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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable, Circuit Court Judge

Appeal No. 2020-001095

Joseph Abruzzo,.. Respondent,

v.

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

REPLY BRIEF OF APPELLANTS

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Although Plaintiff spends much of his Brief mischaracterizing various provisions of the Release and Arbitration Agreement that are unrelated to the Arbitration Agreement and speculating about Defendants' purported intent, certain facts are undisputed. Plaintiff chose to appear on a hit reality television show featuring "scandal" while romantically pursuing a cast member of that show during active filming. Prior to participating in filming, he voluntarily signed an Agreement setting forth the terms and conditions of his appearance on the Program, which contained a clear and conspicuous Arbitration Agreement requiring that Plaintiff mediate, and if necessary, arbitrate any claims relating to the Agreement or his appearance on the Program, in New York. Plaintiff now asks this Court to override well-settled precedent strongly favoring the enforceability of arbitration agreements based on his argument that he did not bother to read the Agreement.

Plaintiff's Brief relies on various unremarkable general propositions of law, generally outside of the arbitration context and often completely irrelevant, but he points to no case invalidating an arbitration agreement in circumstances that bear any similarity to the situation at hand. On the other hand, the District of South Carolina has recently enforced Defendants' substantially similar arbitration agreement with a different voluntary participant on *Southern Charm*, rejecting many of the same arguments that Plaintiff offers here. *See Ledwell v. Ravenel,* No. 2:19-2815-RMG, 2020 U.S. Dist. LEXIS 30534 (D. S.C. Jan. 2, 2020) (R. pp. 217-224). Defendants respectfully submit that this Court should do the same.

I. Initial Matters

First, the Circuit Court's Orders are immediately appealable. The cases cited by Plaintiff to the contrary, (Resp. Br. 5-6), go to typical "improper forum" disputes as

opposed to a motion to compel arbitration.[1] Indeed, Plaintiff relies on authority that clearly and unambiguously holds that denial of a motion to compel arbitration is immediately appealable. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (denial of a motion to compel arbitration "is immediately appealable, even if interlocutory"). In addition, where an order involves an issue that is immediately appealable, all the matters decided in that order may be reviewed at the same time. *See Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 216 S.C. 500, 510-511, 59 S.E.2d 132, 135-136 (1950), *overruled on other gds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). Thus, the denial of Defendants' alternative argument regarding the forum selection clause is also properly before this Court.

Second, contrary to Plaintiff's arguments, in resolving a motion to compel arbitration, this Court is not required to accept as true Plaintiff's wholly unsupported factual assertions, especially where those conclusory allegations are unequivocally contradicted by evidence the Court is permitted to consider in resolving Defendants' Motion.[2] In other words, this Court is not required to suspend its common sense in order to accept frivolous, patently absurd and/or farfetched allegations and inferences.[3]

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[1] In a transparent attempt to avoid dealing with the merits of Defendants' arguments, Plaintiff repeatedly and erroneously asks this Court to treat Defendants' Motion as one for improper venue, rather than what it is and has always been—a motion to compel arbitration. Thus, Plaintiff's arguments that venue in Charleston County is proper based on contacts and residence pursuant to S.C. Code Ann. §§ 15-7-30 and 15-7-100 are wholly irrelevant.

[2] While Plaintiff asserts the Circuit Court applied the correct legal standards, and that Defendants failed to allege any error of law or abuse of discretion, neither the parties nor this Court knows what standard the Circuit Court applied since it only issued Form 4 orders without any findings of fact or legal rationale. In both the Circuit Court and this appeal, Defendants set forth multiple errors of law made by Plaintiff, which the Circuit Court may have adopted. (App. Br. 15-16, 20, 43, 44.) In any event, Plaintiff does not contest that this Court not only can but must decide this case entirely *de novo* and make its own findings of fact.

[3] *See Bridges v. United States*, No. 1:099-CV-4; 1:05-CR-244-1, 2009 U.S. Dist. LEXIS 42758 *5, 2009 WL 1035226 (M.D. N.C. April 15, 2009) ("the Court is not necessarily bound to accept [a

In addition, *Berkeley County School District v. Hub Int'l Ltd.*—upon which Plaintiff relies—explains that a court must accept as true facts that go to the "underlying dispute" between the parties, but must actually consider the evidence in determining whether an arbitration agreement exists. 944 F.3d 225, 234 (4th Cir. 2019) (explaining that when analyzing whether an arbitration agreement exists, a court is "obliged to employ a standard such as the summary judgment test," and "[i]n applying that standard, the court is entitled to consider materials other than the complaint and its supporting documents").[4] In the summary judgment context, "[i]t is well settled that the nonmoving party may not rely on mere allegations … but must present some evidence in the form of affidavits or otherwise in support of its proposition." *Board of Tr'ees for the Fairfield County Sch. Dist. v. State of S.C.*, 409 S.C. 119, 126, 761 S.E.2d 241, 245 (2014).

Plaintiff ignores the fact that, in most cases, "the court, rather than the jury, determines whether a valid arbitration agreement exists," and that a jury trial is warranted *only* where "there are genuine issues of material fact regarding the parties' agreement," and

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statement in a pleading] but can reject it if it is 'frivolous or patently absurd on its face'"), *citing Raines v. United States*, 423 F.2d 526 (4th Cir. 1970); *see also Campbell v. Ashland Credit Union*, No. 3:10-1341, 2011 U.S. Dist. LEXIS 112387 *8, 2011 WL 4597356 (S.D. W.Va. Sept. 30, 2011) (a court "need not credit conclusory allegations or draw farfetched inferences'"); *Electronics for Imaging, Inc. v. Coyle*, 340 F.3d 1344, 1349 (Fed. Cir. 2003) (in considering a motion to dismiss, a court must accept only "the uncontroverted allegations in the plaintiff's complaint as true"); *Liebl v. Mercury Interactive Corp.*, No. 06 C 5364, 2006 U.S. Dist. LEXIS 89814 *2, 2006 WL 3626764 (N.D. Ill. Dec. 12, 2006) ("In considering a motion to dismiss for improper venue, the court accepts all well-pleaded allegations as true, unless contradicted by the defendant's affidavits").

