

2012-213397

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J. C. Nicholson, Jr., Circuit Court Judge
Case No.: 2009-CP-10-6873

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DEC 10 2012

S.C. Supreme Court

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A., ... Respondents,

v.

Amy Meyer, ... Petitioner.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance, ... Third Party Defendants.

**APPENDIX
VOLUME I of III**

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843) 972-0313
Facsimile: (888) 519-0934
Email: nbloodgood@fosterfoster.com
Attorneys for the Petitioner

Cherie Blackburn, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, SC 29401
Telephone: (843) 577-9440
Facsimile: (843) 720-1777
Email: cblackburn@nexsenpruet.com
Attorneys for Respondent

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**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Charleston County
Honorable J.C. Nicholson, Jr., Circuit Judge
Civil Action No.: 2009-CP-10-6873

Justin O'Toole Lucey and Justin O'Toole Lucey, P.A.,

Appellants,

v.

Amy Meyer,

Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third-Party Defendants.

**RECORD ON APPEAL
(VOLUME 1 OF 2)**

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, LLC
3875 Faber Place Drive, Suite 204
North Charleston, SC 29405
Telephone: (843) 744-3033
Telecopier: (843) 577-0434
E-Mail: nbloodgood@fosterfoster.com

Attorneys for Respondent

Cherie Blackburn, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.577.9440
Telecopier: 843.720.1777
E-Mail: cblackburn@nexsenpruet.com

Attorneys for the Appellants

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STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Plaintiffs,

vs.

AMY MEYER,

Defendant and Third Party
Plaintiff,

vs.

LORCAN LUCEY, GMAC MORTGAGE
CORPORATION, CITI MORTGAGE, INC.,
AND JOHN DOE FINANCE

Third Party Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2009-CP-10-6873

FILED
2009 DEC 11 AM 11:41
JULIE J. ARMSTRONG
CLERK OF COURT

ORDER
TO SEAL PLEADINGS

This matter comes before me upon Motion of Defendant and Third Party Plaintiff Meyer filed December 1, 2009, requesting that this Court seal her Answer, Counterclaims, and Third Party Complaint pursuant to Rule 41.1. SCRPC. Plaintiffs, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A., consent to the Motion and further request that this Court likewise seal any answer filed by Plaintiff's to Defendant's Counterclaims in this case and any future responsive pleadings.¹

Findings of Facts

1. This case involves a dispute between a law firm, its principal attorney, and its former associate attorney, and this motion is made to ensure that the parties are able to

¹ Plaintiffs have a Motion to Compel Arbitration pending with the Court which, if granted, would prevent the need for filing responsive pleadings and sealing answers. A hearing on this Motion has not yet been scheduled.

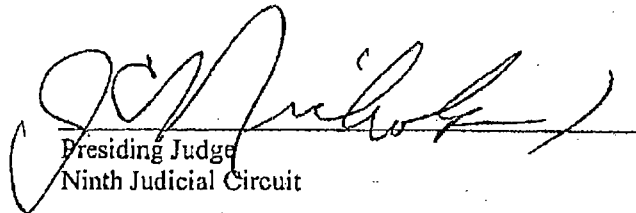
protect private and proprietary information and that the South Carolina Rules of Civil Procedure are fairly applied.

2. There are significant professional concerns to this lawsuit as both parties are members of the South Carolina Bar.
3. Plaintiffs, in their Complaint, complain that Defendant's allegations (as originally set forth in a proposed draft Complaint and now contained in Defendant's Answer, Counterclaims and Third Party Complaint) contain confidential and attorney/client protected information belonging to the law firm that should not be disclosed by filing a pleading of public record.
4. Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration on November 2, 2009, to prevent the filing of the material contained in Defendant's draft Complaint. However, on November 30, 2009, Defendant filed the material in the form of her Answer, Counterclaims and Third Party Complaint against Plaintiffs.
5. Defendant maintains that has not violated the South Carolina Rules of Professional Conduct by filing her Counterclaims against Plaintiffs in the public record. Defendant asks this Court to seal her Answer, Counterclaims and Third Party Complaint to protect any potential client interests.
6. Plaintiffs have filed a Motion to Compel Arbitration with the Court, however, to the extent Plaintiffs are required to file a responsive pleading to Defendant's Counterclaims, Plaintiffs ask this Court to seal such pleading and any future responsive pleadings filed by the parties.
7. There are no other alternatives that would protect the information and potential client interests.

8. The public interest is best served by granting this Motion to the extent that any information could possibly be construed as affecting a client's interest or confidential information.

Conclusions of Law

Based upon the findings of fact listed above, the requirements of Rule 41.1. SCRPC have been met. Defendant's Motion to Seal is granted and it is ordered that Defendant's Answer, Counterclaims, and Third Party Complaint shall be placed under seal. Likewise, Plaintiffs' request that any answer it files to the Counterclaims be filed under seal is granted. Therefore, it is further ordered that Plaintiffs' answer to Defendant's Counterclaim and any future responsive pleading shall be placed under seal.


Presiding Judge
Ninth Judicial Circuit

December 10, 2009

Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY,
JUSTIN O'TOOLE LUCEY, P.A.,

) Case No. 2009-CP-10-6873

PLAINTIFFS,

ORDER DENYING PLAINTIFFS'
MOTION TO COMPEL
ARBITRATION

vs.

AMY MEYER,
DEFENDANT AND
THIRD PARTY PLAINTIFF,

vs.

LORCAN LUCEY,
GMAC MORTGAGE CORPORATION,
CITIMORTGAGE, INC., AND
JOHN DOE FINANCE

THIRD PARTY DEFENDANTS.

2010 JAN 25 PM 2:39
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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This matter came before the Court at a hearing on December 9, 2009 on Plaintiffs' Motion to Compel Arbitration. Present at the hearing were counsel for Plaintiffs, Cherie Blackburn, Esq., and counsel for Defendant, Nancy Bloodgood, Esq. Plaintiffs assert Defendant must arbitrate all controversies between all of the parties under the Federal Arbitration Act ("FAA"). Conversely, Defendant asserts that the FAA does not apply because interstate commerce is not involved or affected. Both parties agree for different reasons that the South Carolina Uniform Arbitration Act ("SCUAA") does not apply in this case.

Having reviewed the pleadings (including the complaint and answer filed under seal), briefs, legal authorities and exhibits submitted by the parties, and having heard the oral arguments of counsel, the Court agrees that the SCUAA does not apply or require arbitration between the parties. Therefore, the issues to be decided by the Court is whether the FAA applies

to the case at bar and whether the arbitration clauses is valid and enforceable. Upon careful consideration, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Justin O'Toole Lucey ("Lucey") is an attorney licensed to practice law in the state of South Carolina with his principal place of business at 415 Mill Street, Mount Pleasant, South Carolina.

2. Plaintiff Justin O'Toole Lucey, P.A. ("Lucey law firm") is a law firm with its principal place of business located at 415 Mill Street, Mount Pleasant, South Carolina.

3. The Lucey law firm does not have offices outside of the state of South Carolina, and Lucey is the principal attorney in the Lucey law firm.

4. In January 2006, the Lucey law firm hired Defendant Amy Meyer ("Meyer") as an associate attorney. Ms. Meyer is only licensed to practice law in South Carolina.

ger
5. After being employed for several months with the law firm, the Lucey law firm presented Meyer a written employment agreement in June 2006 which contained an arbitration clause in the middle of the second page of the agreement in regular type. The arbitration clause, among other things, precluded the calling of witnesses. Counsel for Meyer indicated that the unredacted 2006 employment agreement would be filed under seal following the hearing.¹

6. In addition to other employment related benefits and matters, the 2006 employment agreement set forth a base salary as well as a salary bonus structure for contingency cases Meyer worked on for the Lucey law firm.

¹ This 2006 employment agreement and a subsequent amendment were provided to the Court at the hearing but were not filed at that time as the Court had not yet signed the Order to Seal.

7. Thereafter, in May 2007, the Lucey law firm and Meyer amended their employment agreement for Meyer's salary bonus for a complex, multi-family construction defect case filed in Charleston County, South Carolina (referred to at the hearing by Plaintiffs' counsel and in this Order as "Ocean Club")².

8. During the years of 2006, 2007, 2008, and 2009, Meyer worked on the Ocean Club case.

9. The Ocean Club case arose out of a construction project on the Isle of Palms, Charleston County, South Carolina. Some parties to the litigation were domiciled in states other than South Carolina, and some witnesses deposed in the Ocean Club case were also domiciled outside of South Carolina. Additionally, insurance companies providing defenses and indemnification were domiciled in states other than South Carolina, some of which paid proceeds to settle the Ocean Club case.

10. The Lucey law firm made intermittent payments toward Meyer's salary bonuses for the Ocean Club case during 2008 and 2009 as defendants settled out and/or as the Lucey law firm collected its attorney's fees earned.

11. Plaintiffs do not allege, did not argue at the hearing, and have provided no evidence that any salary payments from the Lucey law firm to Meyer originated from an out-of-state bank account of the Lucey law firm.

12. Further, Plaintiffs do not allege, did not argue at the hearing, and have provided no evidence that the transactions between the Lucey law firm and Meyer for payment of Meyer's salary or salary bonuses involved any out-of-state bank accounts under the custody or control of the Lucey law firm, Lucey, or Meyer.

² The Ocean Club case is part of the record before the Court through the pleadings filed by the parties which have been reviewed by the Court.

13. On July 20, 2009, the Ocean Club case was settled, and on July 22, 2009, Meyer's employment with the Lucey law firm terminated.

14. Beginning in August 2009, Meyer's attorney made demands to Lucey's and the Lucey law firm's attorney for payment of salary bonuses relating to Meyer's work on the Ocean Club case.

15. Meyer's claims in the instant action also involve a salary bonus for another case litigated by the Lucey law firm in Charleston County, South Carolina and worked on by Meyer. This second case involved the revocation of an encroachment permit issued by the South Carolina Department of Transportation that had benefited real estate situated in Charleston County, South Carolina and resulted in attorney's fees being paid to the Lucey law firm in March 2007.³ In August 2009, Meyer's attorney also made demands to Lucey's and the Lucey law firm's attorney for payment of salary bonuses relating to this case.

16. The Lucey law firm filed for arbitration with National Arbitration and Mediation, Inc. ("NAM") on October 27, 2009.

17. Thereafter, on November 2, 2009, Lucey and the Lucey law firm filed the instant action and requested that the Court refer all controversies between the parties to arbitration. Meyer indicated to the Court at the hearing that she did not agree to arbitration and had requested NAM close their file opened at the Lucey law firm's request.

³ Though not addressed in detail by counsel at the hearing, this second case is part of the record before the Court through the pleadings filed by the parties which have been reviewed by the Court.

18. On November 30, 2009, Meyer filed an Answer, Counterclaim, and Third Party Complaint in the instant action.⁴

19. As noted in Plaintiffs' brief and at the hearing, Meyer counterclaimed against Plaintiffs for a Declaratory Judgment, Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, Promissory Estoppel, Violation of the South Carolina Payment of Wages Act, Intentional Misrepresentation, Fraud, Constructive Fraud, Unjust Enrichment, and requested the Court to impose a Constructive Trust on certain assets of Plaintiffs.

CONCLUSIONS OF LAW

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The question of arbitrability of a claim is an issue for judicial determination, unless provided otherwise by the parties. *Zabinski v. Bright Acres Associates*, 553 S.E.2d 110, 118 (2001) citing *AT&T Techs, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986). In deciding whether the parties have agreed to submit a particular controversy to arbitration, a court is not to rule on the potential merits of the underlying claims. *Zabinski* at 118. However, arbitration is a matter of contract law, and a court ruling as to whether or not a valid agreement to arbitrate exists is based on the contractual nature of the arbitration agreement. *Towles v. United Healthcare Corp.*, 524 S.E.2d 839, 843-44 (Ct. App. 1999). Further, in determining the validity and enforceability of an arbitration clause, the Court may consider equitable principles of fraud, duress and unconscionability. *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (2007) (quoting S.C. Code § 15-48-10 (a)).

⁴ On December 9, 2009, the Court also heard Meyer's Motion to Seal her responsive pleading. Plaintiffs consented to the Motion, and Meyer's Answer, Counterclaim, and Third Party Complaint is filed under seal pursuant to this Court's Order.

A. The arbitration clause does not meet the requirements of S.C. Code § 15-48-10 (a).

S.C. Code § 15-48-10 (a) states, "[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." The requirements of S.C. Code § 15-48-10 (a) have been strictly construed by the courts, and failure to comply with the mandatory notice requirements of this section requires a court to find the arbitration clause is unenforceable. *Zabinski v. Bright Acres Associates*, 553 S.E.2d 110, 114 (2001); *See also, Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 476 S.E.2d 149 (1996) (terms of § 15-48-10 (a) are clear and must be applied according to their literal meaning); *Osteen v. T.E. Cuttino Constr. Co.*, 434 S.E. 2d 281 (1993); *Timms v. Greene*, 427 S.E.2d 642 (1993); and *Circle S Enters., Inc. v. Stanley Smith & Sons*, 343 S.E.2d 45 (Ct. App. 1986) Plaintiffs' arbitration clause does not meet the requirements of § 15-48-10 (a) and the June 2006 contract is clearly not subject to arbitration under state law.

B. Defendant's employment contract does not involve commerce within the meaning of the FAA.

To determine whether a transaction involves commerce within the meaning of the FAA the court must examine the arbitration clause as well as the surrounding facts. *Towles v. United Healthcare Corp.*, 524 S.E.2d 839 (Ct. App. 1999) The heart of this transaction between the Luccy law firm and Meyer is an employment agreement between a South Carolina law firm and a South Carolina attorney for legal services to be performed in South Carolina. Meyer is not licensed to practice out of state and the employment agreement does not require Meyer to be licensed to practice law anywhere other than South Carolina. As such, the controversy between the Luccy law firm and Meyer lacks a sufficient relationship with interstate commerce to render the FAA applicable. The factual situation for the case at bar is similar to that in *Timms v.*

Greene, 427 S.E.2d 642 (1993) which involved a contract between a nursing home and a patient for nursing services to be performed at the nursing home. Here, an attorney is providing legal services for a South Carolina law firm doing business in South Carolina. In short, when an agreement is "devoid of any basis for holding that commerce was involved in the transaction between the parties," *id.* at 644, arbitration should not be compelled.

gm
Moreover, even if the Court considers Plaintiffs' arguments about facts in the underlying Ocean Club case upon which Meyer's claims for salary bonuses are based, the facts cited by Plaintiffs fail to rise to the level of involving or affecting interstate commerce. Domicile of parties to litigation, activities outside the state of South Carolina incident to the completion of a transaction, and receipt of insurance proceeds do not render a transaction as "involving" or "affecting" interstate commerce within the purview of the FAA. See *Mathews v. Fluor Corporation*, 440 S.E.2d 880 (1994) (when subject matter was situated in South Carolina, arbitration was not ordered even when domicile of both parties involved in controversy was outside of South Carolina and nearly all activities to complete the contract occurred outside of South Carolina) (overruled on other grounds in *Munoz v. Green Tree Financial*, 542 S.E. 2d 360, 363(2001)). See also *Timms* at 643 (rejecting claim that a nursing home's acceptance of federal insurance proceeds created an involvement in "interstate commerce" within the FAA). Therefore, the domicile of homeowners who executed assignments of rights in favor of a non-profit South Carolina corporation,⁵ domicile of parties to the Ocean Club litigation, domicile of the insurance companies providing a defense and indemnification to parties, and payment of proceeds under an insurance policy by out-of-state insurance companies to settle the Ocean Club case do not bring the controversy between the parties in the instant case within the FAA.

⁵ The homeowners in the Ocean Club case executed assignments of rights giving all rights to recoveries in the case to the South Carolina horizontal property regime, Wild Dune Ocean Club Horizontal Property Regime, Inc., which was the plaintiff in the Ocean Club case.

C. The arbitration clause at issue is further void on equitable grounds.

It appears in their brief and at the hearing, Plaintiffs attempted to argue that because the parties intended to arbitrate, vis-a-vis an arbitration clause being included in their 2006 agreement, then arbitration should be ordered by the Court. However, the Court will not summarily rule in favor of Plaintiffs based upon the mere existence of an arbitration clause. Arbitration is a matter of contract law and a court ruling as to whether or not a valid agreement to arbitrate exists is based on the contractual nature of the arbitration agreement and common law principles. *Towles v United Healthcare Corp.*, 524 S.E.2d 839, 843-44 (Ct. App. 1999). The premise underlying the Supreme Court's holdings in many of the cases cited by Plaintiffs is that a prospective litigant can effectively vindicate its claims in the arbitral forum. *See e.g., Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 89 (2000) (internal quotation marks and alterations omitted) However, in this case, Meyer cannot effectively vindicate her case without witnesses.

In reviewing the arbitration clause in the 2006 agreement and the facts of this case, the Court finds the arbitration clause unconscionable. The parties were in vastly unequal bargaining positions. The Lucey law firm as employer was in a significantly more powerful position as Meyer was an associate who had already been working for several months when the employment contract with the arbitration clause was presented to her. Additionally, the arbitration clause required the preclusion of calling any witnesses and as such, the arbitration clause violates public policy, specifically SCRCP, Rule 43 which states the oral testimony of witnesses "shall be taken orally in open court" in order to determine the competency of witnesses. *Id.* It is against public policy to require an employee to participate in arbitration without being able to produce witnesses at the arbitration. *See Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668,

(S.C. 2007) quoting S.C. Code § 15-48-10 (a) ("A party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress and unconscionability.") Therefore, the Court finds that Meyer has set forth facts sufficient for a showing of unconscionability, and even if the FAA applied, the arbitration clause is not valid or enforceable.

D. Compelling Arbitration in real estate development and construction cases under the FAA is distinguishable from compelling arbitration for personal service contracts.



Finally, the Court has considered several cases submitted by Plaintiffs in support of their motion. These cases involve construction and/or real estate development contracts, which the South Carolina Supreme Court has distinguished from other cases when considering whether interstate commerce is involved. *See Timms* at 644. The remainder of Plaintiffs' cases are either only persuasive and the Court is not bound by them, or factually distinguishable. The heart of the controversy in the instant case is an employment agreement between a South Carolina law firm and a South Carolina attorney for legal services necessarily performed in South Carolina as the employee is not licensed to practice law elsewhere.

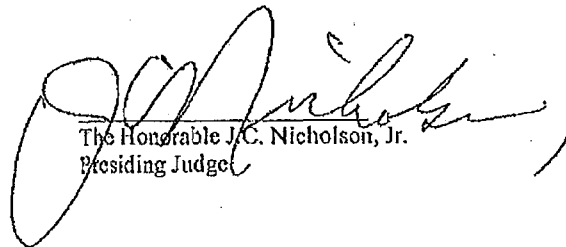
CONCLUSION

Even though South Carolina courts favor arbitration, there is no ground upon which arbitration should be ordered based upon the facts of this case. Therefore, consistent with the above Findings of Fact and Conclusions of Law, the Court finds that the Federal Arbitration Act does not apply, the arbitration clause is not valid or enforceable, and Plaintiffs' Motion to Compel Arbitration is denied.

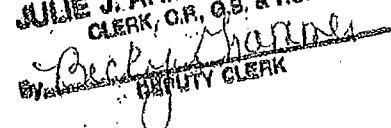
Additionally, upon Motion by the Defendant, this Court has signed an Order to Seal Defendant's Answer, Counterclaims and Third Party Complaint and Plaintiffs' Reply to protect any client interests. This case will remain in circuit court and proceed accordingly.

Plaintiffs are granted leave to file under seal documentation regarding the Ocean Club case in support of their arguments as to their Motion to Compel Arbitration.

AND IT IS SO ORDERED!


The Honorable J.C. Nicholson, Jr.
Presiding Judge

Dated this ^{Jan. 2010} ~~25~~ day of December ~~2009~~.
Charleston, South Carolina ^{JC}

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.R., C.B. & F.C.
By  DEPUTY CLERK

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

Case No.: 2009-CP-10-6873

Justin O'Toole Lucey, etc et al

versus

Amy Meyer, etc et al

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and the verdict has been rendered.
- ☐ **DECISION BY COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. nonsuit)
☐ Rule 43(k), SCRPC(Settled); ☐ Other - _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding Arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING THE LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

Plaintiff's Motion for Reconsideration is respectfully denied.

Dated at Charleston, South Carolina, this 4 day of May, 2010.

[Signature]
PRESIDING JUDGE

FILED
2010 MAY -5 AM 11:14
JULIE J. ARMS, CLERK OF COURT
BY _____

This judgment was entered on the 4 Day of MAY, 2010, and a copy mailed first class this _____ Day of _____, 20____, to attorneys of record or to parties (when appearing pro-se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCCA SCRP Form 4 Revised 6/2008

Clerk of Court

cc
Bonnie

2009-CP-10-6873

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Plaintiffs,

vs.

AMY MEYER,

Defendant and Third Party
Plaintiff,

vs.

LORCAN LUCEY, GMAC MORTGAGE
CORPORATION, CITI MORTGAGE, INC.,
AND JOHN DOE FINANCE

Third Party Defendants.

Case No. 2009-CP-10-6873

FILED
2009 JUL -1 AM 8:58
CLERK OF COURT
J. ARMSTRONG

AMENDED CONSENT ORDER
TO SEAL FILINGS WITH THE
CLERK OF COURT

This matter originally came before me upon a Motion to Seal by Defendant and Third Party Plaintiff Meyer filed December 1, 2009. Plaintiffs, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A., consented to the Motion and further requested that this Court likewise seal any answer filed by Plaintiffs to Defendant's Counterclaims in this case and any future responsive pleadings. The Court granted the original motion and issued an Order to Seal Pleadings on December 11, 2009.

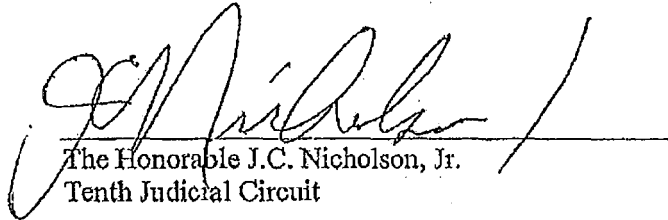
Plaintiffs now move to amend the Order to Seal Pleadings, requesting that all documents filed in this case including, but not limited to, all pleadings, affidavits, motions, briefs and exhibits thereto, be filed under seal. Additionally, the Clerk of Court's office has requested clarification from Plaintiffs' counsel, Cherie Blackburn, as to what documents filed in the case are to be included under seal.

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Further, Defendant and Third Party Plaintiff Meyer consents to this Order, as evidenced by her counsel's signature below.

For the reasons set forth in this Court's Order dated December 11, 2009, this Court finds that all documents filed in this case are to be filed under seal pursuant to SCRPC Rule 41.1.

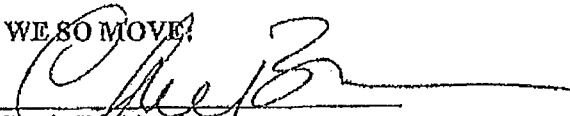
WHEREFORE, Plaintiffs' Motion to Amend the Order to Seal Pleadings is granted, and it is ordered that all documents filed with the Clerk of Court in this case, including all pleadings, motions, affidavits, briefs and exhibits thereto, as well as all other documents, shall be placed under seal hereto forward.


The Honorable J.C. Nicholson, Jr.
Tenth Judicial Circuit

June 20, 2010

Charleston, South Carolina

WE SO MOVE!



Cherie W. Blackburn

NEXSEN PRUBT, LLC

205 King Street, Suite 400 (29401)

P.O. Box 486

Charleston, SC 29402

843.577.9440

Attorneys for Plaintiffs

Justin O'Toole Lucey and Justin O'Toole Lucey, P.A.

WE CONSENT:

Nancy Bloodgood

Nancy Bloodgood

THE FOSTER LAW FIRM, LLP

3875 Faber Place Drive, Suite 204

North Charleston, SC 29405

Attorneys for Defendant and Third Party Plaintiff Amy Meyer

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Case No. 2009-CP-10- 6873

Plaintiffs,

vs.

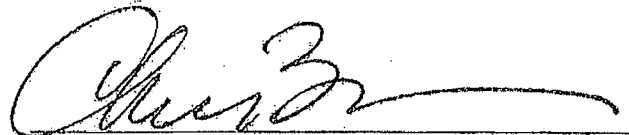
AMY MEYER,

Defendant.

SUMMONS
(Non-Jury)

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscriber at her office at 205 King Street, Suite 400, Charleston, South Carolina, 29401, within thirty (30) days after the service hereof in which to serve its Answer to said Complaint, exclusive of the date of service, and if you fail to Answer the Complaint within the times aforesaid, the Plaintiffs will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.



Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400
P.O. Box 486
Charleston, South Carolina 29401
Tel: (843) 577-9440
Fax: (843) 414-8236
Attorneys for Plaintiffs

November 2, 2009

Charleston, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Case No. 2009-CP-10- 6873

Plaintiffs,

vs.

AMY MEYER,

Defendant.

COMPLAINT
(Non-Jury)

FILED
2009 NOV -2 AM 9:15
JULIE J. ARISTON
CLERK OF COURT

COMES NOW the Plaintiffs who complain of the Defendant and alleges as follows:

1. Plaintiff Justin O'Toole Lucey, P.A. ("the Firm") maintains a law practice in Charleston County located at 415 Mill Street, Mount Pleasant, South Carolina.
2. Plaintiff Justin O'Toole Lucey ("Lucey") is the Firm's owner and principal attorney and is a resident of Charleston County.
3. Defendant Amy Meyer is a resident of Charleston County and a former associate attorney with the Firm.
4. This Court has jurisdiction to order the relief requested herein and to enforce the arbitration provision in the employment agreement between the Firm and Defendant.
5. In or about January 2006, the Firm hired Meyer as an associate attorney.
6. In the late spring/early summer of 2006, the Firm and Meyer entered into an agreement setting forth the terms of her employment. This agreement was amended with regard to the payment of bonuses by letter agreement in the summer of 2007. (The 2006 agreement and

2007 amendment being referred to collectively as the "Employment Agreement" and attached hereto as Exhibit A.¹

7. Among other things, the Employment Agreement specifies that all disputes related to the Employment Agreement are subject to mandatory, binding arbitration as follows:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

8. The Employment Agreement further provides that Meyer

"agree[s] that client confidentiality, and the activities within our firm are absolutely confidential; and that you will maintain that confidentiality at all times, absent a lawfully issued subpoena. If you are subpoena'd, you will promptly provide me with notice of the subpoena and an opportunity to contest it."

9. Defendant, through her attorney, Nancy Bloodgood of the Foster Law Firm, has made demands for compensation she claims is due under the Employment Agreement.

10. On Friday, October 30, 2009, Ms. Bloodgood's assistant sent to Plaintiffs' counsel, Cherie Blackburn of Nexsen Pruet, LLC, a draft Complaint (the "Meyer Complaint") "which Attorney Bloodgood is intending on filing next week." A copy of the e-mail transmitting the Meyer Complaint is attached hereto as Exhibit B.²

11. On Saturday, October 31, 2009, Ms. Bloodgood sent an e-mail to Ms. Blackburn indicating that she intends to file the Meyer Complaint, as well as a Lis Pendens, on Monday, November 2, 2009. A copy of her e-mail is attached as Exhibit C.

12. The allegations and causes of action contained in the Meyer Complaint are all

¹ A redacted version of Exhibit A is attached to protect and preserve the confidentiality of the provisions thereof.

² The Meyer Complaint is being submitted to the Court en camera to preserve the confidential information contained therein.

based upon the Employment Agreement, which Meyer specifically refers to in the Meyer Complaint as the "June 2006 Contract" and the "May 2007...Agreement."

13. The proposed filing of the Meyer Complaint by Defendant is in complete disregard of, and contrary to, the arbitration provision of the Employment Agreement whereby she specifically agreed to arbitrate any disputes arising in any way related to the terms of the Employment Agreement.

14. On October 29, 2009 the Firm filed a Demand for Arbitration (the "Arbitration Proceeding") with National Arbitration and Mediation, Inc. ("NAM"), which provides arbitration services throughout the United States.

15. The Arbitration Proceeding was filed under the NAM Employment Rules and Procedures, which require the employer to pay all fees except for a \$60 filing fee to be paid by the employee.

16. The Meyer Complaint contains and discloses confidential Firm information in direct violation of the terms of the Employment Agreement.

17. The Meyer Complaint also contains confidential attorney/client information, communications and work product.

18. The Meyer Complaint names as defendants the mortgagees of properties owned by Lucey, as well as Lucey's brother, as a co-owner of certain property, and will presumably be served on these defendants and filed of record in Charleston County on Monday, November 2, 2009.

FOR A FIRST CAUSE OF ACTION

19. Plaintiffs repeat and reiterate the above allegations as if set forth verbatim herein.

20. By filing the Meyer Complaint as intended, Defendant will be disclosing

confidential information of the Firm as well as confidential attorney/client privileged information, communications and work product.

21. The law does not allow Defendant to waive the attorney client privilege and no client or former client of the Firm has waived such privilege to allow Defendant to disclose such information.

22. The filing of the Meyer Complaint is in direct violation of the terms of the Employment Agreement which she seeks to enforce in the Meyer Complaint.

23. The arbitration provision in the Employment Agreement is reasonable and not unduly favorable to the Firm, but rather fair to both parties.

24. Meyer understood the terms of the Employment Agreement and agreed to be bound by them.

25. If Defendant is allowed to file the Meyer Complaint, Plaintiffs will suffer immediate and irreparable harm for which Plaintiffs have no adequate remedy at law.

26. Plaintiffs are entitled to a temporary restraining order and preliminary and permanent injunction prohibiting Defendant from filing the Meyer Complaint, as well as an order declaring that Defendant must arbitrate any disputes arising from or related to the Employment Agreement in the Arbitration Proceeding.

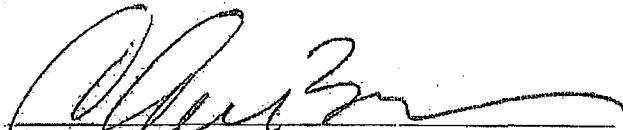
WHEREFORE, Plaintiffs pray that this court grant the following relief:

(a) a temporary restraining order and preliminary and permanent injunction restraining and enjoining Defendant from filing the Meyer Complaint or any other complaint or action in a court of law regarding any dispute arising from or related to the Employment Agreement or Defendant's employment with the Firm;

(b) an order requiring Defendant to arbitrate any dispute arising from or related

to the Employment Agreement or Defendant's employment with the Firm; and

(c) such other and further relief as this Court deems just and proper.

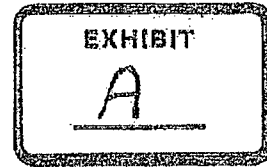


Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

Attorneys for Plaintiffs
Justin O'Toole Lucey and Justin O'Toole Lucey,
P.A.

November 2, 2009

Charleston, South Carolina



Amy:

As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalize, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

Confidential Information Redacted

25

Confidential Information Redacted

Now for some legalese:

You agree that client confidentiality, and the activities within our firm are absolutely confidential; and that you will maintain that confidentiality at all times, absent a lawfully issued subpoena. If you are subpoena'd, you will promptly provide me with notice of the subpoena and an opportunity to contest it.

Confidential Information Redacted

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

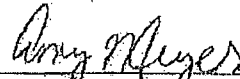
Confidential Information Redacted

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Confidential Information Redacted

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by countersigning below and returning to me at your convenience. If you first need a meeting to discuss, just let me know. I still want to meet with you about workplace arrangements to see if any improvements to your situation would enhance your job performance or enjoyment.

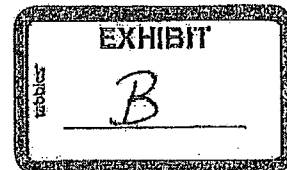
Justin Lucey


Amy Meyer

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Blackburn, Cherie

From: Amanda Kramer [AKramer@fosterfoster.com]
Sent: Friday, October 30, 2009 11:10 AM
To: Blackburn, Cherie
Subject: Amy Meyer
Attachments: 20091030_111028.pdf



Ms. Blackburn, attached please find a copy of the draft Complaint which Attorney Bloodgood is intending on filing next week.

