RECEIVED
Jan 24 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Civil Case No. 2023-CP-07-00646
Appellate Case No: 2024-000869

Amber Leigh Lovelace, by and through her
Conservator Richard Cooler, ...Respondent,

v.

Steven Lovelace, Regions Bank,
Cetera Investment Services d/b/a Regions Investment
Services, and Christopher Lazurek, ...Defendants.

Of whom Regions Bank,
Cetera Investment Services d/b/a Regions Investment
Services, and Christopher Lazurek are, ...Appellants.

FINAL BRIEF OF APPELLANT

Cory E. Manning (SC Bar No. 14702)
Cory.manning@nelsonmullins.com
Andrew Rawl (SC Bar No. 102807)
Andrew.rawl@nelsonmullins.com
Mary S. Williams (SC Bar No. 105883)
Mary.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
Tel (803) 799-2000
Fax (803) 256-7500

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The circuit court erred by finding the arbitration agreements Mr. Cooler entered into on behalf of Ms. Lovelace were unconsionable and, therefore, unenforceable.

II. The circuit erred by finding that there was no consideration to support the Cetera and Regions Arbitration Agreements

III. The circuit court erred by denying Respondent's Motion to Compel Arbitration because Respondent's claims are encompassed by the arbitration agreements and the agreements are enforceable.

IV. The circuit court erred by refusing to ackowledge that the Federal Arbitration Act applies to this action.

V. The circuit court erred by finding that Appellants waived the arbitration agreements.

VI. The circuit court erred in applying a clear and convincing standard when analyzing whether the parties entered into an agreement to arbitrate.

STATEMENT OF THE CASE

Richard Cooler filed the underlying complaint against Appellants, Regions Bank (Regions) and Cetera Investment Services d/b/a Regions Investment Services (Cetera), Christopher Lazurek, and Steven Lovelace on behalf of his granddaughter, Amber Leigh Lovelace, for whom he is the Conservator, on April 6, 2023. (R. p. 20, ¶ 32). The complaint alleged that Appellants, Regions, Cetera, and Lazurek, failed to prevent Ms. Lovelace's father, Steven Lovelace, and then-acting Conservator, from improperly removing funds from two accounts maintained in Ms. Lovelace's name with Regions and Cetera, and that Regions and Cetera charged improper fees for services performed on the accounts at issue. (R. p. 20, ¶ 24–29). Respondent asserted claims against Regions and Cetera for negligence; alleged violations of Section 62-5-420 of the South Carolina Code (1976); negligent hiring, training, and supervision; and alleged violations of the South Carolina Unfair Trade Practices Act. (R. p. 17–18, ¶ 7-15). As to all three Appellants, the complaint alleges breach of contract and conversion. (R. p. 18, ¶ 11-12). Pursuant to the arbitration agreement in Ms. Lovelace's Account Agreements with both Regions and Cetera, Appellants filed a Motion to Compel Arbitration and to Dismiss or Otherwise Stay the Action Set Forth in the Complaint on June 16, 2023. (R. p. 41–45). Respondent filed her response to the motion on November 13, 2023. (R. p. 126–134). The circuit court held a hearing on Appellants' Motion to Compel on November 15, 2023, (R. p. 206–235), and denied the motion in an Order filed December 7, 2023. (R. p. 5–14).

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Appellants timely filed their Motion to Reconsider, Alter, or Amend on December 18, 2023. (R. p. 167–183). Appllants supplemented their initial motion briefing on April 24, 2024. (R. p.184–190). Thereafter Respondent filed her response in opposition on May 1, 2024. (R. p. 200–205). The

court heard the motion the next day and subsequently denied Appellants' Motion to Reconsider through a Form 4 Order filed May 7, 2024.

This appeal followed. Appellants filed their Notice of Appeal on May 24, 2024. Appellants seek this Court's review of the circuit court's May 7, 2024, Form 4 Order and the December 7, 2023 Order denying their Motion to Compel, and ask that this Court find the arbitration agreements at issue are valid and enforceable, the agreements cover Ms. Lovelace's claims, and therefore reverse the circuit court and compel this case to arbitration.

STATEMENT OF FACTS

On February 3, 2016, the Beaufort County Probate Court appointed Steven Lovelace as Conservator for Ms. Lovelace, his minor daughter. (R. p. 18, ¶ 13). The Probate Court established Ms. Lovelace's conservatorship in connection with insurance funds she received after the untimely death of her mother. (R. p. 18, ¶ 14). The conservatorship established by the Probate Court authorized Mr. Lovelace to enter into Restricted Account Agreements with financial institutions and required Mr. Lovelace to secure prior approval from the Probate Court before withdrawing funds. (R. p. 18, ¶ 15). Nothing in the Order prevented Mr. Lovelace from transferring funds from one conservator account to another, only withdrawl required prior court approval. (R. p. 30).

Acting as her Conservator, Mr. Lovelace opened two accounts for his daughter: 1) an investment account with Cetera; and 2) a savings account with Regions. (R. p. 18–19, ¶ 16). In opening these accounts, Mr. Lovelace executed a Restrincted Account Agreement with Cetera on behalf of his daughter. (R. p. 19, ¶¶ 18-19). It appears that Mr. Lovelace never completed a Restricted Account Agreement with Regions; to date, no Restricted Account Agreement has been identified. (R. p. 127).

Mr. Lovelace disregarded the Probate Court's Order and began withdrawing funds from the Regions Savings Account without prior court approval. (R. p. 20, ¶ 24). Mr. Lovelace then began transferring funds from the Cetera Investment Account to the Regions Savings Account. (R. p. 20, ¶ 25). Mr. Lovelace's transfers incurred normal bank fees for Ms. Lovelace's accounts, which Respondent now asserts were excessive. (R. p. 20, ¶ 26). All told, between Mr. Lovelace's withdrawals and incurred fees from 2017 to early 2022, roughly $169,000 was removed from the accounts for which he served as conservator for by Mr. Lovelace. (R. p. 20, ¶ 27).

Mr. Lovelace resigned as conservator on October 13, 2022. (R. p. 20, ¶ 31). On January 13, 2023, after finding him fit to serve, the Probate Court appointed Mr. Cooler Successive Conservator for Ms. Lovelace. (R. p. 20, ¶ 32); Or. Appointing Successor Conservator, Case No. 2015-GC-0700057 (R. p. 138–144) ("Petitioner is qualified to serve as Successor Conservator and his appointment as Successor Conservator is in the Minor's best interest."). Thereafter, Mr. Cooler entered into account agreements with Regions and Cetera, to identify himself as conservator. (R. p. 123–125). Both agreements contained valid arbitration agreements, to which Mr. Cooler, acting on behalf of Ms. Lovelace, assented to.

