THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

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Appeal No. 2020-001095

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Joseph Abruzzo, Respondent,

v.

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

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# AMENDED FINAL BRIEF OF RESPONDENT

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2. Was a valid agreement to arbitrate formed? If so, is it enforceable?

3. If a valid and enforceable agreement to arbitrate was formed, who is entitled to compel arbitration?

## STATEMENT OF THE CASE

Respondent Joseph Abruzzo ("Plaintiff)" commenced this action on January 24, 2020. In his initial Complaint, Plaintiff alleged ten (10) causes of action against the Appellants ("Defendants").[1] Defendants did not file an Answer, but jointly filed a motion to dismiss pursuant to Rule 12(b)(3), SCRCP, on May 12, 2020. (R. pp. 38-51). A hearing was scheduled on Defendants' motion for June 22, 2020.

On June 19, 2020, Plaintiff filed an Amended Complaint. In his Amended Complaint, Plaintiff included another seven (7) causes of action against the Defendants.[2] Out of the

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[1] Outrage/Intentional Infliction of Emotional Distress (Individual Defendants and Corporate Defendants), Fraud (Corporate Defendants), Constructive Fraud (Corporate Defendants), Negligent Misrepresentation (Corporate Defendants), Fraudulent Inducement (Corporate Defendants), Civil Conspiracy (Individual Defendants and Corporate Defendants), Defamation (Individual Defendants and Corporate Defendants), Violation of the South Carolina Unfair Trade Practices Act (Corporate Defendants), Negligence (Individual Defendants and Corporate Defendants), and Quantum Meruit/Unjust Enrichment (Individual Defendants and Corporate Defendants). (R. pp. 7-37)

[2] Wrongful Appropriate of Personality/Infringement on the Right of Publicity (Individual Defendants and Corporate Defendants), Wrongful Publicizing of Private Affairs (Individual Defendants and Corporate Defendants), Public Nuisance (Individual Defendants and Corporate Defendants), Private Nuisance (Individual Defendants and Corporate Defendants), Fraudulent Inducement of Arbitration Agreement/Unconscionability of Arbitration Agreement (Individual

seventeen (17) causes of action, fifteen (15) allege some form of intentional, willful and/or reckless conduct or some form of misrepresentation. Defendants again did not file an Answer, instead filing a second, nearly identical motion, again seeking to a dismissal pursuant to Rule 12(b)(3), SCRCP. Defendants filed their joint motion to dismiss Plaintiff's Amended Complaint on June 22, 2020, and requested the Court hear the motion as scheduled that day. Plaintiff objected to that request, and a hearing was scheduled for June 30, 2020.

Plaintiff filed a memorandum in opposition to the Defendants' motion to dismiss on June 29, 2020, and a hearing on the motion was held on June 30, 2020 before the Honorable Bentley D. Price. On July 6, 2020, Judge Price electronically filed a Form 4 Order denying the Defendants' motion to dismiss and motion for order compelling arbitration. (R. pp. 4-6). On July 16, 2020, Defendants' filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCP. Judge Price electronically signed another Form 4 Order denying that motion without a hearing on July 20, 2020, which was electronically filed on July 22, 2020. (R. pp. 1-3). Defendants then filed and served a Notice of Appeal on August 10, 2020.

## SUMMARY

The detailed factual allegations are set forth in Plaintiff's Amended Complaint. The essence of the Amended Complaint asserts the Corporate Defendants perpetrated a fraud upon the Plaintiff to have him appear on the television show "Southern Charm" by materially misrepresenting to Plaintiff the nature of the show, his portrayal thereon, the substance of a document presented to him with only the signature portion revealed and the remainder of the

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Defendants and Corporate Defendants), Fraudulent Inducement of Release/Unconscionability of Release (Individual Defendants and Corporate Defendants), and Rescission of "Release and

document concealed from view, the purpose for which the document needed to be signed, and the effect signing the document was intended to produce. The Amended Complaint further alleges the Corporate Defendants conspired with the Individual Defendants to knowingly, intentionally, and maliciously publish false and outlandish statements about the Plaintiff personally, his reputation, and his career to millions of people for the sole purpose of injuring the Plaintiff or otherwise causing him harm simply to promote the concocted and false storylines on Southern Charm, a television show that is marketed and distributed to millions of viewers as "reality."

The scheme orchestrated by the Defendants had its intended effect. A major consulting agreement for which Plaintiff was paid $15,000 per month from 2007 up until 2019, and which was reasonably expected to last for the foreseeable future under the circumstances then existing, was terminated as a direct result of the Defendants publication of the falsehoods about Plaintiff on Southern Charm. Moreover, the Plaintiff's previously otherwise impeccable reputation is now lost in the sea of disinformation and falsehoods now populating the internet by websites, bloggers, news organizations, and others republishing the Defendants' false statements and portrayal of him on Southern Charm in the aftermath of the broadcasts.

The sole basis of the Defendants' joint motion to dismiss was Rule 12(b)(3), SCRCP, improper venue. The Defendants' relied entirely upon a document entitled "Appearance Release, Voluntary Participation, and Arbitration Agreement" (hereinafter referred to as "Arbitration Agreement"), which Defendants' argued prohibited Plaintiff from filing suit in Charleston County or from litigating against any one of them in any judicial forum. Based on

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Arbitration Agreement" (Individual Defendants and Corporate Defendants). (R. pp. 94-143)

the arguments, Defendants also seemed to believe the trial court should simply adjudicate the case on its merits and resolve factual disputes in their favor when considering the motion, Plaintiff's response, and the Defendants submissions of several exhibits in support of their motion. These exhibits included affidavits from individuals that fail to assert personal knowledge of the facts and circumstances alleged in the Amended Complaint which directly conflicted the allegations contained in the Plaintiff's Amended Complaint, and an Order from a wholly unrelated case involving different parties, facts, allegations and causes of action.

In the alternative to dismissal, all Defendants sought an order compelling arbitration based on the Arbitration Agreement; that same document Plaintiff specifically alleged to be fraudulently depicted and procured in furtherance of their conspiracy. The entire document, by its own terms, is the "Arbitration Agreement" and not just a single arbitration clause. Plaintiff has specifically alleged fraud, fraudulent inducement, unconscionability, and rescission of the "Arbitration Agreement" - including the "release," "arbitration," and "choice of forum" provisions.

The arguments presented by the Defendants are ostensibly grounded in some form of freedom to contract theory. However, the agreement as a whole and these provisions individually are illegal, unenforceable, and/or otherwise void as against public policy. Defendants nevertheless seek enforcement of this pervasively illegal agreement from the state where all of the Individual Defendants live, all of the Corporate Defendants conduct substantial business, and in which all have availed themselves of the jurisdiction and protections afforded by the laws of South Carolina.

A cursory review of the Amended Complaint and Arbitration Agreement reveals the truth; the Defendants intend to do what they want, whenever they want, to anybody they choose, anywhere in the State of South Carolina, while simultaneously being untethered to the obligations and duties owed to others and imposed by the law. Defendants' assert no error of law or abuse of discretion that would warrant a reversal. Instead, they egregiously misrepresent the Plaintiff's pleadings and the evidence before the trial court and spend the vast majority of their argument simply disagreeing with the trial court's view of the pleadings and evidence submitted. Make no mistake about it, they are not seeking enforcement of a valid arm's length agreement; they are seeking to delay or avoid trial and retreat to a different venue, forum, and body of law that they believe will be more favorable and confidential. The facts, the trial court recognized, however, prevent this from happening.

There are many reasons set forth herein why the trial court's decision must be affirmed, any one of which are sufficient to do so. (*see, e.g.* R. pp 251-285). However, the analysis can be easily boiled down as follows: 1) the denial of a Rule 12(b)(3) motion to dismiss alleging improper venue is not immediately appealable and, even if it were, the trial court's decision to deny the requested relief is not reversible error, 2) a valid agreement was never formed between the parties, and 3) even if an agreement was formed, it is unenforceable. Accordingly, the trial court's decision must be affirmed.

## STANDARD OF REVIEW

South Carolina appellate courts do not allow immediate appellate review of the denial of *any* Rule 12(b), SCRCP motion, including a Rule 12(b)(3) motion alleging improper venue. *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2011)(holding the denial of

Rule 12(b)(3) motion to change venue is not immediately appealable). Accordingly, the Defendants' contention that the denial of their motion to dismiss based upon an alleged improper venue is at issue on appeal is incorrect, and the trial court's decision must be affirmed.

## ARGUMENT

The denial of the Defendants' motion to dismiss based on improper venue is interlocutory and not immediately appealable. On this basis alone, the Defendants' appeal should be denied. Even if it were immediately appealable, the trial court correctly denied the Defendants' requested relief. To the extent the denial of a 12(b)(3) motion alleging improper venue is appealable, "[a] motion for a change of venue is addressed to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion." *State v. Kelsey*, 331 S.C. 50, 67, 502 S.E.2d 63, 71 (1998); *Holroyd v. Requa*, 361 S.C. 43, 603 S.E.2D 417 (Ct. App. 2004). An abuse of discretion occurs either when the court is controlled by some error of law or where the order lacks evidentiary support. *Townsend v. Townsend,* 356 S.C. 70, 73, 587 S.E.2d 118, 119 (Ct.App.2003).

Here, the trial court's denial of the Defendants' 12(b)(3) motion based on improper venue was not controlled by any error of law nor was it without evidentiary support. There is no doubt the Individual Defendants reside in Charleston County, the Corporate Defendants have fully availed themselves of the laws and protection of the State of South Carolina as well as the County of Charleston, and the most substantial acts or omissions occurred in Charleston County.