Amanda Kramer
Assistant to Nancy Bloodgood, Esquire
Foster Law Firm, LLC
3875 Faber Place Drive, Suite 204
North Charleston, S.C. 29405
office: 843-744-3033
fax: 843-577-0434
akramer@fosterfoster.com

34/1/2009

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Blackburn, Cherie

From: Nancy Bloodgood [nbloodgood@fosterfoster.com]
Sent: Saturday, October 31, 2009 7:18 AM
To: Blackburn, Cherie
Subject: Amy Meyer



Cherie, I just saw that my secretary didn't send the correct email to you when she sent you a courtesy copy of the Complaint yesterday. I apologize if the action appeared abrupt. What I intended to convey to you at the same time you received the Complaint was that I had convinced my client to hold off filing it and the accompanying Lis Pendens until Monday as a professional courtesy. I have provided you a copy of the Complaint in the hopes that your client will reconsider his decision not to pay Amy Meyer the wages he owes her. Our last offer of settlement is off the table. I was in depositions in Columbia all day yesterday but am around this weekend if you want to discuss settlement one last time. Assuming this matter cannot be satisfactorily resolved, please let me know if you are authorized to accept service for both Mr. Lucey and the firm, and if you will be representing Mr. Lucey's brother, please let me know that also. Thanks, Nancy

Nancy Bloodgood, Partner
Foster Law Firm, LLC
3875 Faber Place Drive, Suite 204
North Charleston, S.C. 29406
office: 843-744-3033
fax: 843- 577-0434
nbloodgood@fosterfoster.com

11/1/2009

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Plaintiffs,

vs.

AMY MEYER,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO. 2009-CP-10- 6873

MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION AND TO COMPEL
ARBITRATION

FILED
NOV-2 11 01
CLERK OF COURT

The Plaintiffs, Justin O'Toole Lucey ("Lucey") and Justin O'Toole Lucey, P.A. (the "Firm"), pursuant to South Carolina Rules of Civil Procedure, Rule 65, respectfully move this Court for a temporary restraining order and preliminary injunction enjoining and restraining the Defendant, Amy Meyer ("Meyer"), from filing the proposed Complaint described herein and for an Order compelling arbitration of any dispute related to, or arising out of, the Employment Agreement (as defined herein) or Defendant's employment relationship with the Firm. The grounds for this Motion are as follows:

1. Defendant Meyer was an associate attorney employed by the Firm
2. The Firm and Meyer entered into an agreement setting forth the terms of her employment in the spring/summer of 2006. This agreement was amended with regard to the payment of bonuses by letter agreement in the summer of 2007. (The 2006 agreement and 2007 amendment are referred to collectively as the "Employment Agreement").
3. The Employment Agreement specifies that all disputes related to the Employment Agreement are subject to mandatory, binding arbitration as follows:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

4. The Employment Agreement further provides that Meyer

"agree[s] that client confidentiality, and the activities within our firm are absolutely confidential; and that you will maintain that confidentiality at all times, absent a lawfully issued subpoena. If you are subpoena'd, you will promptly provide me with notice of the subpoena and an opportunity to contest it."

5. Meyer's employment was terminated on July 22, 2009.

6. Defendant, through her attorney, Nancy Bloodgood of the Foster Law Firm, has made demands for compensation she claims is due under the Employment Agreement.

7. On Friday, October 30, 2009, Ms. Bloodgood's assistant sent to Plaintiffs' counsel, Cherie Blackburn of Nexsen Pruet, LLC, a draft Complaint (the "Meyer Complaint") with a cover e-mail stating that Ms. Bloodgood intended to file the Meyer Complaint "next week."

8. On Saturday, October 31, 2009, Ms. Bloodgood sent an e-mail to Ms. Blackburn indicating that she intends to file the Meyer Complaint, as well as a Lis Pendens, on Monday, November 2, 2009.

9. The allegations and causes of action contained in the Meyer Complaint are all based upon the Employment Agreement, which Meyer specifically refers to in the Meyer Complaint as the "June 2006 Contract" and the "May 2007... Agreement."

10. On October 29, 2009 the Firm filed a Demand for Arbitration (the "Arbitration Proceeding") with National Arbitration and Mediation, Inc. ("NAM").

11. The Arbitration Proceeding was filed under the NAM Employment Rules and

Procedures, which require the employer to pay all fees except for a \$60 filing fee to be paid by the employee.

12. The Meyer Complaint contains confidential information regarding the Firm's arrangement with employees and clients and confidential attorney/client information, communications and work product regarding certain clients of the Firm.

13. The disclosure of such confidential information would result in immediate irreparable injury, loss and damage to Plaintiffs.

14. The Meyer Complaint seeks to enforce terms of the Employment Agreement which contains an arbitration provision requiring that any disputes in any way related to the Employment Agreement shall be arbitrated.

15. The Meyer Complaint names as defendants the mortgagees of properties owned by Lucey, as well as Lucey's brother, as a co-owner of certain property, and will presumably be served on these defendants and filed of record in Charleston County on Monday, November 2, 2009.

16. If Defendant is allowed to file the Meyer Complaint, Plaintiffs will suffer immediate and irreparable injury loss or damage for which Plaintiffs have no adequate remedy at law. This irreparable injury includes damage to Plaintiffs' goodwill and reputation and relationships with Plaintiffs' clients and in the community and loss of current and future clients and business. It also includes the loss of confidential Firm information which no sum of money can restore to Plaintiffs. See Affidavit of Justin O'Toole Lucey filed simultaneously herewith.

17. Given Defendant's intent to file the Meyer Complaint on November 2, 2009, the date of the hearing on the temporary restraining order, notice was not given to Defendant because such notice could have resulted in an expedited filing of the Meyer Complaint prior to

the hearing on this matter, there being no order prior to the hearing prohibiting such filing by Defendant. Had such notice been given and the Meyer Complaint filed before the hearing, irreparable injury, loss or damage would have been suffered by Plaintiffs.

18. Plaintiffs are entitled to a temporary restraining order prohibiting Defendant from filing the Meyer Complaint until such time as a preliminary injunction hearing can be held within the next ten (10) days.

19. Plaintiffs' are further entitled to a preliminary and permanent injunction prohibiting Defendant from filing the Meyer Complaint or any other lawsuit or proceeding in a court of law regarding a dispute related to, or arising from, the Employment Agreement or Defendant's employment relationship with the Firm.

20. Pursuant to Rule 65(b) of the South Carolina Rules of Civil Procedure, a temporary restraining order may be sought upon the filing of the summons and complaint showing that the applicant will sustain immediate and irreparable injury, loss or damage if relief is not granted.

21. The South Carolina Supreme Court has held that "[t]he sole purpose of a temporary injunction is to avoid irreparable injury to a plaintiff pending final adjudication of a case. *Helsel v. City of North Myrtle Beach*, 413 S.E.2d 824, 826 (1992).

22. To obtain an injunction, the plaintiff must allege facts sufficient to constitute a cause of action for an injunction and demonstrate that the injunction is reasonably necessary to protect the legal rights pending in the litigation. *Levine v. Spartanburg Regional Services District, Inc.*, 626 S.E.2d 38, 41 (Ct App. 2005) Obtaining an injunction requires a plaintiff to show that (1) it would suffer irreparable harm if the injunction is not granted, (2) it will likely succeed on the merits of the litigation; and (3) there is no adequate remedy at law. *Grosshuesch*

v. Cramer, 263 S.E.2d 833, 834 (2005).

23. Plaintiffs have set forth facts sufficient for a showing of irreparable harm, success on the merits and an inadequate remedy at law. Defendant's filing of the Meyer Complaint will disclose confidential Firm information in violation of the Employment Agreement and confidential attorney/client communications, information and work product.

24. Rule 1.6(a) of the South Carolina Rules of Professional Conduct states: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Rule 407, SCACR, Rules of Prof'l Conduct R. 1.6. Paragraph (b) provides seven exceptions to the rule prohibiting a lawyer from revealing information related to the representation of a client; however, none of those exceptions are applicable in the present case.

25. Comment [3] to Rule 1.6 further explains that the confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law." Rule 407, SCACR, Rules of Prof'l Conduct R. 1.6 cmt. (emphasis added).

26. Comment [19] states that the duty of confidentiality "continues after the client-lawyer relationship has terminated" and cross-references Rule 1.9(c)(2). *Id.* Rule 1.9(c)(2) provides: "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client." Rule 407, SCACR, Rules of Prof'l Conduct R. 1.9(c)(2).

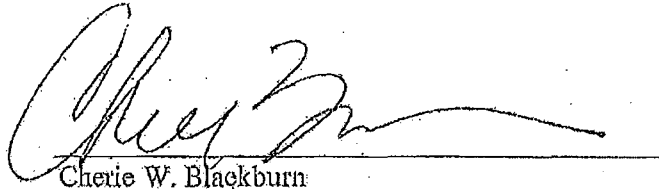
27. Finally, Defendant cannot be permitted to file the Lawsuit in total disregard of the arbitration clause contained in the Employment Agreement between Plaintiff and the Firm. Pursuant to S.C. Code Ann. § 15-48-10(a), "a written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such ground as exist at law or in equity for the revocation of any contract." The statute further excepts the Employment Agreement from the Notice provisions generally required for such agreements. S.C. Code Ann. § 15-48-10(b)(2). Thus, a court must order arbitration on the application of any party showing an agreement of the type described in S.C. Code Ann. § 15-48-10 where one party refuses to arbitrate. S.C. Code Ann. § 15-48-20.

28. It is well settled that in South Carolina arbitration is a favored method of settling disputes. *Glssel v. Hart*, 382 S.C. 235, 240 (2009). It has been repeatedly said that it is the policy of South Carolina to favor the arbitration of disputes. *Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 437, citing *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 586 S.E.2d 581, 585 (2003). Moreover, "[t]here is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *Towles v. United HealthCare Corp.*, 524 S.E.2d 839, 844 (S.C. Ct.App.1999). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, *Id.* at 846 (citations omitted). "Unless a court can say with positive assurance that an arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." *Glssel*, 382 S.C. at 241.

29. As Plaintiffs' Complaint further establishes, a written provision requiring arbitration of disputes was included in the written Employment Agreement that Defendant

entered into with the Firm. The preparation of the Lawsuit and the intent of Defendant to file it, as evidenced by the e-mails attached as Exhibits B and C to Plaintiffs' Complaint establish Defendant's refusal to arbitrate her dispute as required by the arbitration clause contained in the written Employment Agreement. According to South Carolina law, Plaintiffs are entitled to an Order mandating Defendant to submit to arbitration.

For the reasons set forth herein, and as further supported by the Plaintiffs' Complaint and the Affidavit of Justin O'Toole Lucey, filed simultaneously herewith, as well as by the applicable law and equities, Plaintiff's respectfully request this Court to enter a temporary restraining order and, thereafter, a preliminary and permanent injunction barring the Defendant from filing the Meyer Complaint or any other lawsuit or proceeding in a court of law regarding a dispute related to, or arising from, the Employment Agreement or Defendant's employment relationship with the Firm. Plaintiffs further respectfully request an order requiring Defendant to arbitrate any disputes related to, or arising from, the Employment Agreement or Defendant's employment relationship with the Firm.



Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

Attorneys for Plaintiffs
Justin O'Toole Lucey and Justin O'Toole Lucey,
P.A.

November 2, 2009

Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

JUSTIN O'TOOLE LUCEY and LUCEY
O'TOOLE LUCEY, P.A.

Plaintiff,

vs.

AMY MEYER,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2009-CP-10-

6873

AFFIDAVIT OF JUSTIN O'TOOLE
LUCEY

FILED
2009 NOV 2 AM 9:15
JULIE ARMSTRONG
CLERK OF COURT

PERSONALLY appearing before me, Justin O'Toole Lucey, who, being duly sworn,
deposes and says as follows:

1. I am over eighteen (18) years of age and of sound mind. The contents of this Affidavit are true and correct in all respects to the best of my knowledge.
2. I am executing this Affidavit in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration.
3. I am an attorney licensed to practice law in the state of South Carolina.
4. I am the owner and principal attorney in the firm of Justin O'Toole Lucey, P.A. (the "Firm").
5. In or about January 2006, the Firm hired Amy Meyer ("Meyer") as an associate attorney.
6. In the late spring/early summer of 2006, the Firm and Meyer entered into an agreement setting forth the terms of her employment. This agreement was amended with regard to the payment of bonuses by letter agreement in the summer of 2007. (The 2006 agreement and 2007 amendment are referred to collectively as the "Employment Agreement.")

37

7. The Employment Agreement specifies that all disputes related to the Employment Agreement are subject to confidential binding arbitration.
8. The Employment Agreement further provides that Meyer agrees that client confidentiality and the activities within the Firm are absolutely confidential and that she will maintain that confidentiality at all times, absent a lawfully issued subpoena.
9. I discussed the terms of the Employment Agreement with Meyer and she had ample time to review and consider the terms. She executed and agreed to the Employment Agreement.
10. The confidentiality provision was included in the Employment Agreement in order to protect and preserve confidential firm information, including my arrangement with Meyer and my handling of bonuses with regard to fees received on certain cases.
11. The arbitration requirement was included in the Employment Agreement in order to provide for a confidential, efficient and inexpensive manner of resolving any disputes that we might have regarding the terms of her employment relationship.
12. Meyer's employment with the firm was terminated on July 22, 2009
13. Since her termination, Meyer, through her attorney, Nancy Bloodgood of the Foster Law Firm, has made demands for compensation she claims to be due under the Employment Agreement.
14. On Friday, October 30, 2009, Ms. Bloodgood's assistant sent to my attorney, Cherie Blackburn of Nexsen Pruet, LLC, a draft Complaint (the "Meyer Complaint") which, according to the e-mail, "Attorney Bloodgood is intending on filing next week."
15. On Saturday, October 31, 2009, Ms. Bloodgood sent an e-mail to Ms. Blackburn indicating that she intends to file the Meyer Complaint, as well as a Lis Pendens, on

Monday, November 1, 2009.

16. The allegations and the causes of in the Meyer Complaint are all based upon the Employment Agreement, which Meyer specifically refers to in the Meyer Complaint as the "June 2006 Contract" and the "May 2007... Agreement."
17. On October 29, 2009 the Firm filed a Demand for Arbitration (the "Arbitration Proceeding") with National Arbitration and Mediation, Inc. ("NAM"), which provides arbitration services throughout the United States.
18. The Arbitration Proceeding was filed under the NAM Employment Rules and Procedures, which require the employer to pay all fees except for a \$60 filing fee to be paid by the employee.
19. The Firm filed the Arbitration Proceeding under the Employment Rules and Procedures so that there would be no financial burden on Meyer as a result of proceeding with the arbitration.
20. The Arbitration Proceeding was filed in accordance with the terms of the Employment Agreement and requests a declaratory judgment that the Firm is not in violation of the Employment Agreement.
21. After filing the Arbitration Proceeding, I received notice, through my attorney, of Meyer's intent to file a lawsuit in the Court of Common Pleas and a draft of the Meyer Complaint, as evidenced by the e-mail from Nancy Bloodgood's assistant to my attorney on October 30, 2009.
22. The Meyer Complaint contains and discloses confidential Firm information regarding her employment arrangement and compensation and the Firm's handling of bonuses related to fees received by Firm. It specifically discloses the parameters of Meyer's

compensation as it relates to certain named clients whom the Firm represented at the time. One of these clients continues to be a client of the Firm.

23. I consider the compensation arrangements of each of the employees in my office to be confidential and disclosure of such terms even among employees is detrimental to the Firm's operations. In this case, Meyer seeks to disclose such information to the public at large by filing the Meyer Complaint, which clearly results in immediate and irreparable harm.

24. The Meyer Complaint also contains confidential attorney/client information, communications and work product related to two specific clients and cases handled on behalf of those clients on which Meyer performed work. It sets forth dates of discussions with the board of directors of a client, meetings with the board of this client, the attorneys fees earned by the Firm on these two cases, Meyer's billings on the cases, strategies discussed between Meyer and myself on these cases and even a potential defense that could have been raised by the defendants on one of the cases. In addition, the Meyer Complaint discloses the Firm's agreement with another attorney with regard to the bonus this attorney would receive on one of the cases.

25. The Meyer Complaint names as defendants the mortgagees of properties that I own personally, as well as one property that I own with my brother.

26. Upon information and belief, Meyer will file the Meyer Complaint and serve it on all defendants on Monday, November 1, 2009, making it a matter of public record.

27. Upon information and belief, the intent of the Meyer Complaint is to injure and damage my reputation and that of the Firm.

28. The disclosure of the above confidential information will result in immediate irreparable

injury, loss and damage to me and to the Firm for which we have no adequate remedy at law. This irreparable injury includes damage to my reputation as an attorney and the goodwill and reputation of the Firm, including damage to our relationships with our clients and the loss of current and future clients and business. We will also lose confidential Firm information which no sum of money can restore to me or the Firm.

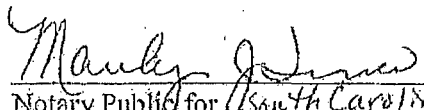
29. Upon information and belief, notice to Meyer of the accompanying Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration would have allowed her to file the Meyer Complaint before a hearing on the motion for a temporary restraining order could be held, thereby creating irreparable injury for which neither I nor the Firm have an adequate remedy of law.

FURTHER AFFLIANT SAYETH NOT.


Justin O'Toole Lucey

SWORN and subscribed to before me

this 13th day of November, 2009.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 4-14-2013



Amy:

As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalize, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

You agree that client confidentiality, and the activities within our firm are absolutely confidential; and that you will maintain that confidentiality at all times, absent a lawfully issued subpoena. If you are subpoena'd, you will promptly provide me with notice of the subpoena and an opportunity to contest it.

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on a arbitrator, I will chose one, you will choose one, and the two will chose a third.

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Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by countersigning below and returning to me at your convenience. If you first need a meeting to discuss, just let me know. I still want to meet with you about workplace arrangements to see if any improvements to your situation would enhance your job performance or enjoyment.

Justin Lucey

Amy Meyer

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Case No. 2009-CP-10-6873

Plaintiffs,

vs.

AMY MEYER,

Defendant.

MOTION FOR EXPEDITED HEARING ON
PLAINTIFFS' MOTIONS TO COMPEL
ARBITRATION AND FOR TRO AND
PRELIMINARY INJUNCTION

FILED
2009 NOV 24 PM 2:50
JULIE J. ARMSTRONG
CLERK OF COURT

TO: THE DEFENDANT ABOVE-NAMED AND HER ATTORNEY, NANCY
BLOODGOOD, ESQUIRE:

PLEASE TAKE NOTICE that pursuant to Rule 6(d) of the South Carolina Rules of Civil Procedure, the Plaintiffs, Justin O'Toole Lucey ("Lucey") and Justin O'Toole Lucey, P.A. (the "Firm") move for an Order expediting a hearing on Plaintiffs' Motion to Compel Arbitration filed on November 2, 2009. This Motion is based on the Complaint, Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration and Affidavit of Justin O'Toole Lucey filed with the Court on November 2, 2009, and any other evidence presented in connection with this Motion and is specifically made on the grounds that:

1. Plaintiffs filed the Motion to Compel Arbitration in order to enforce a compulsory arbitration provision in the Employment Agreement between the Firm and Defendant, a former employee of the Firm ("Former Employee"). This provision requires that any disputes arising out of or related to the Employment Agreement will be subject to confidential binding arbitration.

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2. Former Employee has made demands through her attorney for compensation she claims she is due under the Employment Agreement.

3. Plaintiffs dispute Former Employee's allegations. In accordance with the arbitration clause in the Employment Agreement, the Firm filed a Demand for Arbitration (the "Arbitration Proceeding") with National Arbitration and Mediation, Inc. ("NAM") on October 29, 2009. The Firm's Demand for Arbitration seeks a declaratory judgment that the Firm is not in breach of the Employment Agreement and does not owe any monies to Former Employee under the Employment Agreement.

4. On October 30, 2009, Former Employee's counsel informed Plaintiffs' counsel that Former Employee intended to file a Complaint in the Circuit Court of Charleston County for breach of the Employment Agreement and for wages allegedly due under the Employment Agreement and to its pendens every piece of real estate owned by Lucey and sue the mortgage companies with liens encumbering such real estate under the theory that the mortgage companies were unjustly enriched.

5. On October 31, 2009, Former Employee's counsel confirmed Former Employee's intent to file a Complaint in state court on Monday, November 2, 2009.

6. In an effort to prevent Former Employee's, complete disregard of the arbitration provision in the Employment Agreement, as well as her breach of the confidentiality provision in the Employment Agreement and the disclosure of firm and client confidential information contained within Former Employee's proposed Complaint, Plaintiffs filed this action. See Complaint and Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration filed by Plaintiffs on November 2, 2009.

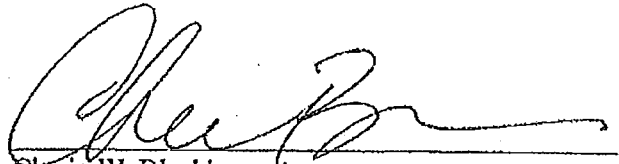
7. On November 4, 2009, Former Employee's counsel communicated to Plaintiffs' counsel that Former Employee will not agree to arbitration.

8. Former Employee was served with the Demand for Arbitration on November 2, 2009. Former Employee's Answer to the Firm's Demand for Arbitration is due on or before Wednesday, November 25, 2009, and Former Employee's and the Firm's submission of proposed arbitrators is due no later than Thursday, December 3, 2009. Based on representations by Former Employee's counsel, Former Employee has no intention of complying with these requirements and participating in the arbitration.

10. Plaintiffs now move for an expedited hearing on their Motion to Compel Former Employee to participate in the arbitration proceeding.

11. Plaintiffs' rights will be unfairly prejudiced if the Motion to Compel Arbitration is not decided on an expedited basis and Former Employee is permitted to ignore the arbitration proceeding and move forward with the filing of claims in this action or in a separate action for breach of the Employment Agreement in disregard of the arbitration provision in the Employment Agreement and South Carolina law.

In the alternative, Plaintiffs seek a hearing on their Motion for a Temporary Restraining Order and Preliminary Injunction in order to prevent Former Employee's breach of the confidentiality provision in the Employment Agreement and the disclosure of firm and client confidential information.



Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

Attorneys for Plaintiffs
Justin O'Toole Lucey and Justin O'Toole Lucey,
P.A.

November 24, 2009

Charleston, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY,
JUSTIN O'TOOLE LUCEY, P.A.,

) Case No. 2009-CP-10-6873
)
)
)

PLAINTIFFS,

) ANSWER, COUNTERCLAIMS AND
) THIRD PARTY COMPLAINT
) (JURY TRIAL REQUESTED)
)

VS.

AMY MEYER,
DEFENDANT AND
THIRD PARTY PLAINTIFF,

VS.

LORCAN LUCEY,
GMAC MORTGAGE CORPORATION,
CITIMORTGAGE, INC., AND
JOHN DOE FINANCE

THIRD PARTY DEFENDANTS.

Defendant Amy Meyer hereby answers the Plaintiffs' Complaint by denying each and every allegation of the Plaintiffs' Complaint not specifically admitted, and further responds as follows:

1. Defendant admits the allegations contained in Paragraph 1 of the Complaint.
2. Defendant admits the allegations contained in Paragraph 2 of the Complaint.
3. Defendant admits the allegations contained in Paragraph 3 of the Complaint.
4. Defendant admits the allegations contained in Paragraph 4 inasmuch as the Court has jurisdiction over the parties but denies the remaining allegations. Specifically, Defendant denies that arbitration is applicable to the causes of action in Defendant's unfiled, draft complaint referred to in Plaintiffs' complaint. No request for arbitration pursuant to S.C. Code § 15-48-20

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was made prior to the time Plaintiffs filed this Complaint, and the alleged arbitration clause does not comply with the provisions of the South Carolina Uniform Arbitration Act. By way of further response, this action by Plaintiffs for a restraining order and injunctive relief is based on an unfiled, draft complaint that alleged equitable causes of action outside of the alleged employment agreement including, but not limited to, fraud, intentional misrepresentation, constructive fraud, unjust enrichment, breach of contract accompanied by a fraudulent act, and promissory estoppel. Further answering Paragraph 4, federal arbitration law is not applicable.

5. Defendant admits the allegations contained in Paragraph 5 of the Complaint.

6. Defendant admits so much of Paragraph 6 as alleges Amy Meyer and Justin O'Toole Lucey, P.A. (hereinafter "Lucey Firm") entered into a written contract of employment in June of 2006 drafted by Justin Lucey (hereinafter "the June 2006 Contract"). Defendant Meyer affirmatively alleges per the terms of the June 2006 Contract, Ms. Meyer was entitled to a lower monthly base salary plus bonuses based on the attorney fees collected by the Lucey Firm in contingency fee cases. Further answering Paragraph 6, Ms. Meyer admits so much of this Paragraph as alleges on May 2, 2007, the Lucey Firm entered into a written agreement with her which stated Ms. Meyer would receive a ten percent (10%) salary bonus on the Ocean Club case if she continued to give the case her energetic commitment (hereinafter "Ocean Club Agreement.") To the extent the remainder of the allegations contained in Paragraph 6 are in conflict with the June 2006 Contract and the Ocean Club Agreement (collectively "Lucey Firm Employment Agreement"), they are affirmatively denied.

7. Answering Paragraph 7, Defendant craves reference to the June 2006 Contract and the Ocean Club Agreement for an exact rendition of the terms listed by Plaintiffs as well as other terms contained therein and denies any allegations inconsistent therewith.

8. Answering Paragraph 8, Defendant craves reference to the June 2006 Contract and the Ocean Club Agreement for an exact rendition of the terms listed by Plaintiffs as well as other terms contained therein and denies any allegations inconsistent therewith.

9. Defendant admits the allegations contained in Paragraph 9 of the Complaint and affirmatively alleges Ms. Meyer demanded payment of wages owed by the Lucey Firm and Justin Lucey on August 20, 2009.

10. Defendant admits the allegations contained in Paragraph 10 of the Complaint.

11. Defendant admits the allegations contained in Paragraph 11 of the Complaint.

12. Defendant denies the allegations contained in Paragraph 12 of the Complaint. The unfiled, draft complaint alleged equitable causes of action outside of the alleged employment agreement including, but not limited to, fraud, intentional misrepresentation, constructive fraud, unjust enrichment, breach of contract accompanied by a fraudulent act, and promissory estoppel.

13. Defendant denies the allegations contained in Paragraph 13 of the Complaint and affirmatively alleges that the alleged arbitration clause in the June 2006 Contract does not comply with South Carolina law because the contract is contrary to the South Carolina Uniform Arbitration Act's provisions. Defendant further alleges the arbitration clause in the June 2006 Contract is not enforceable under federal arbitration law as the employment contract for legal services at issue does not affect interstate commerce.

14. The allegations contained in Paragraph 14 pertain to a party other than this Defendant and require no response. By way of further response, Defendant denies that arbitration applies.

15. The allegations contained in Paragraph 15 pertain to a party other than Defendant and require no response. By way of further response, Defendant denies that arbitration applies.

16. Defendant denies the allegations contained in Paragraph 16 of the Complaint. By way of further response, Defendant affirmatively alleges that Justin Lucey destroyed and waived any alleged confidentiality when Justin Lucey disclosed underlying case details and the details of Ms. Meyer's Lucey Firm Employment Agreement to a third party outside the Lucey Firm.

17. Defendant denies the allegations contained in Paragraph 17 of the Complaint.

18. Defendant admits so much of the allegations contained in Paragraph 18 of the Complaint as allege Ms. Meyer is seeking to have a constructive trust on real estate properties imposed by the Court to ensure Plaintiffs will have the funds necessary to pay her the wages, attorneys fees, costs, and other damages to which she is entitled from funds that Plaintiffs have fraudulently, and/or in bad faith, and/or, through an abuse of confidence retained and converted for use for the real estate properties. The remainder of the allegations contained in this Paragraph is denied.

ANSWER TO FIRST CAUSE OF ACTION

19. Defendant repeats and realleges her previous responses herein.

20. To the extent the allegations contained in Paragraph 20 constitute conclusions of law, they require no response. Defendant affirmatively denies the allegations contained in Paragraph 20 of the Complaint.

21. To the extent the allegations contained in Paragraph 21 constitute conclusions of law, they require no response. Defendant affirmatively denies the allegations contained in Paragraph 21 of the Complaint.

22. Defendant denies the allegations contained in Paragraph 22 of the Complaint.

23. Defendant denies the allegations contained in Paragraph 23 of the Complaint. By way of further response, Defendant denies that arbitration applies.

24. Defendant admits so much of the allegations contained in Paragraph 24 as allege Defendant understood the wages she was entitled to and agrees Plaintiffs should pay her the wages and damages she is entitled to pursuant to the June 2006 Contract and the Ocean Club Agreement. The remainder of the allegations in this Paragraph is denied.

25. Defendant denies the allegations contained in Paragraph 25 of the Complaint. By way of further response, the allegations contain conclusions of law that require no answer.

26. Defendant denies the allegations contained in Paragraph 26 of the Complaint. The unfiled, draft complaint alleged equitable causes of action including, but not limited to, fraud, intentional misrepresentation, constructive fraud, unjust enrichment, breach of contract accompanied by a fraudulent and promissory estoppel. By way of further response, Defendant denies that arbitration applies.

AFFIRMATIVE DEFENSES

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

27. Justin Lucey lacks standing to bring the cause of action, to compel arbitration, and to seek the injunctive relief requested in the Complaint.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

28. Justin Lucey and the Lucey Firm lack standing to bring the cause of action, to compel arbitration, and to seek injunctive relief based upon any claim of attorney-client privilege.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

29. Plaintiffs' Complaint fails to state facts sufficient to allege any cause of action against Defendant regarding any alleged violation of the attorney/client privilege as the privilege belongs to the client, not Plaintiffs, and the Complaint fails to state a cause of action upon which relief can be granted.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

30. Plaintiffs made no demand on Defendant to arbitrate this matter as required by S.C. Code § 15-48-20 (a) prior to filing suit.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

31. The alleged arbitration clause in the employment contract is not enforceable under South Carolina law or federal law.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

32. Plaintiffs' attempt to enforce the alleged arbitration agreement at issue is barred on equitable grounds including, but not limited to, fraud, duress, and unconscionability.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

33. Plaintiffs' claims are subject to their duty to mitigate damages which they have failed to do. By way of further response, Plaintiffs failed to mitigate their damages by not complying with the statutory requirements of the South Carolina Payment of Wages Act.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

34. Defendant was at all times acting in good faith.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

35. Plaintiffs' claims, in whole or in part, are barred by the doctrines of waiver, laches, estoppels, and unclean hands.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

36. Justin Lucey's claims are barred based upon the statute of frauds. Additionally, Justin Lucey's claims are barred because of insufficiency and/no consideration for an agreement to arbitrate.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

37. Whatever damages Plaintiffs allege they have suffered, if any, were caused by and in fact are the direct and proximate cause of their own willful acts, recklessness and/or negligence, and/or the sole negligence or acts of third party(ies).

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

38. No act or omission of Defendant proximately caused any damages to Plaintiffs.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

39. Plaintiffs have failed to establish the necessary prerequisites for injunctive relief.

Further Answering Plaintiffs' Complaint and by Way of Affirmative Defense

40. Plaintiffs' damages, if any, may be limited by certain after acquired evidence.

**DEFENDANT MEYER'S COUNTERCLAIMS
AND THIRD PARTY COMPLAINT**

41. All actions pertinent to the allegations in these Counterclaims and Third-Party Complaint took place in Charleston County.

42. Jurisdiction and venue is proper in this Court.

43. Defendant Ms. Meyer began working at the Lucey Firm on January 24, 2006 as an associate attorney.

44. Prior to working for the Lucey Firm, Ms. Meyer was an Assistant Solicitor specializing in white collar crime prosecutions in Charleston County South Carolina. Ms. Meyer had also been a licensed Certified Public Accountant since 1999 in Kentucky and had worked in public accounting for six years prior to working for the Charleston County Solicitor's Office.