Both agreements included agreements to arbitrate potential claims against Regions and Cetera and their respective employees and/or agents related to the accounts. (R. pp. 46–52; 63–64). The circuit court properly identified in its December 7 Order that these agreements were both related to pre-existing accounts—Ms. Lovelace's accounts that had been maintained since 2017. (R. p. 12). With full knowledge that Mr. Lovelace had withdrawn funds from these accounts, Mr. Cooler agreed to the account terms, including the arbitration agreements. (R. p. 123–125).

As it relates to Cetera, Mr. Cooler completed a New Account Application on or about January 30, 2023. (R. p. 46–52). The Cetera New Account Application is a nine-page document. (R. p. 162, ¶ 5). The sixth page of the Cetera New Account Application is the signature page. (*Id.*) With his signature, Mr. Cooler acknowledged and agreed that: (1) he "received, read, [understood], and agree[d] with all of the information contained within this document" and "that this agreement contains a predispute arbitration clause that is fully set forth in paragraph 20 on page 9 of this form." (R. p. 52). Though Mr. Cooler denies receiving this document, he does not deny signing it. (R. p. 124–125, ¶ 11-16). Furnishing copies of the signed agreements is standard business practice of both institutions. (R. pp.162–163; 165–166).

As part of the ordinary course of business, an account applicant would be provided all nine pages of the Cetera New Account Application and provided an opportunity to review the entire application prior to signing. (R. p. 162–163, ¶6–8). When signed applications are imaged for purposes internal record keeping, the imaging team does not scan the entire New Account Application and stops after the signature page. (*Id.*) Pages seven through nine contain terms and conditions that govern the relationship between Cetera and its account holders. (R. p. 60–62). The "Cetera Arbitration Agreement" is found on page 9 and provides as follows:

20. Arbitration. THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:

(A) ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.

(B) ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.

(C) THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.

(D) THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD UNLESS, IN AN ELIGIBLE CASE, A JOINT REQUEST FOR AN EXPLAINED DECISION HAS BEEN SUBMITTED TO ALL PARTIES TO THE PANEL AT LEAST 20 DAYS PRIOR TO THE FIRST SCHEDULED HEARING DATE.

(E) THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.

(F) THE RULES OF SOME ARBITRATION FORUMS MAY IMPOSE TIME LIMITS FOR BRINGING A CLAIM IN ARBITRATION. IN SOME CASES, A CLAIM THAT IS INELIGIBLE FOR ARBITRATION MAY BE BROUGHT IN COURT.

(G) THE RULES OF THE ARBITRATION FORUM IN WHICH THE CLAIM IS FILED, AND ANY AMENDMENTS THERETO, SHALL BE INCORPORATED INTO THIS AGREEMENT.

ARBITRATION CLAUSE: I AGREE THAT ANY DISPUTE BETWEEN ME AND YOU ARISING OUT OF THIS AGREEMENT SHALL BE SUBMITTED TO ARBITRATION CONDUCTED UNDER THE PROVISIONS OF THE FINANCIAL INDUSTRY REGULATORY AUTHORITY, INC.'S CODE OF ARBITRATION PROCEDURE ADMINISTERED BY FINRA DISPUTE RESOLUTION, INC. ARBITRATION MUST BE COMMENCED WITHIN THE STATUTORY LIMITATION PERIODS APPLICABLE TO THE CLAIMS. I FURTHER AGREE THAT, IF THE FINRA ARBITRATION FORUM IS NOT AVAILABLE FOR THE DISPUTE, THE DISPUTE WILL BE SUBMITTED TO ARBITRATION CONDUCTED BY THE AMERICAN ARBITRATION ASSOCIATION.

NO PERSON SHALL BRING A PUTATIVE OR CERTIFIED CLASS ACTION TO ARBITRATION, NOR SEEK TO ENFORCE ANY PRE-DISPUTE ARBITRATION AGREEMENT AGAINST ANY PERSON WHO HAS INITIATED IN COURT A PUTATIVE CLASS ACTION, OR WHO IS A MEMBER OF A PUTATIVE CLASS WHO HAS NOT OPTED OUT OF THE CLASS WITH RESPECT TO ANY CLAIMS ENCOMPASSED BY THE PUTATIVE CLASS ACTION UNTIL: (i) THE CLASS CERTIFICATION IS DENIED; (ii) THE CLASS IS DECERTIFIED; OR (iii) THE CUSTOMER IS EXCLUDED FROM THE CLASS BY THE COURT. SUCH FORBEARANCE TO ENFORCE AN AGREEMENT TO ARBITRATE SHALL NOT CONSTITUTE A WAIVER OF ANY RIGHTS UNDER THIS AGREEMENT EXCEPT TO THE EXTENT STATED HEREIN.

(R. p. 62). This Arbitration Agreement permits arbitration to be administered by the Financial Industry Regulatory Authority or the American Arbitration Association (AAA). (*Id.*).

Mr. Cooler also acknowledged receipt of the Regions Arbitration Agreement when he signed Regions' Fiduciary Account Maintenance and Signature Form, which provides in bolded font immediately next to the signature line:

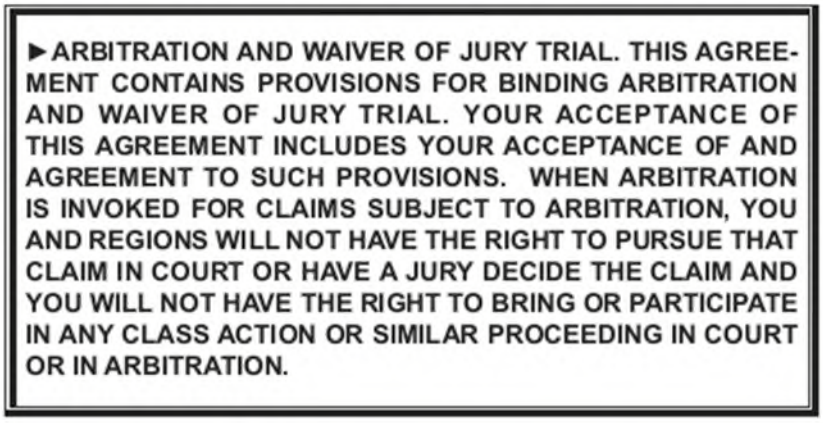
> **By signing, I acknowledge receiving and agree to each and every term, condition, and provision of the Deposit Agreement (including without limitation, the ARBITRATION AND WAIVER OF JURY TRIAL provisions thereof and the provisions for changing the terms thereof) and related disclosures for this account**.

(R. p. 64).

Regions provides customers a copy of their Deposit Agreement at signing, which also contains a bilateral arbitration agreement.[1] Regions' customers are provided a copy of the Deposit

[1] The Deposit Agreement is also available for viewing online at https://www.regions.com/-/media/pdfs/terms/Deposit-Agreement.pdf?6123.

