant,” he “declined any such outing or event,” and “[u]ltimately Plaintiff decided he would allow a private dinner at Dennis’s residence in downtown Charleston to be filmed by the Corporate Defendants.” (R. pp. 104-105, 108-109, ¶¶ 43-44, 61). Abruzzo alleges that, prior to and following filming, certain verbal representations were made to him about how he would be portrayed on the Program. (R. pp. 105-106, ¶¶ 47-54).

Abruzzo has admitted that, prior to being filmed for the Program, he was given and signed a three-page Release and Arbitration Agreement. Although Abruzzo initially alleged that he was

presented with a document for his signature, "turned to the third page," (R. p. 21, ¶ 53), after Defendants filed their Motion to Dismiss and Supporting Memorandum, Abruzzo changed his story to allege that he was presented with a "partial piece of paper with only the signature portion of the page visible," which he nonetheless signed without reading based on purported representations by the Corporate Defendants and/or their agents that the document "simply authorized filming of [Abruzzo and Dennis's] dinner." (R. pp. 105-106, ¶¶ 48, 50-54). Abruzzo alleges that he felt pressure from both Dennis and the Corporate Defendants "to participate in the filming of the dinner" and "to begin filming" because "it would be a great thing for" his then girlfriend Dennis. (R. pp. 104, 106, ¶¶ 42, 52-53). The Amended Complaint alleges that there was no conflict between him and Dennis during the dinner and that the Defendants did not "state, suggest, or imply that he would be portrayed in a negative and/or false light." (R. pp. 105, 107-109, ¶¶ 49, 55, 61-62).

Abruzzo alleges that the relationship between himself and Dennis ended in early 2019, and that the Corporate Defendants "later falsely claim[ed] that Dennis ended the relationship with Plaintiff Abruzzo as a result of the concern expressed by other cast members about Plaintiff Abruzzo," which claim he asserts is false and was "designed and intended to defame, disparage, and/or portray Plaintiff Abruzzo as an unsafe, corrupt, abusive and/or otherwise unsavory individual in order to preserve and further Dennis's storyline and reputation at Plaintiff's expense." (R. pp. 111-112, ¶¶ 70-72).

In particular, Abruzzo alleges that false statements were made about him in episode three of *Southern Charm* "in order to further the storylines" for the Program, including a statement by Defendant Conover to the effect that Plaintiff is "'a disgraced politician in Florida' and 'He's not running for re-election because of his divorce. His wife is accusing him of being physically

abusive.'" Pursuant to the Amended Complaint, these statements were elicited by Defendant Meissner, who was "prompted and/or encouraged by" the Corporate Defendants for the purpose of disparaging, defaming and otherwise portraying him "in a false light in order to create and further the storylines involved in Southern Charm." (R. pp. 107-108, 112, ¶¶ 58-59, 72).

Abruzzo alleges that, in an episode following his dinner date with Dennis, Defendants LeCroy and Meissner, along with other individuals, falsely stated there were nude photographs of Plaintiff in the public domain. The Amended Complaint alleges that certain cast members "Googled" and discussed photographs of Plaintiff—photographs that had been posted online by third parties unrelated to Defendants and were publicly available at the time of filming. The Amended Complaint also notes that a photo of Abruzzo is shown during the episode with "the image blurred at the bottom of his torso." Plaintiff alleges the conversation about the photographs was prompted and/or encouraged by the Corporate Defendants "in order to falsely state, depict, or imply they were viewing a photo in which they could see Plaintiff Abruzzo's penis or 'pecker.' Such photos do not exist, nor are they in the public domain to be viewable simply by a Google Search," and that the blurring of the bottom of the photograph was malicious and was intended to imply falsely that "photos of Plaintiff Abruzzo's genitals exist, were viewed by the individual Defendants and/or Corporate Defendants." (R. pp. 109-111, ¶¶ 63-69).

Abruzzo alleges that all of the purportedly false statements about him were made on *Southern Charm* either in order to further a storyline and "create dramatic material for consumption by the viewers of the 'reality' show Southern Charm in the United States and worldwide," (R. pp. 107-113, ¶¶ 57-59, 65-66, 72, 74), or "to defame, disparage, or otherwise harm the Plaintiff." (*Id.* ¶¶ 59, 69, 75). As a result of these statements and other actions alleged to

have been taken by Defendants, Abruzzo filed his Amended Complaint in South Carolina state court.

B. The Appearance Release, Voluntary Participation, and Arbitration Agreement.

In connection with his appearance on *Southern Charm*, Plaintiff concedes that, on October 30, 2018, prior to being filmed, he signed the Release and Arbitration Agreement. (R. pp. 153-155). Pursuant to the Release and Arbitration Agreement, Abruzzo agreed to be a voluntary participant "[i]n exchange for the opportunity to be part of the program currently titled 'Southern Charm' (the 'Program')." All of the Defendants are parties to the Release and Arbitration Agreement. Pursuant to its terms, Defendant NBCUniversal Media, LLC, is designated as the Network, and Defendants Comcast Corporation and Bravo Media Productions LLC, as affiliated entities, are also parties to the Release and Arbitration Agreement; Haymaker Media, Inc is designated as the Producer; and the Individual Defendants are express intended third party beneficiaries of the Release and Arbitration Agreement. (R. pp. 154-155, ¶¶ 17, 21).[5]

In Paragraph 6 of the Release and Arbitration Agreement, Abruzzo agreed that he would "not be paid for any and all of the rights listed in this Agreement and waive any right I may have to any compensation. I acknowledge and agree that a significant element of the consideration I am receiving under this Agreement is the opportunity for publicity that I will receive if Producer includes the Materials in the Program …"

In Paragraph 8, Abruzzo agreed that he understood "that I or other parties may communicate private, factual, or fictional information about myself that I might find humiliating or embarrassing or that is defamatory, disparaging or unfavorable and that the depiction of such

[5] For purposes of resolving this appeal, the only relevant provisions of the Release and Arbitration Agreement are Paragraphs 19 and 20; however, given that Plaintiff improperly focused on other provisions of that Agreement in his attack on the Arbitration Agreement, they are set forth below for the Court's ease of reference.

information may portray me in a false light. I consent to the inclusion of this information in the Program and the exploitation of the Materials even to the extent such inclusion might otherwise constitute an actionable tort."[6] In addition, in Paragraph 9, Plaintiff acknowledged that, "[f]or dramatic or creative purposes, Producer and Network may make misrepresentations to me related to any and all topics, prior to and during the course of my participation. I consent to and assume all risks of such acts and omissions regardless of whether they may infringe upon my rights or give rise to a claim."

In Paragraph 12 of the Release and Arbitration Agreement, entitled "**CONFIDENTIALITY AND PUBLICITY**," Abruzzo promised he would not disclose any information or materials about Producer, the Network this Agreement, the Program, its participants, location(s), events and outcomes, that I learn from my Program participation (collectively, the 'Confidential Information'), unless such Confidential Information is specifically disclosed in the Program exhibition, if ever." It also provides that "[a]ny breach by me of any of these confidentiality and publicity provisions would cause Producer and Network irreparable injury and damage that cannot be reasonably or adequately compensated by damages in an action at law. I agree that Producer and Network will be entitled to injunctive and other equitable relief (without posting bond) to prevent or cure any such breach or threatened breach." Acknowledging the difficulty of proving damages for such a breach, Abruzzo agreed "to pay Producer and Network the sum of $500,000 per breach plus disgorgement of any income that I may receive in connection with any such breach as liquidated damages."

Paragraph 17 of the Release and Arbitration Agreement, entitled "**RELEASE, AGREEMENT NOT TO SUE AND INDEMNITY**," provides, in pertinent part, as follows:

[6] In Paragraph 2, Abruzzo "waive[d] any right to object to any use (including any editing/dubbing/fictionalization) of the Materials by Producer or Network for any reason."

To the maximum extent permitted by law, I … agree to release from liability, never sue, and bring no proceedings of any kind against Producer, Network, and/or any of their parents, subsidiaries, assignees, licensees, affiliates or anyone associated with the Program (the "Released Parties") for any claims, actions, damages, losses, costs, expenses or causes of action whatsoever that in any way relate to this Agreement, my participation in the production of the Program, or the creation, use, or exhibition of the Materials, the Program or the Promotions, on any legal theory (including without limitation, failure to adequately compensate me, infliction of emotional distress, personal injury, rights of privacy and publicity, defamation, or false light), regardless of whether caused by the negligence or willful misconduct of the Released Parties (collectively, the "Released Claims"). I will defend and indemnify the Released Parties from any Released Claims and any breach or alleged breach by me (including breaches by me of this paragraph 17) relating to this Agreement. I shall be liable for any attorney fees and costs incurred by the released Parties in connection with any claim or lawsuit I may bring in violation of this Agreement."

Paragraph 19 of the Release and Arbitration Agreement contains the Arbitration Agreement, is entitled "**MEDIATION & ARBITRATION**," and provides, in pertinent part, as follows:

WHERE ANY DISPUTE IN CONNECTION WITH THIS AGREEMENT ARISES, THE PARTIES AGREE TO FIRST TRY TO RESOLVE SUCH DISPUTE THROUGH CONFIDENTIAL MEDIATION. IF MEDIATION IS UNSUCCESSFUL, THEN ALL DISPUTES, INCLUDING THE SCOPE OR APPLICABILITY OF THIS AGREEMENT TO ARBITRATE, SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION ADMINISTERED BY JAMS OR ITS SUCCESSOR ("JAMS")[7] IN ACCORDANCE WITH ITS STREAMLINED ARBITRATION RULES AND PROCEDURES (COLLECTIVELY, "JAMS RULES," HARD COPIES PROVIDED UPON REQUEST) …. ALL SUCH PROCEEDINGS WILL BE CONDUCTED IN THE CITY OF NEW YORK. MY AGREEMENT TO MEDIATE ANY AND ALL DISPUTES SHALL EXTEND TO THE RELEASED PARTIES. I AGREE THAT GIVEN THE UNIQUE NATURE OF THE ENTERTAINMENT INDUSTRY, AND THE IRREPARABLE DAMAGE TO PRODUCER, NETWORK AND THEIR LICENSEES THAT WOULD RESULT FROM DELAYING OR PREVENTING THE EXHIBITION OF ANY PROGRAM PRODUCED HEREUNDER, I MAY NOT SEEK OR OBTAIN INJUNCTIVE RELIEF IN CONNECTION WITH THIS AGREEMENT.

Paragraph 20 of the Release and Arbitration Agreement, entitled "Governing Law," provides as follows:

[7] JAMS stands for Judicial Arbitration and Mediation Services, Inc.

> Without regard to the conflicts of law provisions, New York law shall govern the entire relationship between the parties, including, but not limited to, any breach of contract, tort or other claims relating to this Agreement or my appearance on the Program. The parties submit to the in personam jurisdiction of the Supreme Court of the State of New York located in New York County and the United States District Court for the Southern District of New York, and waive any objections thereto.