[4] Cases relied on by Plaintiff (Resp. Br. 21-22), *Epstein v. Howell*, 308 S.C. 528, 419 S.E.2d 379 (Ct. App. 1992; *Unlimited Servs. v. Macklen Enters.*, 303 S.C. 384, 401 S.E.2d 153 (1991); *Starkey v. Bell*, 281 S.C. 308, 315 S.E.2d 153 (Ct. App. 1984); *Moseley v. All Things Possible*, 395 S.C. 492, 719 S.E.2d 656 (2011), do not involve or address the standard applied to determine the existence of an arbitration agreement, and thus, are wholly inapposite. However, tellingly, *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 300 (2010), quoted at length (and somewhat misleadingly) by Plaintiff, makes clear that a court needs and is entitled to consider "evidence" regarding the existence of an arbitration agreement.

that he, as the party resisting arbitration, bears the burden of "produc[ing] some evidence to substantiate the allegations that the prevailing law would release him from a contractual obligation to arbitrate." *Towles*, 338 S.C. at 38 n.3, 524 S.E.2d at 844 n.3; *Oppenheimer & Co. v. Neidhardt*, 56 F.3d 352, 358 (2nd Cir. 1995) (the party opposing arbitration "may not rest on a denial but must submit evidentiary facts showing that there is a dispute of fact to be tried"); *Berkeley County*, 944 F.3d at 234 ("the court is obligated to conduct a trial under the Trial Provision" of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") only "when a party unequivocally denies 'that an arbitration agreement exists,' and 'show[s] sufficient *facts* in support' thereof") (emphasis added); *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 118 (2d Cir. 2012) ("a trial is warranted only if there exists one or more genuine issues of material fact regarding whether the parties have entered into such an agreement"); *Southside Internists Group PC Money Purchase Pension Plan v. Janus Cap. Corp.*, 741 F. Supp. 1536, 1538 (N.D. Ala. 1990) ("The party resisting arbitration has the burden of showing entitlement to a jury trial"). However, "[a] naked assertion … by a party to a contract that it did not intend to be bound by the terms thereof is insufficient to place in issue 'the making of the arbitration agreement' for purposes of Section 4" of the FAA. *See, e.g.*, *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 55 (3rd Cir. 1980).

Here, as discussed in detail in Defendants' opening Brief and below, there is no genuine dispute of material fact relating to the existence of an agreement to arbitrate because Plaintiff has failed to come forward with *any* evidence whatsoever, not even a sworn affidavit, to support his conclusory and internally inconsistent allegations.[5]

[5] For this reason, *Hopkins v. New Day Fin.*, 643 F. Supp. 2d 704 (E.D. Pa. 2009), which Plaintiff relies on, actually supports Defendants' position. In *Hopkins*, unlike here, the plaintiffs proffered sworn testimony, which was sufficient to raise a jury issue as to unconscionability.

Defendants, on the other hand, have proffered reliable evidence—which this Court is entitled to consider—that establishes the existence of a valid and enforceable Arbitration Agreement. (*See, e.g.*, R. pp. 153-159).

II. The Arbitration Agreement is valid and enforceable, and this Court should order the parties to arbitrate this dispute pursuant to its terms.

Although Plaintiff would like this Court to focus primarily on the forum selection provision of the Agreement (which provides an alternative basis for dismissal of Plaintiff's Amended Complaint), he has not established any basis to disregard the parties' valid and enforceable Arbitration Agreement. Plaintiff concedes, as he must, that the enforceability of the Arbitration Agreement (as well as the forum selection clause), must be considered separate and apart from the rest of the Agreement. *See, e.g.*, *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) ("Under the FAA,[6] an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole"), *citing Prima Paint Corp. v. Flood & Conklin Mgf. Co.*, 388 U.S. 395, 403-404 (1967); *2215 Fifth St. Assocs., LP v. U-Haul Int'l, Inc.*, 148 F. Supp. 2d 50, 55 (D. D.C. 2001) (the plaintiff "bears the burden of establishing duress or coercion, and 'fraud and overreaching must be specific to a forum selection [clause] in order to invalidate it'") (emphasis added). However, relying entirely on *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), he asserts that the Arbitration Agreement is inextricably intertwined with several other separate provisions of

[6] While Plaintiff contends that he does not "stipulate" that the FAA applies, he has not disputed that the Agreement involves interstate commerce, nor has he disavowed his allegations that *Southern Charm* "has been airing on national and international television," and that the purportedly false and defamatory statements he alleges were "aired" or "published" on "national television." (R. pp. 102, 110-111, ¶¶ 31, 65, 66). Thus, the FAA governs this dispute.

the Agreement that he mischaracterizes and erroneously claims to be illegal.[7] Defendants have explained repeatedly why the significant factual differences between the arbitration agreement in *Smith* and the Arbitration Agreement at issue here render *Smith* inapposite, (App. Br. 43), and Plaintiff has not even attempted to counter those arguments. In short, contrary to Plaintiff's assertions, (Resp. Br. 31-33), the only reference in the Arbitration Agreement to any other part of the Agreement is the use of, to avoid redundancy, the defined term "Released Parties" from ¶ 17.[8] That falls far short of meeting the degree of intertwinement present in *Smith*, and Plaintiff has not proffered any authority to support his assertion that the use of a single previously defined term renders an arbitration agreement inextricably intertwined with the rest of the agreement.[9] There is none.

While Plaintiff purports to assert the Arbitration Agreement is unenforceable due to fraud, misrepresentation, duress, unfair surprise and/or unconscionability, the Amended Complaint plainly reveals that all of his arguments go to the entire Agreement, rather than the Arbitration Agreement itself. (*See* R. pp. 130-142, ¶¶ 169-184, 187-202, 205-222; *see also* ¶¶ 178, 183, 196, 217) (demonstrating that his theories of unconscionability and other

[7] For example, he ignores the fact that release of claims is limited by its own terms "to the maximum extent permitted by law." (*See, e.g.*, R. p. 154, ¶ 17). Thus, it does not and could not purport to release Defendants from illegal conduct.