Agreement in the ordinary course of business. (R. p. 165, ¶ 5). The Deposit Agreement contains a bi-lateral arbitration agreement, that binds both parties to arbitration for any potential claims arising out of the customers' dealings with Regions, and provides on page one that, "[t]his Agreement covers any and all deposit accounts you have or have had from time to time with Regions Bank, by whatever name or description, including, but not limited to, checking accounts, savings accounts, money market deposit accounts, time deposit accounts, and certificates of deposit." (R. p. 70–71). The Deposit Agreement, in bold, all caps print, also clarifies in conspicuous type that **"BINDING ARBITRATION** provisions set forth in [the] Agreement also apply to any account, contract, loan, credit, transaction, business, contact, interaction or relationship you may have or have had with us from time to time." (R. p. 70). And that, "You should read this Agreement carefully and keep it with your other account records." (R. p.70). For the avoidance of all doubt, page two of the Deposit Agreement contains the following notice:


►ARBITRATION AND WAIVER OF JURY TRIAL. THIS AGREEMENT CONTAINS PROVISIONS FOR BINDING ARBITRATION AND WAIVER OF JURY TRIAL. YOUR ACCEPTANCE OF THIS AGREEMENT INCLUDES YOUR ACCEPTANCE OF AND AGREEMENT TO SUCH PROVISIONS. WHEN ARBITRATION IS INVOKED FOR CLAIMS SUBJECT TO ARBITRATION, YOU AND REGIONS WILL NOT HAVE THE RIGHT TO PURSUE THAT CLAIM IN COURT OR HAVE A JURY DECIDE THE CLAIM AND YOU WILL NOT HAVE THE RIGHT TO BRING OR PARTICIPATE IN ANY CLASS ACTION OR SIMILAR PROCEEDING IN COURT OR IN ARBITRATION.

(R. p. 71). The Regions Arbitration Agreement further provides that the arbitration shall be administered by the American Arbitration Association (AAA). (R. p. 73). Similar to how he claims he did not receive the Cetera Arbitration Agreement; Mr. Cooler claims to have not received the Deposit Agreement containing the Regions Arbitration Agreement. (R. p. 124–125, ¶ 11-16). Mr.

Cooler admits that he did sign these documents, however, and has never challenged whether the signature is his. (R. p. 124, ¶ 12–13).

When Mr. Cooler brought his granddaughter's case against Appellants, he disregarded the legal effect of the binding and enforceable arbitration agreements that he signed on her behalf. Appellants are now asking this Court to properly apply these binding and enforceable arbitration agreements, find that the Federal Arbitration Act applies, and subsequently compel this case to arbitration.

STANDARD OF REVIEW

"Whether a valid arbitration agreement exists is a matter for judicial determination." *York v. Dodgeland of Columbia, Inc.,* 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013). The appellate court "reviews an arbitrability determination de novo." *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 59, 791 S.E.2d 286, 291 (Ct. App. 2016) (citing *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015)). Factual findings of the circuit court may be reversed for lack of any reasonable evidence. *Id.*

ARGUMENT

The policy of the United States and of South Carolina is to favor arbitration of disputes. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001)). "Unless the parties have contracted otherwise, the [FAA] applies in federal or state court to any arbitration agreement involving interstate commerce." *One Belle Hall Prop. Owners Ass'n, Inc.*, 418 S.C. at, 59–60, 791 S.E.2d at, 291. "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of*

Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)). "In interpreting agreements within the scope of the FAA, 'due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.'" *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004) (quoting *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 714 (Ct. App. 2002)).

I. The Circuit Court Erred In Finding the Arbirtation Agreements Mr. Cooler Entered Into On Behalf of Ms. Lovelace Were Unconsionable and Therefore Unenforceable.

Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131. "[A]greements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Courts may not hold arbitration agreements to a higher standard than any other contract provision. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) ("A state law that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies." (quoting *Allied–Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995)).

In the Order denying Appellants' Motion to Compel, the circuit court improperly found that the Arbitration Agreements were unconscionable. South Carolina defines unconscionability 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." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 85, 749

S.E.2d 139, 148 (Ct. App. 2013). South Carolina law thus requires both procedural and substantive unconscionability to invalidate a contract. *See Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

Substantive unconscionability refers to whether an agreement contains "oppressive, one-sided terms . . . [that] no reasonable person would make and no fair and honest person would accept." *York*, 406 S.C. at 88, 749 S.E.2d at 149–50. Procedural unconscionability exists if there is an "absence of meaningful choice on the part of one party due to one-sided contract provisions." *Id*. at 85, 749 S.E.2d at 148. Although courts may refuse to enforce a contract on unconscionability grounds, this authority is limited. *Maybank v. BB&T Corp*., 416 S.C. 541, 573, 787 S.E.2d 498, 514 (2016) ("[O]nly in rare circumstances has an appellate court invalidated a contract on the basis of unconscionability."). In its Order Denying the Motion to Compel, the circuit court failed to identify any contract provision, much less any part of the Arbitration Agreements that were substantively unconscionable. Instead, the circuit court relied only on alleged procedural unconscionability and found that Mr. Cooler was not as sophisticated as Cetera and Regions.

The circuit court found that the Cetera and Regions Arbitration Agreements were contracts of adhesion; however, a contract of adhesion not rendered per se unconscionable. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26, 644 S.E.2d 663, 670 (2007) ("Adhesion contracts, however, are not per se unconscionable."). Indeed, "the South Carolina Supreme Court has noted the standardization of contracts is 'a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations.'" *See Morgan v. Advance Am.*, No. 4:07-3235-TLW-TER, 2008 WL 4191754, at *15 (D.S.C. Sept. 5, 2008) (quoting *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct.App.1998)). A court's analysis of claims of unconscionability should focus on "whether the arbitration clause is geared towards achieving

an unbiased decision by a neutral decision-maker." *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 368, 887 S.E.2d 534, 541 (Ct. App. 2023) (internal citations omitted). Respondent has provided no evidence to suggest that any arbitration forum would be biased against him.

i. The circuit court erred to the extent it based its finding of unconscionability on Mr. Cooler's perceived lack of sophistication.

Mr. Cooler has already been deemed fit, by a court of competent jurisdiction, to serve as the fiduciary for Ms. Lovelace. (R. p. 20, ¶ 32; R. p. 138–144) ("Petitioner is qualified to serve as Successor Conservator and his appointment as Successor Conservator is in the Minor's best interest."). The appointment of Mr. Cooler was never contested by Ms. Lovelace's Guardian Ad Litem (GAL) and at all times it was known that Mr. Cooler would have the responsibility of controlling the monetary investments and savings of Ms. Lovelace.