Paragraph 21 of the Release and Arbitration Agreement provides, in pertinent part, as follows:

> I acknowledge and agree that … each of the Released Parties is an express intended third party beneficiary of this Agreement, including, without limitation, with full standing to enforce each, every, any and all of its provisions as if it was an express party thereto.

Paragraph 22 provides, in pertinent part, that:

> This is the entire agreement between Producer and me, and it supersedes all prior oral or written communications. I am not relying on any promise or statement, express or implied, that is not contained in this Agreement. The illegality, invalidity or unenforceability of any specific provision shall in no way affect the remainder of this Agreement."

Immediately above the signature line is the following, in larger, bolded, all capitalized and underlined print:

> **I HAVE HAD AMPLE OPPORTUNITY TO READ THIS ENTIRE AGREEMENT, HAD AN OPPORTUNITY TO REVIEW THIS AGREEMENT WITH AN ATTORNEY OF MY CHOICE, AND HAVE IN FACT READ THIS AGREEMENT. I UNDERSTAND THAT I AM GIVING UP LEGAL RIGHTS IN THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, MY RIGHT TO FILE A LAWSUIT IN COURT OR TO BRING A CLAIM IN CONNECTION WITH THIS AGREEMENT.**

C. Plaintiff's Appearance on *Southern Charm*.

Abruzzo appeared briefly on an episode of Season Six of *Southern Charm* as a result of his pursuit of Dennis, an original cast member of the Program, during filming for that season. The Defendants were not involved with Dennis's decision to begin dating Abruzzo. Dennis was free to date whomever she chose, and Abruzzo could have pursued a romantic relationship with Dennis without appearing on *Southern Charm*. (R. p. 157, ¶¶ 4, 5). Abruzzo knew, prior to traveling to

Charleston, South Carolina, that he was pursuing a relationship with a reality television cast member during active filming, (R. p. 104, ¶ 42), and that his dinner date with Dennis would be filmed. Indeed, Plaintiff alleges he had input, through Dennis, into the circumstances in which he was willing to be filmed and had declined to participate in two other possible outings, one being a "guy's trip" and the other a dinner date with Dennis in a busy restaurant. (R. pp. 104-105, ¶¶ 43-44) (R. p. 157, ¶ 7).[8]

Prior to filming, the Release and Arbitration Agreement was handed to Plaintiff turned to the first page, and he took time to review each of the three pages of the Agreement. In fact, he asked a question about Paragraph 5 of the Release and Arbitration Agreement—which concerns whether the voluntary participant is or will become a candidate for public office—which is located on the first page of Release and Arbitration Agreement. (R. pp. 157-158, ¶¶ 8, 9). That question was answered to Plaintiff's satisfaction. If Abruzzo had raised any other issues with the Release and Arbitration Agreement, they would have been addressed prior to filming. If Abruzzo had declined to sign the Release and Arbitration Agreement, his dinner date with Dennis simply would not have been filmed. (R. p. 158, ¶¶ 10, 11). Abruzzo seemed eager to appear on *Southern Charm*, and freely chose to sign the Release and Arbitration Agreement, which was documented with a photograph. (R. pp. 157-158, ¶¶ 7, 12) (R. p. 159). It is evident from the photograph that Plaintiff was aware that the document he was holding had more than one page and it is indisputable that he could see, at a minimum, all of the third page.

[8] Morgan Miller, who served as the Executive Producer for Season Six of *Southern Charm*, attests that neither the Producers nor any of the Defendants had any discussions with Plaintiff prior to his arrival in Charleston, South Carolina, for his dinner date with Dennis. (R. p. 157, ¶¶ 2, 6).

STANDARD OF REVIEW

Under South Carolina law, a denial of a motion to arbitrate a dispute is immediately appealable. *Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 121 n.4, 747 S.E.2d 461, 464 n.4 (2013); *see also Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) ("'an order that favors litigation over arbitration—whether it refuses to stay the litigation in deference to arbitration [or] refuses to compel arbitration … is immediately appealable, even if interlocutory'").

An appellate court "reviews an arbitrability determination de novo." *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 59, 791 S.E.2d 286, 291 (Ct. App. 2016). Where a circuit court has entered an order with findings of fact, an appellate court will not reverse them, "if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). However, in this case, the Circuit Court has provided absolutely no findings of fact, reasoning or rationale to support its denial, leaving both Appellants and this Court to guess at the basis for both Orders. While this may be permissible under Rule 52, SCRCP, the South Carolina Supreme Court has advised that "it is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order for summary judgment." *Woodson v. DLI Props. LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014). While *Woodson* admittedly addressed summary judgment, the rule is equally applicable in the context of a denial of a motion to compel arbitration, particularly given the applicable standard of review and in light of both South Carolina's and New York's robust public policy favoring enforcement of arbitration agreements. *See, e.g., Cape Romain,* 405 S.C. at 125, 747 S.E.2d at 466 ("There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration");

see also PromoFone, Inc. v. PCC Mgmt., 224 A.D.2d 259, 260, 637 N.Y.S.2d 405, 406 (N.Y. App. Div. 1996) (noting New York's strong public policy in favor of arbitration). Because the Circuit Court failed to make any findings of fact or set out any of its legal reasoning, this Court is free and, in fact, has no choice but to decide this matter entirely *de novo*.

ARGUMENTS

The Circuit Court erred in failing to dismiss the Amended Complaint for two separate and independent reasons. First, the Amended Complaint should be dismissed and the parties ordered to mediation and, if necessary, arbitration pursuant to the valid, enforceable Arbitration Agreement between the parties. Abruzzo, a highly educated, sophisticated, former Florida Congressman who currently is "employed as a director of government relations for a major law firm in Florida," (R. p. 96, ¶ 12), voluntarily signed the prominent and unambiguous Arbitration Agreement specifying that, in the event "any dispute in connection with this Agreement" arose, the parties would first "try to resolve such dispute through confidential mediation," and, if that failed, "all disputes, including the scope or applicability of this agreement to arbitrate, ***shall be*** resolved by final and binding arbitration administered by JAMS or its successor." (R. p. 155, ¶ 19) (emphasis added). Second, even if the Court were to decline to enforce those enforceable mandatory dispute resolution provisions, this case still should be dismissed because the parties' Agreement specifies that the exclusive venue for any dispute arising from the Release and Arbitration Agreement or Abruzzo's participation on *Southern Charm* is New York. (*Id.* ¶ 20).

Because the Circuit Court failed to make any findings of fact and failed to set forth any basis for its denial of Defendants' Motion to Dismiss, despite Defendants' request that it do so, this Court is free to not only review the denial *de novo*, but to make its own findings of fact. In light of his strenuous opposition to Defendants' request for the Court to set forth its reasoning, (R.

pp. 335-336), Plaintiff cannot now argue that this case should be sent back to the Circuit Court for further findings of fact. Appellate courts routinely reject parties' attempts to argue inconsistent positions on appeal. *See, e.g.*, *King v. Daniel Int'l Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982) (rejecting appellant's exception on appeal where it was inconsistent with its statement at trial); *see also Vaughan v. Kalyvas*, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) (declining to allow the appellant to assert a position on appeal that is contrary to the position taken below).

To the extent the Circuit Court's denial is based on Plaintiff's Opposition, as set forth in detail below, it is grounded on numerous manifest legal and factual errors, and Plaintiff failed to establish any valid basis to justify the denial of Defendants' Motion to Dismiss. Based on the arguments presented to the Circuit Court and as is set forth herein, this Court should reverse the Circuit Court and order the parties to mediate and, if necessary, arbitrate their dispute pursuant to the terms of the parties' Arbitration Agreement. In the alternative, this Court should dismiss the Amended Complaint in light of the valid and enforceable exclusive forum selection clause in the Release and Arbitration Agreement.

I. To the Extent the Circuit Court Limited Its Review to the Four Corners of the Amended Complaint, That Was Manifest Legal Error.

To the extent the Circuit Court denied Defendants' Motion to Dismiss because it limited its review to the Amended Complaint, as was argued by Plaintiff below, it committed legal error. "When evaluating a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) or 12(b)(3), the court does not have to accept the pleadings as true, and may go beyond the face of the complaint and consider evidence outside of the pleadings. In so doing, the court does not convert the motion to dismiss into one for summary judgment." *Tetrev v. Pride Int'l, Inc.*, 444 F. Supp. 2d 524, 528-529 (D. S.C. 2006) (internal citations omitted); *see also Argueta v. Banco*

Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996) ("Under the Supreme Court's standard for resolving motions to dismiss based on a forum selection clause, the pleadings are not accepted as true as would be required under a rule 12(b)(6) analysis").[9]

If the Circuit Court adopted Plaintiff's erroneous argument that *Berkeley County School District v. Hub Int'l Ltd.*, 944 F.3d 225 (4th Cir. 2019), holds that the review of a motion to compel arbitration is conducted pursuant to the same standard of review applied to a motion to dismiss for failure to state a claim for relief, it erred. Below, Plaintiff misconstrued *Berkeley County* in numerous respects. First, the law is clear that, in the context of a motion to dismiss in favor of arbitration, a court "***accept[s] as true*** the allegations of the Operative Complaint ***that relate to the 'underlying dispute between the parties."***" 944 F.3d at 233 (emphasis added); *citing Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 113 (2d Cir. 2012) (reviewing court accepting "as true for purposes of this appeal factual allegations in the plaintiff's complaint ***that relate to the underlying dispute*** between the parties") (emphasis added). However, allegations that go to the enforceability of an arbitration agreement itself, particularly where, as is the case here, they are wholly unsupported by any evidence whatsoever, are not accepted as true. If that were not the case, a party could defeat any motion to compel arbitration simply by amending his or her complaint to include conclusory allegations aimed at defeating arbitration, regardless of whether they have any evidentiary or legal support. That is precisely what Plaintiff has done in his Amended Complaint, particularly with respect to, but not limited to, causes of action Nos. 15, 16, and 17. (R. pp. 129-142, ¶¶ 167-223).

Consequently, in the context of a motion to dismiss in favor of arbitration, legal inferences and conclusions in a complaint relating to the existence and validity of an arbitration agreement

[9] Where the federal rules of civil procedure are substantively similar to the state rules of civil procedure, as is the case here, "federal cases interpreting the federal rule [are] persuasive." *Garrison v. Target Corp.*, 429 S.C. 324, 359, 838 S.E.2d 18, 36 (Ct. App. 2020).

are not accepted as true but, instead, must be supported by sufficient factual evidence. *Schnabel*, 697 F.3d at 113 (explaining that allegations as to whether the parties entered into a valid arbitration agreement "are evaluated to determine whether they raise a genuine issue of material fact that must be resolved by a fact-finder at trial"); *cf. Fireman's Ins. Co. v. Cincinnati Ins. Co.*, 302 S.C. 234, 236, 394 S.E.2d 855, 856 (Ct. App. 1990) (while accepting well pleaded facts in the complaint as true under a Rule 12(c) motion, a court "does not admit the inferences drawn by the plaintiff from the facts nor does it admit conclusions of law").