45. Ms. Meyer worked for the first five months at the Lucey Firm without a written employment contract.

46. In March 2006, Ms. Meyer began working on Charleston County Civil Action No. 2005-CP-10-0359 (hereinafter "Bees Ferry Case") on behalf of the Lucey Firm. The Bees Ferry case involved an encroachment permit that allowed special variances for road access construction and had been issued by the South Carolina Department of Transportation to the plaintiffs who were represented by the Lucey Firm. After substantial development of the plaintiffs' property benefited by the encroachment permit, SCDOT revoked the permit, and the Lucey Firm's clients sought monetary damages suffered as a result of an unconstitutional taking of their property. The legal issues in the case dealt with complex, constitutional issues which included inverse condemnation.

47. Ms. Meyer and Lucey Law Firm entered into a written contract of employment in June of 2006 drafted by Justin Lucey (herein referred to as "the June 2006 Contract").

48. Per the terms of the June 2006 Contract, Ms. Meyer was entitled to a lower monthly base salary, plus bonuses based on a percentage of the attorneys fees collected by the Lucey Firm in contingency fee cases.

49. The June 2006 Contract set forth that Ms. Meyer's bonus on cases she spearheaded would "generally be ten percent of the net fee earned by the firm." Justin Lucey further communicated to Ms. Meyer in the June 2006 Contract that "I will compute your bonus each time a client disbursement is prepared and add it to the following paycheck."

50. Additionally, in the June 2006 Contract, Justin Lucey represented to Ms. Meyer that in any case that she did not spearhead, he would pay her a salary bonus of five percent of the net fee recovered after verdict on any case "you try to a verdict with me."

51. Ms. Meyer understood that her five percent salary bonus on cases she tried to a verdict with Justin Lucey but were not spearheaded by her would be paid after the appeal ended or if the case were settled while on appeal.
52. The week of June 18, 2006, Ms. Meyer worked with Justin Lucey and the Lucey Firm on the Bees Ferry trial.
53. Two central issues in the Bees Ferry case were 1) whether a valid property interest existed for the holder of an encroachment permit issued by the South Carolina Department of Transportation and then revoked and 2) whether a claim for inverse condemnation ensued after the revocation.
54. During the week of June 18, 2006, Ms. Meyer researched and found a key case that supported the position that a property interest exists for the holder of an issued permit thus triggering the unconstitutional taking for the inverse condemnation claim.
55. On June 23, 2006, Ms. Meyer argued the case law for the encroachment permit property interest issue and other jury charges in front of the Court of Common Pleas for the Bees Ferry Case.
56. The permit property interest case law that Ms. Meyer had found through her research and efforts and argued before the Court was found as the law of the case for the jury instructions in the Bees Ferry case.
57. On June 23, 2006, the Bees Ferry Case ended in verdicts in favor of the clients represented by Justin Lucey and the Lucey Firm.
58. An election of the inverse condemnation verdict was made by the Bees Ferry Case clients, and the judgment was filed in the Court of Common Pleas for Charleston County on June 26, 2006.

59. On July 3, 2006, Justin Lucey filed an affidavit with the Charleston County Clerk of Court in support of the Lucey Firm's attorney fees claimed in the Bees Ferry case.

60. The July 3, 2006 Justin Lucey affidavit specifically mentioned Ms. Meyer's participation in the case.

61. The July 3, 2006 Justin Lucey affidavit supporting it attorneys fees petition in the Bees Ferry Case cited, among other issues, the complexity and novelty of the issues addressed. Specifically, the Justin Lucey July 3, 2006 Affidavit cited, "There is a scarcity of inverse condemnation precedent for inverse condemnation with facts such as this case and with regard to the legal issues, as evidenced by the extensive arguments on directed verdict and the jury charges. The legal issues in this case dealt with the revocation of a previously approved and issued permit....".

62. On July 14, 2006, a notice of appeal was filed in the Bees Ferry Case so Ms. Meyer knew she would not receive her salary bonus of five percent for the Bees Ferry case until the appeal was resolved or the case settled.

63. On July 25, 2006, Justin Lucey spoke to Ms. Meyer about a potential case involving the Ocean Club Villas on the Isle of Palms.

64. The Ocean Club Villas property is a large, multi-family complex on front beach on the Isle of Palms, South Carolina. There are two buildings that contain 102 individual condominiums owned by several hundred individuals, trusts, partnerships, and corporations.

65. Justin Lucey was scheduled to take an extended vacation out of the office beginning on Wednesday, July 26, 2006.

66. Between her meeting with Justin Lucey in July and August 10, 2006, Ms. Meyer reviewed documents and prepared for a meeting with the Ocean Club Board of Directors to

discuss the retention of the Lucey Firm for a construction defect case against several parties for a reconstruction project at the Ocean Club Villas.

67. On August 11, 2006, Ms. Meyer met with the Ocean Club Villas Board of Directors about employing the Lucey Firm to file and handle their construction defect case.

68. On August 11, 2006, Justin Lucey was still out of the office on his scheduled vacation.

69. While Justin Lucey was on vacation and prior to meeting with the Ocean Club Villas Board of Directors, Ms. Meyer reviewed documents from the potential client, spoke with the property manager, prepared chronologies of the case, reviewed photographs, researched party information, and prepared a factual memorandum to be used for the complaint in the action to be filed.

70. On August 17, 2006, the Lucey Firm filed a case on behalf of the Ocean Club Horizontal Property Regime, Inc. (hereinafter "Ocean Club").

71. Throughout the summer and fall 2006, Ms. Meyer worked on the Ocean Club matter in addition to her other caseload.

72. On October 10, 2006, funds were deposited with the Charleston County Clerk of Court by the defendant debtor in the Bees Ferry Case that had ended at trial in June.

73. In early 2007, the Bees Ferry Case was settled while the case was still on appeal.

74. On March 27, 2007, Justin Lucey asked Ms. Meyer to go to the Charleston County Clerk's Office and pick up a check made out to the Lucey Firm by the Charleston County Clerk's Office from the funds previously deposited by the defendant debtor SCDOT.

75. The net attorney fees received on March 27, 2007 by the Lucey Firm for the Bees Ferry Case were \$409,000.

76. Ms. Meyer was not paid the five percent bonus she was entitled to for the Bees Ferry Case in her April 2007 paycheck pursuant to the June 2006 Contract.

77. Ms. Meyer questioned the non-payment of this bonus, and on April 27, 2007, Ms. Meyer and Justin Lucey met regarding cases and bonuses.

78. At the April 27, 2007 meeting, Ms. Meyer and Justin Lucey discussed the recently settled Bees Ferry Case and the Ocean Club Case. At that time, although she believed she was entitled to a salary bonus on the Bees Ferry case, Ms. Meyer did not further pursue the payment of it based upon the representations and statements made by Justin Lucey at that meeting.

79. At the April 27, 2007 meeting, Justin Lucey represented to Ms. Meyer that he expected the trial of the Ocean Club Case to begin in late 2007 or early 2008.

80. On May 1, 2007, Ms. Meyer and Justin Lucey met as a follow up to the April 27, 2007 meeting. At this meeting, Justin Lucey provided Ms. Meyer with a written agreement that he had drafted for her to review and discuss with him on the following day.

81. On May 2, 2007, Ms. Meyer and the Lucey Firm entered into a written agreement which stated Plaintiff would receive a ten percent bonus on the Ocean Club Case if she continued to give the case her energetic commitment (hereinafter "Ocean Club Agreement.") Ms. Meyer was given the opportunity by Justin Lucey, and the Lucey Firm to accept a higher fixed income and lower variable income by diversifying her caseload in lieu of an Ocean Club bonus, but Ms. Meyer rejected that option by crossing out that language on the May 2007 Ocean Club Agreement. Ms. Meyer also initialed this rejection of that option of changing the ten percent bonus she would receive on the Ocean Club Case on the face of the Ocean Club Agreement.

82. On May 2, 2007, Ms. Meyer and Justin Lucey did not resolve the Bees Ferry salary bonus issue, and Ms. Meyer continued to believe she was entitled to a salary bonus on the Bees

Ferry case and would eventually be paid the same even though Ms. Meyer did not further pursue the payment of it at that time.

83. By executing the Ocean Club Agreement with the Lucey Firm, Ms. Meyer specifically agreed to accept a lower base salary in exchange for a ten percent bonus in the Ocean Club Case, to wait for her bonus for several months while the case was litigated, and to accept the risk associated with not knowing the ultimate recovery amount in the case and foregoing the opportunity for a higher, known salary.

84. As of May 2007, both Ms. Meyer and Justin Lucey knew that the Ocean Club Case would be heavily litigated and defended on statute of limitations defenses and other complex legal issues that could potentially reduce any recovery significantly or completely as to some parties, which could ultimately vastly decrease any recovery in the case if the Lucey Firm client lost on these issues. Several defendants had already filed answers in the Ocean Club case defending on statute of limitations, and as early as of May 2007, statute of limitations was being litigated.

85. After May 1, 2007, Ms. Meyer spent the majority of her time on the Ocean Club case to the exclusion of other cases and other bonus opportunities.

86. In early 2008, the defendants in the Ocean Club case sought and received a delay in the trial of the case until the Fall 2008 causing Ms. Meyer to wait potentially even longer for her bonus in the case.

87. The Ocean Club Case was mediated on June 17, 18, and 19, 2008.

88. Several defendants settled during the June 2008 Ocean Club mediation, and several negotiations remained in process after the June 2008 Ocean Club mediation.

89. A second mediation was held on August 4 and 5, 2008 in the Ocean Club Case, and additional defendants settled.

90. In August 2008, the Ocean Club trial was again delayed until the Spring of 2009, and causing a further delay in the resolution of the case.

91. A third mediation was held in the Ocean Club Case the week of November 3, 2008, and additional defendants settled.

92. On January 19, 2009, Ms. Meyer met with Justin Lucey to review proposed Ocean Club jury charges for the anticipated date-certain trial which had been set for March 2009. At this meeting, Justin Lucey told Ms. Meyer that he had collected some additional fees in the Ocean Club Case.

93. Nevertheless, Justin Lucey and the Lucey Firm did not pay Ms. Meyer the Ocean Club Case bonus she was entitled to in her February 1, 2009 paycheck.

94. Periodically, the Lucey Firm had made partial payments of Ms. Meyer's earned Ocean Club salary bonus. Sometimes the payments were made as the different defendants settled and others were made when the fees were actually collected by the Lucey Firm. Prior to January 19, 2009, Ms. Meyer knew that the Lucey Firm's fee had not been fully collected for the 2008 settlements and, therefore, did not question the total of the intermittent payments toward her Ocean Club bonus.

95. On February 1, 2009, an additional intermittent payment was made to Ms. Meyer, but this payment did not bring the total of Ms. Meyer's salary bonuses paid out for the prior settlements to her full ten percent per the Ocean Club Agreement.

96. By February 26, 2009, the Lucey Firm had earned a fee in excess of \$2 Million for the Ocean Club Case.

97. At the same time, Ms. Meyer had been paid less than one third of her earned salary bonus in the Ocean Club Case.

98. On February 11, 2009, Ms. Meyer emailed Justin Lucey about the status of her Ocean Club bonus as she became concerned for the first time that she had not received her full salary bonuses based upon Justin Lucey's statement about having collected all the fees for the 2008 settlements as of January 19, 2009.

99. Between February 11, 2009 and February 27, 2009, Justin Lucey avoided Ms. Meyer's attempts to discuss her Ocean Club bonus and remained out of the office for extended periods of time while forcing Ms. Meyer to communicate by email about her Ocean Club bonus.

100. On February 27, 2009, Ms. Meyer and Justin Lucey had a telephone conversation in the morning ("February 2009 Conversation") when Ms. Meyer discovered that in her paycheck that day Justin Lucey and the Lucey Firm had not paid her earned Ocean Club bonus. During this conversation, Justin Lucey told Ms. Meyer for the first time he may not give her a ten percent bonus in the Ocean Club Case.

101. During the February 2009 Conversation, Justin Lucey told Ms. Meyer he questioned her "commitment" and "energetic efforts" in the Ocean Club Case.

102. However, according to records generated by the Lucey Firm by February of 2009, Ms. Meyer had produced 30% more billable hours in the Ocean Club Case than Justin Lucey, yet he questioned her "commitment" and "energetic efforts."

103. Between the time of the original May 2007 Meeting regarding Ocean Club and February 27, 2009, though Ms. Meyer had continued to receive a lower base salary per the May 2007 Agreement, she had worked and billed in excess of 3,400 hours for the Ocean Club Case. Defendant Justin Lucey had also not assigned Ms. Meyer any new cases to spearhead and earn

bonuses on because of the demands of and her time commitment necessary to the Ocean Club Case and her rejection of diversifying her caseload when entering into the Ocean Club Agreement.

104. As of February 27, 2009, Justin Lucey and the Lucey Firm still owed Ms. Meyer thousands of dollars on the fee that had been collected to date from the Ocean Club Case.

105. On February 27, 2009, Ms. Meyer and Justin Lucey met and worked to complete several deadlines and filings, and during these meetings Justin Lucey once again questioned Ms. Meyer's commitment to the Ocean Club Case.

106. Ms. Meyer became fearful that Justin Lucey and the Lucey Firm were trying to change the terms of her compensation after the fact.

107. On this same day, on February 27, 2009, an additional settlement of \$3.5 Million was reached with one group of parties in the Ocean Club case.

108. Also, on this same day, Justin Lucey emailed Ms. Meyer confirming the total amount he had paid her to date toward her Ocean Club bonus and acknowledging Ms. Meyer did not agree with his calculation of her earned salary bonus to date. Justin Lucey further confirmed that Ms. Meyer's acceptance of the monies on February 27, 2009 did not constitute an acceptance of his determination of the amount of the bonus paid to date.

109. Thereafter, in March 2009, Justin Lucey began taking the position that a bonus was normally paid "at the end" of a case, leading Ms. Meyer to believe Justin Lucey still intended to pay her the remainder of her unpaid bonus in full.

110. In addition to Ms. Meyer, Justin Lucey and the Lucey Firm entered into agreements with other Lucey Firm attorneys and staff members for bonuses on the Ocean Club Case.

111. By the end of February 2009, the wages which had been wrongfully withheld from Ms. Meyer (the unpaid portion of Plaintiff's Ocean Club bonus) equated to approximately 2% of Plaintiff's Ocean Club salary bonus.

112. In late 2008, well after execution of Ms. Meyer's May 2007 Ocean Club Agreement and after Ms. Meyer had expended thousands of hours in the Ocean Club Case, Justin Lucey and the Lucey Firm entered into a new agreement to pay a second firm associate attorney a 2% bonus in the Ocean Club Case.

113. The dollar value of the thousands of dollars withheld from Ms. Meyer's salary bonus as of February 2009 approximated 2%. Justin Lucey and the Lucey Firm attempted to reduce Ms. Meyer's Ocean Club ten percent bonus by 2% to pay the second associate attorney with whom they had struck an independent bonus agreement in the Ocean Club Case.

114. Ms. Meyer's May 2007 Ocean Club Agreement was never amended to contemplate the 2% bonus arrangement with a second firm associate attorney, nor did Plaintiff ever agree to reduce her bonus in the Ocean Club Case or to fund the second associate attorney's bonus.

115. As of the date Justin Lucey informed Ms. Meyer that he was withholding approximately 2% of her Ocean Club bonus, Ms. Meyer's hours exceeded the second associate attorney's hours in the Ocean Club Case by 3,900 hours, or 92%, according to the Lucey Firm's records generated on February 27, 2009.

116. In February 2009, the Ocean Club trial was delayed for a third time, and a date-certain trial for the week beginning July 6, 2009 was set.

117. On Friday, April 24, 2009, one of the main forensic experts in the Ocean Club Case died suddenly. That evening, Justin Lucey tried to reach Ms. Meyer to ask her to talk to the deceased

expert's widow and/or daughter to request that the family not run the obituary in the newspaper until after Justin Lucey could try to get a settlement agreement completed over the weekend.

118. Ms. Meyer did not call the expert's widow or daughter to make this request and disagreed with Justin Lucey that making the request of the family was appropriate, which caused Justin Lucey to become extremely angry at Ms. Meyer when they discussed this issue.

119. Ms. Meyer continued to work on the Ocean Club Case and believed the disputed bonus amount would be paid per the May 2007 Agreement at the end of the case based upon Justin Lucey's statements.

120. During May 2009, Ms. Meyer worked tirelessly on the case, and the two weeks of May 11, 2009 and May 25, 2009 had worked 160 hours on the Ocean Club Case in order to prepare experts for final depositions and in anticipation of trial.

121. In June and July 2009, further negotiations and settlements in the Ocean Club Case occurred while the case was being prepared for trial.

122. On July 20, 2009, the Ocean Club Case was mediated with the two remaining parties, and the entire Ocean Club case has settled by the end of the day.

123. On July 21, 2009 at 11:15 a.m., Justin Lucey summoned Ms. Meyer into his office via a computer instant message and handed her a letter complaining about their working relationship.

124. During the July 21, 2009 discussion, Ms. Meyer realized she had been set up, and she told Justin Lucey that she was not willing to discuss their working relationship until she knew what Justin Lucey's and the Lucey Firm's plans were regarding payment of the remainder of the Ocean Club salary bonus owed to her.

125. After hearing this request by Ms. Meyer, Justin Lucey leaned over his table, looked at Ms. Meyer, swore at her using profanity, and said he would be "so glad" to be rid of her. Then, Justin Lucey proceeded to tell Ms. Meyer that he was going to do "this" to teach her a "lesson."

126. Ms. Meyer, was ordered to leave the Lucey Firm property on July 21, 2009 just before noon and less than 24 hours after the last defendant in the Ocean Club Case had settled.

127. On August 5, 2009, Ms. Meyer received a termination package from Justin Lucey.

128. Though typed otherwise, the termination letter to Ms. Meyer had a handwritten date of July 23, 2009, and terminated Ms. Meyer from the Lucey Firm as of July 22, 2009.

129. Ms. Meyer's termination package was originally postmarked July 25, 2009, but was returned to the Lucey Firm for insufficient postage. Justin Lucey had left the country for an extended vacation in Norway and upon information and belief had left on Saturday, July 25, 2009.

130. On July 29, 2009 additional postage was added to the termination package sent to Ms. Meyer and placed in the mail sometime thereafter.

131. Prior to July 22, 2009 and during August 2009, additional settlement funds were received by the Lucey Firm for the Ocean Club Case. Ms. Meyer was entitled to a bonus equal to ten percent of those additional funds.

132. The total settlements in the Ocean Club Case were in excess of \$20 Million as reflected in filings by one of the defendants with the Charleston County Court in July 2009.

133. The Lucey Firm attorney fee pursuant to its retainer agreement with Ocean Club was more than \$5.6 Million.

134. Despite repeated demands, Justin Lucey and the Lucey Firm have refused to pay Ms. Meyer the balance of her earned Ocean Club bonus of more than \$300,000.00, which is, upon information and belief, now more than 30 days past due.

135. Justin Lucey and the Lucey Firm have also refused to pay Ms. Meyer her earned Bees Ferry bonus of \$20,450.00, which is all now more than 30 days past due.

136. Plaintiff has also not been paid the value of her accrued vacation.

BY WAY OF COUNTERCLAIM AND AS A FIRST CAUSE OF ACTION

Declaratory Judgment
(As to Plaintiff Justin Lucey)

137. Defendant Meyer incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

138. Justin Lucey is not a party to the Lucey Firm Employment Agreement in his individual capacity.

139. Defendant Meyer requests a Declaratory Judgment from the Court that Justin Lucey is not a party to the Lucey Firm Employment Agreement and as such cannot compel arbitration.

BY WAY OF COUNTERCLAIM AND AS A SECOND CAUSE OF ACTION

Breach of Contract
(As to Plaintiff Lucey Firm)

140. Defendant Meyer incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

141. The document executed by Ms. Meyer in June 2006 was a contract between Plaintiff Lucey Firm and Ms. Meyer.

142. The June 2006 Contract was supported by valuable consideration.

143. The May 2007 Ocean Club Agreement was an amendment to the contract between Plaintiff Lucey Firm and Ms. Meyer.

144. There were no modifications, written or oral, to the June 2006 Contract to which Ms. Meyer agreed or otherwise assented after execution of it.

145. Ms. Meyer completed her performance under the June 2006 contract and the Ocean Club Agreement.

146. Justin Lucey and the Lucey Firm have refused to pay Ms. Meyer the Bees Ferry bonus and the Ocean Club bonus, and accrued vacation, all due and owing to her under the June 2006 Contract and the May 2007 Ocean Club Agreement.

147. The Lucey Firm has breached its employment contract with Ms. Meyer.

148. The breaches by the Lucey Firm are unjustified and violate its duties and obligations owed to Ms. Meyer.

149. The Lucey Firm has violated its duties of good faith and fair dealing owed to Ms. Meyer.

150. By and through its principal officer, Justin Lucey, the Lucey Firm attempted to change the terms of Ms. Meyer's contract and secreted intentions and purposes not communicated to Ms. Meyer at the time of the execution of the June 2006 Contract and the May 2007 Ocean Club Agreement.

151. Justin Lucey stated on July 21, 2009 when terminating Plaintiff that he was doing "this" to teach Plaintiff a "lesson."

152. Justin Lucey and the Lucey Firm's actions in 2009 were done in order to prevent, hinder, and/or make more costly Ms. Meyer's collection of the monies owed to her under the June 2006 contract and the Ocean Club Agreement by expending attorneys fees, costs and expenses, and her time and efforts in order to collect her salary bonuses and accrued vacation due and owing to her.

153. The Lucey Firm has breached its contract with Ms. Meyer by terminating Ms. Meyer on July 22, 2009, taking the position that Ms. Meyer is not entitled to her bonuses, refusing to pay Ms. Meyer her bonuses and accrued vacation, and doing so with an intent to hinder, prevent, and/or make more costly Ms. Meyer's collection of the monies due and owing to her.

154. The Lucey Firm has further breached its contract with Ms. Meyer by additional facts and evidence to be borne out during the discovery conducted in this case.

155. As a result of the Lucey Firm's breaches, Ms. Meyer has suffered damages in the form of lost back and future wages, lost income and benefits, severe psychological harm, emotional distress, anxiety, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, humiliation, physical injuries, costs of this action, and other consequential damages.

BY WAY OF COUNTERCLAIM AND AS A THIRD CAUSE OF ACTION
Breach of Contract Accompanied By a Fraudulent Act
(As to Plaintiff the Lucey Firm)

156. Defendant Meyer incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

157. Plaintiff Lucey Firm breached its June 2006 Contract and Ocean Club Agreement with Ms. Meyer.

158. Plaintiff Lucey Firm breached its duties of good faith and fair dealing owed to Ms. Meyer upon its termination of Ms. Meyer from the Lucey Firm and by refusing to pay Ms. Meyer's ten percent (10%) Ocean Club bonus.

159. Beginning in February 2009 and/or up to and including the time of her termination on July 22, 2009, Plaintiffs Justin Lucey, as the principal officer for and on behalf of the Lucey Firm, and the Lucey Firm made misrepresentations to Ms. Meyer, fraudulently induced Ms.

Meyer to continue expending extensive hours in the Ocean Club case, and acted recklessly in disregard for the truth in order to defraud Ms. Meyer and to deprive her of her ten percent (10%) Ocean Club bonus.

160. The Lucey Firm has fraudulently breached its employment contract with Ms. Meyer by terminating her on July 22, 2009, taking the position that Ms. Meyer is not entitled to her ten percent Ocean Club bonus or the Bees Ferry bonus, refusing to pay Ms. Meyer her bonuses and accrued vacation, and doing so with an intent to hinder, prevent, and/or make more costly Ms. Meyer's collection of the monies due and owing to her.

161. The Lucey Firm has further breached its employment contract with Ms. Meyer by additional fraudulent acts to be borne out during the discovery conducted in this case.

162. The Lucey Firm's actions were designed and intended to appropriate Ms. Meyer's bonus monies to its own use.

163. The Lucey Firm has appropriated Ms. Meyer's bonus monies to its own use.

164. The Lucey Firm terminated Ms. Meyer on July 22, 2009, less than twenty four hours after the entire Ocean Club case had settled to deprive Ms. Meyer of her ten percent (10%) Ocean Club salary bonus.

165. The Lucey Firm terminated Ms. Meyer in order to claim that Ms. Meyer's ten percent (10%) Ocean Club salary bonus was not due and payable for amounts received for settlements after 30 days of Ms. Meyer's termination.

166. Under the June 2006 Contract drafted by Justin Lucey, he had included a contract term that Ms. Meyer's bonuses for contingency case for which settlement monies were received more than 30 days after Ms. Meyer had separated employment with the Lucey Firm would not be payable.

167. The June 2006 Contract does not contemplate a separation of Ms. Meyer's employment from the Lucey Firm under the circumstances present when Justin Lucey and the Lucey Firm terminated Ms. Meyer on July 22, 2009.

168. In the termination package received by Ms. Meyer on August 5, 2009, Justin Lucey stated that the situation created by the Lucey Firm's termination of Plaintiff on July 22, 2009 may not be covered by the June 2006 Contract's notice provision.

169. Plaintiffs Justin Lucey and the Lucey Firm did not complete all of the settlements of the Ocean Club case within 30 days of Ms. Meyer's termination.

170. Ms. Meyer's bonus earned for settlements between May 2009 and July 2009 and not paid equals hundreds of thousands of dollars.

171. As a result of the Plaintiffs' fraudulent acts, Ms. Meyer has suffered damages in the form of lost back and future wages, lost income and benefits, severe psychological harm, anxiety, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, humiliation, physical injuries, and further seeks costs of this action, and pre-judgment and post judgment interest.

172. Additionally, Ms. Meyer has suffered emotional distress as a result of the actions of Plaintiffs which has resulted in physical injuries and lost income.

173. Ms. Meyer seeks punitive damages as to be determined by the trier of fact.

BY WAY OF COUNTERCLAIM AND AS A FOURTH CAUSE OF ACTION
Failure to Pay Wages Pursuant to S.C. Code § 41-10-10 et seq.
(As to Plaintiffs Justin Lucey and the Lucey Firm)

174. Defendant Meyer incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

175. Lucey Firm is an "employer" as that term is defined in S.C. Code §41-10-10 (11).

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176. Lucey Firm employs more than five employees and is subject to S.C. Code §41-10-10 *et seq.*

177. Justin Lucey is the owner of Lucey Firm and as an officer and agent of the employer with knowledge of the failure to pay a former employee is the person directly responsible for the nonpayment, and is personally liable as an "employer."

178. Ms. Meyer was an employee of the Lucey Firm at the time of her termination by Justin Lucey on July 22, 2009.

179. Ms. Meyer's bonuses are wages within the definition set forth in §41-10-10 (2).

180. Unpaid and earned wages are owed to Ms. Meyer in an amount exceeding \$340,000 and this amount remains unpaid.

181. Ms. Meyer has demanded payment of all wages due to her, and Plaintiffs have willfully and intentionally refused to pay Ms. Meyer the remaining wages due to her.

182. Upon separation of Ms. Meyer's employment, Plaintiffs Justin Lucey and the Lucey Firm failed to give written notice to Ms. Meyer containing the amount of her Bees Ferry and Ocean Club bonuses that were conceded to be due and failed to pay that amount, without condition, by August 21, 2009.

183. Plaintiffs Justin Lucey and the Lucey Firm violated the written notice requirements of S.C. Code §41-10-60.

184. Because Plaintiffs Justin Lucey and the Lucey Firm have not complied with the requirements of S.C. Code §41-10-10 *et seq.*, Ms. Meyer is entitled to payment of all unpaid wages and accrued vacation.

185. Ms. Meyer is entitled to payment of the unpaid wages in excess of \$340,000, treble damages, and attorney fees and costs pursuant to S.C. Code § 41-10-10 *et seq.* for Justin Lucey

and the Lucey Firm's willful and intentional failure to pay the her all of the wages due and owing to her.

BY WAY OF COUNTERCLAIM AND AS A FIFTH CAUSE OF ACTION

Promissory Estoppel
(As to Plaintiff Lucey Firm)

186. Defendant Meyer incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

187. The Lucey Firm made unambiguous assurances and promises to Ms. Meyer through its conduct and actions, including, but not limited to 1) Justin Lucey and the Lucey Firm promising to pay money owed to the Ms. Meyer which was due to her from the Bees Ferry case in order to induce her to remain employed and work on the Ocean Club case; and 2) Justin Lucey and the Lucey Firm promising on May 2, 2007 that Ms. Meyer would receive a higher percentage bonus on the Ocean Club case if she continued to give the Ocean Club case her energetic commitment.

188. Ms. Meyer relied on the promises and assurances that were made to her by the Lucey Firm by and through its principal officer, Justin Lucey, regarding the bonuses she was promised.

189. Ms. Meyer's reliance on the Lucey Firm's representations regarding her receipt of salary bonuses was reasonable.

190. Ms. Meyer's reliance on the assurances and promises made to her by Justin Lucey and the Lucey Firm was expected and foreseeable to Plaintiffs.

191. Ms. Meyer has been injured by her reliance on the Lucey Firm's promises.

192. Ms. Meyer is entitled to lost back and future wages, benefits, costs, and pre- and post judgment interest for damages resulting from her reliance on Plaintiffs' promises.

BY WAY OF COUNTERCLAIM AND AS A SIXTH CAUSE OF ACTION
Intentional Misrepresentation/Fraud/Constructive Fraud
(As to Plaintiffs Justin Lucey and the Lucey Firm)

193. Defendant Meyer incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

194. Plaintiffs Justin Lucey and the Lucey Firm intentionally misrepresented the terms of Ms. Meyer's salary bonus in the Ocean Club Agreement, (10%) of the Ocean Club attorneys fee if she did not reduce her hours or "commitment" in the case but purposely failed to define the term "commitment," and then changed its meaning to avoid meeting his and the Lucey Firm's obligations under the terms of Plaintiff's Ocean Club Agreement.

195. Justin Lucey knew at the time Ms. Meyer entered into the Ocean Club Agreement that Ms. Meyer was executing the agreement for a ten percent (10%) salary bonus as evidenced by Ms. Meyer striking through language in the document to reduce her hours in the Ocean Club Case and diversify her caseload. Ms. Meyer signed the Ocean Club Agreement based upon statements and representations by Justin Lucey about the payment of a ten percent bonus in the case, and his representations about the ten percent (10%) salary bonus were material to Ms. Meyer.

196. When meeting with Ms. Meyer to go over the Ocean Club Agreement with Ms. Meyer, Plaintiff Justin Lucey's explanation of the term "commitment" to Ms. Meyer was false, and Plaintiff Justin Lucey knew he could change the term to suit his needs when he used it.

197. Plaintiffs Justin Lucey and the Lucey Firm intended Ms. Meyer to rely on their misrepresentation of the term "commitment" and used the term to induce Ms. Meyer to continue working for the Lucey Firm.

198. Plaintiffs Justin Lucey and the Lucey Firm benefited monetarily from misrepresenting the term "commitment" to Ms. Meyer as they were able to use the term against her when they attempted to retain wrongfully some of Ms. Meyer's earned bonus.

199. Ms. Meyer had no knowledge as to whether or not the representations made by Plaintiffs Justin Lucey and the Lucey Firm to her regarding the term "commitment" were true or false at the time the statements were made.

200. Plaintiffs Justin Lucey and the Lucey Firm owed a duty to Ms. Meyer to communicate truthful information to Ms. Meyer regarding her eligibility for bonuses, and the criteria being used to determine the same.

201. Plaintiffs Justin Lucey's and the Lucey Firm's change of the meaning of the term "commitment" in a manner that injured Ms. Meyer and financially benefited Plaintiffs Justin Lucey and the Lucey Firm as the Ocean Club Case was settling breached the duty of care Plaintiffs owed to Ms. Meyer as her employers.

202. Plaintiffs Justin Lucey and the Lucey Firm never communicated to Ms. Meyer that her Ocean Club bonus could be less than ten percent (10%) until February 27, 2009. Thereafter, on June 1, 2009, Justin Lucey emailed Ms. Meyer that funds had been deposited into her checking account. Justin Lucey also included in the email a calculation that indicated the recent deposit represented ten percent (10%) of the Lucey Firm's fee from the \$3.5 Million settlement on February 27, 2009, leading Ms. Meyer to believe she would in fact be paid the full ten percent (10%) commission.

203. The June 1, 2009 email from Justin Lucey was intended to make Ms. Meyer believe that Justin Lucey agreed Ms. Meyer would receive her full Ocean Club bonuses and induce her to

continue to expend significant hours on the Ocean Club Case on the basis she would continue to receive ten percent (10%) of the outstanding and the unpaid Ocean Club bonus.