In fact, entering into these types of contracts is exactly the type of action that the court contemplated when it appointed Mr. Cooler. (R. p. 142) ("[T]his Order shall be read and construed in pari materia with a Restricted Account Agreement, required to be signed subsequent to the entry of this Order, between the Conservator and one or more financial institutions, and any other such Agreement(s), such Agreement(s) being hereby incorporated by reference herein.").

Regardless of this fact, the circuit court found that Mr. Cooler did not receive the pages of the Cetera New Account Application containing the Cetera Arbitration Agreement or the Regions Deposit Agreement based on his affidavit. (R. p. 9–10). Thus, the circuit court concluded Mr. Cooler "lacked meaningful choice in the ability to negotiate the terms of the arbitration agreement." (Or. at 7; R. p. 11). In doing so, the circuit court completely rejected the evidence presented by Appellants wherein a representative from Cetera and Regions stated that these documents are provided in the ordinary course of business. (R. p. 162–163; 165–166).

More problematic is that the circuit court overlooked the undisputed fact that Mr. Cooler signed the Cetera New Account Application and Regions Fiduciary Account Maintenance and Signature Form. On each of these forms, either directly beside or above his signature, Mr. Cooler was instructed that by signing he was agreeing to arbitrate any claims against Cetera or Regions related to the accounts and agreements. Mr. Cooler cannot hide from information that he could have learned if he had simply read the documents he was signing. *Munoz*, 343 S.C. at 541-42 S.E.2d 360, 365 ("[A] person who can read is bound to read an agreement before signing it."). Moreover, by signing the respective agreements with Cetera and Regions, Mr. Cooler is assumed to have read and understood the terms of the agreement. *Burwell v. S.C. Nat. Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986) ("[E]very 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."); *see also First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) (concluding that "in the absence of showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement'"). Neither Cetera nor Regions was required to explain the terms of the agreements to Mr. Cooler. *See Citizens & S. Nat. Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994) ("The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document.").

ii. The circuit court erred to the extent that it based its finding of unconscionability on lack of notice.

The circuit found that the Cetera Arbitration Agreement was unconscionable because it "did not provide [Mr. Cooler] with conspicuous notice of the arbitration language." (R. p. 11). The circuit court appears to be referencing S.C. Code Ann. § 15-48-10(a) of the South Carolina

Uniform Arbitration Act. This section provides that "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." *Id.* The circuit court determined that "the reference to arbitration [in the Cetera Arbitration Agreement] is included at the end of a long paragraph, with no bold or capital letters." While the Order does not cite S.C. Code Ann. § 15-48-10(a), it appears to be enforcing the notice requirements contained therein.

In *Munoz v. Green Tree Fin. Corp.*, our Supreme Court ruled that the Federal Arbitration Act ("FAA") preempts S.C. Code Ann. § 15-48-10, when the FAA applies. 343 S.C. at 537–38, 542 S.E.2d at 363. The court in *Munoz* made clear that it was specifically referring to the portion of S.C. Code Ann. § 15-48-10 that "requires notice that a contract is subject to arbitration be 'typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract.'" *Id.* at 538, 542 S.E.2d at 363 n.1.

As explained more fully in the forthcoming analysis, the FAA covers the arbitration agreements in this case. Therefore, the notice requirements referenced in the Order cannot invalidate the otherwise enforceable Cetera Arbitration Agreement. Even if the Order is not referencing S.C. Code Ann. § 15-48-10, the Order's enforcement of substantively similar requirements has the effect of "plac[ing] arbitration clauses on an unequal footing with contracts generally" and is preempted by the FAA. *Id.* at 539, 542 S.E.2d at 364 (citing *Allied–Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995)); *see also Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 581 U.S. 246, 247 (2017) (finding that the Kentucky Supreme Court's finding that a power of attorney did not permit a legal representative to enter into an arbitration agreement for someone else singled out arbitration agreements and violated the FAA); *AT&T Mobility LLC*

v. Concepcion, 563 U.S. 333, 339 (2011) (A court may not invalidate an arbitration agreement based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.").

iii. The circuit court erred to the extent it based its finding of unconscionability on the grounds that the facts giving rise to this case occurred prior to Mr. Cooler signing the Cetera and Regions Arbitration Agreements.

The December 7 Order notes on page 3 that the Cetera New Account Application and Regions Fiduciary Account Maintenance and Signature Form completed by Mr. Cooler related to preexisting accounts. (R. p. 7). The Order also notes that Mr. Cooler was merely substituting his name for that Steven Lovelace, the former conservator. (*Id.*) On page 5, the Order appears to base its finding, in part, on the basis that Mr. Cooler "had no choice but to sign the paperwork when he sought to remove Defendant [Steven] Lovelace's name from the account and substitute his own name as Successor Conservator." (R. p. 9). Finally, page 7 of the Order notes that "Plaintiff did not open new accounts; he merely substituted his name on two existing accounts in response to the Probate court appointing him as Successor Conservator for his minor granddaughter." (R. p. 11).

This finding in the December 7 Order disregards the fact that the Cetera New Account Application and Regions Fiduciary Account Maintenance and Signature Form signed by Mr. Cooler explicitly informed him that he was signing agreements that require him to arbitrate claims against Cetera and Regions. With full knowledge that Mr. Lovelace had withdrawn funds from the Cetera and Regions accounts, Mr. Cooler entered into arbitration agreements with Cetera and Regions. As noted in Section I. i. above, Mr. Cooler is presumed to have read and understood what he was signing.

To the extent the circuit court's Order is based on the preexisting legal relationship between the conservatorship and Cetera and Regions, the circuit court overlooked the fact that potential claims against Cetera and Regions, relating to Ms. Lovelace's funds, were already subject to

binding arbitration provisions. Steven Lovelace signed similar agreements with Cetera and Regions when he was appointed conservator in 2016, when he established these accounts on behalf of his daughter. (R. p.191[2]–199[3]). Like Mr. Cooler, Mr. Lovelace's signature appears on the 2016 Cetera New Account Application, which clearly and prominently provides:

> I have received, read, understand, and agree to the Disclosures and Agreement above and the Important Disclosures, Customer Agreement and Important Information About Your Cetera Investment Services LLC Relationship as well as the Privacy Promise that are part of this New Account Application packet, and **I am aware that Section 21 of the Customer Agreement on Page 8 contains an agreement to arbitrate disputes.**

(R. p. 196) (emphasis in original). Likewise, the 2016 Regions Account Package contains the following language in the paragraph preceding Mr. Lovelace's signature:

> By signing below, each party (i) acknowledges receiving and agrees to each and every term, condition and provision of the Regions Bank (the "Bank") Deposit Agreement (including, without limitation, the ARBITRATION AND WAIVER OF JURY TRIAL provisions thereof and the provisions for changing the terms thereof) and related disclosures for this account . . . .