Further, and despite the Defendants' assertions otherwise, the Arbitration Agreement's "venue clause" - to the extent it is enforceable at all - does nothing more than *confer* jurisdiction in New York. It does not *limit* jurisdiction to New York to the exclusion of any other proper

jurisdiction. Venue is therefore proper in Charleston County, and nothing in the Arbitration Agreement dictates otherwise. Moreover, this court cannot enforce provisions of an agreement that are antithetical to South Carolina law and public policy, nor can it enforce provisions of an agreement procured through fraud. Accordingly, the trial court's decision was without error and should therefore be affirmed.

## I. VENUE IS PROPER IN CHARLESTON COUNTY.

Practice on a motion under Rule 12(b)(3) is relatively straight-forward. Although it appears South Carolina has not addressed this specific issue, federal courts have held, on a motion to dismiss under Rule 12(b)(3), the court is permitted to consider evidence outside the pleadings. *See Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*,471 F.3d 544, 550 (4th Cir.2006). A plaintiff is obliged, however, to make only a prima facie showing of proper venue in order to survive a motion to dismiss. *Id.* In assessing whether there has been a prima facie venue showing, we view the facts in the light most favorable to the plaintiff. *Id* (citing *Global Seafood Inc. v. Bantry Bay Mussels Ltd.,* 659 F.3d 221, 224 (2d Cir.2011)).

### a. The trial court employed the correct standard of review.

Contrary to the Defendants uncited proposition that the trial court "is obliged to employ a standard such as the summary judgment test" (Appellant's Initial Brief, p. 17), the clear weight of authority is that when objection to venue has been raised, the court must construe all reasonable inferences in Plaintiff's favor to determine whether the Plaintiff chose a proper venue. *Id; see also Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 366 (4th Cir. 2012)("In

assessing whether there has been a prima facie venue showing, [the court] view[s] the facts in the light most favorable to the plaintiff.")[3]

The Defendants did not assert any recognized statutory grounds for changing venue.[4] Instead, they sought dismissal of the Amended Complaint pursuant to a forum selection clause

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[3] *Accord* 5B Wright & Miller § 1352 (3rd ed. 2004)(A trial court may examine facts outside the complaint to determine whether its venue is proper and, as is consistent with practice in other contexts such as construing the complaint, the court must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138 (9th Cir.2004) (considering, in a case of first impression, how the court should consider disputed facts on a motion to dismiss for improper venue under Rule 12(b)(3) and concluding that "[a]fter reviewing the available authorities from outside of our circuit, we are persuaded that, in the context of a Rule 12(b)(3) motion based upon a forum selection clause, the trial court must draw all reasonable inferences in favor of the non-moving party and resolve all factual conflicts in favor of the non-moving party ..."); *Seariver Mar. Fin. Holdings, Inc. v. Pena,* 952 F.Supp. 455, 459 (S.D.Tex.1996)(When venue is challenged, "[a] court is not obliged to determine the 'best' venue for a cause of action pending before it, but rather must determine only whether or not its venue is proper."); *2215 Fifth St. Assocs. v. U–Haul Int'l, Inc.*, 148 F.Supp.2d 50, 54 (D.D.C.2001)(In considering a Rule 12(b)(3) motion, the court accepts the plaintiff's well-pled factual allegations regarding venue as true, draws all reasonable inferences from those allegations in the plaintiff's favor, and resolves any factual conflicts in the plaintiff's favor); *Gross v. Winter,* 876 F.2d 165, 166 (D.C.Cir.1989)(the court must accept all of the plaintiff's allegations as true and must resolve factual discrepancies in favor of the plaintiff); *Hoover Group, Inc. v. Custom Metalcraft, Inc.*, 84 F.3d 1408, 1410 (Fed.Cir.1996); *Dody v. Brown,* 659 F.Supp. 541, 544 n. 2 (W.D.Mo.1987) (determining that the plaintiff's factual assertions were sufficient to establish proper venue despite direct contradiction by the defendant); *Gibson v. Toyota Motor Sales, U.S.A., Inc.*, 2017 WL 4296723 (DSC Florence, Sep. 26, 2017)(When considering a motion under Rule 12(b)(3), the Court may consider evidence outside the pleadings, but the facts are viewed light most favorable to the plaintiff because a plaintiff need only make a *prima facie* showing of proper venue to survive a motion to dismiss); *Jeffers Handbell Supply, Inc v. Schulmerich Bells, LLC*, 2017 WL 3582235 (DSC Rock Hill, Aug. 18, 2017)(the plaintiff is obliged "to make only a prima facie showing of proper venue in order to survive a motion to dismiss."); *Brown v. Five Star Quality Care, Inc.*, 2016 WL 8710474 (DSC Charleston, Jan. 8, 2016)( When considering a motion under Rule 12(b)(3), the Court may consider evidence outside the pleadings, but the facts are viewed light most favorable to the plaintiff because a plaintiff need only make a *prima facie* showing of proper venue to survive a motion to dismiss).

[4] "The court may change venue if (1) it is a court in a county designated for that purpose in the

contained in the "Arbitration Agreement." (R. pp. 45-48). It is undisputed all of the individual Defendants are residents of Charleston County and the most substantial acts or omissions giving rise to the action occurred in Charleston County. South Carolina law mandates venue for the claims against the individual Defendants be in Charleston County. *See* S.C. Code § 15-7-30(C); S.C. Code § 15-7-30(G).

Nothing the Defendants submitted in support of their motion challenges or even addresses these facts. Nothing the Defendants submitted in support of their motion contends forum is improper in Charleston County, and the record does not support a conclusion the trial court did not consider the Defendants' submissions. Even if he didn't, the refusal to consider them would not be reversible error because the revelation from these documents is clear: there are significant and material facts that are disputed regarding the circumstances of the "Arbitration Agreement's" execution, the representations or omissions by the Defendants, and the substance of communications among the Plaintiff and the numerous agents/employees of the Corporate Defendants who interacted with the Plaintiff at the time of filming. Construing the facts alleged and all reasonable inferences in Plaintiff's favor, the trial court's refusal to resolve disputed issue of fact in the Defendants favor and denial of relief sought was correct.

**b. The forum selection clause does is permissive, not mandatory.**

Undeterred with the aforementioned facts and rules, Defendants repeatedly misrepresent the content of the "forum selection" clause and urge this Court, as they did the trial court, to put

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complaint, but the designated county is not the proper county pursuant to the provisions of the Code providing for the venue of actions; (2) there is reason to believe that a fair and impartial trial cannot be had there; or (3) the convenience of witnesses and the ends of justice would be promoted by the change." S.C. Code § 15-7-100.

the cart before the horse and enforce provisions of an agreement alleged to be illegal and void *ab initio* which was procured through fraud. Defendants further urge this Court, as they did the trial court, to enforce a forum selection clause that is contrary to South Carolina law and public policy. Neither is permitted.

As a general matter, courts enforce forum selection clauses unless it would be unreasonable to do so. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). This presumption of enforceability, however, only applies if the forum selection clause is mandatory rather than permissive. *See Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650–51 (4th Cir. 2010). A mandatory clause requires litigation to occur in a specified forum; a permissive clause permits litigation to occur in a specified forum but does not bar litigation elsewhere. *BAE Sys. Tech. Sol. & Servs., Inc. v. Republic of Korea's Def. Acquisition Program Admin.*, 884 F.3d 463, 470 (4th Cir. 2018). A permissive forum selection clause does not justify dismissal on the grounds that the plaintiff filed suit in a forum other than the one specified in the clause.[5] *Id.*

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[5] In *Atlantic Marine Construction Co. v. U.S. District Court*, the Supreme Court held that a defendant seeking to enforce a forum selection clause that points to a foreign forum should move to dismiss pursuant to the common-law doctrine of *forum non conveniens* rather than Rule 12(b)(3). 571 U.S. 49, 134 S.Ct. 568, 580 (2013). This doctrine allows a court to dismiss a case when the original venue is highly inconvenient and an adequate alternative venue exists. In the typical case, the defendant invoking *forum non conveniens* "bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Co.*, 549 U.S. 422, 430, 127 S.Ct. 1184 (2007). In particular, the defendant must prove that an alternative forum is available, adequate, and more convenient (in light of the public and private interests involved) than the forum selected by the plaintiff. *See DiFederico v. Marriott Int'l, Inc.*, 714 F.3d 796, 800–01 (4th Cir. 2013). But that framework is modified, the *Atlantic Marine* Court explained, in the context of a mandatory forum selection clause. Most importantly, a mandatory forum selection clause reverses the presumptions that would otherwise apply: instead of heavily favoring the plaintiff's chosen forum and placing the burden on the defendant, the forum

A forum selection clause is permissive unless it contains "specific language of exclusion." *Albemarle Corp. v. Astra Zeneca UK Ltd*, 628 F.3d at 651 (4th Cir. 2010) (quoting *IntraComm, Inc. v. Bajaj*, 492 F.3d 285, 290 (4th Cir. 2007)) (internal quotation marks omitted)). "[A]n agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction" in another unless the clause expressly sets forth "specific language of exclusion." *Id.*

The forum selection clause at issue here, Paragraph 20 of the Arbitration Agreement (the "forum selection" clause)(R. p. 47), does not contain any "specific language of exclusion." It states only "the parties submit to in personam jurisdiction" in New York and "waive any objections thereto." This clause differs significantly from forum selection clauses found to be mandatory, which provide that a particular place constitutes the "sole" or "only" or "exclusive" forum. *See BAE Sys. Tech.*, 884 F.3d at 470 (4th Cir. 2018)(holding forum selection clause that stated disputes "shall be resolved through litigation and the Seoul Central Court shall hold jurisdiction" was permissive). And, it says nothing to support the conclusion repeatedly, and falsely, asserted by Defendants that it is an *exclusive* venue for any action. (*See* App. Initial Brief, pp. 1, 14, 15, 47, 48, 49, 51, 52, 53). In fact, the word exclusive is nowhere to be found in the Arbitration Agreement, much less paragraph 20. The Defendants' assertions otherwise are simply false.