[8] In an effort to misdirect the analysis, Plaintiff claims that Defendants rely on ten other provisions of the full Agreement "to prop up their various theories of enforceability." Leaving aside the fact that Plaintiff's assertion is demonstrably false, that is not the appropriate analysis. The analysis is whether the Arbitration Agreement incorporates and relies on other provisions of the Agreement, which are found to be illegal and so pervasive in and integral to the Arbitration Agreement that they are incapable of being severed. As set forth above, it does not. In addition, as set forth in Section II.D below, the issue of which Defendants are entitled to enforce the Arbitration Agreement is determined by case law, and is not dependent on the release.

[9] Plaintiff's arguments are inconsistent on this issue as well. Although he argues that the entire Release and Arbitration Agreement constitutes the Arbitration Agreement, for the purpose of severability, he limits the boundaries of the Arbitration Agreement to ¶ 19. (Resp. Br. 40) (arguing that that the Arbitration Agreement does not contain a severability clause because one is not contained in ¶ 19, even though ¶ 22 of the Agreement contains a severability clause).

challenges to the contract relate to the Agreement as a whole, and thus, are dependent on his erroneous argument that the Arbitration Agreement is "intertwined with the remainder of the document"). As was the case in *Buckeye Check Cashing, Inc. v. Cardegna*, here, "because respondent[] challenge[s] the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract," and challenges to the remainder of the Agreement "should … be considered by an arbitrator, not a court." 546 U.S. 440, 446 (2006).

A. The parties entered into a binding and enforceable Arbitration Agreement.

Without proffering any evidence whatsoever, not even a supporting affidavit, Plaintiff continues to paint himself as a hapless victim who, with "bright blinding lights shining on his face," was purportedly presented with a signature block, accompanied by alleged representations as to what he was signing, and that he signed what was represented to him to be a legal agreement governing his appearance on a reality television program, without reading it or attempting to negotiate it because he assumed he would not have any luck had he tried to negotiate it. Critically—and even accepting Plaintiff's farfetched and internally inconsistent allegations as true—all of Plaintiff's fraud, misrepresentation, mistake, duress and unfair surprise claims depend on him being entitled to rely on the Corporate Defendants' alleged statements concerning the document he signed which, as a matter of law, he was not. (App. Br. 24-34 (explaining why Plaintiff cannot establish justifiable reliance on any purported misstatement made by Defendants). Ignoring several of the arguments made by Defendants disproving justifiable reliance, Plaintiff suggests, without any explanation, that Defendants owed him a legal duty to disclose. (Resp. Br. 18 n.9). However, in contrast to *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (1967),

no fiduciary relationship of any kind existed between Plaintiff and the Corporate Defendants.[10] Indisputably, Plaintiff is a well-educated, sophisticated former Florida politician who, at the time in question, was the "director of government relations for a major law firm in Florida." (R. pp. 96-102, ¶¶ 12-29). The Corporate Defendants had no obligation to "encourage" Plaintiff to read the Agreement before signing it—(*see* Resp. Br. 19)—it was an arm's-length business transaction and he is neither uneducated nor a child. Nor were the Defendants under any "duty to disclose" any facts to Plaintiff—particularly facts that would have been readily apparent to him had he satisfied his legal obligation to read the contents of the three-page document he was signing—or at least the single paragraph constituting the Arbitration Agreement.[11] *See Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 39-40, 340 S.E.2d 786, 789-790 (1986) ("every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it").[12] Thus, assuming, solely for the sake of argument, that he did not read the clear and conspicuous terms of the Arbitration Agreement prior to signing, that fact does not establish unfair surprise or

[10] *Jacobson* found a duty to disclose where "officers and directors of a corporation stand in a fiduciary relationship to the individual stockholders." 249 S.C. at 584-585, 155 S.E.2d at 605. No such fiduciary relationship exists here, and Plaintiff does not even attempt to explain how (because he cannot) a single business transaction involving a voluntary appearance on a reality show creates a relationship of trust and confidence between him and the Corporate Defendants.

[11] Plaintiff does not claim (nor could he) that he asked Defendants for additional time to review the contents of the Agreement or to consult with counsel, let alone that he asked and was denied.

[12] *See also Tetrev v. Pride Int'l, Inc.*, 444 F. Supp. 2d 524, 530 (D. S.C. 2006) (even assuming the drafting party "made false representations" regarding a contract, the other party has "no right to rely on them when the truth of these representations [would] have been evident by an inspection of the contract"); *Southside Internists Group*, 741 F. Supp. at 1539 ("absent a showing of fraud or mental incompetence, a person who signs a contract cannot avoid his obligations thereunder by showing he did not read what he signed").

provide any other basis to set aside the parties' agreement to arbitrate.[13]

Plaintiff's arguments regarding the purported absence of a "meeting of the minds" also fail. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893-894 (1989), and other contract cases relied on by Plaintiff, (Resp. Br. 17), none of which involves an arbitration agreement, are readily distinguishable. For example, in *Player*, the purported modification to a written contract leasing real property was entirely oral, prompting the Supreme Court to explain that there can be no meeting of the minds "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." 299 S.C. at 105, 382 S.E.2d at 894. Here, the purpose and intent of the parties is clearly reflected in the terms of the Arbitration Agreement, which are unambiguous, conspicuous and in writing.

Plaintiff's newly proffered "fraud in the factum" argument also fails. First, *Langley v. FDIC*, 484 U.S. 86 (1987), cited by Plaintiff, holds that representations going to future actions do not serve as defenses against a contract because they are "promissory in nature." 484 U.S. at 89. Most, if not all, of Plaintiff's allegations regarding fraud and misrepresentation go to future actions or events, and thus, cannot serve as a basis to disregard the parties' agreement to arbitrate. (*See* App. Br. 31-32).

Second, pursuant to *South Carolina Pub. Serv. Auth.*, fraud in the factum consists of "ineffective assent to the agreement," and "there must be an allegation of fraud in the inducement of the arbitration agreement to avoid arbitration of the contract itself." 312 S.C. at 562, 437 S.E.2d at 24. Indeed, the South Carolina Supreme Court has joined other

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[13] In fact, the evidence shows that he read the entire Agreement prior to signing and even asked for clarification about Paragraph 5 of the Agreement. (R. pp. 157-158, ¶¶ 8, 9, 10).

jurisdictions that hold that "the *Prima Paint* doctrine is not limited to rescission based on fraudulent inducement but extends to all challenges to a contract," including charges of fraud in the factum. *Id.* Here, Plaintiff's allegations of fraud and misrepresentation go exclusively to the entire Agreement, and not to the Arbitration Agreement separate and apart from the rest of the Agreement, and thus, Plaintiff's fraud in the factum argument fails for this reason too.