(R. p. 198) (emphasis in original). For the same reasons that Mr. Cooler entered into binding agreements to arbitrate, Mr. Lovelace did as well. Claims relating to the funds in the conservatorship accounts have always been subject to arbitration.

II. The Circuit Court Erred In Finding That These Agreements Lacked Consideration.

The circuit court's December 7 Order also found that the agreements lacked consideration because Mr. Cooler did not open any new accounts, he merely substituted his name on Ms.

[2] Like the Regions Fiduciary Account Maintenance and Signature Form signed by Mr. Cooler, Mr. Lovelace acknowledged receiving and agreeing to the Regions Deposition Agreement referenced in the Regions Account Package.

[3] Like the account application signed by Mr. Cooler in 2023, the New Account Application signed by Mr. Lovelace was imaged for purposes internal record keeping. The imaging team does not scan the entire New Account Application and stops after the signature page.

Lovelace's existing accounts. (R. p. 12). Long-standing interpretation of what rises to the level of sufficient consideration acknowledges that mutually binding promises consitute sufficient consideration to render a contract enforceable. *Furman Univ. v. Waller*, 124 S.C. 68, 117 S.E. 356, 362 (1923) ("Promise for promise is a sufficient consideration."). Indeed, this court has previously found that mutual agreements to arbitrate constitute valid consideration. *St. Aubin v. THI of S.C. at Camp Care*, LLC, No. 2020-000357, 2023 WL 3614283, at *1 (S.C. Ct. App. May 24, 2023). Therefore, the parties mutual promises to arbitrate their claims is sufficient consideration.

Furthermore, valuable consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012); *see also Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 463 (Minn. Ct. App. 2001)[4] (*quoting Deli v. Hasselmo*, 542 N.W.2d 649, 656 (Minn.App.1996), review denied (Minn. Apr. 16, 1996)) ("Consideration is 'something of value given in return for a performance or promise of performance,' and requires that a contractual promise be the product of a bargain."). Here, Mr. Cooler was required to enter into the respective agreements with Cetera and Regions in order to continue banking and investing with each. In the analagous case of *Towles v. United HealthCare Corp.*, this Court found that ongoing employment was sufficient consideration to enforce an arbitration agreement against employees who challenged their contracts. 338 S.C. 40, 524 S.E.2d 845 (Ct. App. 1999). Similarly, here, Mr. Cooler maintained Ms. Lovelace's banking relationships

[4] The Cetera New Account Application indicates that the contract is controlled by Minnesota law; whether Minnesota law applies is not a question before this court, but Appellants analyze both to demonstrate that both Minnesota and South Carolina law require compelling this case to arbitration. *See* Sec. III *infra*.

with Regions and Cetera after taking over as conservator. Under the *Towles* analysis, maintaining the benefits of these banking and investment relationships readily satisfies sufficient consideration and demonstrates Mr. Cooler's acceptance of these agreements for which the Arbitration Agreements must be enforced.

III. The Circuit Court Erred In Denying Respondent's Motion to Compel Arbitration Because Respondent's Claims Are Encompassed By the Arbitration Agreements and the Agreements Are Enforceable.

Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131. For the reasons stated above, the contract principles raised by Respondent, to avoid the obligation to arbitrate these claims fail. Here, this Court must determine whether the factual allegations underlying Respondent's claims are within the scope of what is contemplated by the Arbitration Agreements. *Id.* at 7, 791 S.E.2d at 131. The heavy presumption in favor of arbitrability requires that when the scope of an arbitration clause is open to question, a court must decide the question in favor of arbitration. *Id.* (citing *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013)).

The Cetera New Account Application contains a Minnesota choice of law provision. (R. p. 62, ¶19).[5] Like South Carolina, Minnesota's public policy favors arbitration. *Dunshee v. State Farm Mut. Auto. Ins. Co.*, 303 Minn. 473, 477, 228 N.W.2d 567, 570 (1975). The framework for determining whether an arbitration agreement is enforceable is materially the same in Minnesota as it is in South Carolina—state law legal principles relating to contract formation govern whether an agreement to arbitrate was validly entered. *Mainville v. Coll. Town Pizza, Inc.*, 629 F. Supp. 3d 913, 920 (D. Minn. 2022) ("Although state contract law governs whether an enforceable agreement

[5] This analysis does not apply to the Regions Arbitration Agreement.

exists, federal law governs whether the dispute is within the scope of the parties' arbitration agreement.") Like South Carolina law, Minnesota law places the burden on the party seeking to avoid the arbitration to demonstrate why no arbitration agreement was reached. *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 349 (Minn. 2003).

i. Respondent entered into a valid arbitration agreement with Appellants.

The December 7 Order erred in finding no valid arbitration agreement was reached between Mr. Cooler and Cetera and Regions, respectively.[6] It is undisputed that Mr. Cooler signed the Cetera New Account Application and the Regions Fiduciary Account Maintenance and Signature Form on or around January 30, 2023. These documents also verify that Mr. Cooler was informed that he was agreeing to arbitrate these claims. (R. p. 46–52; 63–64).

Unable to deny his signature, Mr. Cooler avers that he was not provided the final three pages of the Cetera New Account Agreement, containing the Cetera Arbitration Agreement, nor the Regions Deposit Agreement, containing the Regions Arbitration Agreement. (R. p. 124). Contrary to the circuit court's assertion, Appellants submitted two affidavits controverting Mr. Cooler's affidavit. Representatives of Cetera and Regions filed affidavits attesting to the fact that Mr. Cooler would have received these documents in the ordinary course of business, and the affiants can think of no reason why Mr. Cooler would not have. (R. p. 162–163 (¶ 6–8); 165–166 (¶5–6)).

Under South Carolina or Minnesota law, regardless of whether Mr. Cooler reviewed the Cetera Arbitration Agreement or the Regions Arbitration Agreement, prior to signing the Cetera New Account Application or the Regions Fiduciary Account Maintenance and Signature Form, he

[6] To the extent the circuit court based its determination that the arbitration agreements were unconscionable due to its findings that Mr. Cooler did not see the arbitration agreements, for the reasons set forth in this section that finding was in error.

nevertheless entered into the Arbitration Agreements by acknowledging he had reviewed them through affixing his signature.

As it relates to Cetera, the case of *Bam Navigation, LLC v. Wells Fargo & Co.*, No. 20-CV-1345 (NEB/ECW), 2021 WL 533692 (D. Minn. Feb. 12, 2021) is compelling. In *Bam Navigation*, the representative for the plaintiff applied for an account with the defendant bank. *Id.* at *1. On the third page of that application, the plaintiff agreed to a list of terms and conditions. *Id.* Specifically, the plaintiff agreed to be bound by a separate "account agreement that includes the Arbitration Agreement." *Id.* The plaintiff also acknowledged receipt of the account agreement. *Id.* The court in *Bam Navigation* expressly rejected the plaintiff's arguments that he could not be bound by the arbitration agreements because he never signed the arbitration agreement and claimed to have never received the account agreement. *Id.* at *3.