Contrary to Plaintiff's argument below, "the court is obligated to conduct a trial under the Trial Provision" of the FAA ***only*** "when a party unequivocally denies 'that an arbitration agreement exists,' ***and*** '***show[s] sufficient facts in support***' thereof." *Berkeley County*, 944 F.3d at 234 (emphasis added); *see also Schnabel*, 697 F.3d at 118 ("a trial is warranted only if there exists one or more genuine issues of material fact regarding whether the parties have entered into such an agreement"). In other words, in determining "whether 'sufficient facts' support a party's denial of an agreement to arbitrate, the district court is obliged to employ a standard such as the summary judgment test. [citation omitted] In applying that standard, the court is entitled to consider materials other than the complaint and its supporting documents." *Berkeley County*, 944 F.3d at 234.

Here, Plaintiff failed to submit *any* evidence—not even an affidavit of his own—to support his conclusory claim that an agreement to arbitrate does not exist.[10] On the other hand, Defendants have submitted affidavits and objective, photographic evidence that shows, at a minimum, that

[10] In contrast, in *Berkeley County*—which involved an alleged insurance kick-back scheme—the plaintiff attached to its complaint "a total of twenty-three exhibits," including information concerning the indictment and conviction of one of the alleged perpetrators, emails and a spreadsheet. 944 F.3d at 231. The plaintiff also submitted additional information in response to the defendants' motion to compel arbitration by filing a declaration denying the existence of an agreement to arbitrate, as well as addressing the school's Chief Financial Officer's authority to bind the school. *Id.*

Plaintiff signed and could see the third page of a contract with a valid Arbitration Agreement. (R. pp. 157-159). Notably, when reviewing "the question of whether an arbitration agreement was formed, [appellate courts] interpret the record as a whole in the light most favorable to the defendants, the party against whom the district court resolved the motion to compel arbitration." *Schnabel*, 697 F.3d at 114.

In addition, in reviewing a contested arbitration provision, a court should not accept unsupported allegations as true in the face of concrete objective evidence to the contrary. *See Bridges v. United States*, No. 1:09CV4; 1:05CR244-1, 2009 U.S. Dist. LEXIS 42758 *5, 2009 WL 1035226 (M.D. N.C. April 15, 2009) ("the Court is not necessarily bound to accept [a statement in a pleading] but can reject it if it is 'frivolous or patently absurd on its face'"), *citing Raines v. United States*, 423 F.2d 526 (4th Cir. 1970); *see also Campbell v. Ashland Credit Union*, No. 3:10-1341, 2011 U.S. Dist. LEXIS 112387 *8, 2011 WL 4597356 (S.D. W.Va. Sept. 30, 2011) (a court "need not 'credit conclusory allegations or draw farfetched inferences'"). Exhibit 3 to the Memo in Support, (R. pp. 159, 210), is a photograph of Plaintiff, taken immediately after he signed the Release and Arbitration Agreement, and shows him holding the Agreement up with the third page facing the camera. Both the Arbitration Agreement and the forum selection clause are contained on the third page, which is clearly visible in its entirety to Plaintiff, as reflected in Exhibit 3. (R. pp. 159, 210). The provision above the signature line, in boldface font, underlined and in all capital letters, attesting that Plaintiff has had ample opportunity to read the entire Agreement, had an opportunity to review it with legal counsel of his own choice and had, in fact, read the Agreement, appears so prominently that it can be read in the photograph. (R. p. 159). Based on that photograph

alone, Plaintiff's revised allegation in the Amended Complaint that he was only able to see the signature line of the Agreement is demonstrably and patently false.[11]

In any event, even if Rule 12(b)(6) evidentiary standards did apply to Defendants' Motion (and they do not), the Court should still consider the contents of the Release and Arbitration Agreement because it both is expressly incorporated by reference into Plaintiff's Amended Complaint and is integral to several of his causes of action. *See, e.g., Patterson v. Witter*, 425 S.C. 213, 235, 821 S.E.2d 677, 689 (2018), *citing L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2nd Cir. 2011) ("A complaint is deemed to include … materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint"). Plaintiff quotes extensively from various provisions of the Release and Arbitration Agreement in his Amended Complaint, and relies on it as the basis for several of his purported causes of action. Thus, the Court is not required to accept any of Plaintiff's allegations regarding the existence or validity of the Arbitration Agreement or the forum selection clause as true for purposes of Defendants' Motion to Dismiss and should consider the Exhibits to that Motion.

II. Under New York and South Carolina Law, Public Policy Strongly Favors Holding Parties to the Terms of Their Agreements.

The Release and Arbitration Agreement provides that New York's substantive law applies to this dispute. (R. p. 155, ¶ 20). The New York choice of law provision in the Release and Arbitration Agreement is based on the Corporate Defendants' substantive corporate connections to the State of New York. (R. pp. 213-214, ¶¶ 2-4; R. p. 212, ¶¶ 4, 5; R. p. 215, ¶ 2). On the other hand, Abruzzo is a Florida resident. (R. p. 94, ¶ 1). Given the clear and unambiguous choice of

[11] Plaintiff's strategic and internally contradictory amendment of his original allegation that he was handed the Release and Arbitration Agreement turned to the third page—on which the arbitration agreement and forum selection clause appear—is nothing more than "a thinly-veiled attempt to gerrymander [his] case to avoid arbitration." *Berkeley County*, 944 F.3d at 231. Such attempt should be roundly rejected.

law provisions in the Release and Arbitration Agreement, and the fact that "[c]hoice of law clauses are generally honored in South Carolina," *Team IA, Inc. v. Lucas*, 395 S.C. 237, 248, 717 S.E.2d 103, 108 (Ct. App. 2011), the internal substantive law of New York applies here. *Skywaves I Corp. v. Branch Banking & Trust Co.*, 423 S.C. 432, 448-449, 814 S.E.2d 643, 652 (Ct. App. 2018) (holding that where "the parties to a contract specify the law under which the contract shall be governed, the court will honor this choice of law"); *see also Albemarle Corp. v. Astrazeneca UK Ltd*, 628 F.3d 643, 652 (4th Cir. 2010) ("for an action filed in South Carolina, South Carolina law would be consulted for its choice of law rules, and under those rules, South Carolina law would give effect to the parties' choice of law as specified in the contract").

The only exception to this general rule, which is not applicable here, is where application of foreign law would violate South Carolina public policy. *Skywaves*, S.C. at 449, 814 S.E.2d at 652. That exception does not apply here because "South Carolina's public policy regarding contracts focuses on holding parties to their contract provisions and the effect of those provisions." *Id.* at 450, 814 S.E.2d at 653. In fact, with respect to the enforceability of arbitration provisions and holding parties to the terms of their contracts, New York and South Carolina law is substantively consistent.

III. The Circuit Court Erred in Failing to Enforce the Parties' Valid Arbitration Agreement.

New York, South Carolina, and applicable federal law all strongly favor enforcing the parties' Arbitration Agreement. To overcome that strong public policy, Abruzzo must establish a valid basis to set aside the parties' agreement to arbitrate. Even limiting the analysis to the four corners of his Amended Complaint (which is improper for the reasons set forth herein), he cannot satisfy that showing.

A. Public policy strongly favors enforcing the parties' Arbitration Agreement.

The Arbitration Agreement, which requires any unresolved disputes, including this lawsuit, to be mediated and, if necessary, arbitrated in New York City, is valid and enforceable under New York and South Carolina law—as well as under applicable federal law. Under New York and South Carolina law, "[t]here is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *Cape Romain,* 405 S.C. at 125, 747 S.E.2d at 466; *see also PromoFone*, 224 A.D.2d at 260, 637 N.Y.S.2d at 406 (noting New York's strong public policy in favor of arbitration).

Additionally, Plaintiff's claims clearly involve interstate commerce as contemplated by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), because all of Abruzzo's claims concern *Southern Charm*, and in his Amended Complaint, Abruzzo states as a factual matter that *Southern Charm* "has been airing on national and worldwide television, as well as streaming online, since March 2014." (R. p. 102, ¶ 32). As recognized in *Zabinski v. Bright Acres Assocs.*, the United States Supreme Court interprets the phrase "involving commerce" in the FAA as "the functional equivalent of 'affecting commerce,'" which typically indicates Congress' intent to exercise its commerce power in full." 346 S.C. 580, 591, 553 S.E.2d 110, 116 (2001).

Under South Carolina law, where interstate commerce is involved, "the United States Supreme Court [has] found that courts may invalidate arbitration provisions on general contract defenses, such as fraud, duress, and unconscionability, but courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions." *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116; *see also Wilson v. Willis*, 426 S.C. 326, 336-337, 827 S.E.2d 167, 173 (2019) ("[a] state law that places arbitration clauses on an unequal footing with contracts generally . . . is preempted if the FAA applies"). Where a contract involves interstate commerce, "state law

regarding arbitration is supplanted by federal substantive law." *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 425, 434 S.E.2d 281, 283 (1993). In other words, the U.S. Congress has "precluded states from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 117.

New York law—the substantive law chosen in the Release and Arbitration Agreement—provides that, "in the absence of an established ground for setting aside a contractual provision, such as fraud, duress, coercion or unconscionability, a court must enforce the parties' arbitration agreement according to its terms." *Salvano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 85 N.Y.2d 173, 182, 647 N.E.2d 1298, 1302 (N.Y. 1995). Similarly, under South Carolina law, a contract is enforceable unless grounds exist to revoke it, such as fraud, duress, and unconscionability. *See Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668.

Whether considered under federal, New York or South Carolina law, it is for a court to determine initially whether a binding arbitration agreement exists between the parties. "Generally, 'whether there is a clear, unequivocal and extant agreement to arbitrate the claims[] is for the court and not the arbitrator to determine.'" *Matter of Fiveco, Inc. v. Haber*, 11 N.Y.3d 140, 144, 893 N.E.2d 807, 809 (N.Y. 2008). "In determining whether an agreement to arbitrate exists, 'the court should apply "ordinary state-law principles that govern the formation of contracts."'" *Towles*, 338 S.C. at 37, 524 S.E.2d at 844. Here, the relevant inquiry must be limited to whether the Arbitration Agreement is itself valid and supported by adequate consideration—separate and apart from the larger Agreement in which the arbitration agreement is contained. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the

substantive validity of the contract as a whole"), *citing Prima Paint Corp. v. Flood & Conklin Mgf. Co.*, 388 U.S. 395, 403-404 (1967).