204. Ms. Meyer, therefore, reasonably believed as late as June of 2009 that Justin Lucey still intended to pay her a full ten percent (10%) of the Ocean Club fee.

205. Between June 2009 and July 2009, Justin Lucey and the Lucey Firm knew that they did not intend to pay Ms. Meyer the balance of her ten percent (10%) bonus in the Ocean Club Case in spite of the June 1, 2009 email to Ms. Meyer and statements and actions leading Ms. Meyer to believe it would be paid at the end of the case.

206. Plaintiffs Justin Lucey and the Lucey Firm held positions of special confidence as to Ms. Meyer.

207. Plaintiffs Justin Lucey and the Lucey Firm were fraudulent in their actions and conduct.

208. As the result of Plaintiffs Justin Lucey's and the Lucey Firm's intentional misrepresentations to Ms. Meyer regarding her salary bonuses and their fraudulent acts, Ms. Meyer has been seriously injured.

209. Ms. Meyer seeks actual and punitive damages for Plaintiffs Justin Lucey's and the Lucey Firm's intentional misrepresentations and fraudulent conduct.

210. As a result of the Plaintiffs' intentional misrepresentations and fraudulent acts, Ms. Meyer has suffered damages in the form of lost back and future wages, lost income and benefits, severe psychological harm, anxiety, pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, embarrassment, humiliation, physical injuries, and further seeks costs of this action, and pre-judgment and post judgment interest.

211. Additionally, Ms. Meyer has suffered emotional distress as a result of the actions of Plaintiffs which has resulted in physical injuries and lost income.

BY WAY OF COUNTERCLAIM
AND AS A SEVENTH CAUSE OF ACTION
Unjust Enrichment
(As to Plaintiffs Justin Lucey and the Lucey Firm)

212. Defendant Meyer incorporates all prior allegations, where not inconsistent, as if fully set forth herein.

213. Ms. Meyer's legal services in the Bees Ferry and Ocean Club cases were performed at Plaintiffs' requests and with the reasonable belief that Ms. Meyer would be fairly compensated for her services.

214. Ms. Meyer agreed to a lower base salary with the Lucey Firm per the June 2006 Contract in exchange for which Ms. Meyer would receive salary bonuses for her work in cases at the Lucey Firm.

215. Plaintiffs Justin Lucey and the Lucey Firm benefited from Ms. Meyer's work.

216. Plaintiffs Justin Lucey and the Lucey Firm have failed to pay Ms. Meyer her earned salary bonus in the Bees Ferry case.

217. Ms. Meyer earned her Bees Ferry salary bonus pursuant to the June 2006 Contract when she tried the case to verdict with Justin Lucey and the Lucey Firm.

218. Ms. Meyer has been paid an amount toward her Ocean Club bonus which represents only 4.3% of the Lucey Firm attorney fees in the case.

219. Ms. Meyer expended more than 5,100 hours of legal work in the Ocean Club Case.

220. According to the Lucey Firm records generated on February 27, 2009, Ms. Meyer had worked 56% of the attorney hours for the attorneys in the Lucey Firm assigned to the Ocean Club case, representing Ms. Meyer's billings in excess of 4,200 hours in the Ocean Club Case as of that date.

221. According to the Lucey Firm records, Ms. Meyer's time as of February 27, 2009 represented 31% of all Lucey Firm hours billed on the Ocean Club Case, including attorneys, legal assistants, law clerks, and paralegals.

222. According to the Lucey Firm records, Justin Lucey had worked 3,037 hours on the Ocean Club Case as of February 27, 2009.

223. According to the Lucey Firm records, Justin Lucey's time as of February 27, 2009 represented 22% of all Lucey Firm hours billed on the Ocean Club Case, including attorneys, legal assistants, law clerks, and paralegals.

224. Plaintiffs Justin Lucey and the Lucey Firm benefited from Ms. Meyer's legal services and could not have achieved the same results and realized their significant profits from the Ocean Club Case without the efforts and legal services of Ms. Meyer.

225. In July 2009, Plaintiff Justin Lucey began touting the Ocean Club case as the most successful construction defect case ever in Charleston County while denying Ms. Meyer her Ocean Club bonus and payment for her legal services and contribution to the case.

226. Plaintiff Lucey Firm did not enter into any fee sharing agreements with any other law firms for the Ocean Club Case.

227. Fee sharing and multiple-firm representation is common in complex as well as multi-family construction cases in South Carolina and the Charleston area.

228. Justin Lucey spoke frequently with Ms. Meyer about the luxury of not having to litigate the Ocean Club Case with co-counsel due to her being available to work full-time on the Ocean Club case.

229. Plaintiffs Justin Lucey and the Lucey Firm were able to control and manage the Ocean Club Case and retain significant profits without fee sharing with co-counsel because of Ms.

Meyer's efforts and services in the case unlike another complex construction defect case the Lucey Firm had litigated with Nexsen Pruet, LLC during the same time frame.

230. Likewise, during the same time period as the Ocean Club Case, Plaintiffs Justin Lucey and the Lucey Firm were co-counsel with another firm in Charleston and were required to fee share in attorney fees with co-counsel for their joint efforts in the action.

231. Plaintiffs Justin Lucey and the Lucey Firm have retained significant profits as a result of Ms. Meyer's full-time dedication and legal services in the Bees Ferry and Ocean Club Cases, for which the Lucey Firm received total attorney fees in excess of nearly Six Million Dollars.

232. Plaintiffs Justin Lucey and the Lucey Firm have refused to pay Ms. Meyer a fair percentage for the legal work she performed on the Bees Ferry and Ocean Club Cases.

233. Plaintiffs Justin Lucey and the Lucey Firm have been unjustly enriched at Ms. Meyer's expense.

234. As of the time of the attorney fee petition following trial, Ms. Meyer's time in the Bees Ferry Case was 8.5% of the Lucey Firm time, and Ms. Meyer seeks compensation for her legal services in the Bees Ferry Case an amount to be determined by the trier of fact.

235. As of February 27, 2009, the value of Ms. Meyer's services, based on the percentage of hours she worked on the Ocean Club case was 56% of the attorney fees, or approximately \$1.7 Million, obtained by the Lucey Firm in the Ocean Club Case.

236. Ms. Meyer's services from February 27, 2009 and July 22, 2009 also resulted in additional attorney's fees obtained by the Lucey Firm, and Ms. Meyer seeks compensation for her legal services relative to the Ocean Club Case in an amount equal to the reasonable amount of her services during this time frame as to be determined by the trier of fact.

**BY WAY OF COUNTERCLAIM AND AS AN EIGHTH CAUSE OF ACTION AGAINST
PLAINTIFFS AND A FIRST CAUSE OF ACTION AGAINST THIRD PARTY
DEFENDANTS
Constructive Trust**

237. Defendant and Third Party Plaintiff Meyer incorporates all previous responses, where not inconsistent, as if fully set forth herein.

238. Plaintiff Lucey Firm maintains offices at 415 Mill Street, Mount Pleasant, South Carolina, and conducts business in Charleston County.

239. Plaintiff Lucey Firm is the owner of record for the property known as "415 Mill Street, Mount Pleasant, South Carolina" that is listed as Parcel Number 5171600059 according to the records of the Charleston County Register of Mesne Conveyances (hereinafter "Mill Street Property").

240. Plaintiff Justin Lucey is the owner of record for the property located at 218 Lucas Street, Mount Pleasant, South Carolina (hereinafter "Lucas Street Property").

241. The Lucas Street Property has been used to conduct business exclusively by Plaintiffs Justin Lucey and the Lucey Firm since at least June 2007.

242. Plaintiff Justin Lucey is the owner of record for the property located at 109 Friend Street, Mount Pleasant, South Carolina (hereinafter "Friend Street Property").

243. Plaintiff Justin Lucey is the owner of record for the property located at 121 E. Artic Avenue, Folly Beach, South Carolina (hereinafter "Folly Condo").

244. Plaintiff Justin Lucey is the owner of record for the property located at 519 E. Artic Avenue, Folly Beach, South Carolina (hereinafter "Folly House").

245. Plaintiff Justin Lucey is an owner of record for the property located at 1396 Madison Court, Mount Pleasant, South Carolina (hereinafter "Brickyard Property").

246. Third Party Defendant Lorcan Lucey is listed as a second owner for the Brickyard Property according to the records of the Charleston County Register of Mesne Conveyances.

247. Third Party Defendant Lorcan Lucey is a citizen and resident of the County of Charleston, State of South Carolina.

248. Third Party Defendant GMAC Mortgage Corporation is a corporation organized under the laws of a state other than South Carolina and is listed as the mortgagee for the residential mortgage for the Friend Street Property according to the records of Charleston County.

249. Third Party Defendant CitiMortgage, Inc. is a corporation organized under the laws of a state other than South Carolina and is listed as the mortgagee for the mortgage for the Lucas Street Property according to the records of Charleston County.

250. Third Party Defendant John Doe Finance is a company that provides line(s) of credit and/or other financing to Plaintiffs the Lucey Firm and/or Justin Lucey. Upon information and belief, the Lucey Firm and Justin Lucey real estate properties identified above are used to collateralize some or all of said line(s) of credit and/or financing.

251. Plaintiffs Justin Lucey and the Lucey Firm have obtained funds from case settlements described above which do not belong to them, and Plaintiffs have fraudulently, and/or in bad faith, and/or, through an abuse of confidence retained and converted said funds for use for the real estate properties described herein.

252. Defendant and Third Party Plaintiff Meyer has a clear right to bonuses that Plaintiffs Justin Lucey and the Lucey Firm are wrongfully withholding from her.

253. Plaintiffs' refusal to pay Defendant and Third Party Plaintiff Meyer the funds she is entitled to is a breach of fiduciary duty, has been done in bad faith, and is fraudulent.

254. Upon information and belief, in July 2008 Plaintiff Justin Lucey began paying to maintain two separate residences and began paying child support under a separation agreement in his Family Court case and then had to pay other funds to his ex-wife pursuant to a subsequent divorce decree.

255. Upon information and belief, Plaintiff Justin Lucey used monies from the Ocean Club settlement to fund payments to his wife, to pay marital debts, and to reach a property settlement with his wife instead of paying Defendant and Third Party Plaintiff Meyer the wages owed to her.

256. Upon information and belief, Plaintiffs Justin Lucey and the Lucey Firm have used proceeds from the Ocean Club and Bees Ferry settlements to make improvements, pay taxes, pay insurance, and maintain the real estate properties listed herein.

257. Third-Party Defendants are joined to this action as parties with interests in the various real estate properties for which constructive trusts are being requested and have been joined as necessary parties pursuant to South Carolina Rule of Civil Procedure 19.

258. Defendant and Third Party Plaintiff Meyer respectfully requests this Court impose a constructive trust on the Mill Street Property, Lucas Street Property, Folly Condo, Folly House, Friend Street Property, and Brickyard Property pending a final resolution of this matter.

259. Defendant and Third Party Plaintiff Meyer respectfully requests this Court also impose a constructive trust on the Plaintiff and Third Party Defendant Lucey Firm's financial institution accounts pending a final resolution of this matter.

Wherefore, having fully stated their Complaint against Plaintiffs, Defendant and Third Party Plaintiff Meyer prays for actual damages, a declaration of this court consistent with

the requests in this Answer, for attorney fees and costs, and such other relief the Court deems appropriate.

Nancy Bloodgood

Nancy Bloodgood
SC Bar No.: 6459
FOSTER LAW FIRM, L.L.C.
3875 Faber Place Drive, Suite 204
North Charleston, SC 29405
Telephone: (843) 744-7828
Facsimile: (843) 577-0434
Email: nbloodgood@fosterfoster.com
Attorneys for Defendant and Third Party Plaintiff
Meyer

Charleston, South Carolina

Date: November 30, 2009

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Case No. 2009-CP-10-6873

Plaintiffs,

vs.

AMY MEYER,

Defendant and Third Party
Plaintiff,

vs.

LORCAN LUCEY, GMAC MORTGAGE
CORPORATION, CITI MORTGAGE, INC.,
AND JOHN DOE FINANCE,

Third Party Defendants.

PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION TO COMPEL
ARBITRATION

FILED
2009 DEC 3 37
JULIE J. STRONG
CLERK OF COURT
BY

In support of the Motion to Compel Arbitration, filed on November 2, 2009, Plaintiff Justin O'Toole Lucey, P.A. (the "Firm") respectfully submits this Memorandum and requests that the Court compel arbitration of this action pursuant to the Federal Arbitration Act ("FAA").

FACTS

The Firm maintains a law practice located at 415 Mill Street, Mount Pleasant, South Carolina. In or about January 2006, the Firm hired Defendant Amy Meyer ("Meyer" or "Defendant") as an associate attorney. In June of 2006, the Firm and Meyer entered into an agreement setting forth the terms of her employment. This agreement was amended with regard to the payment of bonuses by letter agreement in May of 2007. (The 2006 agreement and 2007 amendment being referred to collectively as the "Employment Agreement" are

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NPCHAR1:528814.2-MM-(AJOWERS) 045831-00001

attached as Exhibit A to the Complaint filed in this action.)¹

The Employment Agreement contains a binding arbitration provision, as follows:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

(See Employment Agreement attached as Exhibit A to the Complaint).

On July 22, 2009, Defendant's employment with the firm terminated. Beginning in August of 2009, Defendant, through her attorney, Nancy Bloodgood of the Foster Law Firm, made demands for compensation she claims is due under the Employment Agreement.

In response to Meyer's demands under the Employment Agreement, on October 27, 2009, the Firm filed a Demand for Arbitration with National Arbitration and Mediation, Inc. ("NAM") in which the Firm seeks a declaratory judgment that it has paid all compensation and wages due to Meyer and is not in violation of the Employment Agreement.

On October 30, 2009, Nancy Bloodgood's assistant, Amanda Kramer, sent to Cherie Blackburn, Plaintiff's counsel, by electronic mail, "a draft Complaint which Attorney Bloodgood is intending on filing next week." (See e-mail attached to Complaint as Exhibit B). The draft Complaint ("Draft Complaint") contained causes of action against not only the Firm, but also Justin O'Toole Lucey ("Lucey"), the Firm's owner and principal attorney. The Draft Complaint claimed that the Employment Agreement "was a contract between Defendants Justin Lucey and the Lucey Firm and the Plaintiff." The allegations and causes of action contained in the Draft Complaint were all based upon the Employment Agreement, which Meyer specifically referred to in the Draft Complaint as the "June 2006 Contract" and the

¹ A redacted version of Exhibit A was attached to the Complaint to protect and preserve the confidentiality of the provisions thereof. A complete version will be provided to the Court for an en camera review.

"May 2007...Agreement."

On October 31, 2009, Ms. Bloodgood sent an e-mail to Ms. Blackburn stating that she would be filing, on behalf of Meyer, the Draft Complaint as well as a Lis Pendens on Monday, November 2, 2009. (See Exhibit C to Complaint.) The Draft Complaint included as defendants GMAC Mortgage Corporation, CitiMortgage, Inc., and John Doe Financial, as mortgagees of property owned by the Firm and Lucey, and Lorcan Lucey, as co-owner with Lucey of a piece of real estate. The only cause of action against these defendants was one for a constructive trust, alleging that Lucey and the Firm have used bonus monies due to Meyer to make improvements, pay taxes, pay insurance, and maintain the real estate owned by Lucey and the Firm.

On November 2, 2009, Lucey² and the Firm instituted this action by filing a Complaint and Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration in order to prevent the filing of the Draft Complaint, which, in addition to constituting a complete disregard of the binding arbitration clause in the Employment Agreement, contained confidential information regarding the Firm's arrangement with employees and clients and confidential attorney/client information, communications, and work product regarding certain clients of the Firm. Plaintiffs' counsel also communicated to Meyer's counsel Plaintiffs' intent to sue for slander of title should a Lis Pendens be filed with the Court covering the properties owned by Plaintiffs.

On November 30, 2009, Meyer filed an Answer, Counterclaims and Third Party Complaint that contained, among other allegations, the claims set forth in the Draft Complaint

² Lucey was included as a plaintiff in this action because the Draft Complaint included him as a defendant, claimed he was a party to the Employment Agreement (although he was not), and contained breach of contract and other causes of action against him, including a request for a constructive trust on property he owned.

in the form of counterclaims. The counterclaims set forth eight causes of action, all arising out of the terms of the Employment Agreement. The crux of the counterclaims is Meyer's allegation that the Firm breached the Employment Agreement by not paying Meyer bonuses she claims were due under the Employment Agreement. Her counterclaims include breach of the Employment Agreement, breach of the Employment Agreement accompanied by fraudulent act, violation of the Payment of Wages Act (S.C. Code Ann. § 41-10-10 *et seq.*) for failure to pay "wages" under the Employment Agreement, and intentional misrepresentation/fraud/constructive trust based on alleged representations regarding Meyer's entitlement to the bonuses referenced in the Employment Agreement.

LEGAL ARGUMENT

I. PLAINTIFFS' MOTION TO COMPEL ARBITRATION SHOULD BE GRANTED BECAUSE THE EMPLOYMENT AGREEMENT BETWEEN THE PARTIES CONTAINS A VALID AND ENFORCEABLE ARBITRATION AGREEMENT

The Employment Agreement executed by the parties contains a binding arbitration clause:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

See Employment Agreement attached as Exhibit A to the Complaint. Meyer admits that the Employment Agreement is a binding agreement between the parties upon which she bases her causes of action. See Def.'s Answer, Countercl. & Third-Party Compl. ¶6 ("Defendant admits so much of Paragraph 6 as alleges Amy Meyer and Justin O'Toole Lucey, P.A. . . . entered into a written contract of employment in June of 2006."); ¶ 47 ("Ms. Meyer and Lucey Law Firm entered into a written contract of employment in June

of 2006 drafted by Justin Lucey"); ¶ 81 ("On May 2, 2007, Ms. Meyer and the Lucey Firm entered into a written agreement"); ¶ 140 ("The document executed by Ms. Meyer in June 2006 was a contract between Plaintiff Lucey Firm and Ms. Meyer."); ¶ 142 ("The June 2006 Contract was supported by valuable consideration."); ¶ 143 ("The May 2007 Ocean Club Agreement was an amendment to the contract between Plaintiff Lucey Firm and Ms. Meyer.").

II. THE FAA SHOULD APPLY TO THIS MATTER BECAUSE THE DISPUTE INVOLVES INTERSTATE COMMERCE

In her counterclaims, Meyer alleges that she is due additional bonus compensation under the Employment Agreement pertaining to her work on the Ocean Club case, a large case involving a suit filed by the Firm on behalf of homeowners from several different states against defendants from various states, represented by insurance companies from dozens of states. The representation required travel to Florida, Georgia, and North Carolina (to name a few states) to take witness depositions. Thus, by its nature, the Ocean Club case clearly involved interstate commerce, as did the work Meyer was performing for other clients. As a result, Meyer's claims under the Employment Agreement, that she was entitled to bonuses for the Ocean Club and other cases, necessarily implicate interstate commerce.

Since interstate commerce is involved, the FAA should apply to this matter, and not the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 *et seq.* ("SCUAA"). Under South Carolina law, "unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, *regardless of whether or not* the parties contemplated an interstate transaction." Munoz v. Green Tree Fin. Corp., 343 S.C.

531, 538-39, 542 S.E.2d 360, 363 (2001) (external citations and footnote omitted) (emphasis added); Episcopal Housing Corp. v. Federal Ins. Co., 269 S.C. 631, 636, 239 S.E.2d 647, 649 (1977) (stating that where a transaction involves interstate commerce, the FAA trumps state common-law); see also New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) ("As a preliminary note, we find the trial court properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . ."). "In all cases, determination of whether a transaction involves interstate commerce depends on the *facts of the case*." Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) (emphasis added). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). Further, the "United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002).

Meyer's performance under the Employment Agreement and her claims for compensation and wages related to the Employment Agreement, clearly involve interstate commerce, as evidenced by the cases described above. This is especially the case given the broad interpretation of commerce by the United States Supreme Court. Sutton v.

Hollywood Entm't Corp., 181 F. Supp. 2d 504, 509 n.2 (D. Md. 2002) ("The United States Supreme Court has given broad interpretation to the definition of 'interstate commerce,' as used in section 2 of the FAA."). Therefore, the Court should apply the provisions of the FAA and not those of the SCUAA.

A. The Employment Agreement is exempted from operation of the SCUAA by section 15-48-10(b).

Meyer argues that the arbitration agreement fails to meet the requirements of the SCUAA. See Def.'s Answer, Countercl. & Third-Party Compl. ¶¶ 13, 31. However, as an arbitration agreement between an employer and an employee, the Employment Agreement is excepted from the SCUAA pursuant to subsection (b), which states:

(b) This chapter however shall not apply to: . . .

(2) Arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply

S.C. Code Ann. § 15-48-10(b)(2).

Section 15-48-10(a) of the SCUAA generally requires that in order for an arbitration agreement to be "valid, enforceable, and irrevocable," the clause must be "typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract." S.C. Code Ann. § 15-48-10(a). However, because the arbitration agreement at issue here is contained in an employment agreement, the requirements of the SCUAA do not apply, and a lack of notice of the intent to arbitrate on the first page of the agreement is not fatal to its validity or enforcement.

B. This Court should enforce the arbitration provision contained in the Employment Agreement because arbitration is favored by both federal and South Carolina state courts.

Moreover, both federal and South Carolina state courts recognize the strong policy favoring arbitration. Rich v. Walsh, 357 S.C. 64, 69, 590 S.E.2d 506, 508 (Ct. App. 2003) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927 (1983)). In fact, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem...is the construction of the contract language . . . waiver, delay, or a like defense to arbitrability." Id. (citing Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000) and Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995)); see also Brown v. Green Tree Servs., Inc., 585 F. Supp 2d 770, (D.S.C. 2008) (quoting Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Jr. Univ., 489 U.S. 468, 475-76, 109 S.Ct. 1248(1989)) ("[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration."). A court should order arbitration unless it can say with positive assurance that the arbitration clause is not susceptible to an interpretation covering the dispute. Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir.1989); Carolina Care Plan, Inc. v. United Healthcare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

In the present case, the underlying dispute involves the payment of bonus compensation for work Meyer performed on a large, multi-state case. The arbitration provision of the Employment Agreement envisioned just such a dispute, and thus, such dispute is clearly within the scope of the provision. Given the strong policies of both the state and federal judiciaries favoring arbitration, mandatory arbitration should be compelled for this dispute.

III. MEYER'S OTHER ARGUMENTS AGAINST THE APPLICABILITY OF THE ARBITRATION AGREEMENT LIKEWISE LACK MERIT.

A. Meyer's claims against Plaintiffs all stem from the Employment Agreement and are, thus, subject to the arbitration agreement.

Meyer argues that the arbitration agreement between the parties is inapplicable to the additional causes of action in her Draft Complaint (which were later recited in her counterclaims). See Def.'s Answer, Countercl. & Third-Party Compl. ¶ 4. However, the eight causes of action set forth therein all arise out of the terms of the Employment Agreement. The crux of these claims is Meyer's allegation that the Firm breached the Employment Agreement by not paying Meyer bonuses she claims were due under the Employment Agreement. Her counterclaims include breach of the Employment Agreement, breach of the Employment Agreement accompanied by fraudulent act, violation of the Payment of Wages Act for failure to pay "wages" under the Employment Agreement, and intentional misrepresentation/fraud/constructive trust based on alleged representations regarding Meyer's entitlement to the bonuses referenced in the Employment Agreement.

Thus, all of the causes of action asserted by Meyer arise from the Employment Agreement. However, even if a "dispute does not arise under the governing contract, the dispute is subject to arbitration when the contract contains a broadly worded arbitration clause and a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." Housing Auth. of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 337, 588 S.E.2d 617, 621 (Ct. App. 2003) (citing Zabinski, 346 S.C. at 598, 553 S.E.2d at 119 (internal quotations omitted)).

B. Meyer's claims against Lucey are also subject to arbitration.

Meyer's argument that Lucey lacks standing to compel arbitration because he is

not a party to the Employment Agreement also lacks merit. See Def.'s Answer, Countercl. & Third-Party Compl. ¶¶ 27, 28. Both South Carolina state courts and federal courts have the authority to order parties who are not signatories to a contract to submit to arbitration. S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 24-25 (1993) (holding the trial judge erred in denying a party's motion to compel arbitration because he did not sign the contract); U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Assocs., Inc., 585 F. Supp. 2d 708, 714 (D.S.C. 2007) (allowing a nonsignatory to an arbitration agreement to force one of the signatories to that agreement to arbitrate claims against it pursuant to the "intertwined claims" test, wherein a signatory is estopped from "avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed"). Moreover, "an 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." Zabinski, 346 S.C. at 598, 553 S.E.2d at 119. Here, all claims levied by Meyer against Lucey arise out of a dispute over performance of the Employment Agreement. Thus, a significant relationship exists as described in Zabinski, and the claims against Lucey are also subject to the arbitration agreement of the parties.

C. Meyer's claims that Plaintiffs did not make a demand for arbitration are unfounded.

Meyer also claims that Plaintiffs made no demand for arbitration prior to filing suit as required by section 15-48-20(a) of the South Carolina Code Annotated. See Def.'s Answer, Countercl. & Third-Party Compl. ¶¶ 4, 30. This section states in relevant part:

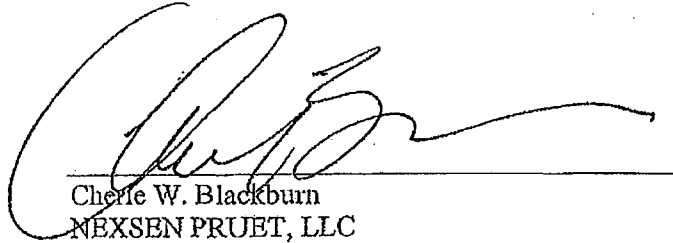
On application of a party showing an agreement described in § 15-48-10,

and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

S.C. Code Ann. § 15-48-20(a). Meyer's claims are simply unfounded. On October 27, 2009, the Firm filed a Demand for Arbitration with NAM in which the Firm seeks a declaratory judgment that it has paid all compensation and wages due to Meyer and is not in violation of the Employment Agreement. Meyer, through her counsel's communications with Plaintiffs' counsel, has made it clear that she will not submit her claims to, or participate in, arbitration. Thus, as Plaintiffs did demand arbitration prior to the filing of this suit, and the Defendant refused, Plaintiffs have fully complied with section 15-48-20(a).

CONCLUSION

The arbitration provision contained in the Employment Agreement constitutes a binding and enforceable agreement to arbitrate by the parties. The Federal Arbitration Act, and not the South Carolina Uniform Arbitration Act, should apply to this matter because interstate commerce is involved in the dispute. This Court should grant Plaintiffs' Motion to Compel Arbitration of this dispute.



Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

Attorneys for Plaintiffs
Justin O'Toole Lucey and Justin O'Toole Lucey,
P.A.

December 9, 2009

Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT

) Case No. 2009-CP-10-6873
)

JUSTIN OTOOLE LUCEY AND
JUSTIN OTOOLE LUCEY, P.A.,

)
) **DEFENDANT'S BRIEF IN**
) **OPPOSITION TO PLAINTIFFS' MOTION**
) **TO COMPEL ARBITRATION**

PLAINTIFFS

vs.

AMY MEYER,

DEFENDANT.

FACTS

Defendant submits this brief in opposition to Plaintiffs' Motion to Compel Arbitration.

This case involves a dispute about unpaid wages and related employment matters. Ms. Meyer began working at the Lucey Firm on January 24, 2006 as an associate attorney. Ms. Meyer worked for the first five months at the Lucey Firm without a written employment contract. Ms. Meyer and Lucey Law Firm entered into a written contract of employment in June of 2006 drafted by Justin Lucey. (Exh. A) Per the terms of the June 2006 Contract, Ms. Meyer was entitled to a lower monthly base salary, plus bonuses based on a percentage of the attorneys fees collected by the Lucey Firm in contingency fee cases. The contract contained the following paragraph typed in regular print located in the middle of the second page of the contract: "Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on a mediator, I will choose one, you will choose one, and the two will chose a third."

Ms. Meyer spent the vast majority of her time between May 2007 and July of 2009 working on one complex state court construction case. On July 20, 2009, this case finally settled and the attorney fees in the case exceeded several million dollars. The next day, Justin Lucey summoned Ms. Meyer into his office via a computer instant message, handed her a letter complaining about their working relationship and terminated her effective the next day. Thereafter, Plaintiffs refused to pay Ms. Meyer the wages to which she was entitled. After Ms. Meyer sent a courtesy copy of a Complaint she intended to file to Plaintiffs, they filed this Motion trying to compel arbitration. Ms. Meyer subsequently filed a Motion to file her answer, counterclaims and third party complaint (which requests a constructive trust) under seal. Ms. Meyer's Motion to Seal is also before the Court today and both parties have previously submitted proposed Orders relating to that Motion. If the Court decides to seal Ms. Meyer's Answer, Counterclaims and Third Party Complaint, Ms. Meyer consents to this Court signing either proposed Order.

Ms. Meyer's position is that the arbitration clause in the June 2006 contract is invalid under state law as it does not meet the notice requirements of S.C. Code § 15-48-10 (a); is not enforceable under the Federal Arbitration Act as an employment contract between two South Carolina Lawyers to perform legal services in South Carolina is not a transaction involving interstate commerce; and even if the employment contract could be interpreted as involving interstate commerce, the arbitration clause should be voided on equitable grounds.

LEGAL ARGUMENT

A. The arbitration clause does not meet the requirements of S.C. Code § 15-48-10 (a).

S.C. Code § 15-48-10 (a) states, "[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." The requirements of S.C. Code § 15-48-10 (a) have been strictly construed by the courts, and failure to comply with the mandatory notice requirements of this section requires a court to find the arbitration clause is unenforceable. *Zabinski v. Bright Acres Associates*, 553 S.E.2d 110, 114 (S.C. 2001) See also, *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 476 S.E.2d 149 (S.C. 1996) (terms of § 15-48-10 (a) are clear and must be applied according to their literal meaning); *Osteen v. T.E. Cuttino Constr. Co.*, 434 S.E. 2d 281 (S.C. 1993); *Timms v. Greene*, 427 S.E.2d 642 (S.C. 1993); and *Circle S Enters., Inc. v. Stanley Smith & Sons*, 343 S.E.2d 45 n.1 (Ct. App. 1986) Plaintiffs' arbitration clause does not meet the requirements of § 15-48-10 (a) and the June 2006 contract is clearly not subject to arbitration under state law.

B. Defendant's employment contract does not involve commerce within the meaning of the FAA.

The employment contract at issue is not subject to arbitration under the Federal Arbitration Act (FAA). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the Complaint and the surrounding facts." *Zabinski*, 553 S.E.2d at 117. Though the acquisition of equipment and materials from out of state has been held sufficient to "affect commerce," the issue before the Court is a contract for legal services, and the legal services are licensed to be performed in South Carolina.

In *Zabinski*, the Supreme Court held a partnership created to develop land on Hilton Head which utilized out of state materials and consisted of out of state investors and contractors did, in fact, involve interstate commerce. *Zabinski*, 553 S.E.2d at 115. In this case, however, the transaction at issue is an employment contract for the provision of legal services. The employer,

licensed to practice law in South Carolina, maintains a South Carolina law practice and hired Ms. Meyer, who is only licensed to practice law in South Carolina, to work in South Carolina on South Carolina cases. There is no language in the 2006 employment contract indicating anything other than the fact that the subject of the 2006 contract is the provision of legal services in South Carolina. Plaintiffs do not allege in their Complaint that the employment contract affects interstate commerce.

In fact, interstate commerce as defined by the Federal Arbitration Act is not involved when transactions incident to completion of a contract occur outside the state of South Carolina. In this case, Plaintiff Law Firm argues that because a few depositions occurred out of state in a complex construction case filed in Charleston County that Ms. Meyer worked on during her employment with the Lucey Firm, interstate commerce was affected or involved with her employment contract. However, in *Mathews v. Fluor Corporation*, 440 S.E.2d 880, (S.C. 1994) the South Carolina Supreme Court held an arbitration clause did not apply when nearly all activities to complete the contract occurred out of state because the subject matter of the contract was situated in South Carolina. In the subsequent case of *Munez v. Green Tree Financial*, 542 S.E. 2d 360, 363 (S.C. 2001), *Mathews* was overruled only "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied."