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selection clause is "given controlling weight in all but the most exceptional cases," and the plaintiff bears the burden of proving why it should not be enforced. *See* 134 S.Ct. at 581, 583 & n.8 (internal quotation marks and citation omitted). Accordingly, determination of whether the forum selection clause here is permissive or mandatory is critical. If it is permissive, then the traditional *forum non conveniens* analysis applies and Defendants bear a "heavy burden" in opposing Plaintiff's chosen forum.

Because the clause here is permissive, there is no presumption in favor of enforceability, and the court must proceed with a traditional *forum non conveniens* analysis. A *forum non conveniens* ruling is discretionary. *Mansour v. Mansour*, 296 S.C. 215, 371 S.E.2d 537 (1988); *Nienow v. Nienow,* 268 S.C. 161, 232 S.E.2d 504, (1977) (explaining it is axiomatic that a plaintiff's choice of forum "should not be disturbed except for weighty reasons"). Pursuant to that analysis, the Defendants bear the burden of proving, *inter alia*, that Plaintiff's chosen forum is improper. Defendants do not even attempt to do this. Even if paragraph 20 of the Arbitration Agreement were enforceable, the mere fact it permits venue in New York does not make venue in South Carolina improper. Accordingly, the trial court correctly rejected the Defendants' misleading arguments otherwise and the refusal to dismiss pursuant to Rule 12(b)(3) was correct.

**c. The forum selection clause is unenforceable.**

Forum selection clauses are generally enforceable unless shown by the resisting party to be "unreasonable" under the circumstances. *Insurance Products Marketing, Inc. v. Indianapolis Life Ins. Co.*, 176 F.Supp.2d 544 (D.S.C. 2001)(quoting *M/S Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 12-12, 92 S.Ct. 1907 (1972)). A forum selection clause is "unreasonable" if its formation was induced by fraud or overreaching. *Id* (*citing Jewel Seafoods Ltd. v. M/V Peace River,* 39 F.Supp.2d 628, 633 (D.S.C.1999).

In *Johnson v. Key Equipment Finance*, 367 S.C. 665, 627 S.E.2d 740 (2006), a case similar to the present matter, the S.C. Supreme Court held that a New York forum selection clause in lease agreement for telephone marketing system did not prevent suit in South Carolina when it was alleged the lessor fraudulently induced the contract by misrepresenting or hiding pertinent information from lessees. The Supreme Court explained as follows:

> The issue of whether a forum selection clause applies to causes of action alleging that a plaintiff was induced to enter into a contract or lease by the misrepresentations of the defendant is a question of first impression for this Court. Generally, when wrongs arise inducing a party to execute a contract and not directly from the breach of that contract, **the remedies and limitations specified by the contract do not apply**...it would not make logical sense to allow a forum selection clause to operate to prevent suit in South Carolina where the acts alleged occurred prior to the execution of the contract...But for the events leading to the signing of the contract, the agreement allegedly would not have been consummated.

367 S.C. at 668 (emphasis added)(internal citations omitted).

Here, the forum selection clause (Arbitration Agreement, ¶ 20)(R. p. 47) is unenforceable because it was induced by fraud and/or overreaching. *See, e.g.* (R pp. 94-143)(Am Compl. ¶¶ 47-54, 74-75, 77-104, 151-223). Plaintiff's causes of action for fraud, fraudulent inducement, constructive fraud, negligent misrepresentation, civil conspiracy, UTPA violations, public nuisance, private nuisance fraudulent inducement/unconscionability of release, fraudulent inducement/unconscionability of arbitration agreement, and rescission all allege acts or omissions forming their basis in events which occurred in whole or in part prior to execution of the "Arbitration Agreement." But for these events, the "Arbitration Agreement" would not have been signed. Therefore, the remedies and limitations contained therein, including the forum selection clause, do not apply and the trial court correctly denied the Defendants' motion.

**d. The forum selection clause violates statutory law and public policy.**

A forum selection clause is also unenforceable if enforcement would contravene the public policy of the forum in which suit is brought, whether declared by statute or a judicial decision. *Indianapolis Life Ins.*, 176 F.Supp.2d at 546 (quoting *M/S Bremen*, 407 U.S. at 15)).

South Carolina Code § 15–7–120(A) embodies just such a strong public policy. That statute reads:

> (A) 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.

This statutory provision is controlling, *M/S Bremen*, 407 U.S. at 10, 92 S.Ct. 1907 (making clear that it is the public policy of the *forum* state that is controlling), and many courts have concluded the statute is evidence "South Carolina has a strong policy disfavoring forum selection clauses." *See Consolidated Insured Benefits, Inc. v. Conseco Medical Ins. Co.*, 370 F.Supp.2d 397, 401 (D.S.C 2004); *accord Indianapolis Life Ins. Co.*, 176 F.Supp.2d at 550 ("under the principles presented in *M/S Bremen,* the strong public policy pronounced by the legislature and courts of the State of South Carolina is sufficient, in and of itself, to render the forum selection clause here unenforceable").

Further, because the statute is applicable to all contracts generally, it is not preempted by any federal authority. "The fact that the statute is applicable to all civil cases across the board, rather than merely to cases involving some other limited subject matter, leads the court to conclude that the legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect." *Indianapolis Life Ins. Co.*, 176 F.Supp.2d at 550.

Indeed, this Court has interpreted § 15–7–120(A) in such a manner in *Johnson v. Paraplane Corporation,* explaining the statute applied to jurisdiction as well as venue and

holding case was properly brought in Horry County despite venue and jurisdiction being assigned to New Jersey in forum selection clause of contract. 319 S.C. 247, 460 S.E.2d 398 (1995), *vacated on other grounds,* 321 S.C. 316, 468 S.E.2d 620 (1996).

The reasoning for these decisions is sound. The statute embodies South Carolina's policy of disfavoring forum selection clauses through what it expressly allows. The statute does not *prevent* a plaintiff from bringing a case in the forum designated in a forum selection clause; rather, it simply *permits* a plaintiff to bring the case in South Carolina where possible under the South Carolina statutory laws and Rules of Civil Procedure. *See Spinks v. Krystal Co.*, 2007 WL 2822788 (D.S.C. 2007)("[the statute] is evidence of a strong public policy in South Carolina of non-enforcement of a forum selection clause that would deprive a litigant of his choice of forum...as such, the forum selection clause is 'unreasonable'").

Defendants cite *Albemarle Corp. v. Astra Zeneca UK Ltd.,* 628 F.3d 643 (4th Cir. 2010) to argue "the Fourth Circuit has questioned the continued viability of S.C. Code § 15–7–120(A)." (App. Initial Brief, p. 52). While there was a discussion by the *Aldbemarle* court regarding § 15–7–120(A) in dicta, those comments simply do not apply to the circumstances presented in this case.

The *Albemarle* court was applying federal law: "a federal court interpreting a forum selection clause must apply federal law in doing so" and rejected the notion that § 15–7–120(A) controlled the federal court's analysis. 628 F.3d at 650, 652. Regardless, the forum selection clause at issue in *Albemarle* provided the contract "shall be subject to English Law and the jurisdiction of the English High Court." *Id* at 646. Under English law, when the parties designate the English High Court as an appropriate forum, the designation is mandatory and

exclusive. *Id* at 652. But for this peculiarity, the *Albemarle* court would've held South Carolina was a proper forum for the very reason why the Defendants' forum selection arguments here must fail: "A general maxim in interpreting forum selection clauses is that 'an agreement *conferring* jurisdiction in one forum will not be interpreted as *excluding* jurisdiction elsewhere unless it contains specific language of exclusion.' " *Id* at 651. [6] A close reading of the *Albemarle* opinion reveals the shallow analysis set forth by the Defendants was properly rejected by the trial court and must also be rejected by this Court.

## STANDARD OF REVIEW

Appeal from the denial of a motion to compel arbitration is subject to *de novo* review. *Simpson v. World Finance Corp. of South Carolina*, 367 S.C. 184, 623 S.E.2d 877 (Ct. App 2005). The factual allegations of Plaintiff's Amended Complaint must be taken as true when reviewing the denial of a motion to compel arbitration. *Berkeley County School District v. Hub International Limited*, 944 F.3d 225 (4th Circuit 2019)(noting court must accept as true the allegations of the operative complaint that relate to the underlying dispute when reviewing the denial of a motion to compel arbitration). A circuit court's decision will not be reversed on

[6] The other cases cited by Defendants regarding forum selection clauses are also irrelevant and inapplicable to the issue before this Court. The question before the courts in *Minorplanet Sys. USA Ltd. v. American Aire, Inc.*, 368 S.C. 146, 150, 628 S.E.2d 43, 45 (2006) and *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) were **whether the courts in which the trials were held had jurisdiction.** The plaintiffs in those cases brought their actions in the forums delineated by the forum selection clauses. Accordingly, the South Carolina courts were not evaluating whether the plaintiff could bring the case in South Carolina (as in this case), but instead were evaluating whether the forums that already tried the cases had jurisdiction and whether the resulting decisions should be upheld.

appeal if any evidence reasonably supports the findings. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 644 S.E.2d 705 (2007).