Finally, under South Carolina law, Plaintiff cannot establish the elements of fraud in the factum. *See*, *e.g.*, *Green v. Sparks*, 232 S.C. 414, 428, 102 S.E.2d 435, 442 (1958) ("fraud in the factum … relates to the matter of the manual signing of the paper, and if the plaintiff at the time [he] signed it had sufficient mental capacity to understand what [he] was doing, then there was no fraud in the factum"). Plaintiff has not even alleged that he was ignorant, illiterate, drugged or unconscious at the time he signed the Arbitration Agreement. He simply and inconsistently alleges that he was handed the Arbitration Agreement with only the signature block showing, which he knew was a legal agreement governing the terms of his appearance on a reality television show, but he does not allege that he lacked mental capacity to understand that he was signing it, or that he was prevented from reading the agreement or, in fact, that he even asked for additional time to read it prior to signing. It also should be noted that his strategically revised allegation is plainly false. R. p. 159 is objective indisputable proof that Plaintiff could see, at a minimum, the third page of the Agreement, which contains the full Arbitration Agreement.[14] Thus, there is no

[14] Plaintiff's attempt to avoid what R. p. 159 clearly proves is nothing more than a belated effort to persuade this Court to disbelieve obvious and indisputable evidence over his entirely unsupported insinuations and arguments. First, Morgan Miller's affidavit specifically attests that R. p. 159, (Exhibit A to her affidavit), the photo of Abruzzo holding up the Release and Arbitration Agreement, was "taken of Plaintiff Joseph Abruzzo immediately after signing" the Agreement, and that the Program's Producers "routinely photograph participants immediately after they sign an

genuine issue of material fact relating to fraud in the factum (or any other issue in dispute).

Nor can Plaintiff prove fraud in the inducement of the Arbitration Agreement for all the reasons set forth in Defendants' opening Brief. In sum, Plaintiff cannot prove he reasonably relied on any representations purportedly made to him—whether they addressed existing facts or future promises. *See Turner v. Milliman*, 392 S.C. 116, 122-123, 708 S.E.2d 766, 769 (2011) (setting forth the elements required to prove a claim for negligent misrepresentation and for fraud including, in both instances, justifiable reliance); *Regions Bank v. Schmauch*, 354 S.C. 648, 673, 582 S.E.2d 432, 445 (Ct. App. 2003) ("one cannot complain of fraud in the misrepresentation of the contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and that one entering into a written contract must read it and avail himself of every reasonable opportunity to understand its content and meaning"). Here, Plaintiff owed himself, Defendants and the public the duty to read the contents of the Agreement—or at least the Arbitration Agreement—prior to signing it. *Burwell*, 288 S.C. at 39-40, 340 S.E.2d at 789-790; *Tetrev*, 444 F. Supp. 2d at 530. For that reason, all of the cases on which Plaintiff relies, (Resp. Br. 21-22), are inapposite since none involves a situation in which the truth was readily ascertainable by reading the contract.[15] In fact, *Moseley* confirms that "one cannot rely upon misstatement of facts, if the truth is easily within its reach." 395 S.C. at

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appearance agreement so that they can readily identify participants later if needed." (R. p. 158, ¶ 12). Plaintiff has submitted no evidence to the contrary. Second, none of Plaintiff's arguments regarding R. p. 159 contradict the primary and critical point for which it was offered—that Plaintiff could see all of the last page of the Agreement, including all of the Arbitration Agreement.

[15] *See Epstein* (misrepresentation as to whether payroll and FICA taxes had been paid could have been discovered only by examining bank statements and books prior to sale); *Macklen* (oral misrepresentation outside of any contract as to whether road access to restaurant would be maintained); *Starkey* (misrepresentation regarding profit/loss numbers for sale of restaurant that had been "doctored" and were not part of the contract); *Moseley* ("fraud in connection with a real estate transaction, where the truth" was "discoverable in the public records").

496, 719 S.E.2d at 658, *quoting O'Shields v. Southern Fountain Mobile Homes, Inc.*, 262 S.C. 276, 282, 204 S.E.2d 50, 52 (1974).

Finally, Plaintiff's fraud claims fail, even as alleged (and accepting them as true), because all of his fraud claims must be proven by clear and convincing evidence, *Turner*, 392 S.C. at 124-125, 708 S.E.2d at 770; *Moseley*, 395 S.C. at 496, 719 S.E.2d at 658 (proof of fraud "must be by clear, cogent and convincing evidence"), *quoting Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 594, 541 S.E.2d 257, 261 (2001), a standard he falls far short from meeting. Here, he has not proffered even an affidavit or any other objective evidence supporting his fraud (or any other) allegations.

On the other hand, Defendants have supported their position with sworn affidavits and other objective evidence, (R. pp. 204-216), whereas Plaintiff has proffered nothing but insufficient naked assertions denying the existence of an agreement to arbitrate. In sum, Plaintiff has fallen far short of meeting his burden to show sufficient facts to entitle him to a jury trial on the existence of an arbitration agreement, let alone to release him from his contractual obligation to arbitrate.

B. Plaintiff cannot show the Arbitration Agreement is procedurally unconscionable.

Plaintiff cannot satisfy the exacting standard required to establish the Arbitration Agreement is procedurally unconscionable. Although Plaintiff relies heavily on *Hopkins*, the facts of that case are in stark contrast to the instant case, where the only consequence Plaintiff would have faced had he not signed the Arbitration Agreement was that his dinner with his then-girlfriend would not have been filmed. In contrast, in *Hopkins*, the plaintiffs testified that defendant New Day made clear to each of them that they would lose their jobs immediately if they did not sign the arbitration agreements. 643 F. Supp. 2d at 718. Plainly,

the loss of one's livelihood bears no resemblance to not having a dinner filmed for a reality television program.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007), does not compel a different conclusion, and Plaintiff's attempts to compare his situation to that of the plaintiff in *Simpson* actually highlight the stark differences in terms of the consequences associated with declining to sign the contract at hand. Like the plaintiff in *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020), the plaintiff in *Simpson*, was purchasing "a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society." 373 S.C. at 27, 644 S.E.2d at 670. In contrast to the loss of livelihood as in *Hopkins* or of an automobile intended for use as primary transportation (which in turn would impact the plaintiff's ability to maintain a job and accomplish other necessities of life) as in *Doe* and *Simpson*, respectively, here, Plaintiff entered into the Arbitration Agreement in order to have a dinner with his then-girlfriend filmed for possible inclusion on a nationally-broadcast reality television show. Plainly, appearing on a reality television show as an unpaid voluntary participant is not "critically important in modern day society." As a result, Plaintiff cannot show either that the Arbitration Agreement is a contract of adhesion[16] or that the circumstances of its execution were so oppressive as to rise to the level of procedural unconscionability.