The case at bar is even more far removed from interstate commerce than the facts in *Mathews*. Nearly all of the activities required by Ms. Meyer to complete her contract with the Lucey Firm occurred within the state of South Carolina and only minimal activities were outside the state. Further, the *Mathews* opinion makes clear that the domicile of parties is not a controlling factor, and therefore, Plaintiffs' argument about the domicile of homeowners and defendants in the complex construction case upon which Ms. Meyer's claims for bonuses is

based is a red herring. Finally, as with the *Mathews* case, the heart of the transaction between Plaintiff and Ms. Meyer involved a subject matter in the South Carolina: her work as a licensed South Carolina attorney.

Plaintiff law firm also relies upon acceptance of payments from out of state insurance companies in resolution of the complex construction case at issue as a basis for establishing interstate commerce, and in turn, argues the controversy falls within the Federal Arbitration Act. (Plaintiff's Brief in Support, p. 5) However, acceptance of insurance payments by an instate business has been rejected by the South Carolina Supreme Court as establishing interstate commerce when determining if the FAA applies. See *Timms v. Greene*, 427 S.E.2d 642 (1993). (rejecting claim that a nursing home's acceptance of federal insurance proceeds created an involvement in interstate commerce).

Plaintiff law firm claims that the complex construction case at issue was filed on behalf of homeowners from several different states. However, the case was brought by the Wild Dunes Ocean Club Horizontal Property Regime, Inc., a South Carolina not-for-profit corporation. Additionally, the homeowners executed assignments of rights giving all rights to recoveries in the case to the regime and reserving none to themselves. Therefore, this allegation by Plaintiff is insufficient to touch upon interstate commerce.

Finally, Plaintiff law firm claims travel to Florida, Georgia, and North Carolina for witness depositions establishes interstate commerce. However, of the 1,038 days this complex construction case was pending, Ms. Meyer spent just 6 days at out-of-state depositions, with minimal travel costs estimated at less than \$4,000. This travel was only done as a result of Mr. Lucey's concessions to the defendants who were tired of bringing their witnesses to Mr. Lucey's office for depositions, and video depositions were not taken. As a note, if video depositions had

been taken, no travel would have been necessary, and this ground would not be defensible. Further, under South Carolina case law, Mr. Lucey had the ability to compel witness appearances in this state if he so chose. Therefore, because such a small percentage of the days (less than one-half of a percent) that the case was pending were spent by Ms. Meyer out of state and such nominal expenses were incurred, it can hardly be argued that the activity rises to the level of "affecting interstate commerce." Further, of the thousands of hours worked on this case by Ms. Meyer, those days would be even less than one-half of one percent of her time.

For the foregoing reasons, it is clear that the arbitration clause in Ms. Meyer's employment contract is not governed by the FAA and Plaintiff's Motion to Compel Arbitration should be denied.

C. Even if the Court were to conclude Ms. Meyer's employment contract involves interstate commerce, the arbitration clause should nevertheless be voided on equitable grounds.

Arbitration is a matter of contract law and a court ruling as to whether or not an agreement to arbitrate exists is based on the contractual nature of the arbitration agreement. *Towels v United Healthcare Corp.*, 524 S.E.2d 839, 843-44 (Ct. App. 1999) "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress and unconscionability," *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 668 (S.C. 2007) (quoting S.C. Code § 15-48-10 (a)).

Unconscionability is defined as the absence of a meaningful choice coupled with terms so oppressive that no reasonable person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 757 (S.C. 2004) In this case, after having worked for Plaintiffs for six months, Ms. Meyer was presented with a contract by her employer that provide

lucrative wage provisions, but also included a clause requiring arbitration -- an arbitration at which no witnesses could be called and which had to be held in an "expedited and abbreviated" manner (meaning little, if any, discovery). Arguably, no reasonable person would agree to such a clause, but as Ms. Meyer was already working and not in a position to jeopardize her existing job or her employer's good will she had to. Changing employment at law firms is a more difficult than changing other types of jobs. This particular arbitration clause was certainly not "geared towards achieving an unbiased decision" and smacks of an employer taking advantage of its position of power. Ms. Meyer had no meaningful choice regarding the acceptance of this clause. *Simpson*, 644 S.E.2d at 668-69.

When determining whether there is the absence of a meaningful choice, courts look at a number of factors. *Id.* In this case, the facts relevant to this inquiry include a substantial injury to Ms. Meyer, Ms. Meyer's status as a young associate working for an older and more powerful attorney, a disparity in the bargaining power as Ms. Meyer was already working when the arbitration clause was presented to her, the inconspicuousness of the arbitration clause, Ms. Meyer's lack of sophistication as to the significance of its provision for no witnesses and an expedited and abbreviated determination, and the element of surprise. As the Court noted in *Simpson*, the presumption in favor of arbitration is much weaker when the contract is one of adhesion. *Id.* at 669. Perhaps Ms. Meyer could have objected to the arbitration clause, but she was certainly in a poor position to do so, and Plaintiffs took advantage of her situation. For these reasons, Ms. Meyer respectfully requests this Court exercise its powers of equity and find the arbitration clause void.

D. Confidentiality of law firm information¹

Plaintiff Justin Lucey has waived the confidentiality clause contained in the employment agreement (Exh. A, p. 2) regarding "activities within our firm." Specifically, Justin Lucey told Ms. Meyer he discussed her salary and bonus arrangements with his brother (a non-lawyer) (without Ms. Meyer's permission); he discussed Ms. Meyer's salary and bonus arrangements with another associate in the firm (without Ms. Meyer's permission); and Ms. Meyers believes he likely discussed her salary and bonus arrangement during the course of his divorce negotiations as her fee would have been relevant at the time.

Waiver is the voluntary and intentional abandonment of a known right. *Sanford v. SC State Ethics Comm'n*, 2009 S.C. LEXIS 517 (Nov. 5, 2009) (Exh. B) Justin Lucey knew there was a confidentiality agreement in the 2006 employment contract because he wrote the contract. Mr. Lucey intentionally abandoned his request for confidentiality of "activities within our firm" when he discussed Ms. Meyer's salary and bonuses with persons who had no need to know this information, without her permission. Mr. Lucey has waived the confidentiality clause and his contention that he will suffer irreparable harm is without merit. Further, if the Court grants Ms. Meyer's Motion to Seal (and Ms. Meyers has no problem with Plaintiffs' proposed Order to Seal), any issues regarding office confidentiality are also moot.

Ms. Meyer, therefore, respectfully requests this Court deny Plaintiffs' Motion to Compel Arbitration and grant her Motion to Seal the Answer, Counterclaims and Third Party Complaint

¹ As Ms. Meyer understands and appreciates Plaintiffs' concerns regarding the attorney client privilege, she has hired Professor Nathan Crystal to advise her on any and all issues relative to client interests and has been advised by Professor Crystal to file her answer, counterclaims and third party complaint under seal. Therefore, the issue of protecting attorney client privilege is likely moot.

in order to preserve any attorney client privilege issues which may arise during the course of this litigation.

Nancy Bloodgood

Nancy Bloodgood

SC Bar No.: 6459

FOSTER LAW FIRM, L.L.C.

3875 Faber Place Drive, Suite 204

North Charleston, SC 29405

Telephone: (843) 744-7828

Facsimile: (843) 577-0434

Email: nbloodgood@fosterfoster.com

Attorneys for Defendant and Third Party Plaintiff
Meyer

Charleston, South Carolina

Date: 12-10-09

Amy:

As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalize, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

I have offered you a job where you will be paid a monthly salary, beginning at 3k per month during training; and increasing to 50k per year after training. *It has already increased to 50k.*

You will additionally be paid a bonus based upon fees earned on contingency cases spearheaded by you.

Your bonus on your contingency cases will generally be ten percent of the net fee earned by the firm. Net means net; if there is a reduction in fees for un-recouped expenses or fee sharing with another firm, your cut shall be calculated on the reduced fee. The percentage of your bonus may be increased or decreased by prior agreement (for matters such as staffing or case size)

There is no post departure bonus of any kind unless the case settles pre departure and pays within thirty days of departure.

I will pay for your legal CLE's; to the extent that you can make them overlap with your accounting CLE's, that is fine. In theory, you are generally expected to do your CLE's and personal professional obligations on your own time by making up time. However, if you are typically working 45 hours per week, and more on trial weeks, there won't be any time to make up.

I pay your health insurance, your mal practice insurance, employer payroll taxes, and deposition school. You may add dependants to the health policy at your expense. I will pay for your Scitla membership and your bar membership. I will also pay for you to attend the SCATLA convention in Hilton Head once every three years. You will pay for any benefit not listed herein.

You will get two weeks off per year; three after five years. There is up to five sick days per year as needed for illness. Paid holidays total an additional ten business days (two weeks) per year off in addition to vacation time. (You are aware that we do some forced vacation at Christmas).

I will provide a laptop for your use..

You are generally expected to be in the office during office hours, which in the past have run from 8:30 to 5:30, with a one hour break for lunch; but which currently run from 9-5 with lunch eaten at desks. Unless up for trial or behind schedule, we try to close at 3pm on Fridays. You are also expected to spend 1-2 hours organizing your week sometime between late Friday and early Monday. It is anticipated that you will need to do project work one nite per week (more if in deposition or in trial). You should generally anticipate a forty five hour work week, exclusive

of breaks. Obviously, trial and trial preparation weeks are more hours.

Now for some legalize:

You agree that client confidentiality, and the activities within our firm are absolutely confidential; and that you will maintain that confidentiality at all times, absent a lawfully issued subpoena. If you are subpoena'd, you will promptly provide me with notice of the subpoena and an opportunity to contest it.

Until or unless we agree otherwise, I have sole client/case acceptance and assignment responsibility.

You agree not to moon light or accept compensation from any other source. You agree not to refer out clients without my express instruction.

This agreement may be terminated by either one of us on thirty days written notice without cause. After two years, the notice period will be increased to six weeks.

You agree that the office clients and files belong to my firm and that should a separation occur, you will not attempt to take any files or clients with you. For any files and clients you end up with for any reason, I will be entitled to payment of 75% of all fees earned on the case, and reimbursement of all expenses.

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will chose one, you will choose one, and the two will chose a third.

Subsequent Modifications

As we prepared for the Cusack trial, I provided you with an additional compensation term to compensate you for extra time spent in trial prep or trial on my cases. I communicated to you that you would be paid a bonus on my cases which you try to a verdict with me of 5% of the net fee recovered after verdict.

Secondly, I have been meaning to tell you that given various factors present in the Harper case, I am bumping your bonus to 15% on that case. If our co-counsel still receives a full 50% cut of the gross fee, I will bump your bonus further to 20%.

The contingency cases you are currently spearheading include Harper, Shoshan, Hanson, and Turner.

You are currently eligible for a trial bonus on Cusack to the extent we collect. You will have other trial bonus opportunities in the coming year.

Since we did not go to verdict on Planters Place, I am working on doing something(s) for you for your help in that case. On a semi-related matter, I think we have previously discussed some sort of retirement benefit. I am working on that now and will address it separately.

Lastly, I am working on modifying your trial bonus formula on my cases so that you will (1) give me candid trial assessment even if it jeopardizes your bonus; and (2) not feel let down if the case settles before verdict. I anticipate that so long as you are employed here, you would be participating in any case I try.

- Therefore, I propose to give you a bonus of 1% of the fee earned on any settlement which occurs after the case is called to trial (date certain or top of the roster) and is ready for trial if you have shared the load with me in getting the case ready for trial. Being ready for trial will be defined as having filed the trial brief, voir dire, jury charges, initial publication, and motion in limine; and having the first day's witness's and the expert ready to testify.
- This amount of the bonus will increase to 2% on fees earned after the jury is sworn and will increase to 3% on fees earned after the plaintiff rests.
- Should we go to verdict before recovery, the bonus is the original 5%.
- Should an appeal be necessary, you will spearhead that effort to defend our verdict.
- As always, these bonuses are only on amounts actually collected during your employment (or agreed to during your employment and collected within 30 days thereafter).

Separately, I am now adding a 5% bonus to the 5-6 collection matters you are handling for me. This is intended to give you an opportunity for some extra bonus money while we are building your pipeline.

I will compute your bonus each time a client disbursement is prepared and add it into the following paycheck.

I am also ready to send you to the one week Nita Trial seminar; or the longer one in Bolder Colorado. There are two one week sessions in June and the National session in July (10-12 days). Please go to Nita.com and take a look. While I am paying your expenses and salary during this seminar, your attendance does require that you have your other work sufficiently under control in advance; and may be preempted by any trial, although I think we can schedule around that.

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by countersigning below and returning to me at your convenience. If you first need a meeting to discuss, just let me know. I still want to meet with you about workplace arrangements to see if any improvements to your situation would enhance your job performance or enjoyment.

Justin Lucey

Amy Meyer

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2009 S.C. LEXIS 517, *

Governor Mark Sanford, Petitioner, v. South Carolina State Ethics Commission and Herbert R. Hayden, Jr., in his official capacity as Executive Director of the State Ethics Commission, Respondents, The Honorable Robert W. Harrell, Jr., Speaker of the South Carolina House of Representatives, Intervenor, and The Honorable Robert W. Harrell, Jr., Speaker of the South Carolina House of Representatives, Petitioner, v. South Carolina State Ethics Commission and Herbert R. Hayden, Jr., in his official capacity as Executive Director of the State Ethics Commission, Respondents, Governor Mark Sanford, Intervenor.

Opinion No. 26741

SUPREME COURT OF SOUTH CAROLINA

2009 S.C. LEXIS 517

October 19, 2009, Heard
November 5, 2009, Filed

NOTICE:

THIS DECISION IS NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

DISPOSITION: [*1] RELIEF DENIED.

CORE TERMS: confidentiality, writ of mandamus, ethics, injunction, waive, investigative, impeachment, Ethics Act, final disposition, mandamus, work product, investigatory, publicly, waived, public record, injunctive relief, original jurisdiction, confidential, oral arguments, letter dated, remain confidential, imperative duty, relinquishment, documentation, discretionary, waiving, transparency, mile, ministerial act, force of law

COUNSEL: Karl S. Bowers, Jr. -, Kevin A. Hall -, and M. Todd Carroll -, all of Columbia, for Petitioner and Intervenor Governor Mark Sanford.

Charles F. Reid, Bradley S. Wright, Bonnie B. Goldsmith and Patrick G. Dennis, all of Columbia, for Petitioner and Intervenor Speaker Robert W. Harrell, Jr.

Cathy L. Hazelwood -, of Columbia, for Respondents South Carolina State Ethics Commission and Herbert R. Hayden, Jr., in his official capacity as Executive Director of the State Ethics Commission.

JUDGES: JUSTICE WALLER -, TOAL -, C.J., BEATTY - and KITTREDGE -, JJ., concur. PLEICONES -, J., concurring in a separate opinion.

OPINION BY: WALLER -

OPINION**ORIGINAL JURISDICTION**

JUSTICE WALLER -: These matters involve the confidentiality of an ethics investigation involving Governor Mark Sanford which is currently pending before the South Carolina State Ethics Commission (Commission).

PROCEDURAL BACKGROUND

On September 30, 2009, Governor Sanford petitioned this Court for a writ of mandamus directing the Commission to comply with the statute and regulations regarding confidentiality of Commission proceedings. More specifically, the Governor requested that the Commission not be permitted to publicly disseminate any investigatory reports or other [*2] information about this investigation. The Commission filed a return in opposition to the Governor's petition for a writ of mandamus.

Robert W. Harrell, Jr., Speaker of the South Carolina House of Representatives, then filed a motion to intervene in the Governor's action. We granted that motion, and the Speaker filed a return in opposition to the Governor's petition. In addition, Speaker Harrell filed his own petition for a writ of mandamus in the Court's original jurisdiction. The Speaker asked the Court to direct the Commission to issue "its investigation materials and information to the House of Representatives" because the House is "the sole prosecuting authority for purposes of impeachment." The Commission filed a return in opposition to the Speaker's petition. The Governor sought to intervene in the Speaker's action; we granted that request.

Because of the exigencies related to the case, we agreed to entertain this matter in the Court's original jurisdiction, on an expedited

basis, and heard oral arguments of the parties on October 19, 2009. On October 21, 2009, we issued an order requesting additional materials and briefs from the parties on the issue of waiver. With that briefing [*3] now complete, the matter is ripe for our decision.

FACTS

By letter dated August 18, 2009, Governor Sanford was informed by Herbert R. Hayden, Jr., Executive Director of the Commission, that the Commission had determined an ethics complaint against the Governor set forth "sufficient facts" to warrant an investigation. See S.C. Code Ann. § 8-13-320(10)(c) (Supp. 2008). The Governor was informed that: (1) he would be contacted by an investigator concerning any statements he desired to make; and (2) he could provide a written response to the complaint and include any documentation he would like for the Commission to consider.

Significantly, this letter also advised the Governor of the following:

In accordance with [S.C. Code Ann.] Section 8-13-320(9) and (10), **all complaints, investigations, inquires [sic], hearings, and accompanying documents are confidential unless the respondent waives the right to confidentiality in writing to the Commission, or the Commission issues a public disposition....**

(Emphasis added).

By letter to Hayden dated August 24, 2009, counsel for the Governor stated it was his understanding that if the Governor waived his right to **confidentiality** the following would apply:

1. **[*4] The only information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself;**
2. **The investigation and the results thereof, including any statements or documents, will remain confidential and will not be made public at any time, either during or after the conclusion of this matter;**
3. **If a hearing is held in this matter, such hearing will be held in executive session unless Governor Sanford requests an open hearing; and**
4. **Any action taken by the Commission will be made public upon final disposition.**

(Emphasis in original). Counsel for the Governor further represented that his understanding was based on information Hayden had given him during their recent discussions regarding the impact of a potential waiver by the Governor.

Hayden responded to counsel's letter with his own letter dated August 27, 2009, which stated:

If Governor Sanford waives his right to **confidentiality**, the following will apply:

1. **The only information that will be made public during the pendency of this matter is the fact that an investigation is being conducted and the Complaint Form itself;**
2. **The investigative report, including any [*5] statements or documents, will not become part of the public record; however, any testimony given, documents entered into evidence at an administrative hearing, and the Commission's findings will become a part of the formal record along with the Commission's Decision and Order, and will be public;**
3. **If a hearing is held in this matter, such hearing will be held in executive session unless Governor Sanford requests an open hearing; and**
4. **Any action taken by the Commission will be made public upon final disposition.**

(Emphasis added). Hayden also stated that the only item "affected by a waiver of confidentiality is Item 1. Items 2, 3 and 4 are required by either statute or regulation and will apply regardless of a waiver." (Emphasis added).

The following day, August 28, 2009, the Governor himself (i.e., not counsel for the Governor) sent a signed letter to Hayden setting forth his record of "going the extra mile in fighting for transparency in our state government." The Governor's August 28th letter further stated as follows:

In an effort to once again go the extra mile, I would like to waive my right to confidentiality in your upcoming ethics probe. I believe that what the whole of our travel [*6] records will show is that this administration has worked very hard to be a good steward of taxpayer resources.

It's also my hope that my decision to take the unilateral step of waiving confidentiality will serve to encourage both the public to invite, and legislators to lead, in changing the current system. In this system all constitutional officers, and every state employee, is held to one standard -- while the General Assembly lives under a completely different standard without transparency. I strongly believe this needs to change, and again do hope this is one of the byproducts of what takes place this fall. *

(Emphasis added.)

FOOTNOTES

- 1 Moreover, we note the Governor also issued a press release on August 28th which stated in relevant part:

///

In the continued spirit of a fair and transparent process, I am today announcing that I'll be waiving **confidentiality** as the Ethics Commission studies some of the allegations made in the press and by political detractors. Our administration has nothing to hide. We would welcome the public to scrutinize our record, just as the Ethics Commission will do.

See <http://www.sccgovernor.com/news/releases/8-28-2009.htm>.

In his petition for a writ of mandamus, Governor [*7] Sanford maintains he actually intended his August 28th letter to be a "limited" waiver of **confidentiality** and not the unconditional waiver conveyed by the letter's clear terms.

The Governor's counsel met with Hayden on September 8, 2009. Hayden advised counsel that the Commission intended to publicly distribute its preliminary investigative report to the House of Representatives.

On September 14, 2009, the Governor filed a Motion to Enjoin Dissemination of Investigative Report with the Commission. * By letter dated September 15, 2009, Cathy Hazelwood, counsel for the Commission, advised the Governor's counsel that the motion was premature because the investigation into this matter is "ongoing and no report has been begun, let alone completed." She explained the Governor would receive the report "when the Commission receives the report," and at that time, there would be an opportunity "to argue any and all motions related to this matter."

FOOTNOTES

2 The motion for an injunction requested that the Commission enjoin itself, including all commissioners and staff members, from disseminating any investigative reports, recommendations, pre-hearing reports, or any other written or oral materials or information [*8] regarding this matter that may be created by any person associated with the Commission. The motion is nearly identical to the petition for a writ of mandamus filed in this Court.

Regarding Speaker Harrell's petition for a writ of mandamus, he argues that pursuant to Article XV, Section 1 of the South Carolina Constitution, the House has the sole power of impeachment. ³ Therefore, because the House of Representatives is the prosecutorial authority for purposes of impeachment, the Speaker contends this Court should order the Commission to release its investigation materials to the House.

FOOTNOTES

3 Article XV, Section 1 provides as follows:

The House of Representatives alone shall have the power of impeachment in cases of serious crimes or serious misconduct in office by officials elected on a statewide basis, state judges, and such other state officers as may be designated by law. The affirmative vote of two-thirds of all members elected shall be required for an impeachment. Any officer impeached shall thereby be suspended from office until judgment in the case shall have been pronounced, and the office shall be filled during the trial in such manner as may be provided by law.

ISSUES

1. Has either [*9] the Governor or the Speaker met the requirements for the issuance of a writ of mandamus?
2. Does the Governor's August 28th letter constitute a complete waiver of **confidentiality** under S.C. Code Ann. § 8-13-320(10)(a)?

DISCUSSION

1. Writ of Mandamus

This Court has the power to issue writs or orders of injunction or mandamus. S.C. Const. Art. V, § 5; S.C. Code Ann. § 14-3-310 (1976). The writ of mandamus is "the highest judicial writ known to the law." Willimon v. City of Greenville, 243 S.C. 82, 86, 132 S.E.2d 169, 170 (1963); accord Edwards v. State, 303 S.C. 82, 678 S.E. 2d 412 (2009); City of Rock Hill v. Thompson, 349 S.C. 197, 563 S.E.2d 101 (2002); Ex parte Littlefield, 343 S.C. 212, 540 S.E.2d 81 (2009). The "principal function" of mandamus "is to command and execute, and not to inquire and adjudicate; therefore, it is not the purpose of the writ to establish a legal right, but to enforce one which has already been established." Willimon, 132 S.E.2d at 171; see also Porter v. Jedziniak, 334 S.C. 16, 18, 512 S.E.2d 497, 497 (1999) ("The primary purpose of a writ of mandamus is to enforce an established right and to enforce a corresponding imperative duty created or imposed by law.");

Redmond v. Lexington County Sch. Dist. No. 4, 314 S.C. 431, 445 S.E.2d 441 (1994) [*10] (a writ of mandamus is not appropriate for a discretionary authority).

To obtain a writ of mandamus requiring the performance of an act, the petitioner must show: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. E.g., Wilson v. Preston, 378 S.C. 348, 662 S.E.2d 580 (2008); Porter v. Jedziniak, *supra*; Willimon, *supra*. Mandamus is based on the theory that an officer charged with a purely ministerial duty can be compelled to perform that duty in case of refusal. Wilson v. Preston, *supra*.

The confidentiality provision of the Ethics Act is found in S.C. Code Ann. § 8-13-320(10)(g), which states as follows:

All investigations, inquiries, hearings, and accompanying documents must remain confidential until final disposition of a matter unless the respondent waives the right to confidentiality. The willful release of confidential information is a misdemeanor, and any person releasing such confidential information, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year.

(Emphasis added).

We find there [*11] is no ministerial act to be performed under this provision, and consequently no duty to perform the act. Moreover, the Governor has other legal remedies available. As noted, the Governor has a motion for an injunction pending before the Commission in which he seeks the same relief he is seeking from this Court. The Commission has indicated it will not disseminate the investigative summary or preliminary report in this matter until the Governor's motion has been heard and acted upon by the Commission and, if the Commission's decision is adverse to the Governor, until he has had an opportunity to seek review of that decision. For these reasons, a writ of mandamus is simply not available to the Governor under these circumstances and his petition is therefore denied.

Likewise, there is no ministerial act under the statute requiring the Commission's investigation materials to be provided to the House of Representatives. While the Ethics Act clearly indicates the statute "does not limit the power of either chamber of the General Assembly to impeach a public official," S.C. Code Ann. § 8-13-320(10)(n), it is nonetheless indisputable that there is no "imperative duty created or imposed by" the [*12] Ethics Act which compels the Commission to release its investigation materials to the House. Porter v. Jedziniak, 334 S.C. at 18, 512 S.E.2d at 497.⁴

FOOTNOTES

⁴ We note that with regard to turning over evidence to the Attorney General, the Ethics Act provides it is within the "discretion" of the Commission whether to do so. S.C. Code Ann. § 8-13-320(10)(h). Discretionary authority, however, is insufficient for mandamus. See Redmond v. Lexington County Sch. Dist. No. 4, 314 S.C. at 438, 445 S.E.2d at 445 (a writ of mandamus is inappropriate for a discretionary authority). To the extent the Speaker argues S.C. Code Ann. Regs. 52-718(C) (Supp. 2008) -- which permits the Commission to release information "to another prosecuting authority" -- creates an imperative duty appropriate for mandamus, we disagree.

Furthermore, we note the House has a number of alternative avenues available for obtaining the information it seeks, none of which have been pursued. See, e.g., S.C. Code Ann. § 2-69-10 (2005); S.C. Code Ann. § 30-4-10 et seq. (2007 & Supp. 2008). Additionally, as the parties conceded at oral argument in this matter, the pending ethics investigation is wholly unrelated to any potential impeachment. [*13] The House of Representatives may proceed (or not proceed) with impeachment at its own choosing, irrespective of any finding by the Commission, or any other investigation of the Governor.

Accordingly, like the Governor, the Speaker has failed to establish the necessary requirements for issuing a writ of mandamus; therefore, we deny the Speaker's petition as well.

2. Waiver

Although a writ of mandamus is unavailable to the Governor, we are cognizant of the Governor's pending motion filed with the Commission for an **injunction** based on the same legal grounds as are asserted to this Court in his petition for a writ of mandamus. Because it is "the substance of the requested relief that matters" and not the form in which the petition for relief is framed, we may construe the Governor's request as one for injunctive relief if that is substantively what he is requesting.⁵ Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009); accord Richland County v. Kaiser, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002) (where the Court of Appeals treated a denial of a petition for a writ of mandamus as a denial of injunctive relief).

FOOTNOTES

⁵ As previously discussed, this Court has [*14] the power to issue a writ or order of injunction: S.C. Const. Art. V, § 5; S.C. Code Ann. § 14-3-310.

Generally speaking, an injunction should be granted only where some irreparable injury is threatened for which the parties have no adequate remedy at law. Greenwood County v. Shav, 202 S.C. 16, 23 S.E.2d 825 (1943). The Governor contends that if the Commission is allowed to publicly disclose information about the investigation, "the integrity of the entire process" would be destroyed. Thus, he has requested that we prevent the Commission from publicly distributing any investigatory reports or other information about the investigation. Given the arguments raised by the Governor, we find the requested relief is akin to a prohibitory injunction.⁶ Accordingly, we will also construe the petition as one asking for injunctive relief.

FOOTNOTES

⁶ A prohibitory injunction is defined as an injunction "that forbids or restrains an act." BLACKS LAW DICTIONARY 855 (9th ed. 2009).

The Governor's argument is based upon the confidentiality provision of the Ethics Act and the accompanying regulations. See § 8-13-320(10)(g); S.C. Code Ann. Regs. 52-718 (Supp. 2008). As outlined above, the Ethics Act clearly provides [*15] a right of confidentiality; just as clearly, however, the statute allows this right to be waived by the respondent under investigation. § 8-13-320(10)(g); S.C. Code Ann. Regs. 52-718(B) (Supp. 2008) (the respondent "may waive the confidentiality of the proceeding in writing filed with the Commission").

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The dispositive issue therefore becomes: Did the Governor's August 28th letter waive his right to **confidentiality**?

A **waiver** is a voluntary and intentional abandonment or relinquishment of a known right. E.g., Eason v. Eason, 682 S.E.2d 804, 682 S.E.2d 804 (2009). **Waiver** requires a party to have known of a right and known that right was being abandoned. Id. The determination of whether one's actions constitute **waiver** is a question of fact. Laser Supply and Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 675 S.E.2d 139 (Ct. App. 2009). Because the instant case has been brought in the Court's original jurisdiction, it is within the province of this Court to make findings of fact and conclusions of law regarding the issues before us. See Johnson v. Calce, 345 S.C. 389, 548 S.E.2d 587 (2001); S.C. Code Ann. § 14-3-340 (1976).

Initially, we find the Governor knew of his right to **confidentiality**, [*16] as it was clearly set forth and correctly stated in the complaint and the initial letter from the Commission, which was sent directly to Governor Sanford and not to his counsel. The Governor asserts, however, that his August 28th letter effected a "limited" **waiver of confidentiality**, and his expectation was that only the existence of an investigation and the contents of the Complaint would be made publicly available.

We disagree. The intent of the August 28th letter -- which Governor Sanford himself signed and was written on the Governor's letterhead -- is clear from the letter's plain language:

In an effort to once again go the extra mile, I would like to waive my right to **confidentiality** in your upcoming ethics probe.

Moreover, the Governor characterized this **waiver** as a "unilateral step." Governor Sanford's August 28th letter did not limit the **waiver** in any way, shape or form. It did not reference the very specifically delineated restrictions that had been outlined by Hayden to the Governor's counsel. Indeed, the Governor specifically stated this is "my decision." The additional language the Governor used in the letter, regarding "fighting for transparency," disclosure, as well as [*17] his reference to travel records -- which would not have been disclosed under the partial **waiver** that had been discussed between the Governor's counsel and Hayden -- indicates his intent was to waive **confidentiality without limitation** and without reliance upon the communications between his counsel and Hayden.⁷

FOOTNOTES

⁷ Governor Sanford's press release of the same day confirms this reading. See fn.1, supra.

Thus, the only reasonable interpretation of Governor Sanford's August 28th letter is that it was an intentional relinquishment of the right to **confidentiality**, and therefore a valid -- and complete -- **waiver**. Eason, supra.

Governor Sanford also maintains that even when **confidentiality** is waived pursuant to section 8-13-320(10)(g), the **waiver** is limited by the regulations applicable to **confidentiality**. We disagree.

Section 8-13-320(10)(g) states that "[a]ll investigations, inquiries, hearings, and accompanying documents must remain confidential until final disposition of a matter unless the respondent waives the right to **confidentiality**."

Regulation 52-718 governs the **confidentiality** of the Commission's ethics proceedings. Subsection 52-718(F) provides as follows:

After the final disposition of [*18] a matter where a violation is found, the Commission shall prepare a public record which shall consist of the pleadings and record of the hearing. The Commission's internal and investigatory papers including work product shall not be made part of the public record.

Based on regulation 52-718(F), the Governor argues the Commission's "preliminary reports and other working papers remain confidential" even if the respondent has waived his right to **confidentiality** under section 8-13-320(10)(g). We disagree.

Although regulations authorized by the Legislature generally have the force of law, a regulation may not alter or add to the terms of a statute. Gaffney Ledger v. S.C. Ethics Comm'n, 360 S.C. 107, 600 S.E.2d 540 (2004); Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995); Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496 (1943); see also Society of Profit Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) ("Although a regulation has the force of law, it must fall when it alters or adds to a statute.").