## ARGUMENT

### II. NO VALID AGREEMENT WAS FORMED.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). The "meeting of minds" required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. *Id.*[7]

Despite the Defendants somewhat bizarre statement otherwise (see App. Initial Brief pp. 23-24), Plaintiff's Amended Complaint clearly alleges fraud and fraudulent inducement of the

[7] In the absence of an enforceable contract, traditional choice of law rules apply. Under traditional South Carolina choice of law principles, the substantive law governing a tort action is determined by the *lex loci delicti*, the law of the state in which the injury occurred. *Boone v. Boone*, 345 S.C. 8, 546 S.E.2d 191 (2001)(citing *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct.App.1997); *Bannister v. Hertz Corp.*, 316 S.C. 513, 450 S.E.2d 629 (Ct.App.1994). Moreover, because Plaintiff disputes the valid formation of an agreement at all, Plaintiff does not stipulate that the FAA applies. The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. S.C.Code Ann. § 15–48–20(a)(2005). If no agreement is found to exist, the court must deny any application to arbitrate. *See Simpson*, 373 S.C. at 22, 644 S.E.2d at 667, fn 1(Even in cases implicating interstate commerce, the UAA governs where the validity of a choice of law provision is it issue).

"Arbitration Agreement," including the arbitration provision itself. These allegations are summarized as follows: [8]

Rather than presenting the Arbitration Agreement during any one of their prior discussions or upon his arrival at the residence for the filming, while he was sitting down at dinner, after many hours of preparation and discussion with Corporate employees or agents about the mechanics of filming, and with film crews in place and bright blinding lights shining on his face, he was presented a piece of paper with only the signature portion of the page revealed to him with the remainder of the document, including the arbitration provision, concealed from sight. It was falsely represented to Plaintiff that the signature was a mere formality of no consequence which authorized them to begin filming of the dinner.

At no time did any of the Corporate Defendants state, suggest, or imply that he was somehow authorizing them to lie, disparage, defame, or otherwise depict him in a false or misleading fashion, nor did he have any reason to so suspect. At no time did any of the Corporate Defendants state, suggest, or imply that he was somehow authorizing the Individual Defendants lie, disparage, defame, or otherwise cause him irreparable injury. At no time was arbitration ever discussed, nor was any language purporting to compel arbitration ever made visible to the Plaintiff.[9]

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[8] *See, e.g.* R. pp. 94-143, Am. Compl. ¶¶ 47-56, 64, 74-75, 80-91, 99-104, 121-127, 141-145, 167-223.

[9] A duty to disclose may be required when the circumstances of the case, including the nature of the parties' dealings or their position towards each other, necessarily implies a trust and confidence in the other with reference to the particular transaction in question. *Jacobson v. Yaschik,* 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967).

To the contrary, he was assured by the Corporate Defendants, falsely and with had no intention of abiding by those assurances, that he was only authorizing filming of the dinner and the would be portrayed fairly and accurately. He was presented only the signature portion of the document, given no time to read it, no time or encouragement to consult with an attorney regarding its substance, no time or encouragement to verify the accuracy of its contents, no time or encouragement to verify the parties and no explanation of its contents by any of the producers, employees, and/or agents of the Corporate Defendants other than the false representation that it simply authorized filming of their dinner. The language relied upon so heavily by the Defendants in their arguments saying otherwise was affirmatively concealed from the Plaintiff.

Plaintiff provided no photographs, videos, or depictions of his name, likeness, or voice at any time, nor did he authorize them to utilize any such thing other than to film the private dinner described. Plaintiff, who does not watch reality television, had no reason to suspect the Defendants would purport to grant themselves the illegal and outrageous rights contained therein or to acquire and alter images depicting the Plaintiff. Plaintiff did not and would not consent or otherwise knowingly, willfully, or voluntarily agree to the Defendants' false, misleading, deceptive, and fraudulent portrayal of him in what was a concerted and coordinated effort by the Defendants simply to create dramatic material for consumption by the viewers of the "reality" show Southern Charm in the United States and worldwide. Plaintiff did not and would not consent to be subjected to such conduct while also being precluded from exercising his legal rights in a judicial forum.

The Defendants acknowledge that the court must determine the threshold issues of whether an agreement to arbitrate was formed and, if so, whether the agreement to arbitrate is

enforceable. (App. Initial Brief pp. 22-44). Defendants fail, however, to allege the trial court's decision was controlled by an error of law or abuse of discretion. Instead, Defendants simply argue at length their disagreement with the Plaintiff's allegations and the trial court's decision. All of the Defendants' various disagreements with the existence, nature, and weight of the evidence, however, are properly resolved not by the trial court on a motion to dismiss but by a jury.

Moreover, as discussed below, Plaintiff specific claims of fraud and fraudulent inducement of the arbitration provision of the Arbitration Agreement itself lead to the conclusion the purported "agreement to arbitrate" was never formed. Consequently, it is invalid and incapable of being either interpreted or enforced to compel the parties to arbitrate. "After all, one cannot 'interpret' an invalid contract." *Doe v. TCSC, LLC*, 430 S.C. 602, 609, 846 S.E.2d 874, 877 (Ct. App. 2020). Accordingly, the trial court's decision must be affirmed.

**a. Disputed facts are not properly resolved through a motion to dismiss.**

Defendants seem to believe the trial court, and now this Court, should simply adjudicate the case on the merits by resolving in Defendants' favor their various assertions that contradict Plaintiff's allegations regarding the representations made, the circumstances and timing of the representations, Plaintiff's own knowledge of the falsity of the representations, and even whether Plaintiff was entitled or justified in relying upon those false representations. Defendants simply declare Plaintiff's allegations to be false or egregiously misrepresent them in a desperate attempt

to avoid accountability for their conduct and the inescapable conclusion that an agreement was never formed. [10]

However, the determination of the parties state of mind, intent and justifiable reliance are material issues of fact. *See Epstein v. Howell,* 308 S.C. 528, 530, 419 S.E.2d 379, 381 (Ct.App.1992) ("issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the triers of the facts"); *Unlimited Servs., Inc. v. Macklen Enters., Inc.,* 303 S.C. 384, 401 S.E.2d 153 (1991) (general rule is that questions concerning reliance and its reasonableness are factual questions for the jury); *Starkey v. Bell,* 281 S.C. 308, 315 S.E.2d 153 (Ct.App. 1984)("issues of reliance and its reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the trier of facts"); *Slack v. James*, 364 S.C. 609, 614 S.E.2d 636 (2005)(neither a merger clause, non-

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[10] A sample of the Defendants' mirepresentations include:

- "Prior to filming, the Release and Arbitration Agreement was handed to Plaintiff turned to first page." *See* App. Initial Brief, p. 12.; *cf* R. pp. 94-143, Am Compl. ¶¶ 48, 54, 170, 173, 188, 191, 209, 212 (alleging only the signature block was presented).

- "Plaintiff has not even alleged fraud, misrepresentation, duress, unfair surprise or unconscionability relating to the Arbitration Agreement itself." *See* App. Initial Brief, p. 23 fn 3.; *cf* R. pp. 94-143, Am. Compl. ¶¶ 47-56, 64, 74-75, 80-91, 99-104, 121-127, 141-145, 167-223 (alleging among other things fraud, fraudulent inducement, misrepresentation and unconscionability of the Arbitration Agreement and/or the arbitration provision itself).

- "he has not even alleged...that the governing law and exclusive venue provisions themselves were a product of fraud." *See* App. Initial Brief, p. 51 fn 3.; *cf* R. pp. 94-143, Am. Compl. ¶¶ 47-56, 64, 74-75, 80-91, 99-104, 121-127, 141-145, 167-223 (alleging among other things fraud, fraudulent inducement, misrepresentation and unconscionability of the Arbitration Agreement and/or the arbitration provision itself.

reliance clause, nor the parol evidence rule precludes one from proceeding on tort theories of negligent misrepresentation and fraud.); *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 770 (2011)(a future promise is fraudulent if it was part of a general design or plan existing at the time to induce the signing of a paper or to make one act as he otherwise would not have acted, to his injury, and "where one promises to do a certain thing, having at the time no intention of keeping his agreement, it is a fraudulent misrepresentation of a fact, and actionable as such...[E]ntering into an agreement, with no intention of keeping such agreement, constitutes fraudulent misrepresentation."); *Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 719 S.E.2d 656 (2011)(whether reliance upon fraudulent statements was reasonable was question for factfinder because purpose of constructive notice doctrine is to protect innocent people, not those committing fraud).

A jury normally decides whether a contract exists when there is conflicting evidence. *See Small v. Springs Indus., Inc.*, 292 S.C. 481, 483, 357 S.E.2d 452, 454 (1987)(noting "a trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference"). The proper resolution of the disputed facts set forth in Plaintiff's Amended Complaint is not for the court to determine through a motion to dismiss; it is the role of the factfinder. *Id; see also Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia*, 762 S.E.2d 696, 701 (2014)("The existence of a contract is ordinarily a question of fact for the jury"); *Towles v. United HealthCare Corp.*, 338 S.C. 39, 524 S.E.2d 839 (Ct. App 1999).