B. Plaintiff has not and cannot establish a valid basis to set aside the Parties' agreement to arbitrate.

To overcome the strong public policy in favor of enforcing the Arbitration Agreement, Abruzzo was required, but failed to show that he entered into the Arbitration Agreement itself—separate and apart from the Release and Arbitration Agreement in general—as the result of fraud, misrepresentation, duress, unfair surprise or unconscionability. *See, e.g.*, *Munoz*, 343 S.C. at 540, 542 S.E.2d 364 (the validity of an arbitration clause is evaluated separately from the validity of the contract as a whole); *Prima Paint*, 388 U.S. at 403-404; *see also Matter of Monarch Consulting, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 26 N.Y.3d 659, 675, 47 N.E.3d 463, 474 (N.Y. 2016) ("courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself"). As is discussed in more detail below, Plaintiff has not even alleged fraud, misrepresentation, duress, unfair surprise or unconscionability relating to the Arbitration Agreement itself. Rather, Abruzzo's allegations focus on the circumstances of the execution of the Release and Arbitration as a whole and on his mischaracterization of several provisions of the Release and Arbitration Agreement that are unrelated to the Arbitration Agreement itself. That alone is fatal to his attempt to set aside the Arbitration Agreement.

i. Plaintiff has not and cannot show the Arbitration Agreement was induced by fraud, misrepresentation, mistake, duress or unfair surprise.

As discussed in detail below, Plaintiff has not even alleged that the Arbitration Agreement itself was the product of fraud, misrepresentation, mistake, duress, or unfair surprise, and that

failure is dispositive of those claims. Plaintiff's fraud, misrepresentation, mistake, duress, and unfair surprise claims fail for the separate and independent reason that he has not and cannot establish the necessary elements of those defenses. Under both South Carolina and New York law, in order to prove fraudulent inducement and/or negligent misrepresentation, Abruzzo must establish that he justifiably relied on the alleged misrepresentation and/or that the alleged misrepresentation related to a present fact or was made with a present intent to not perform. *See Turner v. Milliman*, 392 S.C. 116, 122-123, 708 S.E.2d 766, 769 (2011) (setting forth the elements required to prove a claim for negligent misrepresentation and for fraud including, in both instances, justifiable reliance); *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 31 N.Y.3d 569, 578-579, 106 N.E.3d 1176, 1182 (N.Y. 2018) (the "required elements of a common-law fraud claim are 'a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury).

Even taking, solely for the sake of argument, the allegations contained in Paragraphs 47-54 and 62 of his Amended Complaint, (R. pp. 106, 109), regarding purported assurances made by the Corporate Defendants as true,[12] Abruzzo cannot prove justifiable reliance for numerous reasons. First, Paragraph 22 of the Release and Arbitration Agreement states unequivocally that "I am ***not relying*** on any promise or statement, express or implied, that is not contained in this Agreement." (R. p. 155, ¶ 22) (emphases added). Such a specific disclaimer "destroys the allegations in [a] plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations." *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320, 157 N.E.2d

[12] In fact, Ms. Miller does not recall providing any assurances to Abruzzo regarding how he would or would not be portrayed on *Southern Charm* and was unaware of any other Producer giving him such assurances. As a matter of course, neither she nor the other Producers provide assurances to participants about how they will be portrayed on the shows they volunteer to appear on. (R. p. 157, ¶ 8).

597, 599 (N.Y. 1959); *see also Rissman v. Rissman*, 213 F.3d 381, 384 (7th Cir. 2000) (rejecting fraud argument in the face of a non-reliance clause, explaining that such provisions "ensure[] that both the transaction and any subsequent litigation proceed on the basis of the parties' writings, which are less subject to the vagaries of memory and the risks of fabrication"). Notably, Paragraph 22 appears on the third page of the Release and Arbitration Agreement, which Plaintiff initially alleged he saw, (R. p. 21, ¶ 53 ("Plaintiff Abruzzo was given a three page single spaced document, turned to the third page"))—a fact that the photograph attached as Exhibit 3 to Defendants' Memo in Support, (R. pp. 159, 210), confirms unequivocally. In fact, Paragraph 22, (R. p. 155), appears immediately above the bolded statement that Abruzzo had ample time to review the agreement and seek legal counsel, should he have chosen to do so, which, in turn, is right above the signature block where Abruzzo signed the agreement. In addition, Paragraph 9, (R. p. 153), of the Release and Arbitration Agreement states that, "[f]or dramatic or creative purposes, Producer and Network ***may make misrepresentations to me*** related to any and all topics, prior to and during the course of my participation. ***I consent to and assume all risks*** of such acts and omissions regardless of whether they may infringe upon my rights or give rise to a claim." (emphasis added).

Second, even if true (which it demonstrably is not), Plaintiff's strategically revised assertion that he was only presented with the signature portion of the Release and Arbitration Agreement and/or "a partial piece of paper"—suggesting he could not see the rest of the Agreement but signed it anyway, (*see* R. pp. R. pp. 105-106, 116, 130, 132-134, 136-137, 139-141, ¶¶ 48, 50, 52, 53, 54, 100, 170, 173, 182, 188, 191, 200, 209, 211, 212, 216, 221)—is legally inadequate to prove fraudulent inducement and/or negligent misrepresentation.[13] Contrary to

[13] Plaintiff's internally contradictory and revised allegation that he could not see any portion of the Agreement other than the signature block is demonstrably false, as is shown in the photograph attached to Defendants' Memo in Support. (R. pp. 159, 210). That photograph of Abruzzo, taken immediately after he signed the Release and Arbitration Agreement, visually and indisputably confirms that he could see, at a

Plaintiff's assertion, South Carolina does ***not*** hold that "if the party who signs a written contract in ignorance of its contents without reading it or having it read is induced to sign by conduct of the other party which amounts to actionable fraud, this gives the signer the right to avoid the contract as against him on the ground of fraud." (R. p. 138, ¶ 206). In fact, the opposite is true: "As early as 1924, [the South Carolina Supreme] Court recognized that every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it." *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 39-40, 340 S.E.2d 786, 789-790 (1986) (internal citations omitted); *see also Tetrev*, 444 F. Supp. 2d at 530 (even assuming the drafting party "made false representations" regarding a contract, the other party has "no right to rely on them when the truth of these representations [would] have been evident by an inspection of the contract").

While the rule set forth in *Burwell* "is subject to the exception that if the party is ignorant and unwary, his failure to read the document may be excused," that exception is, "very strictly interpreted by our Court. In determining whether a party can be classified as ignorant and unwary, an individual's education, business experience and intelligence are all considered." 288 S.C. at 40, 340 S.E.2d at 790. Given the five and a half pages of Plaintiff's Amended Complaint setting out his extensive education, numerous professional accomplishments and accolades—including as an

minimum, all of the third page of that Agreement and that there were other pages attached to the signature page. As explained elsewhere herein, the key provisions relevant to this appeal—the Arbitration Agreement, the forum selection clause, the nonreliance clause and the affirmation that he had ample time and opportunity to read and consult legal counsel—all appear on the third page of the Agreement that Abruzzo could clearly see. (R. pp. 155, 159). Abruzzo's revised and demonstrably false allegation that he was presented only with the "the signature portion" is further belied by Ms. Miller's attestation that Abruzzo asked questions about a provision that is located on the first page of the Release and Arbitration Agreement, and that, as a matter of course, she hands such documents to volunteer participants turned to the first page. (R. pp. 157-158, ¶¶ 8, 9).

arbiter of cases involving unfair and deceptive business practices by individuals and businesses in Palm Beach County—and his current position as "a director of government relations for a major law firm in Florida," (R. pp. 96-102, ¶¶ 12-29), he cannot credibly claim that he is uneducated, ignorant or unwary.[14] Even if Plaintiff's allegations concerning purported representations were true, which they are not, the consequences of any failure on his part to read the Agreement—a duty he owed Defendants and the public—fall on him. There simply "is no right to rely, as required to establish fraud, where there is no confidential or fiduciary relationship and there is an arm's length transaction between mature, educated people. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003), *citing Florentine Corp. v. Peda I, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985); *see also Schmauch*, 354 S.C. at 673, 582 S.E.2 at 445 ("It is largely because the law of fraud requires [a claimant] to prove his ignorance of the falsity of the representation and his right to rely on the falsity that the courts long ago established the rule that ordinarily one cannot complain of fraud in the misrepresentation of the

[14] Plaintiff's reliance below on and attempt to analogize his situation to that in *Allen-Parker Co. v. Lollis*, 257 S.C. 266, 185 S.E.2d 739 (1971), only serves to highlight the fact that any reliance on alleged statements made by the Corporate Defendants was not justified. In *Allen-Park*er, the plaintiff, who had only a sixth-grade education, signed a "blank contract" to purchase a mobile home that the authorized sales agent was to fill in later with the agreed-upon terms. Under these specific and narrow facts, where the parties had agreed upon terms and the plaintiff signed a blank contract relying on the defendant to fill in the agreed terms, the Supreme Court held that, "Where a person is induced to sign an instrument as a result of a false representation that it will be filled in or prepared as orally agreed upon, the intentional commission of terms required by the authorization to be included, or the inclusion of terms not so authorized, constitute fraud, invalidating the instrument as between the parties thereto, notwithstanding that the person signing it was negligent in relying on the misrepresentation." 257 S.C. at 276, 185 S.E.2d at 744. Even setting aside Plaintiff's extensive education and professional experience, he has not alleged that he was presented with a blank contract that the Corporate Defendants promised to "fill in" later based on a prior agreement. Thus, *Allen-Parker* neither applies to the facts of this case nor does it support Plaintiff's position. Similarly, *Baldwin v. Postal Tel. Cable Co.*, 78 S.C. 419, 59 S.E. 67 (1907), relied on by Plaintiff below, is also inapposite. There, the plaintiff produced evidence that he was illiterate and relied on the defendant's representation of what the contract involved. Here, at best, Plaintiff simply did not bother to read the contract carefully and now seeks to hold the Defendants accountable for his failure to do so.

contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and that one entering into a written contract must read it and avail himself of every reasonable opportunity to understand its content and meaning").

Additionally, as noted above, Abruzzo knew Dennis was a long-time cast member on a reality television program that focuses on the personal lives of its cast and "reveals scandal" and that his dinner date with her was going to be filmed and that his relationship with Dennis would be featured in the Program. Abruzzo's claim that he did not know and could not possibly be expected to have understood the medium in which he agreed to participate because he purportedly did "not watch reality television," (R. pp. 107, 131, 135, 139-140, ¶¶ 53, 177, 195, 216), is both inconsequential as a matter of law and misses the point. Abruzzo alleges that well before he had any discussions with the Corporate Defendants and prior to his agreement to appear on *Southern Charm*, Dennis immediately began "imploring [him] to appear on the show," (R. p. 104, ¶ 42), and he alleges he negotiated the scene for his "appearance" on the Program, rejecting suggestions from the Corporate Defendants that he was not comfortable with. (*Id.* ¶ 43). If Abruzzo did not watch any episodes of the Program or even do a quick Internet search to find a brief summary of the Program, in which his then girlfriend was a regular cast member, in order to see what he was agreeing to participate in, that, again, falls entirely on him.[15] As noted above, "[w]here there is no confidential or fiduciary relationship and an arm's length transaction between mature, educated people is involved, there is no right to rely. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *Florentine Corp*, 287 S.C. at 386, 339 S.E.2d at 114; *Schmauch*, 354 S.C. at 672, 582 S.E.2d at 444.