Additionally, unlike the plaintiff in *Simpson*, here, Plaintiff is a sophisticated and influential former Florida State Congressman who, at the time, was employed as the "director of government relations for a major law firm in Florida." In light of that, *inter*

[16] In any event, as explained in Defendants' opening Brief, even if an agreement is considered a contract of adhesion, a party seeking to avoid its contractual obligations still must establish procedural and substantive unconscionability. (App. Br. 35, 38).

alia, Plaintiff cannot satisfy the standard established by the case law he relies on, which instructs that courts "should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with facts such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." *Gladden v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882, 884-885 (2013).[17] As was the case in *Gladden*, where the plaintiff was educated and "directly engaged in sophisticated negotiations" with the defendant, 402 S.C. at 146, 739 S.E.2d at 885, here, Plaintiff cannot plausibly allege he lacks the education to understand the terms of a contract or to protect his own interests. Indeed, he alleges he successfully negotiated circumstances of his appearance on *Southern Charm*, (R. p. 104, ¶ 43), on which he was eager to appear. (R. p. 157, ¶ 7).

None of the other cases cited by Plaintiff bear any resemblance to the circumstances at hand here. Plaintiff was on notice of the clear and conspicuous Arbitration Agreement, (R. pp. 157-158, ¶¶ 8, 9, 10) (R. p. 159), and plainly had not only the ability but also the duty to read the papers prior to signing. *Burwell*, 288 S.C. at 39-40, 340 S.E.2d at 789-790. Thus, Plaintiff cannot satisfy his burden of establishing procedural unconscionability.

C. <u>Plaintiff cannot show the Arbitration Agreement is substantively unconscionable.</u>

Nor can Plaintiff establish that the Arbitration Agreement is substantively

[17] Plaintiff cites solely to the Dissent in *Gladden* without indicating this fact to the Court. There, the Majority found that the contract was *not* procedurally unconscionable, 402 S.C. at 146, 739 S.E.2d at 885, even though according to the Dissent, "[t]he parties clearly did not have equal bargaining power," the contract was not even presented to the plaintiff until after the home inspection had been performed, and the limitation of liability clause at issue in the case was not highlighted in any way. 402 S.C. at 148, 739 S.E.2d at 886 (Beatty, J., dissenting).

unconscionable. As Plaintiff concedes and as explained in detail above, an arbitration clause is separable from the contract in which it is embedded, and the issue of its validity is distinct from the substantive validity of the contract as a whole, the latter issue being determined by the arbitrator. *Buckeye Check Cashing*, 546 U.S. at 446 (challenges to the contract as a whole "should … be considered by an arbitrator, not a court"). Fatally, Plaintiff's arguments regarding substantive unconscionability turn exclusively on provisions of the Agreement as a whole (provisions he mischaracterizes) that are separate and apart from the Arbitration Agreement, ignoring the provisions of the Arbitration Agreement itself except for the exclusive New York venue provision, which is addressed below.[18] The provisions that he claims "are so one-sided and oppressive that no reasonable person would make them … and no fair and honest person would accept them," (Resp. Br. 30), are not part of the Arbitration Agreement, both by the terms of the Arbitration Agreement and its operation. As explained above, (Section I), the sole reference in the Arbitration Agreement to any other portion of the Agreement is the use of a term defined earlier in the Agreement for the sake of avoiding redundancy. Plaintiff has not and cannot point to any case in which such a minimal and inconsequential reference led to a finding that an arbitration agreement was inextricably intertwined not only with the provision containing the defined term but also several other separate provisions of a larger agreement. Defendants respectfully submit that this Court should not be the first.[19]

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[18] For this reason, Plaintiff effectively concedes that the Arbitration Agreement itself is not substantively unconscionable.

[19] The fact that Plaintiff spends so much of his Brief trying to distract from the relevant analysis by mischaracterizing the effect of other completely unrelated provisions of the Agreement in inflammatory language is telling. And his claims that the terms of the Agreement "are so one-sided and oppressive" that "no fair and honest person would accept them" is directly belied by the fact that not only do hundreds of voluntary participants on *Southern Charm* and other shows routinely sign them (after actually reading and, often, successfully negotiating their terms), but courts,

Here, enforcement of the Arbitration Agreement would mean only that the parties resolve their underlying dispute, including the scope of any release of claims, in an arbitral forum as they agreed to do, as opposed to in court. *See*, *e.g., Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247 (9th Cir. 1994) (arbitration provision "constitutes nothing more than an agreement to substitute one legitimate dispute resolution *forum* for another and involves no surrender of statutory protections or benefits"); *Southside Internists Group*, 741 F. Supp. at 1539 ("there is nothing inherently unfair or oppressive about arbitration clauses"). And, a fair and neutral arbitrator from a well renowned arbitration association will determine whether other parts of the Agreement are unconscionable or not.

In their opening Brief, Defendants explained why Plaintiff's arguments about mutuality of remedies does not establish substantive unconscionability under well settled case law. (App. Br. 34, 41-42). While the Arbitration Agreement grants only the Corporate Defendants the right to seek injunctive relief in certain limited circumstances, Plaintiff completely ignores authority repeatedly cited by Defendants finding that such provisions do not evidence unconscionability under the circumstances present here.[20]

Not only does Plaintiff fail entirely to respond to that case law, but he argues, without foundation, that enforcement of the Arbitration Agreement would preclude him from recovering "*any damages whatsoever*." (Resp. Br. 32, 37, 39). As explained above,

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including South Carolina federal district courts, also have enforced their terms. *See, e.g.*, *Ledwell*, 2020 U.S. Dist. LEXIS 30534. (R. pp. 217-224).