Even under the FAA, a jury trial on the existence of an arbitration agreement is warranted when there are genuine issues of material fact regarding the parties' agreement. *See Berkeley*

*County School District v. Hub International Limited*, 944 F.3d 225 (4th Circuit 2019)(trial was required to determine whether school district was required to submit claims to arbitration in light of genuine issues of material fact as to whether district was aware of agreements that contained arbitration clauses)(applying South Carolina law); *Avedon Eng'g, Inc. v. Seatex,* 126 F.3d 1279, 1283 (10th Cir.1997); *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 1980, 636 F.2d 51 (P.A. 1980)(Party who is contesting the making of an arbitration agreement has the right to have the issue presented to a jury); *Hopkins v. New Day Financial*, 643 F.Supp.2d 704 (E.D.Pa.2009)(Fact issue on motion to compel arbitration warranted jury trial regarding substantive unconscionability under Pennsylvania law of provision of arbitration agreement); *Southside Internists Group PC Money Purchase Pension Plan v. Janus Capital Corp.*, 741 F.Supp. 1536 (N.D.Ala. 1990)(Jury trial is available on genuine factual questions related to validity of arbitration clause when one party moves to compel arbitration); 9 U.S.C.A. § 4 (1999)(stating the party alleged to be in default may demand a jury trial when the making of the arbitration agreement is at issue).

Thus, the Defendants' conclusory assertions in contradiction of Plaintiff's allegations do not support an argument that the trial court should be reversed; they reveal that resolution of these issues of fact must be adjudicated through a jury trial.[11] Accordingly, the trial court's denial of the Defendants' motion was without error and must be affirmed.

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[11] Defendants repeatedly reference Exhibit 3 (R. p. 159), a photograph of Plaintiff submitted in support of their motion, apparently arguing this photograph somehow negates the allegation that only the signature block was presented with the remainder of the document concealed from sight. It does not. The photograph submitted is not authenticated, does not identify who took the photograph, and does not identify exactly where or when the photograph was taken. Plaintiff already alleged he signed a document presented to him immediately before filming began. (R.

**b. Plaintiff's fraud in the factum claims prevent finding a valid contract was formed.**

Defendants argue in their brief that there exists "a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *See, e.g.* App. Initial Brief, pp. 13, 21 (citing *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013)). Satisfied this is all that is required of them, Defendants seem to argue the trial court simply should've rubber stamped their motion to compel arbitration simply because they showed a piece of paper that says "arbitration" on it. Defendants fail, as they did with the trial court, however, to actually address whether a valid and enforceable agreement to arbitrate was formed in the first place. Instead, they simply declare it to be so and flagrantly misrepresent to this Court that "Plaintiff has not even alleged fraud, misrepresentation, duress, unfair surprise or unconscionability relating to the Arbitration Agreement itself." *See* App. Initial Brief, p. 23. Such statements cause one to wonder if any of the Defendants have even read the Amended Complaint. *See, e.g.* R. pp. 94-143, Am. Compl. ¶¶ 47-56, 64, 74-75, 80-91, 99-104, 121-127, 141-145, 167-223.[12]

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pp. 105-106, Am. Compl. ¶¶46-54). Filming then began. *Id.* Thus, a photograph of him with what he purportedly signed proves nothing of any consequence. Nor does it negate the fact that when it was presented for signature, the remainder of the document was actively concealed. To the extent the photograph goes to those issues, they are clearly material issues of fact. Moreover, the fact Defendants thought it necessary to photograph Plaintiff holding the Arbitration Agreement is so baffling it leads one to reasonably conclude they knew they'd been lying to him, intended to continue lying to and about him, and needed to document his possession of an agreement that purports to grant them such rights.

[12] Defendants further allege "all of the alleged misrepresentations identified by Abruzzo go to future action." (App. Initial Brief p. 31). As demonstrated herein, that is not true. Even if it were, "where one promises to do a certain thing, having at the time no intention of keeping his agreement, it is a fraudulent misrepresentation of a fact, and actionable as such…[E]ntering into

In *Granite Rock Co. v. International Broth of Teamsters*, the Supreme Court explicitly addressed and rejected the idea that arbitration should be ordered when the evidence suggests the agreement to arbitrate hasn't been formed, is invalid, or is otherwise unenforceable:

> [Plaintiff] interprets some of our opinions...to require arbitration of certain disputes...based on policy grounds even where evidence of the parties' agreement to arbitrate the dispute in question is lacking. That is not a fair reading of the opinions, all of which compelled arbitration of a dispute only after the Court was persuaded that the parties' arbitration agreement was validly formed and that it covered the dispute in question and was legally enforceable. That some of our cases applying a presumption of arbitrability to certain disputes do not discuss each of these requirements merely reflects the fact that in those cases some of the requirements were so obviously satisfied that no discussion was needed...As we have explained, this 'policy' is merely an acknowledgment of the FAA's commitment to 'overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.' Accordingly, we have never held that this policy overrides the principle that a court may submit to arbitration 'only those disputes ... that the parties have agreed to submit' ... We have applied the presumption favoring arbitration in FAA and in labor cases only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute."

561 U.S. 287, 300-03, 130 S.Ct. 2847, 2858-60 (2010).

In other words, while there is a federal policy favoring the enforcement and broad interpretation of arbitration agreements, parties cannot be forced to submit to arbitration if they have not agreed to do so, if the agreement to arbitrate is invalid, or if it is otherwise unenforceable. *Accord Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 547, 84 S.Ct. 909 (1964) (stating that "a

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an agreement, with no intention of keeping such agreement, constitutes fraudulent misrepresentation." *Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 770 (2011).

compulsory submission to arbitration cannot precede judicial determination" that there is a binding and valid contract creating a duty to arbitrate).

"Because an arbitration provision is often one of many provisions in a contract covering many other aspects of the transaction, the first task of a court is to separate the arbitration provision from the rest of the contract." *Doe v. TCSC, LLC*, 430 S.C. at 607, 846 S.E.2d at 876 (noting "[t]his may seem odd, but it is the law, known as the *Prima Paint* doctrine.")(citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04, 87 S.Ct. 1801 (1967)(if fraudulent inducement claim went to the arbitration provision specifically, claim would be for court because such a claim goes to the "making" of the arbitration agreement).

A distinction, however, is drawn between misrepresentations that go only to the "inducement" and misrepresentations that go to the "factum" or "execution." Misrepresentations of the latter kind are "regarded as going to the very character of the proposed contract itself, as when one party induces the other to sign a document by falsely stating that it has no legal effect. Such a misrepresentation is said to go to the 'factum' or the 'execution.'" E. Farnsworth, Contracts § 4.10 (2d ed. 1990). Fraud in the factum is "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or content." *Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 93, 108 S.Ct. 396, 402 (1987). It occurs "when a legal instrument as actually executed differs from the one intended for execution by the person who executes it." Black's Law Dictionary (11th Ed. 2019).

If the misrepresentation is of this type, then "there is no contract at all, or what is sometimes anomalously described as a void, as opposed to voidable, contract." *Id.*at 235; *see Restatement (Second) Contracts* § 163, comment a (if misrepresentation of character or

essential term of contract, "no effective manifestation of assent and no contract at all"). In such cases, at no time was there a contractual obligation between the parties. *Id.*

Such is the case here with the false representation that the document was mere formality whose only purpose was to begin filming. To understand why, it is essential to analyze the specific claims of fraud made here. *See, e.g.* R. pp. 94-143, Am Compl. ¶¶ 47-56, 64, 74-75, 80-91, 99-104, 121-127, 141-145, 167-223. Specifically, Plaintiff asserts the Corporate Defendants presented the Arbitration Agreement for his signature as a mere formality authorizing them to begin filming, and affirmatively concealed from him the contents of the document including the arbitration provision. *See, e.g.* R. pp. 94-143, Am Compl. ¶¶ 48, 54, 80-91. Where such a "fraud in the factum" is alleged, the *Prima Paint* notion of the severability of the arbitration clause has no application. If no agreement ever arose between the parties, there can be no severable agreement to arbitrate.

Regardless, even if the arbitration provision is separated out, the fraud in the factum allegations directed specifically to the arbitration provision itself render the arbitration provision itself incapable of being formed, much less enforced. *See, e.g.* R. pp. 94-143, Am Compl. ¶¶ 48, 54, 80-91, 167-223. The trial court thus correctly declined to compel arbitration because it cannot be said a valid and enforceable agreement to arbitrate has been formed. *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 296, 301 (2010). ("It is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide.")(citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443-45, S.Ct. 1204, (2006)("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*")(emphasis added).

**c. Plaintiff's fraudulent inducement claims prevent finding a valid contract was formed.**

As discussed above, Plaintiff has specifically alleged fraudulent inducement of the "arbitration" provision contained in the "Arbitration Agreement." In deciding whether a valid, enforceable and irrevocable arbitration agreement exists, general principles of state contract law are applied. *First Options*, 514 U.S. at 944, 115 S.Ct. 1920. "When wrongs arise inducing a party to execute a contract and not directly from the breach of that contract, **the remedies and limitations specified by the contract do not apply**." *Johnson v. Key Equipment Finance*, 367 S.C. 665, 668, 627 S.E.2d 740 (2006)(emphasis added).

South Carolina refuses to enforce contracts based on fraudulent conduct because "a party should not retain the benefits of an agreement that he knowingly and *intentionally* entered into though deceptive means." *Maybank v. BB&T Corporation*, 416 S.C. 541, 577, 787 S.E.2d 498, 517 (2016). This is the consistent, unaltered, and binding law in South Carolina for more than 120 years. "Beyond the patent unfairness inherent in enforcing a contract induced through intentional fraud, giving legal effect to such a contract violates a fundamental principle of contract law: there must be a meeting of the minds. By its very nature, there can be no union of purpose where one party is intentionally deceiving the other through fraud." *Id.* at 577-78, 517 (citing *Metro. Life Ins. Co. v. Stuckey*, 194 S.C. 469, 470, 10 S.E.2d 3, 5 (1940)("It is true that contracts may be avoided based on fraud" and "it is at the option of the party to be affected by

the fraud whether or not he will treat the contract as void and rescind it")(citing *Levister v. Southern Railway Company*, 56 S.C. 508, 35 S.E. 207, 209 (1900)("fraud avoids all contracts")).