[15] Of course, the fact that Abruzzo alleges that he personally does not watch reality television is not probative of whether he is generally familiar with the genre, which has been highly popular and widely discussed in the United States for almost well over a decade.

Alternatively, Plaintiff alleges that the Release and Arbitration Agreement should be rescinded based on unilateral mistake. (R. p. 138, ¶ 208). However, to be entitled to rescission of a contract based on unilateral mistake, Plaintiff must prove by clear and convincing evidence that his "unilateral mistake" was "induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to rescission, without negligence on the part of the party claiming rescission, or where mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement." *Truck South, Inc. v. Patel*, 339 S.C. 40, 49, 528 S.E.2d 424, 429 (2000). Abruzzo has not and cannot satisfy that showing.

First, even assuming, solely for the sake of argument, that he was presented only with the signature block, which is demonstrably false, (R. p. 159), Abruzzo cannot prove he was not negligent. As explained above, any failure to read the Agreement before signing it is entirely Plaintiff's fault. *Burwell*, 288 S.C. at 39, 340 S.E.2d at 789 ("every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it"); *Schmauch*, 354 S.C. at 663, 582 S.E.2d at 440 ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it"); *see also King v. Oxford*, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984) ("It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests. Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests. A party must avail himself of the knowledge or means of knowledge open to him") (internal citations omitted).

In addition, Abruzzo has not even alleged that he asked or attempted to review the document handed to him before signing and/or that he was prevented from doing so. He simply alleges that he was sitting down to dinner with his then girlfriend and that there were "bright lights." (R. p. 105, ¶¶ 46-48). Thus, even accepting his allegations as true, solely for the purposes of this Motion, he was negligent in failing to protect his interests, which precludes application of the unilateral mistake defense.

Second, and as set forth in detail above, Plaintiff cannot show that he was entitled to rely on any statements purportedly made by the Corporate Defendants, and thus, cannot establish that any unilateral mistake was induced by fraud, deceit or misrepresentation. *See Tetrev*, 444 F. Supp. 2d at 530 (even assuming the party that drafted a contract "made false representations" regarding the contract, the other party has "no right to rely on them when the truth of these representations [would] have been evident by an inspection of the contract"); *see also King v. Oxford*, 282 S.C. at 311, 318 S.E.2d at 127-128 (party had no right to rely on other party's representations where, among other things, she was a college-educated business woman and there was no fiduciary relationship between the parties). That too precludes application of the unilateral mistake doctrine.

Third, Abruzzo, a self-proclaimed successful and accomplished Florida politician who currently is "employed as a director of government relations for a major law firm in Florida," (R. pp. 96-102, ¶¶ 12-29), has not even pled facts, let alone clearly established through competent evidence, that any purported unilateral mistake was "accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement, sustained by competent evidence of the clearest kind." *King v. Oxford*, 282 S.C. at 313, 318 S.E.2d at 128. Even if he had, which he has not, rescission under these circumstances, where he cannot prove fraud, "is appropriate only if both parties can be returned to the status quo prior to the

contract." *Id.* at 313, 318 S.E.2d at 129. They cannot. Relying on Abruzzo's execution of the Release and Arbitration Agreement, the Corporate Defendants filmed and included Abruzzo's dinner with Dennis in one episode and discussions about their relationship in others, which were then distributed on multiple platforms. Under the circumstances, re-editing or withholding those episodes (which would then require substantial re-editing of other episodes that do not include Abruzzo) would cause Defendants to incur significant burden and expense. As such, they have "suffered a definite and substantial change of position in reliance on the contract." *Id.*, at 313-314, 318 S.E.2d at 129.

Abruzzo's misrepresentation claims fail for an additional reason. Any alleged misrepresentation must involve a misstatement of material fact or a promise made with a present but undisclosed intent not to perform, rather than a mere statement of future intent or action. *Turner*, 392 S.C. at 124, 708 S.E.2d at 770 ("to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as to future events"); *Luckow v. RBG Design-Build, Inc.*, 156 A.D. 3d 1289, 1294, 128 N.Y.S.3d 549, 554-555 (N.Y. App. Div. 2017) (it is "nonactionable [to] promise to perform a future act" where "there is no indication that [a defendant] did not intend to carry out that duty when he made the statement"). Here, all of the alleged misrepresentations identified by Abruzzo go to future actions. (R. pp. 105-106, ¶ 49 (none of the Corporate Defendants "state[d], suggest[ed] or impl[ied] that Plaintiff Abruzzo would be disparaged, defamed or otherwise portrayed in a negative and/or false light"), ¶ 51 (alleging the Corporate Defendants "falsely represented to Plaintiff that he should have 'no worries in the world' because Plaintiff was Dennis's savior and 'knight in shining armor'"),[16] ¶ 52

[16] Note that, in his original Complaint, Abruzzo alleged that it was Dennis, not the Corporate Defendants, who "told Plaintiff Abruzzo that the Corporate Defendants were going to make him look incredible, and would portray him as Dennis's comforting knight in shining armor." (R. pp. 20-21, ¶ 52).

(alleging the Corporate Defendants represented to him that "not only would the filming be good for Plaintiff, but that it would also be helpful for Dennis and also for Defendant Conover because his storyline was in jeopardy"), ¶ 53 (alleging the Corporate Defendants "represented to Plaintiff Abruzzo that his appearance on Southern Charm would be a great thing for Kathryn Dennis, his girlfriend at the time, and her role on Southern Charm"). Even if they were actually made by Defendants (and they were not), all of these alleged statements relate to future actions, or relate to the portrayal of a party other than Abruzzo (Defendant Conover or cast member Dennis). Thus, Plaintiff has not and cannot establish any basis sounding in fraud or misrepresentation to set aside the parties' Arbitration Agreement.

Nor can Plaintiff establish duress, coercion, unfair surprise or, as set forth below, unconscionability with respect to the Release and Arbitration Agreement as a whole, let alone the Arbitration Agreement itself which, as discussed above, must be considered separate and apart from the broader Release and Arbitration Agreement. *Prima Paint*, 388 U.S. at 403-404; *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364; *Monarch Consulting*, 26 N.Y.3d at 675, 47 N.E.3d at 474. Plaintiff was not required to sign the Release and Arbitration Agreement or appear in the Program in order to pursue a "romantic relationship" with Dennis, and he does not allege otherwise. Instead, Plaintiff merely alleges that he felt pressure to be a good boyfriend to Dennis because Dennis "began imploring Plaintiff Abruzzo to be on the show" because she believed the Corporate Defendants "would pay big money for rights to televise her wedding, honeymoon, an exclusive, and other things of that nature." (R. p. 104, ¶ 42). He further alleges that he felt pressure to sign the Agreement because he "and Dennis were actually sitting down for dinner," and that with "the film crews in place and bright lights shining on him" when he was "presented a piece of paper ..."

He alleges he was further under pressure because filming the dinner "would be 'a great thing' for his then girlfriend Dennis." (R. pp. 105-106, ¶¶ 47, 48, 52-53).

Even if true, Plaintiff's allegations fall far short of establishing duress, coercion or unfair surprise sufficient to render the Release and Arbitration Agreement, let alone the agreement to arbitrate, unenforceable. Duress has long between defined in South Carolina as "a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition." *Phillips v. Baker*, 284 S.C. 134, 325 S.E.2d 533 (1985), *quoting Cherry v. Shelby Mut. Plate Glass & Cas. Co.*, 191 S.C. 177, 4 S.E.2d 123 (1939). Plaintiff has not alleged and cannot show any set of facts that would demonstrate any pressure applied by Defendants, and certainly none "that practically destroy[ed his] free agency." Defendants did not require Plaintiff to participate on the Program in order to date Dennis, nor could they. (R. pp. 157-158, ¶¶ 4-6, 11). He was not obligated or forced in any manner to have his dinner with Dennis filmed for a reality television program or to enter into any agreement with Defendants but, instead, did so voluntarily, and as alleged, to please the reality television cast member he was pursuing. Had Plaintiff chosen not to appear on the Program or declined to sign the Release and Arbitration Agreement, the Corporate Defendants simply would not have filmed the dinner. (*Id.* ¶ 11). In addition, Plaintiff's claims of duress are belied by his own allegations. He alleges that he established the circumstances under which he would participate in any filming for the Program, declining to go on a "guy's trip," or on a dinner date with Dennis at a "public and crowded restaurant," and "ultimately agree[ing] to a private dinner at Dennis's residence in downtown Charleston." (R. p. 104, ¶ 43). Thus, for the reasons set forth in detail above, Plaintiff has not and cannot establish fraud, misrepresentation, mistake, duress or unfair

surprise as to the Release and Arbitration Agreement as a whole, let alone, as required, as to the Arbitration Agreement specifically.

ii. Plaintiff has not and cannot show the Arbitration Agreement is unconscionable.

Plaintiff has not satisfied his high burden to avoid enforcement of the Arbitration Agreement on the basis of unconscionability. Under New York law, "[t]he doctrine of unconscionability contains both substantive and procedural aspects, and whether a contract or clause is unconscionable is to be decided by the court against the background of the contract's commercial setting, purpose and effect." *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 138, 535 N.E.2d 643, 647 (N.Y. 1989). With regard to substantive unconscionability, "courts consider whether one or more key terms are unreasonably favorable to one party," although New York does not require mutuality of remedy in arbitration clauses or in contracts in general. *Id.*, 73 N.Y.2d 137-138, 535 N.E.2d at 646-647. A contract is substantively unconscionable where it "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." Procedural unconscionability results from the contract formation process, and looks at "whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties." *Id.*, 73 N.Y.2d 139, 535 N.E.2d at 647; *see also Matter of Conifer Realty LLC (Envirotech Servs., Inc.)*, 106 A.D.3d 1251, 1254-1255, 964 N.Y.S.2d 735, 739 (N.Y. App. Div. 2013) (arbitration agreement that was on the back of a one-page agreement was nonetheless not unconscionable in light of the fact that the contract called "the reader's attention to those additional terms and conditions" and because the terms were not "unreasonably favorable" to one party over the other). "The unconscionability doctrine is not designed 'to redress … inequality between the parties but simply to ensure that the more powerful party cannot

surprise the other party with some overly oppressive term.'" *Conifer Realty*, 106 A.D.3d at 1255, 964 N.Y.S.2d at 740.