There, the court ruled that "when a contract incorporates another document by reference, a party cannot avoid its obligations under the incorporated document by claiming it did not read or receive it. *Id.* at *3 (internal citations omitted). Like Mr. Cooler was on notice of the Arbitration Agreement at issue here, the court in *Bam* found that the plaintiff, "read and signed the Application, which put [the plaintiff] on notice not only of the [a]ccount [a]greement, but also the fact that it contained an arbitration agreement." *Id.*

As it relates to Regions, South Carolina courts have enforced arbitration agreements when a plaintiff has claimed to not have actual notice of the arbitration agreement. *See, e.g., Jenkins v. CitiFinancial, Inc.*, No. CV 2:05-1199-PMD-GCK, 2007 WL 9753133, at *6 (D.S.C. Jan. 16, 2007) (rejecting the argument that because plaintiff did not read the arbitration agreement, she did not accept the offer to arbitrate). In the analogous cases of *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) and *Jenkins v. CitiFinancial, Inc.*, No. CV 2:05-

1199-PMD-GCK, 2007 WL 9753133 (D.S.C. Jan. 16, 2007), employees attempted to avoid arbitration by claiming, in part, that they never received actual notice of the arbitration provision. *Towles*, 338 S.C. at 34, 524 S.E.2d at 842; *Jenkins*, 2007 WL 9753133, at *2.

The plaintiff in *Towles* claimed to have never received actual notice of the arbitration provisions. 338 S.C. at 37, 524 S.E.2d at 844. Likewise, the plaintiff in *Jenkins* alleged she was never given an opportunity to read the employee handbook, or the receipt form she signed, and that her manager told her that the receipt form was solely for purposes of processing payroll and benefits. 2007 WL 9753133 at *2. The *Jenkins* plaintiff, like Mr. Cooler, signed the receipt form stating she received the employee handbook containing the arbitration agreement, and then claimed she never had actual notice of the arbitration agreement. *Id.* Similarly, the plaintiff in *Towles* signed a Code of Conduct and Employee Handbook Acknowledgement form which summarized the arbitration policy. *Towles*, 338 S.C. at 34, 524 S.E.2d at 842. The courts rejected these arguments.

In both *Towles* and *Jenkins*, the respective court concluded that by signing the acknowledgment or receipt forms, neither plaintiff could "legitimately claim [the defendant] failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document." *Towles*, 338 S.C. at 39, 524 S.E.2d at 845; *Jenkins*, 2007 WL 9753133, at *4.

Just like the plaintiffs in *Jenkins* and *Towles*, Mr. Cooler was put on notice of the of the Regions Arbitration Agreement when he signed the Fiduciary Account Maintenance and Signature Form. Regions informed Mr. Cooler, immediately next to his signature, in bold and conspicuous text that he "acknowledged receiving and agree[ing] to each and every term, condition, and

provision of the Deposit Agreement (including, without limitation, the ARBITRATION AND WAIVER OF JURY TRIAL provisions . . .)". (Mot. to Compel. Ex. C; R. p. 64). Thus, he cannot now claim lack of notice. *See Citizens & S. Nat. Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994) ("The law does not impose a duty on the bank to explain to an individual what he could learn from simply reading the document.").

ii. The arbitration agreements cover the dispute.

To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Parsons*, 418 S.C. at 7, 791 S.E.2d at 131; *Lynch v. Condominiums of Buena Vista, Inc.*, No. A22-0864, 2023 WL 2230342, at *3 (Minn. Ct. App. Feb. 27, 2023), review denied (June 20, 2023) (quoting *Amdahl v. Green Giant Co.*, 497 N.W.2d 319, 322 (Minn. App. 1993) ("When considering a motion to compel arbitration, the court's inquiry is limited to (1) whether a valid arbitration agreement exists, and (2) whether the dispute falls within the scope of the arbitration agreement")).

The Cetera Arbitration Agreement broadly covers "any dispute" between Mr. Cooler and Cetera "arising out of this agreement." Similarly, the Regions Arbitration Agreement applies to "any controversy, claim, counterclaim, dispute or disagreement between you and [Regions] . . . ." (R. p. 72). This language applies to any account; any alleged contract or tort arising out of or relating in any way to any account, any agreement, any transaction, any advertisement or solicitation, or Mr. Cooler's business, interaction or relationship with Regions; any property loss or damage; or any claim, demand or request for compensation or damages from or against Regions. (R. p. 72–73).

Mr. Cooler brings claims against some or all of the Defendants alleging causes of action for negligence/gross negligence, violation of S.C. Code Ann. § 62-5-420, negligent hiring/training/supervision, breach of contract, conversion, and violation of the South Carolina Unfair Trade Practices Act arising out Cetera and Regions handling of the funds subject to the conservatorship. The broad language of "any dispute" and "any controversy" or "claim" represents an unambiguous, mutual intent to arbitrate. *See York*, 406 S.C. at 81, 749 S.E.2d at 146 (finding that contractual language using "any and all disputes" "indicated the parties' unambiguous, mutual intent to arbitrate"). Consequently, these claims fall within the broad language of the arbitration agreements and the Court must compel arbitration. *Id.* at 95, 749 S.E.2d at 153 ("Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute[,]" arbitration should generally be ordered.) (internal citations omitted); *Minnesota Teamsters Pub. & L. Enf't Employees' Union, Loc. No. 320 v. Cnty. of St. Louis*, 611 N.W.2d 355, 358 (Minn. Ct. App. 2000) ("Doubts concerning the scope of arbitrable issues are resolved in favor of arbitration.").

The December 7 Order found that these claims were not covered under the Cetera Arbitration Agreement because that provision only applies to any dispute between Cetera and Mr. Cooler arising out of *that* agreement and could not cover facts prior to Mr. Cooler's signing of the Cetera New Account Application. (December 7, 2023, Or. at 4; R. p. 8). This finding was error.

The Cetera Arbitration Agreement contains broad language applying to *any dispute* arising out of the agreement, "where a broad arbitration clause is involved, a dispute must be referred to arbitration as long as the underlying factual allegations simply touch matters covered by it." *Valspar Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 104 F. Supp. 3d 977, 981 (D. Minn. 2015) (internal citations omitted); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598,

553 S.E.2d 110, 119 (2001) ("A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained."). Here, all claims stem from Appellants' alleged actions related to the conservatorship accounts and the Cetera New Account Application lays out the terms that govern the rights of the parties to the accounts. Therefore, the factual allegations inherently touch on issues covered by the Cetera Arbitration Agreement because they are related to the parties' relationship with the accounts.