The intent of the Defendants and justifiable reliance by the Plaintiff is not affirmatively shown by the mere assertion by the Defendants, nor are these issues properly resolved in Defendants' favor pursuant to a motion to dismiss. Rather, these defenses must be pleaded by way of answer and proven at trial. *Branham v. Miller Elec. Co.*, 237 S.C 540, 547, 118 S.E.2d 167, 170-71 (1961)(when there is an assertion in motion to dismiss that conflicts with allegations of complaint, resolution by motion to dismiss is improper). Accordingly, the trial court correctly declined to compel arbitration.

## III. THE ARBITRATION AGREEMENT IS UNENFORCEABLE.

To the extent this Court concludes there has in fact been an agreement to arbitration formed between the parties, which Plaintiff denies, the "Arbitration Agreement" is nevertheless unconscionable and unenforceable as a matter of law. Simply finding the parties minds met does not end the review because a contract may be invalid—and courts may properly refuse to enforce it—when it is unconscionable. *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020). A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability. *Id*; citing *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426, 197 L.Ed.2d 806 (2017). An unconscionable contract is not a valid contract. *Id.*

### a. The Arbitration Agreement is unconscionable.

Taken as a whole and individually, the "Arbitration Agreement" in essence purports to allow the Defendants to engage in any type of conduct whatsoever, including lying to and about

the Plaintiff and committing illegal acts or intentional torts against the Plaintiff, while purporting to prohibit Plaintiff from taking any action whatsoever to prevent or repair the harm caused or from even discussing the "Arbitration Agreement" with anybody, at any place, at any time, in perpetuity, and "throughout the universe." *See, e.g.* R. pp. 45-48, Arbitration Agreement, ¶¶ 1, 8-9, 10, 11, 12-15, 17; R. pp. 94-143, Am Compl. ¶¶ 167-223. The terms are so one-sided and oppressive that no reasonable person would make them, Plaintiff included, and no fair and honest person would accept them. It does not seek to limit the Defendants' liability. It purports to completely exculpate the Defendants as well as unknown and ambiguous third parties "associated" with the show from any claim by Plaintiff arising out of any conduct whatsoever, including illegal and intentional acts, throughout the entirety of time and the cosmos themselves. It would be egregious error for this court to enforce such a clause.

Even the Federal Arbitration Act (FAA) "imposes certain rules of fundamental importance, including the basic [contract] precept that arbitration 'is a matter of consent, not coercion.' " *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (internal citations omitted).

This lopsided Arbitration Agreement places Plaintiff at a stunning disadvantage, for an objective reading of the Arbitration Agreement means it forever immunizes not just the Defendants, but their employees, agents, and any unknown third party throughout the universe who may be "associated" with any of them from being brought into the public judicial system by Plaintiff. *See, e.g.* R. p. 46, Arbitration Agreement ¶ 17.[13] Because these provisions are patently

[13] Paragraph 17 of the Arbitration Agreement purports to release and exculpate unknown third parties "associated with the Program" for all claims of any kind, including intentional or criminal

illegal and unconscionable the Defendants' motion to enforce the terms of the "Arbitration Agreement" was correctly denied and the trial court's decision must be affirmed.

**i. The entire document entitled "Appearance Release, Voluntary Participation, and Arbitration Agreement" is the purported agreement to arbitrate.**

Defendants contend this Court is bound to reviewing solely the terms of paragraph 19 of the Arbitration Agreement in determining its validity. *See, e.g.* App. Initial Brief pp. 22, 42-43 This is not true. The South Carolina Supreme Court has looked outside the language of the arbitration clause to determine its enforceability. *See Simpson,* 373 S.C. at 27, 644 S.E.2d at 670 (noting the arbitration clause was unconscionable partly because Simpson did not possess the business judgment necessary to understand the implications of the arbitration agreement, and Simpson did not have a lawyer present when she signed the agreement).

Moreover, despite asserting this Court is bound to reviewing solely the terms of paragraph 19 of the Arbitration Agreement in determining its validity, the Defendants rely upon at least nine (9) enumerated provisions and one non-enumerated provision to prop up their various theories of enforceability (R. pp. 45-48, Arbitration Agreement ¶¶ 6, 8, 9, 12, 17, 19, 20, 21, 22, and the last non-enumerated paragraph) and include all named Defendants and all claims

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acts. The term "anyone associated with the Program" is undefined in the Arbitration Agreement, but has been defined as "to be connected to another party or business." *See* Black's Law Dictionary (11th Ed. 2019). It is so vague and ambiguous that it is unenforceable. Taking this definition to its logical, and absurd, conclusion would mean Plaintiff released almost anyone for any reason: a police department that provided inadequate security when filming, a restaurant where filming took place who violated fire code capacities, a cab company that provided transportation to the cast or crew and got into an accident, a kitchen appliance maker depicted on the show that produced a faulty and dangerous product, a catering service that gave everyone food poisoning or overserved alcohol, an advertiser who aired misleading promotions on the network…the list goes on.

in their motion to dismiss. By doing so, the Defendants impliedly acknowledge the intertwined nature of the Arbitration Agreement. As a result, the unconscionable portions of the arbitration provision cannot be severed from the remainder of the agreement.

By its very own title ("Appearance Release, Voluntary Participation and Arbitration Agreement"), the entire four-page document as a whole constitutes the "Arbitration Agreement." The provisions cross reference one another and the Defendants rely on multiple provisions in their effort to enforce the entirety of the "Arbitration Agreement." see e.g. R. pp. 46-47, ¶¶ 17 (release language), 19 (mediation & arbitration), 20 (forum selection clause), and 21(third party beneficiary). When arbitration agreements are intertwined like the "Arbitration Agreement" here, the Supreme Court has declared they should be read together as a whole. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48–49, 790 S.E.2d 1, 4 (2016)(arbitration clause found in one section of a contract was so "intertwined" with other sections that the entirety constituted the arbitration provision and declaring arbitration agreement unconscionable and thus unenforceable merely because it attempted to disclaim implied warranty claims and prohibit *any* monetary damages).

Enforcement of the arbitration provision alone would mean not only preventing the Plaintiff from seeking injunctive relief (thereby permitting the Defendants to defame and disparage the Plaintiff in perpetuity) (see R. p. 47, ¶ 19), but also from recovering *any* monetary damages (R. p. 46, ¶ 17) while at the same time expressly permitting the Defendants to not only be *entitled to* "injunctive and other equitable relief (without posting bond)" (R. p. 46, ¶12), expressly permitting Defendants to "record Plaintiff's actions and statements "via concealed or hidden cameras and audio devices...including in areas in which a person might have a reasonable expectation of privacy" (R. p. 46, ¶11), "use for any purpose whatsoever" information

about Plaintiff (R. p. 46, ¶12), and also subjecting Plaintiff to a mandatory penalty of at least $500,000 (R. p. 46, ¶ 12) and subjecting him to liability for indemnity, attorney fees and costs (R. p. 46, ¶ 17) for no reason other than attempting to seek a remedy for his wrongs.

Enforcement of the arbitration provision would further require it be held in New York, again in violation of South Carolina law and public policy. See S.C. Code 15-7-120(B). Moreover, by piggybacking the Individual Defendants and other non-parties to the scope of the arbitration provision, enforcement would mean those provisions of the "Arbitration Agreement" outside of the isolated arbitration provision itself would be given effect, including the illegal and unenforceable "release" of intentional torts as well as the unenforceable forum selection and choice of law provisions which were procured through fraud. This cannot be not be permitted.

**ii. The Arbitration Agreement is procedurally unconscionable.**

In South Carolina, 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. *Simpson,* 373 S.C. at 25, 644 S.E.2d at 668. Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process. *Gladden v. Boykin*, 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013) (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669).

Procedural and substantive unconscionability need not be present in the same degree. essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation that creates the terms in proportion to the greater harshness or unreasonableness of the substantive terms themselves. 15 Williston on Contracts § 1763A, at

226-27 (3d ed. 1972). In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa. *See also Farnsworth on Contracts* § 29.4 at 4-212 (2020-1 Supp.); *see Corbin on Contracts* § 29.4 at 388 (2002 ed.) (noting "most cases do not fall neatly" into categorical boxes). Unconscionability is gauged at the time the contract was made.

"In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). The *Hooters* decision struck down an arbitration clause because it incorporated rules so "warped" and void of due process that any arbitration under them would have been a "sham." *Simpson* cannot be interpreted, however, to mean an arbitration clause can never be unconscionable as long as it points to a neutral forum. To do so would be to apply South Carolina general unconscionability law differently in the arbitration context than in others. Such discrimination would run afoul of one of the prime directives of the FAA: that courts must place arbitration contracts on par with all other contracts. *Doe v. TCSC* (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447, 126 S.Ct. 1204 (2006) (noting § 2 is "the FAA's substantive command that arbitration agreements be treated like all other contracts"); *Prima Paint*, 388 U.S. at 404 n.12, 87 S.Ct. 1801 (FAA was passed "to make arbitration agreements as enforceable as other contracts, but not more so")).