[20] *See Higgins v. Superior Court*, 140 Cal. App.4th 1238, 1254 n.12, 45 Cal. Rptr.3d 293, 305 n.12 (Cal. Ct. App. 2006) ("the fact that the injunction provision is one-sided does not necessarily mean that the clause is substantively unconscionable," but that any "'business realities' creating the special need, must be explained in the terms of the contract or factually established"); *Kaufman v. Sony Pictures TV, Inc.*, Civ. No. 16-12027-LTS, 2017 U.S. Dist. LEXIS 112938, at *19 (D. Mass. July 20, 2017) (enforcing, in the reality television context, arbitration clause with a one-sided injunctive relief provision because it "spell[ed] out the 'legitimate commercial need' for the lopsided provision").

the release of claims—upon which he relies for this argument—by its own terms, releases claims only "to the maximum extent permitted by law." Thus, for example, if Plaintiff were able to prove in an arbitration that he was injured as a result of Defendants' illegal conduct, no provision of the Agreement would preclude him from recovering money damages. Nor would it preclude the recovery of unwaivable statutory damages. (Resp. Br. 39).

Plaintiff's other arguments regarding substantive unconscionability fail for several reasons. The stark contrast between the Arbitration Agreement in this case and those at issue in *Graham Oil*, *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003), and *Hopkins*, all cited by Plaintiff, demonstrate the fatal failings of Plaintiff's substantive unconscionability arguments. In *Graham Oil*, the arbitration agreement *itself* barred, without exception, certain relief granted to franchisees under the Petroleum Marking Practices Act, 15 U.S.C. §§ 2801-2806, including the right to exemplary damages, the right to recover reasonable attorneys' fees, and the right to a one-year statute of limitation. 43 F.3d at 1247-1248. In *Hooters*, instead of adopting neutral arbitration rules such as those promulgated by the AAA and JAMS, the arbitration agreement itself reserved to Hooters the right to draft the arbitration rules which were "egregiously unfair" and were "so one-sided that their only possible purpose is to undermine the neutrality of the proceeding." 173 F.3d at 938. The *Ingle* arbitration agreement was contained in Circuit City's employment application form (and thus agreeing to arbitration was a condition of even applying for paid employment) and itself contained provisions limiting only the plaintiff (but not Circuit City) to arbitration, altered the statute of limitations, prohibited class actions, imposed filing fees or cost-splitting, and reserved a "unilateral power to modify or terminate the arbitration

agreement" to Circuit City. 328 F.3d at 1172-1173. The arbitration agreements under consideration in *Hopkins* deprived the plaintiffs of their statutory right to participate in a class action, and granted access to the courts only to the employer. 643 F. Supp. 2d at 719.

Here, in contrast, both parties are bound to arbitrate under the same rules in a fair and neutral forum. Plaintiff has not and cannot show that the Arbitration Agreement is geared toward achieving a biased and egregiously unfair result like the provisions at issue in *Graham Oil*, *Ingle*, *Hooters*, and *Hopkins*. In addition, Plaintiff's repeated denigration of the arbitral process, (Resp. Br. 37, 39-41), both flies in the face of decades of case law strongly favoring the enforcement of arbitration agreements and demonstrates Plaintiff's basic misunderstanding of the process and concepts involved. *Graham Oil Co.*, 43 F.3d at 1247 (arbitration is favored by the courts and "constitutes nothing more than an agreement to substitute one legitimate dispute resolution *forum* for another and involves no surrender of statutory protections or benefits"); *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 82 (D.C. Cir. 2005) (noting the U.S. Supreme Court has condemned the "suspicion of arbitration" as "far out of step with our current strong endorsement of … this method of resolving disputes").

In re Cotton Yarn Antitrust Litig., 406 F. Supp. 2d 585 (M.D. N.C. 2005), relied on by Plaintiff, actually supports Defendants' position. In *In re Cotton*, the district court decision was vacated and remanded by the Fourth Circuit, which found the plaintiffs failed to establish that the arbitration provisions at issue there were unconscionable. *Atlantic Textiles v. Avondale Inc., (In re Cotton Yarn Antitrust Litig.)*, 505 F.3d 275, 277, 286-287 (4th Cir. 2007).[21] In doing so, the Fourth Circuit instructed that the burden of proving that

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[21] It seems as though Plaintiff may have copied and pasted language from *Simpson*, including the citation to *In re Cotton Yarn*, without actually reviewing *In re Cotton Yarn* or its procedural history.

an arbitration provision "would preclude [plaintiffs] from effectively vindicating their statutory rights … is a substantial one" and "proof must be concrete, not merely speculative." *Id.* Plaintiff has not and cannot meet this high burden.

Finally, the Arbitration Agreement does not violate South Carolina public policy because it contains a mandatory and exclusive forum selection provision, directing that mediation and arbitration "will be conducted in the City of New York," as Defendants already have addressed. (App. Br. 44). Because the FAA plainly governs this dispute and mandates that arbitration agreements be treated on the same footing as other contracts, and given that the continued viability of state statutes invalidating forum selection clauses, as S.C. Code § 15-7-120(A) purports to do, is in serious doubt, *Albemarle Corp. v. Astrazeneca UK Ltd*, 628 F.3d 643, 652 (4th Cir. 2010) (no evidence that S.C. Code Ann. § 15-7-120(A) "manifests a strong public policy of South Carolina"), a state statutory provision invalidating forum selection clauses in arbitration agreements, as S.C. Code 15-7-120(B) purports to do, is equally doubtful. This Court's ruling in *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000) (the "trial court erred by applying § 15-7-120 to the arbitration clauses *sub judice* because state law is preempted by the [FAA] under [similar] circumstances presented by this action. Where a contract evidencing interstate commerce contains an arbitration clause, the FAA preempts conflicting state arbitration law"), is controlling and a failure to enforce the Arbitration Agreement based on S.C. Code § 15-7-120 would be reversible error.