This analysis only considers the Cetera Arbitration Agreement, because the Regions Arbitration Agreement considers and thus covers, claims and controversies related to any account maintained by Mr. Cooler, including disputes that arise outside of Mr. Cooler's agreement with Regions. Because the broad language of both Arbitration Agreements contemplates and covers Respondent's claims, the circuit court's ruling otherwise was reversible error, and Appellants ask that this Court compel this case to arbitration.

IV. The Circuit Court Erred by Refusing to Ackowledge that the Federal Arbitration Act Applies to this Action.

The circuit court did not address the application of the Federal Arbitration Act ("FAA"). The FAA provides that, "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

The FAA manifests "an emphatic federal policy in favor of arbitral dispute resolution," and requires that courts "rigorously enforce agreements to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 631 (1985). When the FAA applies, federal substantive law regarding arbitrability controls. *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100,

108, 739 S.E.2d 209, 213 (2013) (citing *Mitsubishi*, 473 U.S. at 626); *see also Churchill Env't & Indus. Equity Partners, L.P. v. Ernst & Young, L.L.P.*, 643 N.W.2d 333, 335–36 (Minn. Ct. App. 2002) ("The FAA creates a body of federal substantive law applicable to any arbitration agreement within the coverage of the Act.") (internal citations omitted).

A litigant can compel arbitration under the FAA where there is:

> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Adkins v. Labor Ready, Inc., 303 F.3d 496, 500–01 (4th Cir. 2002); *Churchill Env't & Indus. Equity Partners, L.P.*, 643 N.W.2d at 337 ("When a party moves to compel arbitration, the court is limited to determining whether an arbitration agreement exists and, if so, whether the dispute falls within the scope of that agreement."). All criteria are met in this case. Criteria one and four are readily satisfied as there is obviously a dispute between the parties and Respondent brought these claims in state court rather than in arbitration. Appellants addressed criterion two in Section III *supra*. Now, Appellant addresses Criterion three as follows.

"Generally, any arbitration agreement affecting interstate commerce is subject to the FAA." *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121, 747 S.E.2d 461, 464 (2013) (internal citations omitted). "The phrase 'involving commerce' as used in the FAA is 'the functional equivalent of the more familiar term "affecting commerce"—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.'" *Hicks Unlimited, Inc. v. UniFirst Corp.*, 439 S.C. 623, 633, 889 S.E.2d 564, 569 (2023) (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003)); *see also DSAI, Inc. v. Mkt. Direct*, LLC, No. CIV. 06-4545 MJD/SRN, 2007 WL 551614, at *3 (D. Minn. Feb. 21, 2007)

(same). Under the FAA, Congress' Commerce Clause power may be exercised in individual cases without a showing of any specific effect upon interstate commerce, if the economic activity in question would represent a general practice subject to federal control. *Hicks*, 439 S.C. at 634, 889 S.E.2d at 569; *DSAI, Inc.*, 2007 WL 551614 at *3. The South Carolina Supreme Court has determined that the banking industry is "an activity that is, in general, subject to federal control." *Id.* at 634, 889 S.E.2d at 569.

Where parties from different states are involved, interstate commerce is present. *Cape Romain Contractors, Inc.*, 405 S.C. at 123–24, 747 S.E.2d at 465 (noting that use of materials and services from out-of-state sources is an indicator of interstate commerce); *DSAI, Inc.*, 2007 WL 55164 at *3 (finding that a dispute between a Connecticut company and two Minnesota residents and their Minnesota-based business implicated interstate commerce). Respondent's allegations acknowledge that Regions and Cetera are out of state defendants. (R. p. 1 ¶ 4–5). Respondent has never argued that the FAA should not apply, and the December 7 Order did not address this issue. Because all four criteria satisfied, the FAA applies, its emphatic policy of favoring arbitration of disputes controls, and a court "has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." *Cape Romain Contractors, Inc.*, 405 S.C. at 128, 747 S.E.2d at 468 (citing *Adkins*, 303 F.3d at 500). Thus, the only proper remedy here is to compel this case to arbitration.

V. The Circuit Court Erred When It Determined that Cetera and Regions Waived Their Right to Arbitrate these Claims by Signing Restricted Account Agreements.

The December 7 Order found that Regions and Cetera waived the right to enforce the arbitration agreements based on a conflated reading of a Restricted Account Agreement that was signed only by a Cetera employee and then-conservator Steven Lovelace, and the 2023 Beaufort County Probate Court Order appointing Mr. Cooler as successor conservator. (R. p. 12–13). As

noted previously, no Restricted Account Agreement with Regions has been identified. The circuit court cited to language in the Restricted Account Agreement signed in 2016 that requires it be construed *in pari materia* with pertinent Court Orders. (R. p. 8–9). The Order then focuses on the language contained in the January 2023 Probate Court Order appointing Mr. Cooler as successor conservator which provides that, "Any financial institution entering into a Court Restricted Account Agreement in so doing submits itself to the personal jurisdiction of *this* [Beaufort County Probate] Court." (R. p. 12; R. p. 141) (emphasis added). The Order then determined Appellants' arbitration agreements were voided by this language in the probate court order appointing Mr. Cooler. (R. p. 13).

As was argued at the hearing on November 15, 2023, the Beaufort County Probate Court Order, on its face, extends personal jurisdiction over financial institutions by the Probate Court and not the Court of Common Pleas. (R. p. 218). Additionally, Counsel for Mr. Cooler in this action represented the GAL in the Probate Court Proceedings. Thus, it is likely Plaintiff's counsel drafted this language contained in the Beaufort County Probate Order. None of the Appellants were a party to the probate proceedings and were not provided any opportunity to protect their rights, including the right to enforce its own agreements with Respondent.

Appellants know of no authority that would support a finding of waiver under these facts. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *McIntyre v. Sec. Comm'r of S.C.*, 425 S.C. 439, 449, 823 S.E.2d 193, 198 (Ct. App. 2018) (quoting *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008)). Appellants received no notice of this in the underlying probate court proceedings before that court purportedly stripped them of its contractual rights to demand arbitration.

Instead, the language from the Beaufort County Probate Court Order appointing Mr. Cooler as successor conservator that purportedly voided Appellants' right to demand arbitration is likely explained by S.C. Code Ann. § 62-5-411 of the South Carolina Probate Code. This section provides "[b]y accepting appointment, a conservator submits *personally to the jurisdiction* of the court in any proceeding relating to the conservatorship estate. Notice of any proceeding must be given or waived pursuant to Sections 62-1-401 and 62-1-402. *Id.* (emphasis added); *see also Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, (2000) ("[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions."). The Beaufort County Probate Court Order is likely just reinforcing this section of the Probate Code and did not contemplate voiding valid arbitration agreements. As such, the circuit court's assertion that these agreements limit the adjudication of Respondent's claims solely to the circuit court are without merit. All this provision of the 2023 Beaufort County Probate Court Order appointing Mr. Cooler as successor conservator does is ensure that any conservator appointed by the Beaufort County Probate Court remains subject to the personal jurisdiction of that court for matters stemming from management of the conservator estate.