A lack of a meaningful choice is often found when the dispute involves an adhesion contract. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365

(2001) (defining adhesion contracts as "standard form contract[s] offered on a take-it or leave-it basis with terms that are not negotiable"). While adhesion contracts are not unconscionable per se, courts tend to look upon them with "considerable skepticism" because they give rise to "considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Id.* at 26–27, 644 S.E.2d at 669–70 (quotation marks omitted).

In determining whether a contract was "tainted by an absence of meaningful choice" to arbitrate, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *See Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir.1989). *See also Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005)("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A AM.JUR.2D *Contracts* § 279 (2004)).

Here, Plaintiff lacked a meaningful choice in his ability to negotiate the arbitration clause of the "Arbitration Agreement." There is no indication in the record that Plaintiff enjoyed a substantially stronger bargaining position against the Defendants than any other person appearing on Southern Charm, or that he was represented by independent counsel.[14] Moreover, Plaintiff was but a single person to a collection of corporations that produce and broadcast television shows throughout the United States and the world. Thus, the Plaintiff also not a

[14] See also R. pp. 94-143, Am. Compl, ¶¶ 182, 200, 221, among others, explicitly disavowing these things.

substantial business concern of the Defendants and did not comprise a large portion of the Defendants clientele, staff, or other business interest.

The Defendants acknowledge that Plaintiff was required to sign the "Arbitration Agreement" or they would not be able to film the dinner. Had he chosen not to, they would not have filmed. Given the entirely false and fraudulent depiction of Plaintiff actually aired on the show, there is no reason to believe that Plaintiff would have had any success in negotiating or bargaining over its terms. While discovery has not yet been conducted, the undersigned would not be surprised to learn that not one person in Plaintiff's position has successfully negotiated the terms of any "Arbitration Agreement" with the Defendants.

Further, given the non-negotiable Arbitration Agreement here, concealed from sight and sprung on Plaintiff's in the midst of a chaotic filming session, the false representation that it was a mere formality that authorized them to begin filming, and the Defendants' acknowledgement that they would not have filmed anything if Plaintiff did not sign, it is entirely reasonable to infer Defendants were in fact executing an orchestrated scheme to defraud him. He had already authorized the filming of the dinner, flown to Charleston, and underwent hours of preparation. The true purpose in having him sign the Arbitration Agreement, immediately before beginning, was to ostensibly grant Defendants the illegal and outrageous rights purportedly enforceable therein and provide cover for the Defendants to avoid culpability in the very jurisdiction where the fraud was perpetrated. This cannot be tolerated. Accordingly, a finding that Plaintiff lacked a meaningful choice in their ability to negotiate the "Arbitration Agreement" is warranted.

### iii. The Arbitration Agreement is substantively unconscionable.

Finding a contract to be one of adhesion or procedurally unconscionable is merely the beginning point in the analysis of whether the contract is unconscionable. *Lackey v. Green Tree Financial Corp,* 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App 1998). Here, neither Plaintiff, nor any rational person, could have reasonably contemplated that by authorizing the Defendants to film his dinner with his then girlfriend, that he somehow was authorizing them to lie, disparage, defame, depict him in a false or misleading fashion, intentionally harm, or otherwise cause him irreparable injury. It is inconceivable Plaintiff, or any other rational person, could have reasonably contemplated that he was somehow authorizing the Defendants to engage in any type of conduct whatsoever while simultaneously being bound to complete secrecy. It is inconceivable Plaintiff, or any other rational person, could have reasonably contemplated that, should he try to prevent or mitigate his loss resulting from the Defendants' conduct by seeking judicial relief, that he could not do so and rather must arbitrate – again in complete secrecy - the false, fraudulent, and intentional harm perpetrated upon him by the Defendants or that he would not be able to recover *any damages whatsoever.*

It is further inconceivable Plaintiff could have reasonably contemplated that, should he dare to seek injunctive relief to prohibit continued harm caused by such unforeseeable conduct, he would be prevented from doing so and subject to a liquidated damages penalty of $500,000.00, along with payment of fees and expenses incurred by the Defendants – the very tortfeasors who caused the harm in the first place.[15] It is inconceivable Plaintiff, or any other

[15] Where a liquidated damages provision is not based upon contemplated actual damages but is intended to provide punishment for breach of the contract, it is a penalty. *Moser v. Gosnell,* 334

rationale person, could have reasonably contemplated those severe restrictions and penalties, all while the Defendants simultaneously are permitted to continue to publish the false content on television and online, in perpetuity and throughout the universe.[16]

Plaintiff acknowledges the state and federal policies favoring arbitration, where many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause. However, the present case is distinguishable from those cases prescribing severability such that the invalidation of the "Arbitration Agreement" in its entirety is the more appropriate remedy.

First, the paragraph 19 of the Arbitration Agreement itself (R. p. 47) contains at least two unconscionable provisions (location of arbitration and lack of mutuality of remedies) while arbitration clauses examined by courts prescribing severability generally contained only one offending provision. *See e.g. Simpson,* fn 9 (citing *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir.2006) (severing a provision in an arbitration clause that prohibited the award of treble damages); *Safranek v. Copart, Inc.*, 379 F.Supp.2d 927 (D.Ill.2005)(severing a provision in an arbitration clause that violated Title VII by requiring each party to bear its own attorney's fees and costs); *Ex parte Celtic Life Ins. Co.*, 834 So.2d 766 (Ala.2002) (severing a provision in an arbitration clause that was void as a violation of public policy by prohibiting the award of punitive damages)).

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S.C. 425, 432, 513 S.E.2d 123, 126 (Ct.App.1999). The stipulation will be deemed a penalty if it "is so large that it is plainly disproportionate to any probable damage resulting from breach of contract." *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 172, 568 S.E.2d 361, 363 (2002).

[16] *See generally* R. pp. 45-48, Arbitration Agreement, ¶¶ 1, 6, 8-9, 10, 11, 12-15, 17, 19-21; Am Compl. ¶¶ 167-223.

The provision prohibiting Plaintiff from seeking or obtaining injunctive relief contravene state statutory and common law remedies otherwise provided to Plaintiff.[17] Further, the term "dispute" in paragraph 19 is undefined, it is unlimited in duration and, it appears, in scope, and purports to mandate an unenforceable clause requiring a New York forum. The fact that the Defendants explicitly rely upon the "release" provision of paragraph 17 to bootstrap the Individual Defendants into arbitration, which purports to exculpate the Individual Defendants and unknown third parties from any claims for damages *of any kind, even for illegal or intentional acts*, at any time, ever, illustrates the true effect and intent behind their desire to compel arbitration. It is *not* geared towards achieving an "unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–69. It is designed as an escape valve the Defendants wish to flee through in their attempt to avoid being held accountable to the

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[17] *See, e.g.* S. C. Code 39-5-50 (authorizing the court to issue orders and injunctions to restrain and prevent violations of the Unfair Trade Practices Act); *Shaw v. Coleman*, 373 S.C. 485, 645 S.E.2d 252 (Ct. App, 2007)(finding permanent injunction appropriate remedy for nuisance); S.C. Code § 15-43-30 (authorizing temporary injunction for abatement of nuisance); S.C. Code § 15-69-90 (authorizing order restraining defendant from damaging, concealing or removing property); *Grosshuesch v. Cramer*, 367 S.C. 1, 623 S.E.2d 833 (2005)(temporary injunction proper for action alleging fraud).

The deprivation of Plaintiff's right to seek injunctive relief is contrasted by the Defendants explicit statement that they are "entitled to injunctive and other equitable relief (without posting bond)" and "[Plaintiff] agree[s] 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." See ¶ 12. Because the posting of a bond is mandatory for injunctive relief in South Carolina, this provision violates statutory law and is also unenforceable. *See, e.g. AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009); Rule 65(c), SCRCP ("Except in divorce, child custody and non-support actions where the giving of security is discretionary, no restraining order or temporary injunction shall issue **except upon the giving of security by the applicant**, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.")

common and statutory laws and the public policy of the State of South Carolina despite fully availing themselves of those same laws and protections since they began filming Southern Charm in Charleston in 2013.

The magnitude of unconscionability that pervades the Arbitration Agreement would effectively operate to prevent Plaintiff from vindicating his statutory and/or common law rights, and bar Plaintiff from recovery on all *seventeen* causes of action. Such a result is exactly what the Defendants desire, and exactly what *requires* this Court to give significant consideration to a remedy in this situation that best serves the interests of public policy. *Simpson*, 373 S.C. 14, 644 S.E.2d 663, fn 9 (citing *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir.1994)(noting that severance of illegal provisions is inappropriate when the entire arbitration clause represents an "integrated scheme to contravene public policy" (citations omitted)). "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Intn'l Inc.*, 413 F.3d 77, 84–85 (D.C.Cir.2005)(citations omitted).

The remedy that best serves the interests of public policy in this case is clear: non-enforcement of the entire "Arbitration Agreement." Because the arbitration provision of paragraph 19 itself does not contain a severability clause, the Court cannot simply strike unconscionable provisions from this provision, it must strike the provision in its entirety. To red line the "Arbitration Agreement" would result in the Court rewriting it in its entirety, something it cannot do. *See Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir.2003); (finding arbitration agreement wholly unenforceable

because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter")); see also *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C.2005)("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights ..., the Court finds that the better course of action in this case is to excise the arbitration clauses altogether."). Accordingly, the whole four-page "Arbitration Agreement" should be struck as unconscionable, and the trial court's decision affirmed in its entirety.