In sum, Plaintiff offers nothing but naked and flatly disproved assertions of fact and general, and often irrelevant, conclusions of law. He points to no case from any jurisdiction

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The South Carolina Supreme Court's decision in *Simpson* was issued months prior to the Fourth Circuit decision overturning *In re Cotton Yarn*.

invalidating an arbitration agreement on even remotely similar facts. On the other hand, Defendants draw this Court's attention to *Ledwell*, where the South Carolina federal district court recently enforced a substantially similar arbitration agreement, rejecting similar arguments made by a different voluntary participant on *Southern Charm* against the Corporate Defendants, where the voluntary participant signed the agreement while working as a nanny for a cast member and had significantly less education and influence than Plaintiff. (R. pp. 217-224). Defendants respectfully submit that this Court also should find that Plaintiff has failed to show substantive unconscionability or to otherwise meet his high burden to avoid his agreement to arbitrate.

D. Plaintiff's Claims against all Defendants are subject to the Arbitration Agreement.[22]

Plaintiff's claim that only Haymaker is entitled to enforce the Arbitration Agreement is meritless. As set forth in detail in Defendants' opening Brief, (App. Br. 37-39), each of the Defendants is expressly included within the definition of "Released Parties"[23] and are also "express intended third-party beneficiaries" of the Agreement who have "full standing to enforce each, every, any and all of its provisions as if it was an express party thereto."[24] (R. pp. 154-155, ¶¶ 17 & 21).

In any event, Plaintiff completely fails to address the well-settled authority cited by Defendants providing non-signatories may compel arbitration when a plaintiff names both

[22] Plaintiff's asserts that Haymaker is owned by NBCUniversal and Comcast. That is not true. (R. pp. 161-162).

[23] For the reasons set forth above, the use of a single previously defined term to avoid redundancy does not warrant a finding that the Arbitration Agreement is inextricably intertwined with the release of claims, let alone several other entirely unrelated provisions of the Agreement.

[24] As the Network that broadcasts the Program (and its indirect parent corporations), and cast members of the Program, respectively, both the Corporate Defendants and the Individual Defendants plainly have a direct and intended interest in enforcement of the Arbitration Agreement.

signatories and non-signatories in a lawsuit, *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600 (Ct. App. 2012) ("a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint … because this would nullify the rule requiring arbitration"), and *South Carolina Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) (allowing non-signatory to enforce arbitration agreement, explaining that "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint … because this would nullify the rule requiring arbitration"), *citing Arnold v. Arnold Corp.*, 920 F.2d 1269, 1281-1282 (6th Cir. 1990) (allowing individual non-signatories to enforce arbitration agreement); *see also Long v. Silver*, 248 F.3d 309, 320 (4th Cir. 2001) (requiring plaintiff to arbitrate claims against non-signatories due to the "intertwined" nature of the claims against both signatories and non-signatories).[25]

All of the Defendants are entitled to enforce the Arbitration Agreement.

E. The Arbitration Agreement has not been terminated.

Plaintiff's final arbitration argument—one never presented to the Circuit Court—that the Arbitration Agreement is silent as to its term and is, therefore, terminable at will, is not only specious but concedes that the entire Release and Arbitration Agreement does not "constitute the Arbitration Agreement." Paragraphs 1 and 12(a) of the Release and Arbitration Agreement state that those provisions continue "in perpetuity." If, as Plaintiff argues elsewhere herein, the entire Release and Arbitration "constitute[d] the Arbitration Agreement," then Arbitration Agreement itself would also continue in perpetuity.

[25] Plaintiff also misconstrues *Malloy v. Thompson*, 409 S.C. 557, 762 S.E.2d 690 (2014), which addresses only whether a non-signatory can be forced to arbitrate and does not involve whether a non-signatory can compel or enforce an arbitration agreement, here, an Arbitration Agreement that Plaintiff himself signed. (R. pp. 153-155, 159).

In any event, Plaintiff's argument that his filing of the lawsuit constitutes "notice of the Plaintiff's termination and rescission of any agreement to arbitrate" rests entirely on an unwarranted and illogical attempted extension of *O'Quinn v. Beach Assoc.*, 272 S.C. 95, 249 S.E.2d 734 (1978). In *O'Quinn*, the court rejected the defendant's argument that its attempt to cure a prior misrepresentation "cured" its breach, and therefore, bound the plaintiffs to the contract, because the plaintiffs had filed suit prior to the defendant's attempted cure, thereby rescinding the executory contract. *O'Quinn* does not even address or involve an arbitration agreement but, rather the circumstances under which a party is entitled to terminate an executory contract after a material breach. Pursuant to Plaintiff's illogical argument, any party seeking to avoid enforcement of an arbitration agreement could do so simply by filing a lawsuit in court after the services specified under the contract have been performed. That is obviously not the law.[26]

III. The forum selection clause is valid and enforceable.

Plaintiff misstates the standards applicable to enforcement of the forum selection provision of the Agreement, which provides an alternative and independent basis to grant Defendants' Motion. *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 550 (4th Cir. 2006),[27] does not hold, as Plaintiff claims, that a plaintiff need only make a prima facie case or that the facts are viewed in the light most favorable to the plaintiff when considering a forum selection clause. In fact, where a motion to enforce a forum selection

[26] *See Rouhi v. Comcast Ctr.*, No. GLR-19-703, 2019 U.S. Dist. LEXIS 235693 *10 (D. Md. Nov. 27, 2019) (broadly worded arbitration provision applied to claim brought after termination of cable service "because [the arbitration clause's] perpetuity is determined not by the duration of [plaintiff's] and Comcast's contractual relationship, but by the accrual of any claims arising thereunder").

[27] Plaintiff appears to have abandoned his argument that a court is limited to the "four corners" of his pleadings in analyzing enforcement of a forum selection clause, now agreeing that a court is allowed to "freely consider evidence outside the pleadings," *citing Sucampo*, 471 F.3d at 550.

clause is filed pursuant to Rule 12(b)(3), "the pleadings need not be accepted as true, [citation omitted] and the court may consider facts outside of the leadings." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2003); *see also 2215 Fifth St. Assocs.*, 148 F. Supp. 2d at 54 ("a court need not accept plaintiffs' legal conclusions as true").