VI. The Circuit Court Erred in Applying a Clear and Convincing Standard.

The December 7 Order applied a clear and convincing evidence standard when analyzing whether the parties entered into an agreement to arbitrate. (R. p. 8). The December 7 Order cites to *Hill v. Emp. Res. Grp., LLC* 816 F. App'x 804, 809 (4th Cir. 2020) for that standard. However, the clear and convincing standard applied in *Hill* is not applicable in this case.

Applying the state law of Virginia, Kentucky, West Virginia, and Ohio, *Hill* applied a clear and convincing standard because that case involved missing arbitration agreements for seventy-one various plaintiffs. *Hill*, 816 F. App'x at 808. Under the laws of Virginia, Kentucky, West Virginia, and Ohio, clear and convincing evidence is required to establish the existence of a missing or lost instrument through parole evidence. *Id.* *Hill* applied the clear and convincing standard to the motion for summary judgment because the court determined it must "view the evidence presented through the prism of the substantive evidentiary burden." *Id.* at 809 (internal citations omitted.) No similar evidentiary burden exists in this case.

Summary judgment orders of the United States District Court for the District of South Carolina, when considering whether parties entered into an arbitration agreement, have not applied a clear and convincing evidence standard. *Webb v. Oaktree Med. Ctr., P.C.*, No. CV 3:18-924-JMC-SVH, 2018 WL 4519338, at *2 (D.S.C. May 16, 2018), report and recommendation adopted, No. 3:18-CV-00924-JMC, 2018 WL 3153614 (D.S.C. June 28, 2018); *Gordon v. TBC Retail Grp., Inc.*, No. 2:14-CV-03365-DCN, 2016 WL 4247738, at *4 (D.S.C. Aug. 11, 2016). Here, the circuit court should have applied a *prima facie* standard in determining whether sufficient evidence existed to meet Appellants' initial burden of demonstrating that an agreement to arbitrate was reached. *Gordon v. TBC Retail Grp., Inc.*, No. 2:14-CV-03365-DCN, 2016 WL 4247738, at *6 (D.S.C. Aug. 11, 2016). This misapplication of the proper standard by the circuit court is an error of law warranting reversal by this Court of the December 7 Order Denying the Motion to Compel.

CONCLUSION

Pursuant to the foregoing, Appellant asks this Court to find that the Arbitration Agreements at issue are not unconscionable and are therefore enforceable; that there was consideration to support the arbitration agreements; that Respondent and Appellants entered into binding arbitration

agreements; that the FAA applies to these claims; that Appellants never waived the jurisdiction of the arbitral forum; and that the circuit court improperly applied the clear and convincing evidence standard when analyzing whether there was an agreement to arbitrate. Thus, Appellants request the Court reverse the circuit court's order Denying the Motion to Compel and compel this case to arbitration.

Respectully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ Andrew Rawl
Cory E. Manning (SC Bar No. 14702)
Cory.manning@nelsonmullins.com
Andrew Rawl (SC Bar No. 102807)
Andrew.rawl@nelsonmullins.com
Mary S. Williams (SC Bar No. 105883)
Mary.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
Tel (803) 799-2000
Fax (803) 256-7500

Attorneys for Appellants

January 22, 2025
Columbia, South Carolina

RECEIVED
Jan 24 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2023-CP-07-00646
App. Case No: 2024-000869

Amber Leigh Lovelace, by and through her
Conservator Richard Cooler, ...Respondent,

v.

Steven Lovelace, Regions Bank,
Cetera Investment Services d/b/a Regions Investment
Services, and Christopher Lazurek, ...Defendants.

Of whom Regions Bank,
Cetera Investment Services d/b/a Regions Investment
Services, and Christopher Lazurek are, ...Appellants.

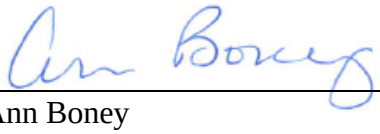
Proof of Service

I, the undersigned Paralegal, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the pleadings hereinbelow specified, by electronic mail.

Pleadings:	Appellants' Corrected Final Brief
Served:	HARVEY & BATTEY, P.A. Ashley H. Amundson aamundson@harveyandbattey.com Thomas A. Holloway tholloway@harveyandbattey.com 1001 Craven Street

Post Office Box 1107 (29901)
Beaufort, SC 29902
Tel (843) 524-3109
Fax (843) 524-6973
Attorneys for Respondent

NELSON MULLINS RILEY & SCARBOROUGH LLP



Ann Boney
Paralegal

January 24, 2025
Columbia, South Carolina

Ann Boney

From: Ann Boney
Sent: Friday, January 24, 2025 12:22 PM
To: aamundson@harveyandbattey.com; tholloway@harveyandbattey.com
Cc: Cory Manning; Andrew Rawl; Mary Williams
Subject: RE: Lovelace v. Lovelace, et al. - Appellate Case No. 2024-000869
Attachments: Appellants' Final Brief (corrected).pdf

Dear Counsel,

Attached, and served upon you as Counsel for the Respondent, please find Appellants' Corrected Final Brief in the above referenced matter. The correction changes "INITIAL" to "FINAL" on the cover page.

Please let us know if you have any questions.

Thank you,
Ann Boney
Paralegal

_____

Ann Boney
Paralegal
Nelson Mullins Riley & Scarborough LLP
Direct Dial: 803.255.5502
Mobile: 803.556.8717

From: Ann Boney
Sent: Wednesday, January 22, 2025 2:54 PM
To: aamundson@harveyandbattey.com; tholloway@harveyandbattey.com
Cc: Cory Manning Cory.Manning@nelsonmullins.com; Andrew Rawl <andrew.rawl@nelsonmullins.com>; Mary Williams <mary.williams@nelsonmullins.com>
Subject: Lovelace v. Lovelace, et al. - Appellate Case No. 2024-000869

Dear Counsel,

Attached, and served upon you as Counsel for the Respondent, please find Appellants' Final Brief and Final Reply Brief in the above referenced matter.

Thank you,
Ann Boney
Paralegal

NELSON MULLINS

ANN BONEY PARALEGAL
ann.boney@nelsonmullins.com

MERIDIAN | 17TH FLOOR
1320 MAIN STREET | COLUMBIA, SC 29201
T 803.255.5502 F 803.256.7500
NELSONMULLINS.COM VCARD