South Carolina follows similar principles. For example, in *Simpson*, the South Carolina Supreme Court explained that "unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." 373 S.C. at 25, 644 S.E.2d at 668. Finding no South Carolina cases on point, the *Simpson* Court looked to Ohio case law which had considered "numerous cases in the very recent past specifically addressing issues of unconscionability of arbitration clauses embedded in adhesion contracts between automobile retailers and consumers." 373 S.C. at 26, 644 S.E.2d at 669. The Court first noted that adhesion contracts "are not per se unconscionable."[17] However, in *Simpson*, the Court held that, because the arbitration agreement was embedded in paragraph 10 out of 16 paragraphs on the back of the purchase contract for a personal vehicle, and was not highlighted or conspicuous in any other way, it was unconscionable. 373 S.C. at 27-28, 644 S.E.2d at 670. Here, in contrast, the arbitration provision is not hidden or obscured but is prominently displayed in boldface and all capital letters, under the heading, "**MEDIATION & ARBITRATION**," on the very page of the Release and Arbitration Agreement that Plaintiff initially conceded he could see, (R. p. 21, ¶ 53), and that he is seen holding up to the camera in to the Memo in Support. (R. pp. 159, 210).

[17] Plaintiff's allegation, relying on *Simpson* below, that the Release and Arbitration Agreement is a contract of adhesion is thus irrelevant, as well as factually incorrect. Abruzzo was not required to appear on *Southern Charm* in order to date Dennis or for any other reason. Had he refused to sign the Release and Arbitration Agreement, his dinner date with her simply would not have been filmed. (R. pp. 157-158, ¶¶ 4, 5, 11). In any event, having a dinner filmed for possible inclusion on a reality television show or pleasing a new romantic partner, is a personal choice and not a necessity, in contrast to *Simpson*, which involved the purchase of "a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society." 373 S.C. at 27, 644 S.E.2d at 670.

For that and the other reasons discussed below, Plaintiff has not and cannot establish that the Arbitration Agreement should be voided based on unconscionability. Even if either were true—and both are demonstrably false (R. pp. 157-158, ¶¶ 8-9; R. p. 159)—Plaintiff's initial allegation that he was handed the Release and Arbitration Agreement "turned to the third page," (R. p. 21, ¶¶ 53, 54), as well as his strategically revised allegation that he was handed a partial piece of paper with only the signature block showing, (R. pp. 105-106, 116, 130, 132-134, 136-137, 139-141, ¶¶ 48, 50, 52, 53, 54, 100, 170, 173, 182, 188, 191, 200, 209, 211, 212, 216, 221), fall far short of establishing unconscionability. Plaintiff does not even allege, let alone offer evidence, that anyone told him that he could not review each page of the Agreement, that he was otherwise prevented from reviewing each page of the Agreement, that he requested additional time to review it, or that he asked to consult with a lawyer, such as any of the lawyers at the major law firm at which he was employed at the time. He simply alleges, without any foundation, that he was denied adequate time or opportunity to review the document and/or consult with an attorney. However, that allegation is directly contradicted by the terms of the Release and Arbitration Agreement. On page three of the Agreement—the page that Plaintiff is shown in Exhibit 3, (R. pp. 159, 210), holding up to the camera—right above the signature line, in large boldface type, underlined and capital letters is the statement:

> **I HAVE HAD AMPLE OPPORTUNITY TO READ THIS ENTIRE AGREEMENT, HAD AN OPPORTUNITY TO REVIEW THIS AGREEMENT WITH AN ATTORNEY OF MY CHOICE, AND HAVE IN FACT READ THIS AGREEMENT. I UNDERSTAND THAT I AM GIVING UP LEGAL RIGHTS IN THIS AGREEMENT, INCLUDING, WITHOUT LIMITATION, MY RIGHT TO FILE A LAWSUIT IN COURT OR TO BRING A CLAIM IN CONNECTION WITH THIS AGREEMENT.**"

In addition, the Arbitration Agreement is ***on the third page*** under the heading "**MEDIATION & ARBITRATION**" in all capital letters, boldface type and underlined. It is not

hidden or obscured in any way but, instead, is prominent and conspicuous. The provision is clear, unambiguous and references the arbitration procedures issued by JAMS, which are publicly available. In addition, the title of the Release and Arbitration Agreement itself—which is at the top of the first page of the agreement and is also in boldface type, all capital letters and underlined—"**APPEARANCE RELEASE, VOLUNTARY PARTICIPATION, AND ARBITRATION AGREEMENT**," clearly and conspicuously put Plaintiff on notice that it contains an agreement to arbitrate. Thus, Plaintiff cannot argue credibly that he was unfairly surprised by or unaware of the Arbitration Agreement.

As set forth above, under both South Carolina and New York law, "a person who can read is bound to read an agreement before signing it." *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365; *see also Burwell*, 288 S.C. at 39-40, 340 S.E.2d at 789-790 ("One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it"); *Anderson v. Dinkes & Schwitzer, P.C.*, 150 A.D.3d 805, 806, 56 N.Y.S.3d 127, 128 (N.Y. App. Div. 2017) ("A party is under an obligation to read a document before he or she signs it, and a party cannot generally avoid the effect of a [document] on the ground that he or she did not read it or know its contents"). That is especially true here, where Plaintiff—as is alleged in the five and a half pages of background on his education, successes and credentials in the Amended Complaint—is a well-educated, successful, former Florida Congressman and current lobbyist who has worked at a major Florida law firm for years. (R. pp. 96-102, ¶¶ 12-29).

By way of contrast, *Higgins v. Superior Court*, 140 Cal. App.4th 1238, 45 Cal. Rptr.3d 293 (Cal. Ct. App. 2006), which involved a reality television program contract containing an arbitration agreement, is instructive. *Higgins* involved five siblings, ranging in age from 14 to 21, and the reality show *Extreme Makeover: Home Edition*, which refurbishes homes for "needy and

deserving" people. After the Higgins siblings lost their parents, a church family, the Leomitis, who had three children of their own, took the Higgins siblings in. The show's producers contacted Charles Higgins, the eldest of the siblings, through the church and, after several months of discussions, sent the Leomitis and the Higgins siblings a 24-page, single spaced agreement that contained an arbitration clause. Nothing in the agreement called attention to the arbitration clause, which was not highlighted in any way. 140 Cal. App.4th at 1242-1243, 45 Cal. Rptr.3d at 296-297. In addition, the agreement contained a release of claims that was in smaller print and had an arbitration provision embedded in the middle. After meeting with the producers, the Leomitis presented the agreements to the five Higgins siblings, told them to "flip through the pages and sign and initial," giving them about five minutes to review the documents.

After the Leomitis's home had been expanded and reconstructed, the Leomitis "informed petitioners [the Higgins siblings] that the home was theirs (the Leomitis'[s]), and the Leomitis ultimately forced petitioners to leave." 140 Cal. App.4th at 1245, 45 Cal. Rptr.3d at 298. Although the Higgins siblings contacted the show's producers, they were told the show could not help them and the episode featuring the Higgins siblings was rebroadcast.

When the Higgins siblings filed suit in California state court, the show's producers petitioned to compel arbitration. The Higgins siblings opposed arbitration on the grounds that the agreement was procedurally and substantively unconscionable. Explaining that arbitration clauses can be rescinded on the same grounds as other contracts in general, the court analyzed the contract and release signed by the Higgins siblings. The court first looked to see whether the agreement and release were contracts of adhesion, which it acknowledged "are routine in modern day commerce," and "are worthy of neither praise nor condemnation, only analysis." 140 Cal. App.4th at 1248, 45 Cal. Rptr.3d at 300. The court also explained that, "[u]nder the FAA, a court may not

consider a claim that an arbitration provision is unenforceable if it is a subterfuge for a challenge that the entire agreement (in which the arbitration clause is only a part) is unconscionable. That contention must be presented to the arbitrator." *Id.* at 1249, 45 Cal. Reptr. 3d at 301. The same is true here.

The court then explained that "[u]nconscionability has both a procedural and a substantive element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results. [citation omitted] The prevailing view is that ***both*** must be present in order for a court to refuse to enforce a contract or clause under the doctrine of unconscionability." *Id.* (emphasis added). As to surprise, the Court noted that "the arbitration provision appears in one paragraph near the end of a lengthy, single-space document … The television defendants knew petitioners were young and unsophisticated … [but] made no effort to highlight the presence of the arbitration provision in the Agreement. It was one of 12 numbered paragraphs in a section entitled 'MISCELLANEOUS.'" The text was neither bolded nor highlighted and, although boxes next to the other paragraphs required the siblings' initials, the arbitration clause did not. Based on these facts, the court found the arbitration clause was procedurally unconscionable. 140 Cal. App.4th at 1253, 45 Cal. Rptr.3d at 304.

As to substantive unconscionability, the court concluded the arbitration clause required only the siblings to submit their claims to arbitration because it repeatedly used the words "I agree" and only used the words "the parties" in connection with the parties' agreement that the producer had the right to seek injunctive or other equitable relief in court. *Higgins*, 140 Cal. App. 4th at 1253, 45 Cal. Rptr.3d at 304. The court explained, however, that "the fact that the injunction provision is one-sided does not necessarily mean that the clause is substantively unconscionable," but that any "'business realities' creating the special need, must be explained in the terms of the

contract or factually established." 140 Cal. App.4th at 1254 n.12, 45 Cal. Rptr.3d at 305 n.12. Other indicia of substantive unconscionability in the Higgins arbitration agreement included that only the television producers could seek appellate review of the arbitrator's decision with regard to the statutory claims, and the requirement that arbitration costs be shared equally between the parties, even though the lower court had shifted all the arbitration costs to the television defendants. 140 Cal. App.4th at 1254, 45 Cal. Rptr.3d at 305.

Unlike the *Higgins* siblings, here, as set forth in detail above, Plaintiff has not adequately alleged—let alone established—procedural unconscionability. Plaintiff simply alleges that he was "actually sitting down to dinner with Dennis for filming," when he was presented with a partial piece of paper that he willingly signed so that the Corporate Defendants could film the dinner, (R. p. 105, ¶¶ 47-48), and that there were bright lights and he felt pressure to be a good boyfriend to the reality television cast member he was dating. He does not allege that he was forced to pursue a romantic relationship with a cast member of a reality show during active filming, or that the Corporate Defendants forced him to sign the Arbitration Agreement, or even the Release and Arbitration Agreement in order to continue that romance, or even that he was forced to agree to have the dinner filmed. He was not.

Unlike the Higgins siblings. Plaintiff is a highly educated professional politician and lobbyist, who worked at a major law firm at the time he voluntarily signed the Agreement, (R. pp. 96-102, ¶¶ 12-29), previously served as an arbiter of alleged business and commercial-related misconduct, and, represented by two major law firms, currently is suing a major Florida newspaper.[18] Plaintiff is more than capable of protecting his own interests, has done so previously in declining certain filming locations for the Program, and he had the opportunity to do so again

[18] https://floridapolitics.com/archives/315360-joe-abruzzo-sues-tampa-bay-times-for-libel-defamation.

either by himself or through his counsel. The existence of "bright lights" on the filming location and his subjective desire to be a good boyfriend come nowhere near meeting the high standard required to establish procedural unconscionability under the applicable law. Thus, even as alleged, Plaintiff cannot establish procedural unconscionability under either New York or South Carolina law.