Indeed, Plaintiff relies on several cases that actually support Defendants' argument that the forum selection clause here is valid and enforceable. For example, Plaintiff relies on *Jeffers Handbell Supply, Inc. v. Schulmerich Bells, LLC*, which provides that a "valid forum-selection clause should be given controlling weight in all but the most exceptional cases." No.: 0:16-cv-03918-JMC, 2017 U.S. Dist. LEXIS 132084 *29, 2017 WL 3582235 (D. S.C. Aug. 18, 2017), *quoting Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31, 33 (1988).[28] *Murphy* does not compel a different conclusion. There, the plaintiff, a blue collar worker without a high-school degree then surviving on disability benefits, submitted a sworn affidavit attesting that he was physically and financially unable to travel to the designated forum due to a physical injury, presenting the court with a bona fide factual dispute concerning whether enforcing the forum selection clause essentially would deprive the plaintiff of his day in court. Here, in contrast, Plaintiff—a Florida resident and former state congressman who held a lucrative position at a major Florida law firm—submitted no evidence whatsoever in his opposition to enforcement of the forum selection clause. Beyond that, he has not even alleged any connections to South Carolina other than traveling to Charleston for a single dinner with his then-girlfriend, which, if anything, shows that he has both the means and ability to travel at will. Thus, Plaintiff has not and cannot establish

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[28] *See also 2215 Fifth St. Assocs.*, 148 F. Supp. 2d at 54 ("Forum selection clauses are to be considered 'prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable under the circumstances'").

even a genuine issue of material fact, let alone prove, that pursuing his claims in New York would present any greater hardship for him than it would be for him to pursue those claims in South Carolina.[29]

Finally, Plaintiff's argument that the forum selection clause should be ignored because it is not "mandatory" is meritless. As was the case in *Albemarle*—upon which he relies—here, the forum selection clause also includes a mandatory choice of law provision. Here, the pertinent provision provides:

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

R. p. 155, ¶ 20 (emphasis added). As Plaintiff acknowledges, the use of the term "shall" is mandatory, such that New York law governs the relationship between the parties, including this dispute.[30] Under New York law, the law chosen to govern the entire relationship between the parties, the language in ¶ 20 of the Agreement creates a binding, mandatory forum selection clause.

For example, in *Babcock & Wilcox Co. v. Control Components*, 614 N.Y.S.2d 678 (N.Y. Sup. Ct. 1993), the court considered a forum selection clause that provided, in

[29] To the extent Plaintiff is arguing that his unfounded allegations of fraud raise any inference that this issue should be resolved in his favor, as explained above, he cannot prove fraud or misrepresentation because he cannot show that he had a right to rely on any alleged misstatement(s) made by the Corporate Defendants. *Tetrev*, 444 F. Supp. 2d at 530 (a party has "no right to rely on [alleged misrepresentations] when the truth of these representations [would] have been evident by an inspection of the contract").

[30] Notably, Plaintiff's only argument regarding the governing law is that the entire Agreement is unenforceable and, therefore, traditional choice of law analysis for tort actions applies. (Resp. Br. 17 n.7). That argument is meritless for the numerous reasons set forth in detail in Defendants' opening Brief. (App. Br. 19-20, 48-49).

pertinent part, that the parties agreed "to submit to the jurisdiction of the Supreme Court of the State of New York and/or of the United States District Court for the Southern District of New York," appointed the Secretary of State for New York as the agent for service, and "waive[d] any other requirements of personal jurisdiction or venue." The Court concluded that, in light of N.Y. Gen. Oblig. § 5-1402—which addresses the enforceability of forum selection clauses choosing a New York forum "'in cases involving' a controversy in excess of $1,000,000"[31]—the above-referenced language constituted a mandatory and exclusive forum selection clause. 614 N.Y.S.2d at 641-643. ("[N]o magic words … must appear in a contract to create an effective designation of an exclusive forum").

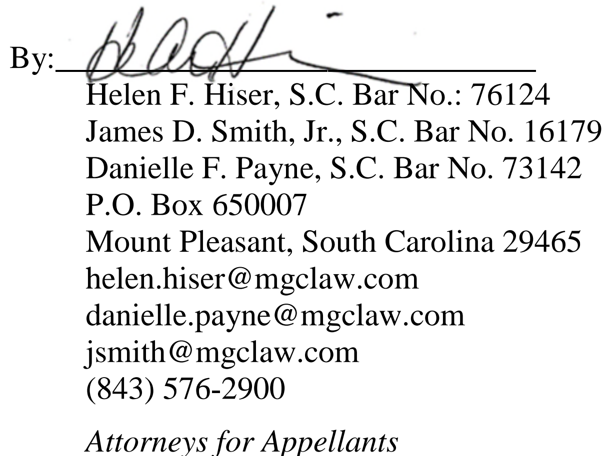
Thus, the forum selection clause of the Agreement is valid, enforceable and provides an alternative and independent basis for denial of Plaintiff's Complaint.

CONCLUSION

This Court should dismiss Plaintiff's Amended Complaint and compel the parties to arbitrate this dispute pursuant to the Arbitration Agreement. Alternatively, this Court should dismiss Plaintiff's Amended Complaint pursuant to the forum selection clause.

MCANGUS GOUDELOCK & COURIE, LLC

February 12, 2021

By: 

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[31] Plaintiff alleges damages of at least $10,000,000. (R. p. 142).

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Feb 12 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable, Circuit Court Judge

Appeal No. 2020-001095

Joseph Abruzzo,.. Respondent,

v.

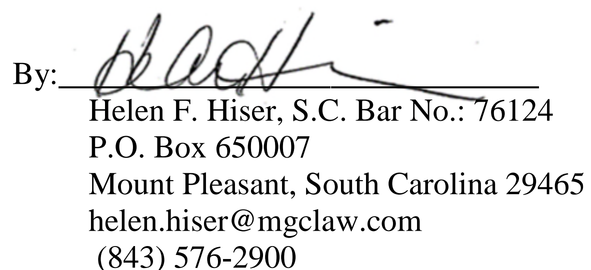
Bravo Media Productions LLC; Haymaker Media, Inc.; NBCUniversal Media, LLC; Comcast Corporation; Craig Conover; Chelsea Meissner; and Madison LeCroy,.. Appellants.

CERTIFICATE OF COUNSEL

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

February 12, 2021

MCANGUS GOUDELOCK & COURIE, LLC

By: 

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