Initially, we find Regulation 52-718(F) is not even implicated by this case because it addresses what would become the public record after the final [*19] disposition of a matter where a violation is found. In contrast, the Governor is primarily concerned with the release of investigatory materials during the ongoing investigation stage because -- according to the Governor -- he will not get a chance to present "his side of the story" until probable cause is found and a hearing is held. * Regardless, because we find Governor Sanford has waived his right to **confidentiality**, the import of Regulation 52-718(F) is irrelevant. However, to the extent Regulation 52-718(F) may be construed to limit the materials covered by a respondent's **waiver** which is allowed by section 8-13-320(10)(g), it is invalid. Gaffney Ledger v. S.C. Ethics Comm'n, supra (a regulation may not alter the terms of a statute); Goodman v. City of Columbia, supra (same).

FOOTNOTES

* We note the plain language of the statute refutes the Governor's contention. See § 8-13-320(10)(h) ("The commission must afford a public official ... who is the subject of a complaint the opportunity to be heard on the alleged violation under oath, the opportunity to offer information, and the appropriate due process rights, including, but not limited to, the right of counsel."). Counsel for the Commission [*20] confirmed at oral argument that the Governor has been allowed to offer information during the investigatory process, and has availed himself of that opportunity.

Although we conclude the Governor's August 28th letter constituted a complete **waiver** of his right to **confidentiality** under section

8-13-320(10)(g), we hasten to add that the Governor's waiver does not reach the Commission's work product. To permit a respondent's waiver to include the Commission's work product and internal investigative process would chill the Commission's ability to thoroughly investigate a complaint. The policy reasons for maintaining the confidentiality of the Commission's work product (especially during the investigative process) are self-evident and compelling. Governor Sanford's waiver here, of course, reaches all documentation to which he is entitled.⁹ Otherwise, we respect the Commission's authority in the first instance to determine what matters and documentation are subject to the Governor's waiver, which the Commission can make in ruling on the Governor's pending motion for an injunction. See *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("[T]he Court generally gives deference [*21] to an administrative agency's interpretation of an applicable statute or its own regulation.").

FOOTNOTES

⁹ It is our opinion the waiver would not apply to the work product of the Commission, including mental impressions, generated during the internal investigative process.

Accordingly, to the extent the Governor's petition seeks injunctive relief, the petition is denied.

CONCLUSION

For the reasons discussed above, the relief requested by both the Governor and the Speaker is

DENIED.

TOAL-, C.J., **BEATTY**- and **KITTREDGE**-, JJ., concur. **PLEICONES**-, J., concurring in a separate opinion.

CONCUR BY: PLEICONES-.

CONCUR

JUSTICE PLEICONES -: I agree with the majority that both petitions should be denied for the reasons stated.

I respectfully differ, however, with the finding of fact which concludes that the only reasonable interpretation of the Governor's letter of August 28, 2009, is that it constitutes a complete waiver of confidentiality under S.C. Code Ann. § 8-13-320(10)(g). Though the letter of August 28 certainly constitutes a waiver, I am not persuaded that the evidence before us demonstrates that the Governor knew that he was waiving *all* confidentiality. See *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (2009) (waiver requires a [*22] party to have known of a right and known he was abandoning that right); *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 433, 673 S.E.2d 448, 456 (2009) (waiver is the voluntary and intentional abandonment or relinquishment of a known right by a party that knew of its rights, or of all the material facts upon which they depend). To the contrary, I conclude that the letter of August 28, 2009, though grandiose and poorly-articulated, is clearly the end-product of negotiations between the Governor's counsel and the executive director of the Ethics Commission. In making this finding, I have considered Mr. Hayden's letters of August 18 and 27, 2009; the Governor's counsel's letter of August 24, 2009; the Governor's affidavit filed herein; and, of course, the Governor's letter of August 28, 2009.

I would have allowed the Ethics Commission to determine in the first instance the meaning and scope of the August 28, 2009, letter in the proceeding referenced by the majority. That avenue is now foreclosed. To the extent that the majority may suggest that a waiver submitted pursuant to S.C. Code Ann. § 8-13-320(10)(g) cannot be limited, I would find that the Governor's attempt at doing [*23] that which cannot be done, constitutes a nullity.

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310 S.C. 469, *; 427 S.E.2d 642, **;
1993 S.C. LEXIS 35, ***Dora R. Timms, Respondent, v. Mary Greene, National HealthCorp, L.P., Greenwood Nursing Homes, Inc., d/b/a/ Greenwood Health
Care Center, Appellants.

Opinion No. 23805

SUPREME COURT OF SOUTH CAROLINA

310 S.C. 469; 427 S.E.2d 642; 1993 S.C. LEXIS 35

May 19, 1992, Submitted
February 16, 1993, Filed

SUBSEQUENT HISTORY: [***1] Rehearing Denied March 23, 1993.

PRIOR HISTORY: Appeal From Greenwood County. James E. Moore, Judge

DISPOSITION: AFFIRMED

CASE SUMMARY

PROCEDURAL POSTURE: Prior to her death of unrelated causes, respondent resident commenced a negligence action against appellant nursing home seeking damages for injuries to her head and ears, which she alleged occurred while left unattended under a hair dryer at the nursing home. Greenwood County Circuit Court (South Carolina) denied the nursing home's motion to dismiss. The nursing home challenged the trial court's decision.**OVERVIEW:** In its motion to dismiss filed pursuant to S.C. R. Civ. P. 12(b)(6), the nursing home asserted: 1) that the trial court was without subject matter jurisdiction inasmuch as the contract between the resident and the nursing home required submission of the dispute to binding arbitration; 2) that the trial court was the improper venue due to the fact that the proper forum to hear the case was the appropriate arbitration panel; and 3) that the resident's complaint failed to allege facts sufficient to state a cause of action. The court held the arbitration clause was not enforceable because it did not comply with the notice requirement of the South Carolina Uniform Arbitration Act (act), S.C. Code Ann. § 15-48-10 (State Act). The contract did not comply with § 15-48-10 because the contract did not contain a first page reference of arbitration. The court further held that the parties' contract did not involve interstate commerce, and, therefore, the Federal Arbitration Act, 9 U.S.C.S. § 1, et seq., did not supersede the act. Moreover, the contract contained no exclusionary language prohibiting the act.**OUTCOME:** The court affirmed the trial court's decision.**CORE TERMS:** arbitration, Federal Act, State Act, commerce, interstate commerce, arbitration agreement, Uniform Arbitration Act, subject to arbitration, Federal Arbitration Act, notice requirement, following provisions, transaction involving, unenforceable, interstate, evidencing, predicated, notice, negligence action, cause of action, claims arising, personal injury, arbitrate, resident, binding, venue, hair

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Contracts Law > Contract Conditions & Provisions > Arbitration Clauses

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Enforcement
HN1 See S.C. Code Ann. § 15-48-10. *Shepardize: Restrict By Headnote*

Civil Procedure > Alternative Dispute Resolution > Arbitration > Federal Arbitration Act > General Overview

International Trade Law > Dispute Resolution > Arbitration

Labor & Employment Law > Collective Bargaining & Labor Relations > Arbitration > Enforcement
HN2 See 9 U.S.C.S. § 2. *Shepardize: Restrict By Headnote*

Civil Procedure > Alternative Dispute Resolution > Arbitration > Federal Arbitration Act > General Overview

International Law > Dispute Resolution > Arbitration & Mediation > General Overview

International Trade Law > General Overview
HN3 Interstate commerce is a necessary basis for application of the Federal Arbitration Act, 9 U.S.C.S. § 1, and a contract or agreement not so predicated must be governed by the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10. To activate application of the Federal Arbitration Act, the commerce involved in the contract must be interstate or foreign.

9 U.S.C.S. § 1. More Like This Headnote | Shepardize: Restrict By Headnote

COUNSEL: Phillip E. Reeves, of Gibbs & Clarkson, P.A., of Greenville, for appellants.

Robert P. Foster of Foster, Foster & Fortson, of Greenville; and William F. Jones, of The Jones Law Firm, of Greenwood, for respondent.

JUDGES: FINNEY, HARWELL, CHANDLER, TOAL

OPINION BY: FINNEY

OPINION

[*469] [*642] **FINNEY, A.J.:** Defendants-Appellants Mary Greene, National HealthCorp, L.P., Greenwood Nursing Homes, Inc., d/b/a Greenwood Health Care Center (appellants), appeal a circuit court order [*470] denying appellant's motion to dismiss Plaintiff-Respondent Dora R. Timms' (respondent) negligence action for lack of jurisdiction, improper venue, and failure to state facts sufficient to constitute a cause of action. We affirm.

Prior to her death of unrelated causes, the respondent commenced this negligence action in the Greenwood County Circuit Court in August of 1990 seeking damages for injuries to her head and ears which she alleged occurred while left unattended under a hair dryer at Greenwood Health Care Center, Inc. (the Center). Appellant National Health Care, L.P., was made a party by [***2] virtue of its ownership of the Center. Appellant Mary Greene contracted with the Center to provide hair care services to residents and was providing services to the respondent at the time of her injuries.

Appellants did not answer the complaint, but moved to dismiss the action under Rule 12(b)(6), SCRCP, asserting 1) that the circuit court was without subject matter jurisdiction inasmuch as the contract between Timms and the Center required submission of the dispute to binding arbitration; 2) that the circuit court was the improper venue due to the fact that the proper forum to hear the case was the appropriate arbitration panel; 3) that respondent's complaint failed to allege facts sufficient to state a cause of action; and 4) sought an order requiring the respondent to provide a more definite statement of her complaint, pursuant to Rule 12(e), SCRCP.

The court denied appellant's motion to dismiss, holding that the arbitration agreement is unenforceable in that 1) it does not comply with the notice requirement of the [*643] South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 (Supp. 1991), (the State Act) or otherwise; and 2) that the contract does not involve interstate commerce, [***3] therefore, the Federal Arbitration Act, 9 U.S.C. § 1, et seq., (the Federal Act) does not supersede the State Act. This appeal followed.

The contract evidencing the controverted arbitration agreement was executed by Timms in September of 1988 when she became a resident of the Center. The Center provided an Admission and Financial Contract containing the following Dispute Resolution Procedure.

The parties hereby agree to arbitrate any claims or disputes arising out of or in connection with the care rendered to PATIENT by CENTER and/or its employees in. [*471] accordance with the provisions of the Uniform Arbitration Act, except that claims arising over non-payment of charges for services rendered or products provided to PATIENT shall not be subject to arbitration. The parties understand that arbitration of claims shall constitute a waiver of the right to trial by judge and/or jury which the parties might otherwise have. The parties hereby agree to arbitration due to the potential for a more timely final resolution of the claim or dispute. The parties freely choose arbitration and understand that the arbitrator's decision is final and binding upon all [***4] parties.

In determining enforceability of the arbitration agreement under the State Act, the trial court relied upon the following provisions of HN2 *Section 15-48-10.

(a) . . . Notice 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.

(b) This chapter however shall not apply to:

(1) Any agreement or provision to arbitrate in which it is stipulated that this chapter shall not apply or to any arbitration or award thereunder . . .

(4) Any claim arising out of personal injury, based on contract or tort . . .

The court found 1) that the contract did not contain on the first page any mention of arbitration; 2) that there exists an insufficient relationship with interstate commerce to render the controversy subject to the Federal Act; 3) that the contract contained no exclusionary language prohibiting application of the State Act and invoking jurisdiction of the Federal Act; and 4) that the action was one seeking redress for personal injury and not arbitrable under the [***5] State Act.

Appellants contend the court erred in failing to find that the express terms of the contract subjects respondent's claim to the Federal Act under the decisions in Episcopal Housing Corp. v. Federal Ins. Co., 269 S.C. 631, 239 S.E.2d 647 (1977); and Circle S. Enterprises v. Stanley Smith & Sons, 288 S.C. 428, 343 S.E.2d 451 (Ct. App. 1986), [*472] and cites the following provision from HN2 *Section 2 of the Federal Act.

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

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In furtherance of its claim that interstate commerce is involved, appellants assert the center's acceptance of federal insurance payments and that terms in the contract imply that the Center procures equipment, services and materials from outside the state. We [***6] disagree.

First, the State Act is clear with regard to the notice requirement. Moreover, the agreement specifically provides for arbitration "in accordance with the provisions of the Uniform Arbitration Act," the official designation for the State Act. S.C. Code Ann. § 15-48-240 (Supp. 1991).

Second, as to the issue of commerce, *Episcopal Housing Corp. v. Federal Ins.* [***644] *Co., supra*, and *Circle S. Enterprises v. Stanley Smith & Davis, supra*, are distinguishable from the case under consideration in that both are construction contracts clearly predicated upon transactions involving the purchase and use of materials and supplies from outside the state. In *Episcopal Housing Corp.*, this Court cited the four-prong test for determining applicability of the Federal Act, the second and relevant prong of which is that "the contract evidences a transaction involving commerce." In determining whether the contract on its face evidences commerce, we are required to look to the entire contract document.

In respondent's personal injury action, the contract for patient-residential service with the Center is [***7] obscure, if not devoid, of any basis for holding that commerce was involved in the transaction between the parties. ~~Interstate~~ Interstate commerce is a necessary basis for application of the Federal Act, and a contract or agreement not so predicated must be governed by State law. See *Shearson, Hayden Stone, Inc. v. Liang*, 493 F.Supp. 104 (1980). To activate application [***473] of the Federal Act, the commerce involved in the contract must be interstate or foreign. 9 U.S.C. § 1; *Varley v. Tarrytown Assoc., Inc.*, 377 F.2d 208 (2d Cir. 1973).

In this record is an affidavit of the administrator of the Center, which avers that the Center engages in interstate commerce in that the Center 1) is a division of National HealthCorp, L.P., a Delaware Limited Partnership; 2) markets its services to persons residing outside this State; 3) hires employees from outside the State; 4) purchases a majority of its goods, equipment and supplies outside the state for use at the Center; and 5) contemplates payment in part by Medicare or Medicaid. Although these factors could evidence the Center's involvement in interstate commerce, [***8] we find that their relationship to the agreement between the Center and the respondent is insufficient to form the basis of the contract between the parties.

Accordingly, we hold that the purported arbitration agreement is unenforceable under Section 15-48-10 and that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, is inapplicable. We affirm the circuit court's denial of appellant's motion to dismiss.

AFFIRMED.

HARWELL C.J., CHANDLER, TOAL, JJ., concur. and MOORE A.J., not participating.

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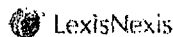
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Rule 13, SCRPC

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SOUTH CAROLINA RULES OF CIVIL PROCEDURE VI. TRIALS

Rule 43, SCRPC (2008)

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RULE 43. CONDUCT OF TRIAL

(a) Form and Admissibility. In all trials the testimony of **witnesses** shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes or rules of evidence heretofore applied in the courts of this State. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a **witness** to testify shall be determined in like manner.

(b) Scope of Examination and Cross-Examination. *Deleted*

(1) Examination, Leading Questions. *Deleted*

(2) Hostile and Adverse **Witnesses**. *Deleted*

(c) Record of Excluded Evidence. *Deleted*

(c)(1) *Reservation of Rights Unnecessary.* If an objection has once been made at any stage to the admission of evidence, it shall not be necessary thereafter to reserve rights concerning the objectionable evidence.

(d) Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but may direct that the matter be heard wholly or partly on oral testimony or depositions.

(f) Interpreters. When a **witness** does not speak the English language sufficiently to testify, the court may appoint an Interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(g) Statement of Pleadings to Jury. Counsel for any party may read his pleadings to the jury or make a statement to the jury of the facts alleged in the pleadings and the theory of his case; but counsel shall not argue his case during his opening statement. The pleadings shall not be submitted to the jury for its deliberations.

(h) Examination of **Witness**. One counsel only for each party shall examine or cross-examine a **witness**. During examination in open court, the examining counsel shall stand. For the purpose of this subdivision of this rule, two or more parties who have pleaded jointly shall be considered one party.

(i) Argument. Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced. No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court. No more than two hours shall be taken by each side in final argument or sum up, without permission of the court. Counsel shall not address or refer to by name any member of the jury he is addressing, or otherwise personally appeal to any member thereof.

(j) Right to Open and Close. The moving party upon a motion shall have the right to open and close argument, and the plaintiff shall have the right to open and close upon the trial; except that a party admitting the adverse party's claim in his pleading, and taking upon himself the burden of proof, shall have the like privilege. The party having the right to open shall be required to open in full, and in reply may respond in full but may not introduce any new matter.

(k) Agreements of Counsel. No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record. Settlement agreements shall be handled in accordance with Rule 41.1, SCRPC.

(l) Subsequent Applications for Order After Refusal. If any motion be made to any judge and be denied, in whole or in part, or be granted conditionally, no subsequent motion upon the same state of facts shall be made to any other judge in that action.

(m) Expert Testimony. *Deleted*

(1) Testimony by Experts. *Deleted*

(2) Bases of Opinion Testimony by Experts. *Deleted*

(3) Opinion on Ultimate Issue. *Deleted*

(4) Disclosure of Facts or Data Underlying Expert Opinion. *Deleted*

History:

[Amended effective May 1, 1986; April 23, 1987; July 1, 1990; September 3, 1995; May 5, 2003.]

NOTES: Notes

This Rule 43 substantially preserves present State practice as to evidence and conduct of trial. The present Federal Rule differs because of the adoption of the Federal Rules of Evidence in 1975; however, the practitioner will notice little change in present practice. Rules 43(a) through 43(d) restate present State practice under statutes, rules and case law. Rule 43(d) preserves Code § 19-1-40. Rule 43(c)(1) preserves new Circuit Rule 101. Rule 43(f) is new matter but is implied by the court's powers under Title 14, Chapter 15 of the Code. Rule 43(g) preserves Circuit Rule 85, except it prohibits submitting the pleadings to the jury for its deliberations, a needed change to avoid the jury treating pleadings as evidence or having information therefrom contrary to the judge's charge and instructions.

Note to 1986 Amendments

The amendment to Rule 43(b)(2) clarifies the right of a litigant to call an adverse party, or a witness who may bind an adverse party, and use leading questions and impeach him if justified by the facts. The amendments to paragraphs (f) and (h) correct inadvertent omissions in those paragraphs.

Note to 1987 Amendments

Rule 43(f) is amended to delete the reference to the hearing impaired whose interpreters are to be provided by statute.

Note to 1990 Amendments

Rule 43(m) Expert Testimony is taken from Rules 702 to 705 of the Federal Rules of Evidence. The language in subdivision (3) is that of Federal Rules of Evidence 704 prior to its amendment in 1984. The Advisory Committee Notes to the Federal Rules of Evidence provide commentary and useful guidance on the use of expert testimony under this Rule.

Note to 1995 Amendments

This amendment deleted subsections (b), (c) [but not (c)(1)], and (m). These matters are now governed by the South Carolina Rules of Evidence.

Note to 2003 Amendments

This amendment changed the title of the Rule to be more reflective of its content and added the final sentence to Rule 43(k), Agreements of Counsel to provide that agreements regarding settling settlements will be handled according to Rule 41.1, SCRPC.

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SIMPSON v. MSA OF MYRTLE BEACH, INC.
Cite as 644 S.E.2d 663 (S.C. 2007)

S.C. 663

373 S.C. 14

Sherry H. SIMPSON, Respondent,

v.

MSA OF MYRTLE BEACH, INC. d/b/a
Addy's Harbor Dodge, Daimler Chrysler
Services NA, LLC, and CrossCheck, Inc.,
Defendants,

of whom MSA of Myrtle Beach, Inc.
d/b/a Addy's Harbor Dodge, is
the Appellant.

No. 26293.

Supreme Court of South Carolina.

Heard Nov. 1, 2006.

Decided March 25, 2007.

Rehearing Denied May 23, 2007.

Background: Customer brought action against automobile dealership alleging that the dealership violated the South Carolina Unfair Trade Practices Act and the South Carolina Manufacturers, Distributors, and Dealers Act by misrepresenting the trade-in value of her vehicle, artificially increasing the purchase price on new vehicle, and failing to provide all rebates promised. Dealership moved to stay the action and to compel arbitration. The Circuit Court, Horry County, B. Hicks Harwell, Jr., J., ordered mediation, then subsequently denied dealership's motion. Dealership appealed, and the Court of Appeals certified the case to the Supreme Court.

Holdings: The Supreme Court, Toal, C.J., held that:

- (1) the Circuit Court was the proper forum to decide the enforceability of the arbitration clause;
- (2) customer lacked meaningful choice in agreeing to arbitration clause;
- (3) limitations on statutory remedies imposed by arbitration clause were unconscionable and unenforceable;
- (4) provision of arbitration clause that excepted from arbitration certain claims dealership might pursue against cus-

tomers was unconscionable and unenforceable; and

- (5) the unconscionable provisions in arbitration clause were not severable.

Affirmed.

1. Alternative Dispute Resolution §213(5)

Arbitrability determinations are subject to de novo review, but a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.

2. Alternative Dispute Resolution §199

The circuit court, rather than an arbitrator, was the proper forum to decide the enforceability of the arbitration clause in automobile trade-in and sales contract between customer and automobile dealership, which contract was governed by the South Carolina Uniform Arbitration Act (UAA), even though the contract specifically stated that arbitration applied to issues involving the "validity and scope" of the contract; the customer challenged the arbitration clause on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. Code 1976, § 15-48-20(a).

3. Alternative Dispute Resolution §114

The Federal Arbitration Act (FAA) codifies federal policy on arbitration and arbitration agreements. 9 U.S.C.A. § 1 et seq.

**4. Alternative Dispute Resolution §116
Commerce §80.5**

Federal Courts §403

Unless the parties have contracted otherwise, the Federal Arbitration Act (FAA) applies in federal and state courts to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. 9 U.S.C.A. § 1 et seq.

5. Alternative Dispute Resolution §116

Even in cases where the Federal Arbitration Act (FAA) otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. 9 U.S.C.A. § 1 et seq.

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6. Alternative Dispute Resolution ¶199

Rulings that a trial court should determine the threshold validity of an arbitration agreement under the South Carolina Uniform Arbitration Act (UAA) are based on the contractual nature of arbitration agreements. Code 1976, § 15-48-20(a).

7. Alternative Dispute Resolution ¶210

There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.

8. Alternative Dispute Resolution ¶139

Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered.

9. Alternative Dispute Resolution ¶112, 134(3, 6)

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate, and a party may seek revocation of the contract under such grounds as exist at law or in equity, including fraud, duress, and unconscionability. Code 1976, § 15-48-10(a).

10. Alternative Dispute Resolution ¶137

General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.

11. Alternative Dispute Resolution ¶134(6)

"Unconscionability," as pertains to a contractual arbitration clause, is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.

See publication Words and Phrases for other judicial constructions and definitions.

12. Contracts ¶1

For purposes of determining whether a contract is unconscionable, the absence of meaningful choice on the part of one party generally speaks to the fundamental fairness

of the bargaining process in the contract at issue.

13. Contracts ¶1

In determining whether a contract was tainted by an absence of meaningful choice so as to render it unconscionable, courts should take into account: (1) the nature of the injuries suffered by the plaintiff; (2) whether the plaintiff is a substantial business concern; (3) the relative disparity in the parties' bargaining power; (4) the parties' relative sophistication; (5) whether there is an element of surprise in the inclusion of the challenged clause; and (6) the conspicuousness of the clause.

14. Alternative Dispute Resolution ¶134(6)

Customer lacked meaningful choice in agreeing to an arbitration clause contained in automobile trade-in and sales contract formed with automobile dealership, as could justify a finding that the clause was unconscionable; the contract was a "take it or leave it" adhesion contract; the contract, the contract was for the purchase of customer's primary vehicle, customer did not possess business sophistication, the contract was hastily presented for customer's signature, and the arbitration clause was inconspicuous in light of its consequences.

15. Contracts ¶1

An "adhesion contract" is a standard form contract offered on a take-it-or-leave-it basis with terms that are not negotiable.

See publication Words and Phrases for other judicial constructions and definitions.

16. Contracts ¶1

"Adhesion contracts" are not per se unconscionable, but the finding of an adhesion contract may mark the beginning point of an unconscionability analysis.

17. Alternative Dispute Resolution ¶134(6)

Limitations on statutory remedies imposed by arbitration clause in automobile sales contract between customer and automobile dealership, which provided that an arbitrator was not authorized to award punitive,

SIMPSON v. MSA OF MYRTLE BEACH, INC.

S. C. 665

Cite as 644 S.E.2d 663 (S.C. 2007)

exemplary, double, or treble damages as to disputes arising under the contract, were oppressive and one-sided and violated statutory law and public policy, and thus, were unconscionable and unenforceable; customer asserted claims that dealership violated the South Carolina Uniform Trade Practices Act (SCUPTA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act), which required courts to impose awards of either double or treble damages for violations. Code 1976, §§ 39-5-140(a), 56-15-110(1), 56-15-130.

18. Alternative Dispute Resolution
§=134(6)

Provision of arbitration clause in sales contract between customer and automobile dealership that excepted from arbitration certain claims which dealership might opt to pursue against customer, and which further stipulated that any judicial proceeding brought by dealership pursuant to the exception would not be stayed pending the outcome of arbitration, was oppressive and one-sided, and, in combination with customer's lack of meaningful choice as to the arbitration clause, was unconscionable and thus unenforceable; the provision allowed dealership to bring a judicial proceeding that completely disregarded any pending claims from customer requiring arbitration.

19. Alternative Dispute Resolution §=121

Antitrust and Trade Regulation §=206

Customer was not precluded from attacking arbitration clause in sales contract with automobile dealership as a violation of the Magnuson-Moss Warranty Act (MMWA), even though customer's underlying claims against dealership alleged no violation of the MMWA, and therefore, the inclusion of the MMWA in the scope of the arbitration clause was unenforceable as a matter of public policy, where the arbitration clause applied to "any and all disputes" including "automobile warranty" and "any consumer protection statute." Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, § 101 et seq., 15 U.S.C.A. § 2301 et seq.; 16 C.F.R. § 703.5(j).

20. Contracts §=103, 105, 108(1)

The Court of Appeals will not enforce a contract which is violative of public policy, statutory law, or provisions of the constitution.

21. Alternative Dispute Resolution §=140

Unconscionable provisions in arbitration clause in the adhesion contract between customer and automobile dealership were not severable, but rather, the entire clause was wholly unconscionable and unenforceable based on the cumulative effect of multiple oppressive and one-sided provisions; severing only the offending provisions would not achieve the intent of the parties, but would effectively "rewrite" the contract, and two of the offending provisions were grossly unconscionable such that public policy was best served by invalidating the entire clause.

22. Alternative Dispute Resolution §=211

Trial court's consideration of parties' memoranda on the unconscionability of an arbitration clause in sales contract between customer and automobile dealership, which consideration was conducted without a hearing, did not deprive dealership of a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the arbitration clause, as statutorily required upon a claim of a contract's unconscionability, where the dealership had four months between customer's motion alleging unconscionability and the time dealership filed a response. Code 1976, § 36-2-302(2).

Joseph Gregory Studemeyer, of Columbia, for Appellant.

Lawrence Sidney Connor, IV, of Kelaher, Connell & Connor, of Surfside Beach, for Respondent.

Chief Justice TOAL:

This case arises out of an arbitration clause in an automobile trade-in contract between an automobile dealership and a customer. The automobile dealership filed a motion for protective order and/or to stay and to compel arbitration in response to the customer's civil action. The trial court denied the dealership's motion on the grounds

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that the arbitration clause was unconscionable. This appeal followed.

FACTUAL/PROCEDURAL BACKGROUND

Appellant MSA of Myrtle Beach, Inc d/b/a Addy's Harbor Dodge ("Addy"), a car dealership, and Respondent Sherry H. Simpson ("Simpson") entered into a contract whereby Simpson traded in her 2001 Toyota 4Runner for a new 2004 Dodge Caravan. Directly above the signature line on the first page of the contract, the signee was instructed in bold to "SEE ADDITIONAL TERMS AND CONDITIONS ON OPPOSITE PAGE." The additional terms and conditions contained an arbitration clause stating the following:

10. **ARBITRATION** Any and all disputes, claims or controversies between Dealer and Customer or between any officers, directors, agents, employees, or assignees of Dealer and Customer arising out of or relating to: (a) automobile warranty, workmanship, or repair; (b) the terms or enforceability of the sale, lease, or financing of any vehicle; (c) any claim of breach of contract, misrepresentation, conversion, fraud, or unfair and deceptive trade practices against Dealer or any officers, directors, agents, employees, or assignees of Dealer; (d) any and all claims under any consumer protection statute; and (e) the validity and scope of this contract, shall be settled by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties expressly waive all rights to trial by jury on such claims. Provided, however, that nothing in this contract shall require Dealer to submit to arbitration any claims by Dealer against customer for claim and delivery, repossession, injunctive relief, or monies owed by customer in connection with the purchase or lease of any vehicle and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration. The filing fees for arbitration shall be paid by the party initiating arbitration. The arbitrator may allocate the other arbitration fees as he/she deems appropriate. In addition to any discovery permitted by the Commercial Arbitration rules, any party may take one disposition [sic] of an oppos-

ing party. The parties agree to exchange all exhibits to be used in arbitration 7 days before arbitration. The arbitrator shall determine the controversy in accordance with the terms of this contract between the parties and shall not consider any parole evidence which purports to alter, modify, vary, add to, or contradict such contract. The arbitrator shall give effect to all applicable statutes of limitation. Any arbitration under this agreement shall take place in Horry County, South Carolina and Customer agrees that the courts of Horry County, South Carolina shall have exclusive jurisdiction over enforcement of this contract and any award made by any arbitrator pursuant to this contract. In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party. Unless otherwise agreed in writing, no claims against Dealer shall be consolidated with other claims in the nature of a class action.

Six months later, Simpson filed a complaint in the Horry County court of common pleas alleging Addy violated the South Carolina Unfair Trade Practices Act and the South Carolina Manufacturers, Distributors, and Dealers Act by misrepresenting the trade-in value of the vehicle, artificially increasing the purchase price, and failing to provide all rebates promised. Simpson sought damages consistent with the maximum statutory remedies permitted for violations of these statutes.

Addy's answer denied Simpson's allegations and asserted that the contract between the parties contained an arbitration clause such that the matter should be stayed and that Simpson's only remedy was to file for arbitration. Addy contemporaneously filed a motion for protective order and/or to stay and compel arbitration. Thereafter, Simpson filed a memorandum in opposition to Addy's motion alleging that the arbitration clause was unconscionable and unenforceable.

At the motion hearing, the trial court ordered the parties to attempt mediation. After the parties notified the trial court that mediation failed, the trial court issued an order denying Addy's motion on the grounds

that the arbitration clause was unconscionable. Addy filed this appeal.

The case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR, and Addy raises the following issues for review:

- I. Did the lower court err in ruling that the arbitration clause was unenforceable without first submitting the issue of enforceability to arbitration?
- II. Did the lower court err in denying Addy's motion to stay the civil litigation pending arbitration?
- III. Did the lower court err in failing to provide Addy a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the arbitration clause in order to aid the court in making a determination on unconscionability?

STANDARD OF REVIEW

[1] Arbitrability determinations are subject to *de novo* review. *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct.App.2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App.2003).

LAW/ANALYSIS

- I. The appropriate forum for determining the validity of the arbitration clause.

[2] As a preliminary matter, Addy contends that the trial court erred in ruling on

the arbitration clause's enforceability rather than first submitting that issue of enforceability to arbitration. We disagree.

[3-5] The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. S.C.Code Ann. § 15-48-20(a)(2005). If no agreement is found to exist, the court must deny any application to arbitrate.¹ *Id.*

[6] Our precedents in this area echo the UAA's policy that the trial court should determine the threshold validity of the arbitration agreement. See *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct.App.2003) ("The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties."). Such rulings are based on the contractual nature of arbitration agreements. See *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct.App.1999) ("Arbitration is available only when the parties involved contractually agreed to arbitrate.").

This proposition finds support in other jurisprudence. The United States Supreme Court has noted that, in limited circumstances, a court should assume that the par-

an issue in this case because the state laws applicable to this case do not operate to completely invalidate the parties' agreement to arbitrate. See *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001).