**iv. S.C. Code 15-7-120(B)**

The circumstances described herein and in Plaintiff's Amended Complaint illustrate the procedural and substantive defects involved in the fraudulent procurement of Plaintiff's signature in the first place. In addition to the fraudulent procurement of the arbitration provision itself, paragraph 19 of the Arbitration Agreement says, "all such proceedings will be conducted in the city of New York." This provision runs afoul, again, of South Carolina statutory law and public policy. S.C. Code § 15–7–120(B) reads:

> 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 the courts of this State. The enforceability of the remaining provisions of the arbitration agreement and the method of selecting a forum for the conduct of the arbitration proceedings is as provided in this title, the Federal Arbitration Act, and any applicable rules of arbitration.

As discussed above, this statute has been held to evidence a strong public policy statement by the State of South Carolina and a substantial right the arbitration provision purports to deprive from

the Plaintiff. It does not render any valid arbitration agreement unenforceable, it simply permits arbitrations to be held in South Carolina if the claims would otherwise be triable here. Accordingly, it is not preempted by federal law. *See, e.g. Zabinski v. Bright Acres Associates,* 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001)(explaining that state procedural rules that do not undermine the enforceability of an otherwise valid contract to arbitrate are not preempted as the FAA will preempt any state law that "completely invalidates the parties' agreement to arbitrate").

*Tritech Elec. Inc. v. Frank M. Hall & Co.*, cited by the Defendants for the position § 15–7–120(B) is preempted by the FAA, is easily distinguishable. 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000). First, for the reasons set forth above, state law governs the determination of the validity of the Arbitration Agreement when it is challenged. Second, in *Tritech*, the validity of the agreement to arbitrate was not at issue, yet the trial court held § 15-7-120 rendered the arbitration agreement unenforceable in its entirety. It of course does no such thing.

To the contrary, §15-7-120(B) specifically declares valid agreements to arbitrate to remain enforceable; the arbitration must simply occur within the State of South Carolina if otherwise proper. Further, § 15-7-120(C) states the section applies to all contracts generally. Thus, when read as a whole, § 15-7-120 is not substantive, nor does it invalidate any otherwise enforceable agreement to arbitrate. Rather, it simply authorizes venue in South Carolina for causes of action and arbitrations which would otherwise be properly adjudicated in South Carolina regardless of the type, substance, or nature of the contract in question. Accordingly, it

is proper to consider in the analysis of whether the Arbitration Agreement is invalid or unconscionable.

## IV. ALL DEFENDANTS CANNOT COMPEL ARBITRATION.

Even if this court were to determine there has in fact been an agreement to arbitration formed between the parties which is valid and enforceable, which Plaintiff denies, the Arbitration Agreement would authorize only Defendant Haymaker to compel arbitration. "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement *or to the identity of the parties who may be bound* to such an agreement." *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). Even the policy favoring arbitration "cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so." *Id.*

Whether an arbitration agreement may be enforced by or against nonsignatories, and under what circumstances, is an issue controlled by state law. *See Arthur Andersen LLP v. Carlisle,* 556 U.S. 624, 630–31, 630 n.5, 129 S.Ct. 1896, (2009) (observing state law is applicable to determine which contracts are binding and traditional principles of state law may permit a contract to be enforced by or against nonparties to a contract). South Carolina has recognized several theories that could enable nonsignatories to enforce arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel. *Malloy v. Thompson*, 409

S.C. 557, 561–62, 762 S.E.2d 690, 692 (2014).[18] Defendants presented none of these recognized grounds to the trial court, and present none of them of them now to this Court.

Instead, Defendants declare in conclusory fashion that all Defendants, including the Individual Defendants, are entitled to enforce the Arbitration Agreement because "South Carolina courts routinely allow non-contracting parties to enforce arbitration agreements when a plaintiff names both signatories and non-signatories in a lawsuit." (App. Initial Brief, p. 46). Incorporating and relying upon ¶¶ 17 and 21 of the Arbitration Agreement (R. pp. 46-47), Defendants further contend the Individual Defendants are therefore "Released Parties" and third-party beneficiaries entitled to enforce ¶ 19 of the Arbitration Agreement. See App. Initial Brief, p. 47 ("each of the Defendants is fully entitled to enforce the Arbitration Agreement, as well as other provisions").

Even assuming the Arbitration Agreement is valid and enforceable, which Plaintiff denies, a close reading of the Arbitration Agreement reveals the Individual Defendants cannot compel arbitration. The very first sentence of the Arbitration Agreement (R. p. 45) explicitly says it is one agreement between Plaintiff and Defendant Haymaker Media, Inc.:

> "[t]his is an agreement between [Plaintiff] and Haymaker Media, Inc. (including its licensees, successors and assigns, and each of their respective parents, subsidiaries, agents and affiliates, and each of their respective officers, directors, shareholders, employees, agents and representatives (collectively, the "Producer").

This sentence identifies the parties to the Arbitration Agreement as Plaintiff and Defendant Haymaker.[19] It is not alleged Defendants Bravo, NBC, or Comcast are licensees, successors, or

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[18] In *Malloy*, the Court noted that, in addition to the five theories enumerated above, some federal courts have also recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled into arbitration as a nonsignatory. *Malloy*, 409 S.C. at 562, 762 S.E.2d at 692.

assigns of Defendant Haymaker, nor are the Individual Defendants alleged to be employees or agents of any of the Corporate Defendants, their parents or subsidiaries (*see, e.g.* R. pp. 94-96, Am. Compl. ¶¶ 2-11), and the Defendants make no such claim.

"Released Parties" is defined in ¶ 17 as "Producer, Network, and/or any of their parents, subsidiaries, assignees, licensees, affiliates or anyone associated with the Program." (R. p. 46). Plaintiff alleges Defendants Bravo and Haymaker are owned in whole or part by Defendants NBC and Comcast. Thus, an objective reading of the Arbitration Agreement would include them as "Released Parties."

For the reasons set forth above, the identity of "anyone associated with the program" is so vague and ambiguous as to be unenforceable. If this is the case, the Individual Defendants would not fall within the definition of "Released Parties." Thus, they would not be third-party beneficiaries within the meaning of ¶ 21 who could be entitled to compel compliance with ¶ 19 of the Arbitration Agreement. Even if they all were "Released Parties" and therefore third-party beneficiaries, however, the explicit terms of ¶ 19 of the Arbitration Agreement do not entitle third-party beneficiaries to compel *arbitration*. The relevant language reads 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") in accordance with its streamlined arbitration rules and procedures...**My agreement to mediate any and all disputes shall extend to the Released Parties.**

Arbitration Agreement ¶ 19 (emphasis added).

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[19] Defendant NBC is identified as the "Network" (Arbitration Agreement ¶ 1) but not as a "party" to the Arbitration Agreement.

The plain and obvious meaning of this provision is that the parties to the Arbitration Agreement (Plaintiff and Defendant Haymaker) are obligated to first mediate any dispute prior to arbitration. The agreement to *mediate* extends to the "Released Parties" but ¶ 19 says nothing of an agreement to *arbitrate* any dispute with anybody other than Defendant Haymaker, much less any "Released Parties." Such a glaring omission can only be interpreted to mean the parties intended to grant "Released Parties" the right to compel mediation, but not arbitration. "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Ellis v. Taylor,* 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id.* Accordingly, even if this Court finds the Arbitration Agreement valid and enforceable, the only party to this litigation with any right to compel arbitration is Defendant Haymaker. Thus, the trial court's decision should be affirmed with that limited exception.

## V. OTHER SUSTAINING GROUNDS

Plaintiff, as prevailing party in the trial court, may raise on appeal any additional reasons the appellate court should affirm the trial court's ruling, regardless of whether those reasons have been presented to or ruled on by the trial court, although basis for Plaintiff's additional sustaining grounds must appear in the record on appeal. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. SCACR, Rule 220 (c). Accordingly, to the extent necessary, Plaintiff requests the court exercise its right to affirm the trial court's ruling on any ground appearing in the record including, but not limited to, the grounds set forth herein.

**a. The Arbitration Agreement has been terminated.**

Even if this court find the parties here had a meeting of the minds as to the essential and material terms of the Arbitration Agreement, it is silent as to the material element of its duration, making the contract terminable at will by either party upon reasonable notice to the other. *Doe v. TCSC*, (*citing Childs v. City of Columbia*, 87 S.C. 566, 572, 70 S.E. 296, 298 (1911)). The Supreme Court has held the initiation of a lawsuit is sufficient notice of the Plaintiff's termination and rescission of any agreement to arbitrate. *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978)(citing 17A C.J.S. Contracts s 435, 17 Am.Jur.2d Contracts s 509 (commencement of lawsuit is sufficient notice of intent to rescind)).

Accordingly, the Plaintiff's filing and service of this lawsuit terminated any contract that existed between him and any of the Defendants, making the provisions therein no longer operative and unenforceable.[20]

## CONCLUSION

For the reasons set forth herein, the trial court's decision should be affirmed in its entirety.

Respectfully submitted,

*s/ Aaron E. Edwards*

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[20] The Defendants statement of issues on appeal do not identify the formation of a valid agreement to arbitrate or the intertwined nature of the Arbitration Agreement as being presented for review. Accordingly, those issues are not properly preserved and Plaintiff further requests the court affirm the trial court's decision pursuant to SCACR Rule 208(b)(1)(B).

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ATTORNEYS FOR RESPONDENT

Mt. Pleasant, South Carolina
Dated: May 18, 2021

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

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Appeal No. 2020-001095

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Joseph Abruzzo, Respondent,

v.

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

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**CERTIFICATE OF COUNSEL**

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I certify that the **Amended Final Brief of Respondent** Joseph Abruzzo complies with Rule 211(b), SCACR.

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May 19, 2021