Nor has Plaintiff alleged—let alone established—substantive unconscionability. The Arbitration Agreement applies to both parties equally. (R. p. 155, ¶ 19 ("where any dispute in connection with this agreement arises, the parties agree to first try to resolve such dispute through confidential mediation," and "if mediation is unsuccessful, then all disputes … shall be resolved by final and binding arbitration"). Thus, both sides, Plaintiff and the Defendants, agreed to resolve any dispute in connection with the Release and Arbitration Agreement, first through mediation and, if that is unsuccessful, via binding, confidential arbitration. Additionally, the Arbitration Agreement provides that it is subject to the JAMS arbitration rules, which are publicly available and apply equally to all parties. (R. p. 155, ¶ 19) (R. pp. 225-250).

While the Arbitration Agreement allows the Corporate Defendants, but not Abruzzo, to seek injunctive relief in certain narrow circumstances that does not establish substantive unconscionability. Unlike in *Higgins*, the underlying business rationale for that provision, which is legitimate and based on the unique realities of the media industry, is spelled out in the Arbitration Agreement. In *Higgins*, the right to injunctive relief—which was only one of several aspects of the arbitration agreement on which the court's substantive unconscionability decision rested, which are not present here—merely provided that "[t]he parties hereto agree that, notwithstanding the provisions of this paragraph, Producer shall have a right to injunctive or other equitable relief as provided for in California Code of Civil Procedure [section] 1281.8 or other relevant laws." 140

Cal. App.4th at 1243, 45 Cal. Rptr.3d at 297. Here, in contrast, the Arbitration Agreement provides, "I agree that given the ***unique nature of the entertainment industry, and the irreparable damage to Producer, Network and their licensees that would result from delaying or preventing the exhibition of any program produced hereunder***, I may not seek or obtain injunctive relief in connection with this Agreement." (R. p. 155, ¶ 19) (emphasis added). Where, as is the case here, there is a legitimate need for a one-sided injunctive relief provision in an arbitration agreement, courts have upheld the agreement. *See, e.g.*, *Kaufman v. Sony Pictures TV, Inc.*, Civ. No. 16-12027-LTS, 2017 U.S. Dist. LEXIS 112938, at *19 (D. Mass. July 20, 2017) (enforcing, in the reality television context, arbitration clause with a one-sided injunctive relief provision because it "spell[ed] out the 'legitimate commercial need' for the lopsided provision"); *see also Sablosky*, 73 N.Y.2d 137-138, 535 N.E.2d at 646-647 (mutuality of remedy not required in arbitration clauses or in contracts in general).

Plaintiff's other unconscionability arguments are also meritless. Below, Plaintiff relied heavily on his erroneous interpretation of the other provisions of the Release and Arbitration Agreement in attempting to establish unconscionability. However, his numerous mischaracterizations of those provisions are irrelevant to the analysis of whether the Arbitration Agreement itself is unconscionable, specifically because "an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole." *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364; *see also Prima Paint*, 388 U.S. at 403-404; *Monarch Consulting*, 26 N.Y.3d at 675, 47 N.E.3d at 474.[19]

[19] Although it does not constitute binding precedent, a recent decision by the South Carolina federal district court in *Ledwell v. Ravenel*, No. 2:19-2815-RMG, 2020 U.S. Dist. LEXIS 30534 (D. S.C. Jan. 2, 2020), is highly instructive. That case involved a challenge to two release and arbitration agreements, which are substantially similar to the one at issue here, brought by a voluntary participant on *Southern Charm* against the Corporate Defendants. There, the district court rejected Plaintiff Ledwell's—a nanny with significantly less experience and credentials than Abruzzo—unconscionability and duress arguments, as well as her

Plaintiff's argument that the Arbitration Agreement is inextricably intertwined with other provisions of the Release and Arbitration Agreement also fails. Below, Plaintiff relied exclusively on *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), which is readily and factually distinguishable. There, the arbitration agreement was embedded as a subparagraph in a comprehensive warranty paragraph that the court construed as a single provision for several reasons, including because the text of the arbitration agreement was physically intertwined with the text of the larger warranty provision, all of those sections addressed the buyer's remedies, and they contained "***numerous cross-references*** to one another, intertwining the subparagraphs so as to constitute a single provision." 417 S.C. at 48, 790 S.E.2d at 4 (emphasis added); *see also Smith v. D.R. Horton, Inc*., 403 S.C. 10, 13-14, 742 S.E.2d 37, 39 (Ct. App. 2013) (describing in detail the various subparagraphs of the warranty paragraph). Here, in contrast, the various provisions Plaintiff argues are "intertwined" with the Arbitration Agreement are set forth in separate paragraphs of the Release and Arbitration Agreement and address entirely different and unrelated topics. The sole cross reference in the Arbitration Agreement to any other provision of the Agreement is a cross reference to the definition of the term "Released Parties." The fact that the Arbitration Agreement adopts the definition of "Released Parties" from the release provision—which is the first place that phrase is used and defined—rather than relist those individuals and entities again in the Arbitration Agreement, does not render those provisions "intertwined" under South Carolina law. *See One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293 (finding the lower court "erred in finding the arbitration agreement was not separable from other allegedly unconscionable provisions that precede the arbitration agreement" in longer warranty provision). Here, by its terms and operation, the Arbitration Agreement stands on its own and must be evaluated separate and

argument that the release and arbitration agreements were void for lack of consideration. (R. pp. 217-224).

apart from the rest of the Agreement. *See, e.g.*, *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364; *see also Prima Paint*, 388 U.S. at 403-404.

Finally, contrary to Plaintiff's argument to the Circuit Court, the fact that the Arbitration Agreement requires that arbitration take place in New York, (R. p. 155, ¶ 19), does not make it unconscionable. As is discussed in more detail below in Section IV, the continued viability of S.C. Code § 15-7-120[20] is highly questionable given the United States Supreme Court rulings in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), and their progeny. In any event, because this case indisputably involves interstate commerce, Section 15-7-120 is preempted by federal arbitration law. In *Tritech Elec., Inc. v. Frank M. Hall & Co.*, this Court held that the trial court erred in "applying § 15-7-120 to the arbitration clauses *sub judice* because state law is preempted by the Federal Arbitration Act (FAA) under [similar] circumstances presented by this action. Where a contract evidencing interstate commerce contains an arbitration clause, the FAA preempts conflicting state arbitration law." 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000); *see also Kiawah Island Util., Inc. v. Westport Ins. Corp.*, No. 2:19-cv-1359-DCN, 2019 U.S. Dist. LEXIS 182220 *17-18; 2019 WL 5394200 (D.S.C. Oct. 22, 2019) (same and, in addition, rejecting the argument that the forum selection clause was unenforceable because the chosen forum was a proper venue). To the extent that Section 15-7-120 remains viable in South Carolina, it conflicts with and is preempted by the FAA, which governs this appeal and strongly favors enforcing arbitration agreements, as agreed to by the parties, including any applicable forum selection provisions. Thus, for the reasons set forth above, Plaintiff has not and cannot establish either procedural or substantive unconscionability.

[20] Subsection (B) of that statute provides, in pertinent part, that "A provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable with respect to a cause of action, which, but for the arbitration agreement, is triable in this State." S.C. Code Ann. § 15-7-120(B).

C. Whether Plaintiff's claims are subject to arbitration is for the arbitrator to decide.

Plaintiff, in cursory fashion, also alleged below that the Arbitration Agreement "does not cover the torts alleged" in his Amended Complaint. (R. pp. 130, 134, 138, ¶¶ 169, 187, 205). However, once this Court has determined that the parties entered into an enforceable agreement to arbitrate their disputes, it need not resolve any other issues. Under New York, South Carolina and federal law, the court decides the scope of an arbitration agreement ***unless***, as is the case here, the parties have provided that the arbitrator decides whether the claims fall within the Arbitration Agreement. *See Zabinski v*, 346 S.C. at 597, 553 S.E.2d at 118 ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise"); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 n.1 (2d Cir. 2005) (the question of who determines arbitrability generally "is a question for the court unless there is 'a "clear and unmistakable" agreement to arbitrate arbitrability'").

Here, pursuant to the clear and unambiguous language of the Arbitration Agreement, the parties have undisputedly agreed that the question of arbitrability must be decided by the arbitrator: "If mediation is unsuccessful, then all disputes, ***including the scope or applicability of this Agreement to Arbitrate***, shall be resolved by final and binding arbitration …" (R. p. 155, ¶ 19) (emphasis added). Thus, it is for the arbitrator, not the Court, to decide whether Plaintiff's claims fall within the parties' agreement to arbitrate this dispute.

Additionally, where "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec Corp.*, 398 F.3d at 208. The streamlined JAMS rules, which, as set forth in the Arbitration Agreement, govern any mediation or arbitration between the parties, provide that the arbitrator is to decide the arbitrability of

disputes. "Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or ***scope of the Agreement*** under which Arbitration is sought, and who are proper Parties to the Arbitration, ***shall be submitted to and ruled on by the Arbitrator***. The Arbitrator has the ***authority to determine jurisdiction and arbitrability issues as a preliminary matter***." *JAMS Streamlined Arbitration Rules & Procedures*, effective July 1, 2014, Rule 8(b) (emphasis added) (R. p. 236). Thus, for this reason too, whether each of Plaintiff's causes of action falls within the scope of the Arbitration Agreement is for the arbitrator, not the Court, to decide in the first instance.

In any event, all of Plaintiff's claims clearly fall within the scope of the parties' broad Arbitration Agreement because they all arise in connection with Abruzzo's participation with the Program and/or the Release and Arbitration Agreement. (R. p. 155, ¶ 19). All of Plaintiff's causes of action are based on his allegations that the Corporate Defendants made or encouraged the Individual Defendants to make statements on the Program about him (and other participants on the Program) that were false, depicted Plaintiff in a false light and/or showed misleading photographs of him, all in order to promote a "storyline" for dramatic effect and/or profit, contrary to assurances purportedly made by certain Defendants in connection with Plaintiff's execution of the Release and Arbitration Agreement.

D. <u>All of the Defendants are entitled to enforce the agreement to arbitrate.</u>

All of the Defendants, including the Individual Defendants, are entitled to enforce the Arbitration Agreement. South Carolina courts routinely allow non-contracting parties to enforce arbitration agreements when a plaintiff names both signatories and non-signatories in a lawsuit. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012) (noting that "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory

parties in his complaint … because this would nullify the rule requiring arbitration"); *citing South Carolina Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993) (allowing non-signatory to enforce arbitration agreement). Thus, for the reasons set forth above, all of the Defendants are entitled to enforce the parties' agreement to arbitrate (and the exclusive forum selection clause).