This distinction is insignificant in the instant case because the UAA and FAA provisions that apply to the issues are nearly identical. See S.C.Code Ann. § 15-48-10(a) (2005) and 9 U.S.C.A. § 2 (1999). Therefore, the analysis under state law is ultimately the same as the analysis under federal law. Moreover, even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

I. The Federal Arbitration Act (FAA), 9 U.S.C.A. § 1 *et. seq.* (1999) codifies federal policy on arbitration and arbitration agreements. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Although the vehicle trade-in contract at issue in the instant case involves interstate commerce, the contract contains a choice of law provision designating South Carolina law as governing law. Therefore, the UAA governs where, as here, the validity of the choice of law provision is not in issue. Additionally, FAA pre-emption of the UAA is not

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ties intended the court to decide certain arbitration issues in the absence of "clear and unmistakable" evidence to the contrary. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (quoting *AT & T Techs., Inc. v. Communications Workers of America*, 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). These limited circumstances typically involve certain "gateway matters," such as whether the parties have a valid arbitration agreement at all, or whether an arbitration clause applies to a certain type of controversy. *Id.* Thus, the prevailing authority supports the notion that courts may have at least a limited role where an arbitration clause otherwise applies.

In this case, the trial court was the proper forum for determining the enforceability of the arbitration clause in the contract between Simpson and Addy. Although the clause specifically stated that arbitration applied to issues involving "the validity and scope of this contract," Simpson challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. Under the UAA, the question of this clause's validity was for the court to decide. See S.C.Code Ann. § 15-48-20(a) (2005).

Furthermore, because Simpson has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity. Accordingly, the trial court did not err in ruling on the issue of validity instead of submitting the issue itself to arbitration.

II. Denial of Addy's motion for protective order and/or to stay and compel arbitration.

Addy argues that the trial court erred in denying Addy's motion for protective order and/or to stay and compel arbitration. We disagree.

[7,8] There is a strong presumption in favor of the validity of arbitration agree-

ments because both state and federal policy favor arbitration of disputes. *Towles*, 338 S.C. at 34, 524 S.E.2d at 842. The South Carolina Uniform Arbitration Act (UAA) provides that in any contract evidencing a transaction involving commerce, a written provision to settle by arbitration shall be valid, irrevocable, and enforceable. S.C.Code Ann. § 15-48-10(a) (2005). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

[9] Despite these clear rules, arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Accordingly, a party may seek revocation of the contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability. S.C.Code Ann. § 15-48-10(a). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C.Code Ann. § 15-48-20(a).

[10,11] General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C.Code Ann. § 36-2-302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See *Hoot-*

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ers of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

A. Absence of meaningful choice

Addy argues that the facts do not show that Simpson had no meaningful choice in agreeing to arbitrate. We disagree.

[12, 13] Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See *Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," *id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293. See also *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2006) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d *Contracts* § 279 (2004))).

There are many cases in this jurisdiction and others involving the enforceability of arbitration clauses in adhesion contracts between commercial entities and consumers. Each transaction is analyzed on its own particular facts in conjunction with the federal and/or state policies favoring arbitration. We begin our inquiry with a focus on the decisions of courts in Ohio, which have heard numerous cases in the very recent past specifically addressing issues of unconscionability of arbitration clauses embedded in adhesion contracts between automobile retailers and consumers. See *Long v. N. Ill. Classic Auto Brokers*, 2006 WL 3783507 (Ohio Ct. App. 9th Dist.2006); *Felix v. Ganley Chevrolet, Inc.*, 2006 WL 2507469 (Ohio Ct.App. 8th Dist.2006); *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 809 N.E.2d 1161 (9th Dist.2004); *Battle v. Bill Swad Chevrolet*,

Inc., 140 Ohio App.3d 185, 746 N.E.2d 1167 (10th Dist.2000).

The Ohio courts characterize automobiles as a "necessity" and factor this characterization into a determination of whether a consumer had a "meaningful choice" in negotiating the arbitration agreement. See, e.g., *Eagle*, 809 N.E.2d at 1175; Cf. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 85 (1960) (invalidating auto manufacturer's standard-form disclaimers of implied warranties because such disclaimers frustrated consumer protection legislation given that in modern times, "automobiles are a common and necessary adjunct of daily life"). In this same context, the Ohio courts have adhered to the idea that sales agreements between consumers and retailers "are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties." *Eagle*, 809 N.E.2d at 1179. Under the Ohio courts' rationale, "the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859, 866 (1998).

[14-16] Turning to the instant case, we first note that under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Neither party disputes that the contract entered into by Simpson and Addy was an adhesion contract as such contracts are standard in the automobile retail industry. Adhesion contracts, however, are not per se unconscionable. Therefore, finding an adhesion contract is merely the beginning point of the analysis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct.App.1998).

We agree with the rationale of the Ohio courts and proceed to analyze this contract between a consumer and automobile retailer with "considerable skepticism." Under this approach, we first observe that the contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party's status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note Simpson's allegation that the contract was "hastily" presented for her signature.

Moreover, regardless of the general legal presumptions that a party to a contract has read and understood the contract's terms,² we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Simpson to forego certain remedies that were otherwise required by statute.³ While certain phrases within other provisions of the additional terms and conditions were printed in all capital letters,⁴ the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. Although this Court acknowledges

that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law. Furthermore, and contrary to Addy's argument, the present transaction may be distinguished from that in *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), where both parties were sophisticated business interests in an arms-length negotiation.

Accordingly, we find that when considered as a whole and in the context of an adhesion contract for a vehicle trade-in, the circumstances reveal that Simpson had no meaningful choice in agreeing to arbitrate claims with Addy.

B. Oppressive and one-sided terms

1. Limitation on statutory remedies in an arbitration clause

[17] Addy contends that the arbitration clause's limitation on statutory remedies was not oppressive and one-sided. We disagree.

The arbitration clause in Simpson's contract with Addy provides that "[i]n no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party." Simpson's underlying complaint filed in civil court alleged, among other things, that Addy violated the South Carolina Uniform Trade Practices Act (SCUPTA) and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act). The SCUPTA requires a court to award treble damages for violations of the statute.⁵ Similarly, the Dealers Act requires a court to

2. See *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 ("[A] person who can read is bound to read an agreement before signing it."); *Towles*, 338 S.C. at 39, 524 S.E.2d at 845 ("[T]he law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents simply from reading the document.").

3. Specifically, the arbitration clause prohibited an arbitrator from awarding double or treble damages.

4. This included phrases in the "Disclaimer of Warranties" provision and the "Used Vehicle Disclosure." We note that S.C.Code Ann. § 36-2-316 (2003) requires disclaimers of implied warranties to be "conspicuous."

5. See S.C.Code Ann. § 39-5-140(a) (1976) (providing that a "court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper" [emphasis added]).

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award double damages for violations of the statute.⁶

In arguing that this provision was not oppressive and one-sided, Addy relies on *Carolina Care Plan*. In that case, this Court held that the issue of whether an arbitration clause prohibiting an arbitrator from awarding "punitive damages" violated the public policy of the SCUTPA was not ripe for review. 361 S.C. 544, 606 S.E.2d 752. The Court explained that "an arbitrator may or may not choose to award treble damages in accordance with the SCUTPA, depending upon whether an arbitrator finds the SCUTPA was violated and whether the arbitrator finds that statutory treble damages are punitive or compensatory damages." *Id.* at 557, 606 S.E.2d at 759 (discussing *PacificCare Health Systems v. Book*, 538 U.S. 401, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003) (holding it was premature to conclude that meaningful relief for the plaintiff under RICO was unavailable in arbitration because the arbitrator may conclude that a restriction on "punitive damages" in an arbitration clause did not preclude the authorization of treble damages under RICO)).

Addy's comparison falls short. In fact, the present case requires the *Carolina Care Plan* analysis to be taken one step further because the arbitration clause at issue here goes beyond banning "punitive" damages generally and specifically prohibits an arbitrator from awarding statutorily required treble or double damages. Therefore, an arbitrator's ultimate classification of an award as "compensatory" or "punitive" is no longer relevant in an analysis of whether this particular clause is unconscionable: under this arbitration clause, treble and double

damages—whether classified as compensatory or punitive—are prohibited outright.

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest.⁷ Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Accordingly, we find the provision prohibiting double and treble damages to be oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker. In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, this provision is an unconscionable waiver of statutory rights, and therefore, unenforceable.

2. Dealer's remedies not stayed pending outcome of arbitration

[18] Addy argues that the arbitration clause's provision reserving certain judicial remedies to the dealer and authorizing the award of the dealer's remedies even if the consumer's arbitration proceedings have not concluded is not oppressive and one-sided. We disagree.

6. See S.C.Code Ann. § 56-15-110(1) (2006) (providing that an individual "shall recover double the actual damages by him sustained" [emphasis added]).

7. This Court has previously recognized the strong public policy notions behind the enactment of the SCUTPA and the Dealers Act. See *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 263, 536 S.E.2d 399, 404 (Ct.App.2000) ("It is a violation of the Dealers Act for any manufacturer or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." (citing S.C.Code Ann.

§ 56-15-40(1) (1991))); *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct.App.1989) (defining an unfair trade practice as a practice which is "offensive to public policy or which is immoral, unethical, or oppressive"), *aff'd in part, rev'd in part, on other grounds*, 309 S.C. 263, 422 S.E.2d 103 (1992) (per curiam). The Dealers Act also specifically provides that "any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." S.C.Code Ann. § 56-15-130 (2006).

While stating that "all disputes, claims or controversies between Dealer and Customer" are to be settled in binding arbitration, the arbitration clause notes several exceptions. Specifically, the clause provides:

Nothing in this contract shall require the Dealer to submit to arbitration any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Consumer in connection with the purchase or lease of any vehicle and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration. [emphasis added].

Our courts have held that lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable. See *Munoz*, 343 S.C. at 542, 542 S.E.2d at 365 (holding that an arbitration agreement between a consumer and a lender was not unconscionable where it allowed the lender to seek foreclosure while requiring the consumer to arbitrate any counterclaim in the foreclosure action); *Lackey v. Green Tree Financial Corp.*, 330 S.C. at 402, 498 S.E.2d at 905 (same). The primary basis for this conclusion in *Munoz* and *Lackey* was that requiring one party to seek a remedy through arbitration rather than the judicial system did not deprive that party of a remedy altogether. See *Munoz*, 343 S.C. at 542, 542 S.E.2d at 365. The *Lackey* court additionally explained that the judicial remedies which the lender in that case had reserved for itself (i.e. replevin and foreclosure actions) provided specific procedures for protecting the collateral and the parties during the pendency of the arbitration proceedings. *Lackey*, 330 S.C. at 401, 498 S.E.2d at 905. Because these protections related to both parties and were facilitated by enforcement procedures specified by law, the court of appeals concluded that, regardless of the lack of mutuality of remedy, the arbitration clause bore "a reasonable relationship to the business risks" inherent in secured transactions. *Id.*

However, the essence of Simpson's unconscionability claim is not the general lack of

mutuality of remedy, but rather the arbitration agreement's express stipulation that the dealer may bring a judicial proceeding that completely disregards any pending consumer claims that require arbitration. The clauses at issue in *Munoz* and *Lackey* contained no such directives. To this effect, we can easily envision a scenario in which a dealer's claim and delivery action is initiated in court, completed, and the vehicle sold prior to an arbitrator's determination of the consumer's rights in the same vehicle. As the arbitration agreement between Simpson and Addy is written, the dealer collects on a judgment awarded in a judicial proceeding regardless of any protections for the collateral afforded by law.

Addy's suggestion that there are procedural motions⁸ available to the consumer which offset any potentially inconsistent effects of this provision, in our opinion, shows an informal acknowledgement on the part of Addy that such a provision on its face is indeed one-sided. These procedural mechanisms only act to place an additional burden on the consumer to ensure that the vehicle in controversy is not disposed of in a court proceeding initiated by the dealer before the adjudication of the consumer's claims in arbitration.

We continue to abide by our previous holdings in *Munoz* and *Lackey* that lack of mutuality of remedy will not invalidate an arbitration agreement. However, we find that the provision in the arbitration clause dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies is one-sided and oppressive and does not promote a neutral and unbiased arbitral forum. Accordingly, in light of Simpson's lack of meaningful choice in agreeing to arbitrate, the provision is unconscionable and unenforceable.

3. Limitation on bringing warranty claims in a judicial forum

[19] Addy argues that Simpson may not attack the arbitration clause on the grounds that it violates the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C.A. § 2301 *et seq.*

8. Specifically, Addy suggests that a motion for protective order or a motion to stay pending

arbitration.

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(1997), because Simpson's underlying claims alleged no violation of the MMWA. We disagree.

The arbitration clause in the contract between Simpson and Addy states that it applies to "any and all disputes" including "automobile warranty" and "any consumer protection statute"—all of which implicate the MMWA. The provision further specifies that such matters are to be resolved only by "binding arbitration."

Rules promulgated by the Federal Trade Commission (FTC) state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703.5(j) (2006). See also *Richardson v. Palm Harbor Homes, Inc.*, 254 F.3d 1321 (11th Cir.2001). Moreover, the MMWA has been interpreted to supersede the FAA with respect to consumer claims for breach of written warranty. See *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1437-38 (M.D.Ala.1997). Therefore, the federal government has made it clear that parties may not agree to arbitrate an MMWA claim as the arbitration clause between Simpson and Addy attempted to do here.

[20] This Court will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 361 S.C. at 555, 606 S.E.2d at 758. The fact that Simpson did not bring a claim under the MMWA is irrelevant to our conclusion that the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy. Accordingly, we hold that this provision of the arbitration clause is an unconscionable and unenforceable violation of public policy.

C. Severability

In the alternative to its argument that the arbitration clause is not unconscionable, Addy suggests that any provision found by this Court to be unconscionable may be severed from the clause and arbitration allowed to otherwise proceed. In fact, it seems as though the "Additional Terms and Conditions" section of the contract anticipated just

such a scenario. Paragraph fifteen (15) articulates a severability clause providing that:

In the event any provision of this contract shall be held invalid, illegal, or unenforceable, the validity, legality, and enforceability of the remaining provisions shall not be affected or impaired thereby.

We disagree.

In consideration of the federal and state policies favoring arbitration agreements, severability clauses have been used to remove the unenforceable provisions in an arbitration clause while saving the parties' overall agreement to arbitrate. See *Healthcomp Evaluation Servs. Corp. v. O'Donnell*, 817 So.2d 1095, 1098 (Fla.Ct.App.2d Dist.2002) (holding that an arbitration clause was divisible and therefore a severability provision acted to remove the unenforceable provision from the arbitration clause without affecting the intent of the parties); *Primerica Fin. Servs. v. Wise*, 217 Ga.App. 36, 456 S.E.2d 631, 635 (1995) (upholding the trial court's application of a severability clause to an arbitration agreement "in light of the liberal federal policy favoring arbitration agreements and the parties' intentions in entering into those agreements"). Additionally, legislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C.Code Ann. § 36-2-302(1) (2003).

At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84-85 (D.C.Cir.2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. *Levis v. Pre-*

minum Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

[21] In this case, we find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.⁹

Additionally, we note that there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. Therefore, in holding today that the arbitration clause in the vehicle trade-in contract between Addy and Simpson is unconscionable due to a multitude of one-sided terms, we do not overrule our decision in

9. We acknowledge that in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause. However, we find the present case is distinguishable from those cases prescribing severability such that the invalidation of the arbitration clause in its entirety is the more appropriate remedy.

First, the arbitration clause in the contract between Simpson and Addy contained a total of three unconscionable provisions while arbitration clauses examined by courts prescribing severability generally contained only one offending provision. See *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir.2006) (severing a provision in an arbitration clause that prohibited the award of treble damages); *Safranek v. Copart, Inc.*, 379 F.Supp.2d 927 (D.Ill.2005) (severing a provision in an arbitration clause that violated Title VII by requiring each party to bear its own attorney's fees and costs); *Ex parte Celtic Life Ins. Co.*, 834 So.2d 766 (Ala.2002) (severing a provision in an arbitration clause that was void as a violation of public policy by prohibiting the award of punitive damages); *Healthcomp Evaluation Servs. Corp.*, 817 So.2d 1095 (severing a provision in an arbitration clause that violated state law by not permitting the parties to appeal or review an arbitration award). But see *Primerica Fin. Servs. v. Wise*, 217 Ga.App. 36, 456 S.E.2d 631 (severing two provisions governing the eligibility of arbitrators and the judicial review of an arbitration). Second, two of the provisions in this case

Munoz where we held that an adhesion contract between a consumer and a lender was not unconscionable because it lacked mutuality of remedy. Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.

Accordingly, we affirm the trial court's denial of the motion to compel arbitration.

III. Presentation of evidence to determine unconscionability

[22] Addy argues that the trial court erred in failing to provide Addy a reasonable opportunity to present evidence as to the commercial setting, purpose, and effect of the arbitration clause in order to aid the court in making a determination on unconscionability. We disagree.

S.C.Code Ann. § 36-2-302(2) (2003) provides:

were found unconscionable because the provisions contravened state and federal consumer protection law. The sheer magnitude of unconscionability present in a provision that prevents a party from vindicating the party's statutory rights, along with the fact that such a grossly unconscionable provision occurred not once, but twice, requires that we give significant consideration to a remedy in this situation that best serves the interests of public policy. See *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir.1994) (noting that severance of illegal provisions is inappropriate when the entire arbitration clause represents an "integrated scheme to contravene public policy" (citations omitted)).

Accordingly, while this Court generally would encourage severability of an unconscionable provision, we do not view the arbitration agreement between Simpson and Addy to be a proper candidate for the application of this remedy. See *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir.2003); (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Colton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C.2005) ("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights . . . , the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

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KEY CORPORATE v. COUNTY OF BEAUFORT

S.C. 675

Cites 644 S.E.2d 675 (S.C. 2007)

When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

Simpson filed her memorandum in opposition to Addy's motion alleging the unconscionability of the arbitration clause on March 16. After a motion hearing that same day, the trial court ordered mediation. When mediation failed, the court ordered Addy to submit a memorandum in support of its motion, which it did on July 13. The court considered the arguments in both memoranda before issuing its order on August 12.

In our opinion, the four months that passed between Simpson's memorandum and Addy's response was a "reasonable opportunity" for Addy to consider Simpson's arguments and respond with respect to the commercial setting, purpose, and effect of the arbitration clause. Accordingly, the trial court's consideration of the parties' memoranda without a hearing did not deny Addy a reasonable opportunity to present its evidence in order to aid the court's determination.

CONCLUSION

For the foregoing reasons, we find the arbitration clause between Simpson and Addy unconscionable and unenforceable in its entirety. Accordingly, we affirm the trial court's denial of Addy's motion to stay litigation pending arbitration.

**MOORE, WALLER, BURNETT and
PLEICONES, JJ., concur.**



373 S.C. 55

KEY CORPORATE CAPITAL, INC., National Tax Assistance Corporation, TransAm Tax Certificate Corp. d/b/a Destiny 98TD, Advantage 99TD, TA Escrow 97 and Destiny 98, Respondents,

v.

COUNTY OF BEAUFORT, Treasurer of Beaufort County, and Tax Collector of Beaufort County, Petitioners.

No. 26302.

Supreme Court of South Carolina.

Heard Dec. 7, 2006.

Filed April 9, 2007.

Background: Successful bidders on properties at tax sale sued county for interest earned on purchase price after county voided sales and refunded purchase price to bidders. The Circuit Court, Beaufort County, Thomas Kemmerlin, Jr., Master-in-Equity, entered judgment for purchasers. County appealed. The Court of Appeals, 360 S.C. 513, 602 S.E.2d 104, affirmed. County filed petition for writ of certiorari.

Holding: The Supreme Court, Waller, J., held that bidders were limited to refund of purchase price without interest as remedy. **Reversed.**

Toal, C.J., dissented and filed an opinion in which Pleicones, J., concurred.

1. Taxation ¶3195

Purchasers of properties at tax sale were limited to refund of purchase price without interest as remedy when the sale was voided, under statute in effect at time of the transaction, providing for a refund of "the amount paid" to the successful bidder where a tax sale was voided; court would apply presumption that Legislature's subsequent amendment of the statute to include interest was intended to change the existing law, and equitable remedy was not warranted because the statute provided an adequate remedy at law. Code 1976, § 12-51-150.

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Case No. 2009-CP-10-6873

Plaintiffs,

vs.

AMY MEYER,

Defendant and Third Party
Plaintiff,

vs.

LORCAN LUCEY, GMAC MORTGAGE
CORPORATION, CITI MORTGAGE, INC.,
AND JOHN DOE FINANCE

Third Party Defendants.

**PLAINTIFFS' NOTICE OF MOTION AND
MOTION TO DISMISS, STRIKE AND
MAKE MORE DEFINITE AND CERTAIN**

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2009 DEC 30 PM 3:37

FILED

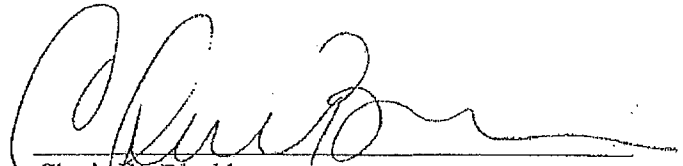
TO: NANCY BLOODGOOD, ESQUIRE, ATTORNEY FOR AMY MEYER

Please take notice that Plaintiffs, Justin O'Toole Lucey ("Lucey") and Justin O'Toole Lucey, P.A. (the "Firm") will move the Court, ten days from the date hereof, or as soon thereafter as this matter may be heard, for an Order: (1) striking the immaterial, impertinent and scandalous matters contained in Defendant's Answer, Counterclaims and Third-Party Complaint, which appears more intended to disparage Plaintiffs rather than set forth a claim, pursuant to Rule 12(f), SCRPC; (2) dismissing Defendant's seventh counterclaim for unjust enrichment pursuant to Rule 12(b)(6), SCRPC; and (3) requiring Defendant to make more definite and certain her sixth cause of action for intentional misrepresentation/fraud/constructive fraud by delineating separately each cause of action and the facts and elements that allegedly support each cause of action, rather than

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combining them as one cause of action, pursuant to Rule 12(e), SCRCP.

Plaintiffs' counsel affirms that she believes consultation with opposing counsel to resolve the Motion to Strike and Motion to Make More Definite and Certain would serve no useful purpose.



Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

Attorneys for Plaintiffs
Justin O'Toole Lucey and Justin O'Toole Lucey,
P.A.

December 30, 2009
Charleston, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Case No. 2009-CP-10-6893

Plaintiffs,

vs.

AMY MEYER,

Defendant and Third Party
Plaintiff,

vs.

LORCAN LUCEY, GMAC MORTGAGE
CORPORATION, CITI MORTGAGE, INC.,
AND JOHN DOE FINANCE

Third Party Defendants.

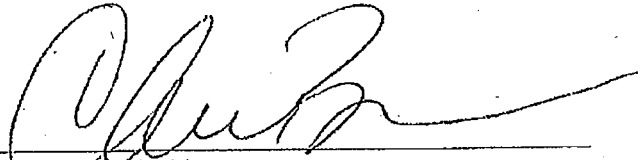
PLAINTIFFS' NOTICE OF MOTION AND
MOTION FOR RECONSIDERATION

TO: NANCY BLOODGOOD, ESQUIRE, ATTORNEY FOR AMY MEYER

Please take notice that Plaintiffs, Justin O'Toole Lucey ("Lucey") and Justin O'Toole Lucey, P.A. (the "Firm") shall move the Court, ten days from the date hereof, or as soon thereafter as they may be heard, for reconsideration of the Court's Order on Plaintiff's Motion to Compel Arbitration issued by the Court on January 25, 2010, pursuant to Rule 59(a), SCRCP.

Plaintiffs' grounds for this Motion for Reconsideration include the following: (i) the Court, in determining whether the Federal Arbitration Act applies to this case, incorrectly focused on Defendant Meyer's activities, rather than the activities of the Firm, (ii) the Court delegated the ruling on the issue of whether the arbitration clause was unconscionable to Defendant's counsel (per attached email); and (iii) the Court did not

recognize or evaluate the factors which render arbitration clauses reasonable and conscionable, especially as between sophisticated parties.



Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

Attorneys for Plaintiffs
Justin O'Toole Lucey and Justin O'Toole Lucey,
P.A.

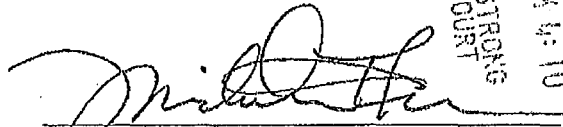
February 7, 2010
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR RECONSIDERATION** has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 2nd day of February, 2010.

Nancy Bloodgood, Esq.
The Foster Law Firm, LLP
3875 Faber Place Drive, Suite 204
North Charleston, SC 29405

ATTORNEYS FOR DEFENDANT



NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
Telephone: (843) 577-9440

FILED
2010 FEB -2 PM 4:10
JULIE J. ARMSTRONG
CLERK OF COURT

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Blackburn, Cherie

From: Nicholson, J. C. [JNicholsonJ@sccourts.org]

Sent: Wednesday, December 16, 2009 4:52 PM

To: 'nbloodgood@fosterfoster.com'

Cc: Blackburn, Cherie

Mrs. Bloodgood,

The court finds that there is no reason for the FAA to apply in this case please send a proposed order regarding this and any other issues you feel appropriate.

Thank you,

Brantly B. Halgler

On Behalf of The Honorable J.C. Nicholson

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

JUSTIN O'TOOLE LUCEY and JUSTIN
O'TOOLE LUCEY, P.A.

Case No. 2009-CP-10-6873

Plaintiffs,

vs.

AMY MEYER,

Defendant and Third Party
Plaintiff,

vs.

LORCAN LUCEY, GMAC MORTGAGE
CORPORATION, CITI MORTGAGE, INC.,
AND JOHN DOE FINANCE,

Third Party Defendants.

FILED
JUL 7 2009
CLERK OF COURT
BY
PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR
RECONSIDERATION

COME NOW Plaintiffs Justin O'Toole Lucey and Justin O'Toole Lucey, P.A. ("Plaintiffs"), by and through their undersigned attorneys, and in support of their Motion for Reconsideration, respectfully state as follows:

PRELIMINARY STATEMENT

Plaintiffs' Motion for Reconsideration requesting this Court to grant Plaintiffs' Motion to Compel Arbitration should be granted because (1) the policies of the United States and South Carolina favor arbitration of disputes, (2) there is sufficient evidence demonstrating that the employment agreement between the parties involves and/or affects interstate commerce, given such a burden of proof is not a rigorous inquiry, (3) the scope of the arbitration clause covers all of Defendant Meyer's counterclaims in this matter, (4) the arbitration provision is not procedurally or substantively unconscionable, and (5) assuming *arguendo*, that the

arbitration provision's limitation on witnesses is deemed unconscionable, such a limitation can be severed from the remainder of the arbitration agreement.

FACTS

A. The Employment Agreement And Arbitration Clause.

Justin O'Toole Lucey, P.A. ("the Firm") maintains a law practice located at 415 Mill Street, Mount Pleasant, South Carolina. In or about January 2006, the Firm hired Defendant Amy Meyer ("Meyer" or "Defendant") as an associate attorney. In June of 2006, the Firm and Meyer executed an agreement setting forth the terms of her employment. This agreement was amended with regard to the payment of bonuses by letter agreement in May of 2007. (The 2006 agreement and 2007 amendment, being referred to collectively as the "Employment Agreement," are attached as Exhibit A to the Complaint filed in this action.)¹

The purpose of the Employment Agreement was to put into writing terms that Meyer and Justin O'Toole Lucey ("Lucey"), the Firm's owner and principal attorney, had discussed when Meyer came to work for the Firm several months earlier. The beginning paragraph explains the reason for the Employment Agreement and states as follows:

"As I have several times told you I would, am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalese, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate."

(See Employment Agreement attached as Exhibit A to the Complaint.) The Employment Agreement goes on to describe benefits that Meyer will receive in her employment, including a monthly salary, an additional bonus paid on fees earned on contingency cases spearheaded by her, payment for legal CLE's, payment for health insurance, malpractice insurance, employer

¹ A redacted version of Exhibit A was attached to the Complaint to protect and preserve the confidentiality of the provisions thereof. A complete version was provided to the Court at the hearing on Plaintiffs' Motion to Compel Arbitration.

payroll taxes and deposition school, vacation, sick days and paid holidays, use of a laptop computer, specific bonuses in certain cases, a general trial bonus and attendance at a trial seminar. In addition, it also addresses the hours Meyer will work, confidentiality of Firm clients and information, and the termination of the Employment Agreement by either party.

The Employment Agreement also contains a binding arbitration provision, as follows:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

(See Employment Agreement attached as Exhibit A to the Complaint). The Employment Agreement encourages Meyer to spend time reviewing it prior to signing it. It states, directly above her signature:

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

See Employment Agreement. Meyer did not voice any objection to the arbitration provision in the Employment Agreement. See Defendant's Brief in Opposition to Plaintiff's Motion to Compel Arbitration ("Defendant's Brief"), p.7 ("Perhaps Ms. Meyer could have objected to the arbitration clause, but she was certainly in a poor position to do so...").

When Meyer was hired by the Firm, she had allegedly been practicing law five years as an Assistant Solicitor with the Ninth Circuit Solicitor's office, allegedly specializing in white collar crime prosecutions in Charleston County. See Def.'s Answer, Countercl. & Third-Party Compl. ¶44. Meyer had also been a licensed certified public accountant since 1999 in Kentucky and had worked in public accounting for six years prior to working for the Solicitor's Office. See Def.'s Answer, Countercl. & Third-Party Compl. ¶44.

The Employment Agreement contemplated that Meyer would work as an associate at

the direction of Lucey on legal cases handled by the Firm that were assigned to her by Lucey. The Firm was engaged in interstate commerce. It represented parties from other states, had cases with witnesses from other states, used experts from other states, took depositions in other states, dealt with court reporting firms in other states, and regularly communicated and corresponded with individuals in other states. Meyer worked on cases that clearly involved and affected interstate commerce.

The Employment Agreement specifically references some of these cases, including "Cusack," "Harper," "Shoshan," "Hanson" and "Turner" and provides Meyer a bonus opportunity on the fees received by the Firm in these cases. Each of these cases affected interstate commerce. Shoshan was an employment lawsuit against a non South Carolina resident car parts manufacturing subsidiary of a German company which had a North Charleston factory. Turner was a partnership/employment lawsuit involving a dental student who had been marketed a dental practice by a Georgia professional practice referral service and who obtained a loan from a Georgia bank. Harper involved a treating doctor who resided in and was deposed in Florida, the Firm's primary liability expert resided in and was deposed in Georgia, another of the Firm's experts resided in and was deposed in California and the Firm procured neurological analysis from physicians in Florida and North Carolina. The majority of the out of state work was handled by Meyer.

Another such case that Meyer worked on was a construction case in which the firm represented the Ocean Club Horizontal Property Regime (the "Ocean Club case"). According to Meyer, she spent the vast majority of her time between May of 2007 and July of 2009 working on this complex state court construction case. See Defendant's Brief, p.2.

The Employment Agreement was amended in May of 2007 to allow Meyer to receive a bonus on the Ocean Club case even though she was not spearheading the case. See

Employment Agreement. The primary purpose of creating this addition to the Employment Agreement was to address Meyer's work on the Ocean Club case and give her the ability to obtain a bonus on fees the Firm received in the case.

Meyer continued to work for the Firm until July 22, 2009, when her employment terminated.

B. The Ocean Club Case.

The Firm's primary client in the Ocean Club case was the Ocean Club Horizontal Property Regime, which was made up of homeowners located in various states. The firm executed retainer agreements with each of the homeowners. An e-mail to the homeowners dated September 18, 2008, lists the numerous homeowners who were the Firm's clients. See Documents Filed Under Seal In Support of Plaintiff's Motion to Compel Arbitration ("Documents Filed Under Seal"), tab 3. The Ocean Club case involved not only regular communication with the clients located in other states, but also travel to other states. On February 2, 2009, Meyer prepared, on behalf of the Firm, a summary of the travel expenses incurred in connection with the case. Her summary states as follows: "...the below is general summary of some of the travel that my office has done during this case to date:

During 2007, my office incurred travel expenses to Charlotte, NC for the Bonsal Corporate deposition; to Columbia for three McCrory depositions (Tharp, Royster, Marshall Clark Architect); to Atlanta for several Kawneer depositions; and, to Sarasota, FL to take the depositions of Valcourt and Spectech employees. During 2008, my office incurred travel expenses to travel to Columbia for roofer and McCrory depositions. Additionally, as you are aware, the Court ordered the owner depositions to be taken in Fall 2008; my office incurred travel expenses to meet with the homeowners and attend their depositions in Columbia, Greenville, Asheville, Atlanta, New Jersey, Washington, D.C., Knoxville and Kingsport. We also had travel to Charlotte for roofer depositions. Finally, in Fall 2008, I incurred travel expenses to meet with our national concrete expert, Peter Emmons, in Baltimore.