In any event, by its terms, the Arbitration Agreement extends to the "Released Parties." (R. p. 155, ¶ 19). The Released Parties include Haymaker (as the Producer), NBCUniversal (as the Network), as well as "any of their ***parents***, ***subsidiaries***, assignees, licensees, affiliates ***or anyone associated with the Program***." (R. p. 154, ¶ 17) (emphasis added). Comcast Corporation is NBCUniversal's parent company, Bravo Media Productions, LLC is indirectly owned by NBCUniversal and is a subsidiary thereof, (R. p. 212, ¶¶ 4, 5), and the Individual Defendants indisputably are "associated with the Program." In addition, in Paragraph 21 of the Agreement, Abruzzo agreed that each of the Released Parties—including those Defendants that are not specifically named in the Release and Arbitration Agreement are—"express intended third party beneficiar[ies] of this Agreement," and have "full standing to enforce each, every, any and all of its provisions as if it was an express party thereto," (R. p. 155, ¶ 21), including the Arbitration Agreement.

Thus, under South Carolina law and under the terms of the Release and Arbitration Agreement, each of the Defendants is fully entitled to enforce the Arbitration Agreement, as well as other provisions of the Release and Arbitration Agreement.

IV. In the Event this Court Finds That the Parties' Arbitration Agreement is Not Enforceable, Plaintiff's Amended Complaint Should be Dismissed Based on the Valid and Enforceable Exclusive Forum Selection Clause.

Alternatively, and in the event the Arbitration Agreement is not enforced, this action still should be dismissed because the Release and Arbitration Agreement requires exclusive venue in the appropriate New York state or federal court. Specifically, the parties agreed to submit to the "in personam jurisdiction of the Supreme Court of the State of New York located in New York County and the United States District Court for the Southern District of New York," waiving "any objections thereto." (R. p. 155, ¶ 20). As is the case with the Arbitration Agreement, this forum selection provision is located on the third page of the Release and Arbitration Agreement, above Plaintiff's signature on the page of the Agreement that Plaintiff can clearly see as reflected in the photograph attached to Defendants' Memo in Support. (R. p. 159). Thus, because Plaintiff agreed to ***exclusive*** jurisdiction of all court proceedings in the appropriate state and federal courts in New York, he has expressly and voluntarily waived his right to file this lawsuit in South Carolina state court and, consequently, the Circuit Court lacked in personam jurisdiction over his claims.

Pursuant to *Minorplanet Sys. USA Ltd. v. American Aire, Inc.*, 368 S.C. 146, 628 S.E.2d 43 (2006), and based on the Release and Arbitration Agreement's clear choice of law provisions, New York law should govern consideration of the forum selection clause. In *Minorplanet*, the contract designated that the agreement was to be "governed by and construed in accordance with the laws of the state of Texas." As a result, the South Carolina Supreme Court applied Texas law in its analysis of whether the forum selection clause, which required exclusive venue in Texas, was enforceable. 368 S.C. at 150, 628 S.E.2d at 45; *see also Loyd & Ring's Wholesale Nursery, Inc. v. Long & Woodley Landscaping & Garden Ctr., Inc.*, 315 S.C. 88, 94, 431 S.E.2d 632, 636 (Ct.

App. 1993) (looking to Florida law to determine whether a forum selection clause choosing Florida courts was enforceable).

Under New York law, "it is the well-settled 'policy of the courts of this State to enforce contractual provisions for choice of law and selection of a forum for litigation.'" *Sterling Nat'l Bank v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222, 222, 826 N.Y.S.3d 235, 237 (N.Y. App. Div. 2006). Forum selection clauses are "prima facie valid and enforceable unless shown by the resisting party to be unreasonable." *Brooke Group v. JCH Synd. 488*, 87 A.D.2d 530, 534, 663 N.Y.S.2d 635, 638 (N.Y. App. Div. 1996). "Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum which will resolve any disputes," and such clauses are "enforced because they provide certainty and predictability in the resolution of disputes." *Id.* 87 A.D.2d at 534, 663 N.Y.S.2d at 638.

The result is the same under South Carolina law. It is well-established that a party can waive personal jurisdiction of South Carolina courts: "A party may always waive lack of personal jurisdiction …. It is not the function of courts to rewrite contracts between parties. Our function is limited to the contract's terms, and absent ambiguity, their plain meaning controls our inquiry." *Republic Leasing Co. v. Haywood*, 329 S.C. 562, 566, 495 S.E.2d 804, 806 (Ct. App. 1998); *see also Firestone Fin. Corp. v. Owens*, 309 S.C. 73, 75-76, 419 S.E.2d 830, 832 (Ct. App. 1992) ("It has long been the law of the State of South Carolina that lack of subject matter jurisdiction cannot be waived even by consent but lack of jurisdiction of the person may be waived," where a party consents in writing thereto). Here, Plaintiff, a Florida resident, consented in writing to the exclusive jurisdiction of New York state or federal courts.

To the extent the Circuit Court adopted Plaintiff's argument that S.C. Code Ann. § 15-7-120,[21] bars enforcement of the forum selection clause, the Court committed manifest legal error. First, as noted above, the Release and Arbitration Agreement contains a choice of law provision specifying New York substantive law. (R. p. 155, ¶ 20). Thus, New York substantive law should be applied to determine whether the forum selection provision is valid and enforceable.

Second, such a ruling would be inconsistent with the well accepted principle under South Carolina law that forum selection clauses are enforceable in general where they are not unreasonable or unjust. *Haywood*, 329 S.C. at 566, 495 S.E.2d at 806 (noting also that forum selection clauses "made at arms' length by sophisticated business entities" enjoy *prima facie* validity and enforceability). Plaintiff has not and cannot show that trying his case in New York is unreasonable or unjust; he has not even alleged any substantive contacts with the State of South Carolina.

Third, for the reasons set forth in Section III.B.ii above, the continued viability of Section 15-7-120 is in serious doubt. In *The Bremen*, the United States Supreme Court rejected state and federal courts' historical reluctance to enforce forum selection clauses. The Supreme Court explained that the reluctance to enforce valid forum selection clauses is "hardly more than a vestigial legal fiction," reflecting "something of a provincial attitude regarding the fairness of other tribunals." 407 U.S. at 12. Thus, they have "little place" in the current era. *Id.*

While the parties in *The Bremen* both were sophisticated business entities, the United States Supreme Court expanded its holding in *The Bremen* to individual purchasers of cruise line tickets

[21] That section provides, in pertinent part, that "Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action." S.C. Code Ann. § 15-7-120(A).

in *Carnival Cruise Lines*, where the Supreme Court explained that, "a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended, sparing litigants the time and expense of pretrial motions to determine the correct forum and conserving judicial resources that otherwise would be devoted to deciding those motions." 499 U.S. at 593-594. The Court recognized that Carnival Cruise Lines had a "special interest in limiting the fora in which it potentially could be subject to suit." *Id.* As to whether the forum selection clauses at issue were fundamentally unfair, the Court noted that there was no indication the forum had been chosen as a means to dissuade passengers from bringing claims but, rather had a legitimate basis, namely, the cruise line had its principle place of business in the forum. 499 U.S. at 595. Furthermore, there was no evidence the defendants obtained the agreement to the forum clause, which was not hidden, by fraud or overreaching, and the plaintiffs had "the option of rejecting the contract with impunity." *Id.*

The same is true here. The forum selection clause is conspicuously set out under the heading "Governing Law" on the page of the Release and Arbitration Agreement that Plaintiff is holding up to the camera. (R. p. 159).[22] The Corporate Defendants have a legitimate, business reason for choosing New York as the forum to resolve disputes with Program participants. Having disputes arising out of its television programs resolved in a central location where their businesses and witnesses are headquartered is reasonable and based on valid business considerations. On the other hand, Plaintiff—a Florida resident—has not alleged any substantive connection to South

[22] For the reasons set forth in detail above, Plaintiff has not and cannot establish that the Release and Arbitration Agreement, as a whole, was obtained by "fraud or overreaching." Moreover, he has not even alleged—let alone established—that the governing law and exclusive venue provisions themselves were a product of fraud, which is required under applicable law. *See, e.g.*, *The Bremen*, 407 U.S. at 12 n. 14 (observing that the plaintiff had "neither presented evidence of nor alleged fraud or undue bargaining power in the agreement"); *Carnival Cruise Lines*, 499 U.S. at 595 (noting "there is no evidence that petitioner obtained respondents' accession to the forum clause by fraud or overreaching").

Carolina other than one short trip to visit Dennis at her home. Nor has Plaintiff alleged or provided any proof that litigating his claims in New York "will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *The Bremen*, 407 U.S. at 18.

The Fourth Circuit has questioned the continued viability of Section 15-7-120. In *Albemarle Corp.*, the Fourth Circuit considered a forum selection clause in a contract between a South Carolina corporation and a British corporation. The Fourth Circuit held that it saw no evidence that S.C. Code Ann. § 15-7-120(A) "manifests a strong public policy of South Carolina," noting that South Carolina courts "have enforced forum selection clauses in contracts, notwithstanding the existence of 15-7-120(A)." 628 F.3d at 652. In addition, the Fourth Circuit concluded that "it can hardly be a strong public policy to countermand the very policy that the [U.S.] Supreme Court adopted in *The Bremen*," which "would have little effect if states could effectively override the decision by expressing disagreement with the decision's rationale." *Id.*; *see also T.R. Helicopters, LLC v. Bell Helicopter Textron, Inc.*, No. 3:10-2250-JFA, 2010 U.S. Dist. LEXIS 21923, *12 (D.S.C. Nov. 17, 2010) (enforcing forum selection clause and concluding that "no South Carolina court has explicitly stated whether South Carolina has a strong public policy against forum selection clauses that would deprive a citizen of his choice").

Thus, even if the Court were to find the Arbitration Agreement unenforceable, the exclusive forum selection provision, which also is valid and enforceable, requires that the Amended Complaint be dismissed as having been filed in an improper forum: *i.e.*, South Carolina state court as opposed to a New York state or federal court.

CONCLUSION

For all of the reasons stated herein, Defendants respectfully request that this Court reverse the Circuit Court, dismiss Plaintiff's Amended Complaint and issue an Order compelling mediation and, if necessary, arbitration in New York pursuant to the valid, enforceable Arbitration Agreement. Alternatively, even if this Court were to find the parties' Arbitration Agreement unenforceable, it should dismiss Plaintiff's Amended Complaint based on improper venue pursuant to the valid, binding exclusive forum selection clause in the Release and Arbitration Agreement.

February 12, 2021

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable, Circuit Court Judge

Appeal No. 2020-001095

Joseph Abruzzo,..... Respondent,

v.

Bravo Media Productions LLC; Haymaker Media, Inc.; NBCUniversal Media, LLC; Comcast Corporation; Craig Conover; Chelsea Meissner; and Madison LeCroy,..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellants Bravo Media Productions LLC; Haymaker Media, Inc.; NBCUniversal Media, LLC; Comcast Corporation; Craig Conover; Chelsea Meissner; and Madison LeCroy complies with Rule 211(b), SCACR.

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February 12, 2021

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