We also had various documents inspections in Columbia and Charlotte that have necessitated travel.

See Documents Filed Under Seal, tab 2. As further described below, much of this travel was performed by Meyer.

The case also involved numerous insurance companies located throughout the country. See Documents Filed Under Seal, tabs 5, 6 and 13. The Firm maintained an Ocean Club Emergency Contact List, which provided the names of the client homeowners, their contact numbers, their billing addresses and their e-mail addresses. The billing addresses evidence that these homeowners were located in numerous different states, including South Carolina, Tennessee, North Carolina, Georgia, Illinois, New York, Michigan, Florida, Ohio, Virginia, California, Indiana, and New Jersey. See Documents Filed Under Seal, tab 7.

The court in the Ocean Club case ordered all of the homeowners to give their depositions. See Documents Filed Under Seal, tab 3. Plaintiffs have provided to the Court deposition transcript cover pages showing depositions that were taken Georgia, Florida, North Carolina, and Minnesota. See Documents Filed Under Seal, tabs 8 through 11. In addition, several out-of-state depositions were taken via video. See Documents Filed Under Seal, tab 12.

Meyer's timesheets, which she maintained for her Ocean Club time, reveals travel to Atlanta on September 24, 2007, attendance at various depositions in Atlanta on September 25 and 26, 2007, travel to Sarasota, Florida on November 12, 2007, attendance at depositions in Florida on November 13 and 14, 2007, travel to Charlotte, North Carolina on October 7, 2008, for a meeting and deposition, meetings and depositions in North Carolina on October 8, 2008, travel to Kingsport, Tennessee for a meeting and depositions on October 9, 2008, attendance at a deposition in Tennessee on October 10, 2008, travel to Statesboro, North Carolina on January 26, 2009, for depositions in North Carolina, and attendance at depositions on January 27, 2009, and January 28, 2009. See Documents Filed Under Seal, tab 1.

Meyer claims that she expended "more than 5,100 hours of legal work on the Ocean Club case" and "worked 56% of the attorney hours for the attorneys in the Lucey Firm assigned to the Ocean Club case." See Def.'s Answer, and Countercl. & Third-Party Compl. ¶ 220. All of her claims in this lawsuit arise out of her allegation that she is entitled to bonus money on the Ocean Club case and one other case on which she worked, the Bees Ferry case. Clearly, the crux of her case involves her claim for the Ocean Club bonus under the Employment Agreement.

C. The Pending Arbitration Petition.

Beginning in August of 2009, Meyer, through her attorney, Nancy Bloodgood, made demands for compensation Meyer claims is due under the Employment Agreement.² In response to Meyer's demands under the Employment Agreement, on October 27, 2009, the Firm filed a Demand for Arbitration with National Arbitration and Mediation, Inc. ("NAM") in which the Firm seeks a declaratory judgment that it has paid all compensation and wages due to Meyer and is not in violation of the Employment Agreement. Plaintiff's Demand for Arbitration in *Justin O'Toole Lucey, P.A. v. Amy Meyer* was filed under seal. See Documents Filed Under Seal, tab 16.

The Demand for Arbitration was filed under the NAM Employment Rules and Procedures. A copy of these Rules and Procedures, along with the NAM Fees and Costs for Employment Disputes were filed under seal. See Documents Filed Under Seal, tabs 14 and 15. Under the NAM Employment Rules and Procedures the "Employer shall pay NAM's Administrative fees and NAM's hourly fees for the total time spent by the Arbitrator/Mediator and shall advance all other costs due NAM related to the costs of the Arbitration/Mediation.

² The crux of Meyer's claims (and the counterclaims that she ultimately filed in this case) is that she is owed bonus monies on the fees the Firm received in the Ocean Club case over and above the \$370,000 she has already received as a bonus on that case and the \$60,000 in salary the Firm paid her.

The Employee shall pay the NAM Filing Fee.” See Documents Filed Under Seal, tab 14. The NAM Filing Fee, which is the only fee that the Employee pays to NAM, is sixty dollars (\$60.00). See Documents Filed Under Seal, tab 15.

PROCEDURAL BACKGROUND

A. The Filing Of This Lawsuit.

On October 30, 2009, Nancy Bloodgood’s assistant, Amanda Kramer, sent to Cherie Blackburn, Plaintiffs’ counsel, by electronic mail, “a draft Complaint which Attorney Bloodgood is intending on filing next week.” (See e-mail attached to Complaint as Exhibit B). The draft Complaint (“Draft Complaint”) contained causes of action against not only the Firm, but also Lucey, the Firm’s owner and principal attorney. The Draft Complaint claimed that the Employment Agreement “was a contract between Defendants Lucey and the Firm and the Plaintiff.” See *id.* The allegations and causes of action contained in the Draft Complaint were all based upon the Employment Agreement, which Meyer specifically referred to in the Draft Complaint as the “June 2006 Contract” and the “May 2007...Agreement.” On October 31, 2009, Ms. Bloodgood sent an e-mail to Ms. Blackburn stating that she would be filing, on behalf of Meyer, the Draft Complaint as well as a Lis Pendens on property owned by the Firm and Lucey on Monday, November 2, 2009. (See Exhibit C to Complaint.)³

On November 2, 2009, Lucey⁴ and the Firm instituted this action by filing a Complaint and Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration in order to prevent the filing of the Draft Complaint, which, in addition to

³ The Draft Complaint included as defendants GMAC Mortgage Corporation, CitiMortgage, Inc., and John Doe Financial, as mortgagees of property owned by the Firm and Lucey, and Lorcan Lucey, as co-owner with Lucey of a piece of real estate. The only cause of action against these defendants was one for a constructive trust, alleging that Lucey and the Firm have used bonus monies due to Meyer to make improvements, pay taxes, pay insurance, and maintain the real estate owned by Lucey and the Firm.

⁴ Lucey was included as a plaintiff in this action because the Draft Complaint included him as a defendant, claimed he was a party to the Employment Agreement (although he was not), and contained breach of contract and other causes of action against him, including a request for a constructive trust on property he owned.

constituting a complete disregard of the binding arbitration clause in the Employment Agreement, contained confidential information regarding the Firm's arrangement with employees and clients and confidential attorney-client information, communications, and work product regarding certain clients of the Firm. Plaintiffs' counsel also communicated to Meyer's counsel Plaintiffs' intent to sue for slander of title should a Lis Pendens be filed with the Court covering the properties owned by Plaintiffs.⁵

B. Meyer's Claims Against Lucey And The Firm.

On November 30, 2009, Meyer filed an Answer, Counterclaims and Third Party Complaint that contained, among other allegations, the claims set forth in the Draft Complaint in the form of counterclaims. The counterclaims set forth eight causes of action, all arising out of the terms of the Employment Agreement. The crux of the counterclaims is Meyer's allegation that the Firm breached the Employment Agreement by not paying Meyer bonuses she claims were due under the Employment Agreement. Her counterclaims consist of the following: (1) declaratory judgment as to Lucey that he is not a party to the Employment Agreement and cannot compel arbitration; (2) breach of the Employment Agreement as to the Firm, (3) breach of the Employment Agreement accompanied by fraudulent act as to the Firm, (4) failure to pay wages under the Employment Agreement in violation of the Payment of Wages Act (S.C. Code Ann. § 41-10-10 *et seq.*) against the Firm and Lucey, (5) promissory estoppel with regard to promises made in the Employment Agreement against the Firm, (6) intentional misrepresentation/fraud/constructive trust based on alleged representations regarding Meyer's entitlement to the bonuses referenced in the Employment Agreement against the Firm and Lucey, (7) unjust enrichment as a result of the Firm's retention of compensation due under the Employment Agreement against the Firm and Lucey; and (8)

⁵ Defendant has not filed a Lis Pendens in this action as of the date of this Memorandum.

constructive trust on properties owned by the Firm and Lucey due to the withholding of compensation due under the Employment Agreement, against the Firm, Lucey and the third party defendants. See Def.'s Answer, and Countercl. & Third-Party Compl.

C. Motion To Compel Arbitration.

On November 2, 2009, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration. On December 9, 2009, Plaintiffs filed a Memorandum in Support of Motion to Compel Arbitration. A hearing was held before the Honorable J.C. Nicholson, Jr. on December 10, 2009. Defendant did not file a brief in opposition to Plaintiffs' Motion prior to the hearing, but handed to Judge Nicholson and Plaintiffs' counsel her Brief in Opposition to Plaintiffs' Motion to Compel Arbitration at the hearing. During the hearing, Judge Nicholson invited counsel to provide any supporting case law to him, including cases addressing the applicability of the FAA to the case. Plaintiffs' counsel hand-delivered a cover letter with nineteen supporting cases on December 11, 2009.

At the time of the hearing, a Motion to Seal the pleadings, filed by Plaintiffs, was pending before the Court. Judge Nicholson granted the Motion and issued an Order to Seal Pleadings that was filed on December 11, 2009.

D. Circuit Court's Order Denying Plaintiffs' Motion To Compel Arbitration.

On December 16, 2009, Judge Nicholson sent an e-mail to Nancy Bloodgood, Defendant's counsel, with a copy to Cherie Blackburn, Plaintiffs' counsel, stating "the court finds there is no reason for the FAA to apply in this case please send a proposed order regarding this and any other issues you feel appropriate." The Order Denying Plaintiffs' Motion to Compel Arbitration was signed by Judge Nicholson and filed January 25, 2010.

The Order signed by Judge Nicholson includes not only a discussion and conclusion that the FAA does not apply to the facts and circumstances surrounding the execution of the

Employment Agreement at issue, but also a discussion and holding that the arbitration clause does not meet the requirements of South Carolina Code Ann. § 15-48-10(a) and a discussion and holding that the arbitration clause at issue is further void on equitable grounds. See Order Denying Plaintiffs' Motion to Compel Arbitration, p.6-9. Although Judge Nicholson did not make such a ruling from the bench or in his e-mail to Nancy Bloodgood of December 16, 2009, presumably Ms. Bloodgood included these findings based upon his instructions that she send a proposed order regarding the FAA "and any other issues you feel appropriate."

The Order Denying Plaintiffs' Motion to Compel Arbitration granted leave to Plaintiffs to file under seal documentation regarding the Ocean Club case in support of their Motion to Compel Arbitration. These documents had not been filed prior to the hearing because they contain confidential and attorney-client privileged communications and work product, and Plaintiffs' Motion to Seal the pleadings had not yet been heard by the Court. On January 28, 2010, in accordance with the Order, Plaintiffs filed Documents Filed Under Seal in Support of Plaintiffs' Motion to Compel Arbitration, which contained sixteen documents.

Plaintiffs filed their Motion for Reconsideration on February 2, 2010, and the Court has agreed to reconsider Plaintiffs' Motion.

LEGAL ARGUMENT

The party opposing arbitration bears burden of proving why arbitration should not be ordered. See Aronson v. Dean Witter Reynolds, Inc., 675 F. Supp. 1324, 1325 (S.D. Fla. 1987).

Once a valid arbitration agreement has been established, *a presumption attaches favoring arbitration.* [citation omitted]. The burden then shifts to the opposing party to establish that the agreement was procured in an unconscionable manner or induced or procured by fraud or duress; that the other party has waived its right to compel arbitration under the agreement; or that the dispute falls outside the scope of the agreement.

Security Service Federal Credit Union v. Sanders, 264 S.W.3d 292, 297 (Tex. Ct. App. 2008)

(emphasis added). "The party seeking to compel arbitration has the burden of proving the

existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce.” TranSouth Financial Corp. v. Bell, 739 So.2d 1110, 1114 (Ala. 1999).

It is well settled that “the policies of the United States and this State *favor arbitration of disputes.*” New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) (emphasis added). The South Carolina Supreme Court explained the broad reach of the Federal Arbitration Act (“FAA”) in Zabinski v. Bright Acres Associates:

Beginning in the mid 1980s, the United States Supreme Court, interpreting the FAA, essentially “federalized” the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause. The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. *The basic purpose of the FAA is to overcome state courts’ refusal to enforce arbitration agreements.*

Zabinski v. Bright Acres Assoc., 346 S.C. 580, 590–91, 553 S.E.2d 110, 115 (2001) (emphasis added) (footnotes omitted) (citing Allied Bruce Terminix Co., v. Dobson, 513 U.S. 265, 115 S.Ct. 834 (1995)).

I. THE FAA APPLIES TO THE ARBITRATION CLAUSE IN THE EMPLOYMENT AGREEMENT BECAUSE THE RELATIONSHIP BETWEEN THE PARTIES INVOLVES INTERSTATE COMMERCE.

Plaintiffs’ Motion to Compel arbitration should be granted because, given the broad and liberal interpretation of interstate commerce, and the fact that the inquiry into whether a transaction involves interstate commerce is not rigorous, there is sufficient evidence demonstrating that the transaction involves interstate commerce.⁶ Under South Carolina law, “unless the parties have contracted to the contrary, the FAA applies in federal or state court to

⁶ Meyer argues that the Employment Agreement fails to meet the requirements of the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 *et seq.* (“SCUAA”). See Def.’s Answer, Countercl. & Third-Party Compl. ¶¶ 13, 31. However, because the FAA applies, it preempts the SCUAA, and the Employment Agreement need not meet the requirements of the state statute. This issue is further discussed in Section I.A.4., *infra*.

any arbitration agreement regarding a transaction that in fact involves interstate commerce, *regardless of whether or not* the parties contemplated an interstate transaction.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363 (2001) (emphasis added) (citing Allied-Bruce, 115 S.Ct 834 (1996); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996)).

Establishing whether a transaction involves interstate commerce is not a rigorous process given the broad and liberal scope of the FAA. See, e.g., In re Sacred Heart Hosp. of Norristown, 200 B.R. 826, 831 (Bankr. E.D. Pa. 1996) (“the FAA would apply if the subject matter of the dispute were found by the arbitrators to have had *even the slightest, tangential nexus with interstate commerce.*”) (emphasis added).

A. Interstate Commerce Is Broadly Construed For Purposes of The FAA

The United States Supreme Court has given broad interpretation to the definition of ‘interstate commerce,’ as used in section 2 of the FAA.” Sutton v. Hollywood Entm’t Corp., 181 F. Supp. 2d 504, 509 n.2 (D. Md. 2002).

1. Interstate Commerce’s Broad Definition

An illustrate explanation of how far-reaching interstate commerce can be is as follows:

Generally, the distinguishing feature and indispensable element of interstate commerce is importation into one state from another. However, interstate commerce *is not necessarily confined to transportation among the states*; rather, the term may include any commercial intercourse between states and their component parts. *It may embrace purely social intercourse between citizens of different states, such as telephone conversations or travel from one state to another.* Even local matters may amount to interstate commerce if they commence a chain of movement which culminates across state lines. . . . Since the Commerce Clause contemplates transactions between citizens of different sovereign states, it does not apply to the transportation of goods from a point within a state to property of the United States within that state.

15A AM. JUR. 2D Commerce § 4 (May 2009) (emphasis added) (internal footnotes omitted).

Further:

The terms 'commerce' 'interstate commerce' and 'commerce among the states' or 'commerce among the several states' embrace business or commercial intercourse *in any and all of its forms and branches and in all its component parts between citizens of different states*, and may embrace purely social intercourse between citizens of different states, *as over the telephone, telegraph, or radio*, or the mere passage of persons from one state to another for social intercourse or pleasure. Indeed, commerce is said to include not only the fact of intercourse and traffic but also the subject matter thereof, which may be either things, goods, chattels, merchandise, or persons.

Nuckols v. Alhey, 149 W.Va. 40, 46, 138 S.E.2d 344, 348 (W.Va. 1964) (emphasis added).

2. *Transactions Involving/Affecting Commerce.*

The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002); Zabinski, 346 S.C. at 591, 553 S.E.2d at 115. As the United States Supreme Court has explained:

We have interpreted the term 'involving commerce' in the FAA as 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. . . . Because the statute provides for 'the enforcement of arbitration agreements within the full reach of the Commerce Clause,' . . . it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce'-that is, 'within the flow of interstate commerce,' . . ."

Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003). The variety of manners in which one can demonstrate interstate commerce for purposes of whether the FAA is applicable has been discussed as follows:

The FAA applies when a contract relates to interstate commerce. [citation omitted]. The FAA *does not require* a substantial effect on interstate commerce, and interstate commerce *can be demonstrated in a variety of ways*, including headquarters located in another state, transportation of material across state lines, or *interstate mail or telephone calls*. [citation omitted]. The relationship between an employer who is regularly engaged in activities involving interstate commerce and its employee relates to interstate commerce.

Nabors Drilling USA, LP v. Carpenter, 198 S.W.3d 240, 245 (Tex. Ct. App. 2006) (emphasis

added).

3. *FAA's Nexus With Interstate Commerce*

"The FAA would apply if the subject matter of the dispute were found by the arbitrators to have had *even the slightest, tangential nexus with interstate commerce.*" In re Sacred Heart Hosp. of Norristown, 200 B.R. 826, 831 (Bankr. E.D. Pa. 1996) (emphasis added); see, e.g., Southwind Group, Inc. v. Landwehr, 188 S.W.3d 730, 734-35 (Tex. Ct. App. 2006) ("The FAA extends to any contract affecting interstate commerce as far as the Commerce Clause of the United States Constitution [footnote omitted] will reach. [citation omitted]. *The FAA does not require a substantial effect on interstate commerce; it requires only that commerce be involved or affected.* [citation omitted] (emphasis added).

The Federal District Court for the District of New Jersey explored the interstate commerce requirement for purposes of whether the FAA applied. The Court first noted that "[f]or the FAA to apply, the district court must find that the contract containing the arbitration provision 'evidenc[es] a transaction involving commerce.' . . . *This is not a rigorous inquiry;* in fact, the contract 'need have *only the slightest nexus with interstate commerce.*'" Crawford v. West Jersey Health Sys. (Voorhees Div.), 847 F. Supp. 1232, 1240 (D.N.J. 1994). The Crawford case essentially dealt with a physician and her former employer and explained:

[T]he Supreme Court has indicated that Section 3's requirements are met where contractual activity facilitates or affects commerce, even tangentially. . . Defendants . . . treat patients who live and work in Pennsylvania. . . Medical costs for many of these patients are paid through out-of-state or multi-state insurance carriers. . . Defendants advertise regularly in out-of-state newspapers. . . [and] receive goods and services from numerous out-of-state vendors, including Hartford Life and Accident (Boston, Mass.), Ohio Psychology Publishing, and Weyman Advertising (New York). . . *Because [Plaintiff's] employment facilitated defendants' interstate business activities, the court finds that her employment agreement 'evidences a transaction involving commerce.'*

Id. at 1240 (emphasis added). A good brief summary of the Crawford case was articulated as follows:

Similarly, in *Crawford v. West Jersey Health Systems* . . . the federal district court for the District of New Jersey found that a physician's employment agreement with West Jersey Physician Associates, P.A., also fell within the FAA. That court observed that determining whether the contract at issue evidenced a transaction involving commerce was not a rigorous inquiry, but that the contract "need have only the slightest nexus with interstate commerce." 847 F.Supp. at 1240 (quoting *Maxus, Inc. v. Sciacca*, 598 So.2d 1376 (Ala.1992)). Accordingly, based on the evidence presented, the court found that because Dr. Crawford's employment facilitated her employer's interstate business activities, her employment agreement evidenced a transaction involving commerce[.]

Arkansas Diagnostic Ctr., P.A. v. Tahiri, 257 S.W.3d 884, 890 (Ark. 2007).

Similarly, in Thornton v. Trident Medical Center, a physician brought a declaratory judgment action, which sought a determination that the arbitration provision contained in the employment agreement between the physician and the medical center was unenforceable. Thornton v. Trident Med. Ctr., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003). The circuit court found that the agreement did not involve interstate commerce and was not subject to the FAA. The South Carolina Court of Appeals reversed the circuit court, holding that the recruiting agreement between the physician and the medical center involved interstate commerce and, thus, was subject to the FAA. In New Hope Missionary Baptist Church v. Paragon Builders, the circuit court denied the builder's motion to compel arbitration. New Hope Missionary, 379 S.C. at 630, 667 S.E.2d at 6. The Court of Appeals reversed, holding that the FAA applied to the arbitration agreement and the circuit court erred in not granting the builder's motion. See id.

4. *Examples of Interstate Commerce*

The issue for the Court in determining if the FAA applies is whether the Employment Agreement and the surrounding facts and circumstances pertain to a transaction involving or affecting interstate commerce. See New Hope Missionary, 379 S.C. at 626-27, 667 S.E.2d at 4 ("As a preliminary note, we find the trial court properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the

contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . ."); see also Munoz, 343 S.C. at 538, 542 S.E.2d at 363.

In Zabinski, the South Carolina Supreme Court examined whether a South Carolina partnership, created for the purpose of renovating and selling thirty apartments and twenty-six acres on Hilton Head Island was involved in interstate commerce such that the FAA would apply to the arbitration provision in the partnership agreement. The court found that the partnership was in fact involved in interstate commerce and reversed the lower court's denial of the motion to compel arbitration:

The heart of the transaction in this case is the sale and development of real property on Hilton Head Island. Bright Acres is a South Carolina partnership with its principal place of business on Hilton Head Island. The only property owned by the partnership is located on Hilton Head Island. The development of land within South Carolina's borders is the quintessential example of a purely intrastate activity. However, the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors and investors.

Zabinski, 346 S.C. at 595, 553 S.E. 2d at 117-18.⁷

5. *Law Practice Constitutes Interstate Commerce*

Illustrative of one Federal District Court that has explored whether a law firm is engaged in business that affects interstate commerce is Equal Employment Opportunity Commission v. Rinella and Rinella, 401 F. Supp. 175, 181-82 (C.D. Ill. 1975). The background facts for Rinella, are as follows:

Arlene Nagy was employed by the defendants [footnote omitted] as a legal secretary from January 1971 to March 1973, when she resigned and from October

⁷ The South Carolina Supreme Court has routinely enforced arbitration clauses in contracts. In Munoz v. Green Tree Financial Corp., the Court of Appeals reversed a lower court and on writ of certiorari, the Supreme Court affirmed the Court of Appeals' decision, finding interstate commerce was involved where there was an installment contract with a builder domiciled in South Carolina who assigned the rights to a Delaware creditor and the agreement was prepared in Minnesota and proceeds were disbursed from Minnesota. See Munoz, 343 S.C. 531, 542 S.E.2d 360 (2001).

1973, when she was rehired, to July 10, 1974 when she was discharged. From March of 1974, she was also a member of Women Employed, an Illinois not-for-profit corporation whose purpose is to oppose discrimination based on sex and otherwise to work to improve the employment status and working conditions of women in Chicago, Illinois. . . Between March 1973 and July 30, 1974, Ms. Nagy engaged in various activities in opposition to what she alleges to be unlawful employment practices by Rinella & Rinella, which discriminated against women. These activities included joining Women Employed, soliciting other women employees of Rinella & Rinella to join Women Employed, attending meetings and participating in the activities of Women Employed, and publicly alleging that Rinella & Rinella discriminated on the basis of sex in its health insurance benefits. On July 30, 1974, Samuel A. Rinella, the owner of the law firm, discharged Ms. Nagy because of her participation in these activities.

Id. at 177. One of the main issues was whether defendant was engaged in interstate commerce:

The defendants contend that they are not engaged in an industry affecting interstate commerce due to the local nature of their business which involves predominately divorce litigation. [footnote omitted] Few cases have dealt with whether the practice of law affects commerce. Of particular note is the National Labor Relations Board's decision in *Evans and Kunz, Ltd.*, 194 NLRB 1216 (1972), involving unfair labor charges levied against a small Phoenix law firm which confines most, if not all, of its activities to the practice of law solely within the state of Arizona. In that case, the Board upheld the Trial Examiner's decision that the firm was engaged in operations affecting commerce within the meaning of the National Labor Relations Act, 29 U.S.C. § 151 et seq. wherein 'affecting commerce' is similarly defined. The Board, however, exercised its discretion and declined to assert its jurisdiction concluding that 'the effect of a labor dispute on commerce is not sufficiently substantial to warrant the exercise of jurisdiction.' *Supra* at 1216. While we do not find the Board's decision defining jurisdiction in the context of a different statute with different policies and purposes to be controlling here, we do find its determination that a predominantly local law firm affects commerce to be germane and instructive.

A similar result may be inferred from the case of *Kohn v. Royall, Koegel & Wells*, *supra*, where the court, sub silentio, assumed jurisdiction over charges of sex discrimination brought under Title VII against a New York law firm. Consistent with these holdings, and in keeping with the general principle that remedial legislation such as Title VII should be liberally construed for jurisdictional purposes, we find that the dynamics inherent in a general law practice necessarily affects interstate commerce. This is especially so in light of the cases interpreting the interstate commerce requirements of the Civil Rights Act of 1964, most notably, *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964), which held that Ollie's Barbeque, a family owned restaurant catering only to local trade, was within the definition of commerce contained in Title II of the Civil Rights Act of 1964.

The incidents of interstate commerce are far more apparent in the instant case than

they were in *Katzenbach v. McClung* and many of its progeny. Notwithstanding the defendants' divorce orientation, they admit that their practice encompasses other types of business, i.e., corporate, probate and real estate. *They further admit that various attorneys travel out of state on firm business.* Samuel Rinella, for instance, travelled to London, England and to Arizona, and Richard Rinella travelled to Washington, D.C. *The firm's long distance phone bill in calendar year 1974 was \$1,277.01; its out-of-state travel expenses amounted to approximately \$2,000 for the same year. The firm also purchased both office intercommunication equipment from an out-of-state company for \$8,400, and law and reference books from out-of-state publishers billed at approximately \$2,500. These various factors establish that Rinella & Rinella indeed affects interstate commerce and, accordingly, is subject to the proscriptions of Title VII.*

Id. at 181-82 (emphasis added).

It is immaterial whether the parties contemplated interstate commerce when the Employment Agreement was entered. In formulating the question to be asked by courts when considering the application of the FAA, the United States Supreme Court rejected the "contemplation of the parties" test (i.e., whether the parties contemplated interstate commerce) applied by the Supreme Court of Alabama, reasoning that Congress would not have intended a "test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid[.]" Allied-Bruce, 513 U.S. at 278, 115 S.Ct. at 841, 130 L.Ed.2d 753 (internal citations omitted). Thus, the Court is to review the contract and the transaction of the parties without consideration of whether the parties ever "contemplated" an interstate transaction upon entering the contract. See Munoz, 343 S.C. at 538, 542 S.E.2d at 363 (citing Allied-Bruce, 513 U.S. 265).

B. The Employment Agreement and the Surrounding Facts and Circumstances Involve or Affect Interstate Commerce.

Plaintiff's Motion to Compel Arbitration should be granted because there are sufficient facts demonstrating that the transaction in the matter involves/affects interstate commerce. "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." Zabinski, 346 S.C. at

594, 553 S.E.2d at 117; Thornton, 357 S.C. at 95, 592 S.E.2d at 52 ("In all cases, determination of whether a transaction involves interstate commerce depends on the *facts of the case*.") (emphasis added).

In her counterclaims, Meyer alleges that she is due additional bonus compensation under the Employment Agreement pertaining to her work on the Ocean Club case, a large case involving a suit filed by the Firm on behalf of homeowners from several different states against defendants from various states, represented by insurance companies from dozens of states. See discussion of Ocean Club case at Section B above.

The Firm's clients in the Ocean Club case included homeowners located in various states, including South Carolina, Tennessee, North Carolina, Georgia, Illinois, New York, Michigan, Florida, Ohio, Virginia, California, Indiana, and New Jersey. See Documents Filed Under Seal, tabs 3 and 7. The Ocean Club case involved regular communication with the clients located in other states, as well as travel to other states. Meyer's summary of the travel in the Ocean Club case, which she prepared for Lucey on February 2, 2009, states as follows: "...the below is general summary of some of the travel that my office has done during this case to date:

During 2007, my office incurred travel expenses to Charlotte, NC for the Bonsal Corporate deposition; to Columbia for three McCrory depositions (Tharp, Royster, Marshall Clark Architect); to Atlanta for several Kawneer depositions; and, to Sarasota, FL to take the depositions of Valcourt and Spectech employees. During 2008, my office incurred travel expenses to travel to Columbia for roofer and McCrory depositions. Additionally, as you are aware, the Court ordered the owner depositions to be taken in Fall 2008; my office incurred travel expenses to meet with the homeowners and attend their depositions in Columbia, Greenville, Asheville, Atlanta, New Jersey, Washington, D.C., Knoxville and Kingsport. We also had travel to Charlotte for roofer depositions. Finally, in Fall 2008, I incurred travel expenses to meet with our national concrete expert, Peter Emons, in Baltimore.

We also had various documents inspections in Columbia and Charlotte that have necessitated travel.

See Documents Filed Under Seal, tab 2. Much of this travel was performed by Meyer.

The case also involved numerous insurance companies located throughout the country. See Documents Filed Under Seal, tabs 5, 6 and 13. The court in the Ocean Club case ordered all of the homeowners to give their depositions. See Documents Filed Under Seal, tab 3. Homeowner depositions were taken in Georgia, Florida, North Carolina, and Minnesota. See Documents Filed Under Seal, tabs 8 through 11. In addition, several out-of-state depositions were taken via video. See Documents Filed Under Seal, tab 12.

Meyer's timesheets, which she maintained for the Ocean Club case, reveals travel to Atlanta on September 24, 2007, attendance at various depositions in Atlanta on September 25 and 26, 2007, travel to Sarasota, Florida on November 12, 2007, attendance at depositions in Florida on November 13 and 14, 2007, travel to Charlotte, North Carolina on October 7, 2008, for a meeting and deposition, meetings and depositions in North Carolina on October 8, 2008, travel to Kingsport, Tennessee for a meeting and depositions on October 9, 2008, attendance at a deposition in Tennessee on October 10, 2008, travel to Statesboro, North Carolina on January 26, 2009, for depositions in North Carolina, and attendance at depositions on January 27, 2009, and January 28, 2009. See Documents Filed Under Seal, tab 1.

Meyer states in her Brief and Opposition to Plaintiffs' Motion to Compel Arbitration that she spent just six days at out-of-state depositions in the Ocean Club case. Meyer's attorney, Nancy Bloodgood, made the same representation to the Court at the hearing. This representation is false, as shown by Meyer's time sheets. The time she spent traveling out-of-state on the Ocean Club case was at least 12 days and does not include the numerous conversations she had with out-of-state witnesses, attorneys and, most importantly, meetings with homeowner clients in preparation for these depositions and in connection with various other aspects of the case, including a trip by Meyer to Tennessee for a homeowner deposition

preparation conference.

By its nature, the Ocean Club case clearly involved interstate commerce, as did the work Meyer was performing for other clients. As a result, Meyer's claims under the Employment Agreement, that she was entitled to bonuses for the Ocean Club case and other cases, necessarily implicate interstate commerce.

Meyer's arguments as to why the FAA should not apply are misplaced and simply do not apply the legal reasoning of our appellate courts in the cases in which the courts address the issue of interstate commerce and the application of the FAA. Meyer argues that most of *her* activities occurred within the state of South Carolina and only minimal activities were outside the state. Def.'s Br., p. 4. She claims that she spent only six days in out-of-state depositions, with minimal travel costs and that *if* video depositions⁸ had been taken or *if* Lucey had compelled witnesses to appear in state, this travel would not have been necessary. See Def.'s Br., p. 6-7. Although it is clear from the timesheets she created and submitted that she spent many more than six days in out-of-state depositions, the issue before the court is not how many days Meyer spent physically outside of the state, nor does it matter that things *might have* or *could have* been handled without her having to go out of state. See Documents Filed Under Seal, tab 1.

As discussed above, the Employment Agreement and Meyer's performance under the Employment Agreement is clearly a transaction involving or affecting interstate commerce.

C. The FAA Preempts The South Carolina Uniform Arbitration Act.

Meyer argues that the Employment Agreement fails to meet the requirements of the SCUAA. See Def.'s Answer, Countercl. & Third-Party Compl. ¶¶ 13, 31. However, because

⁸ The video depositions taken of out of state witnesses used interstate phone lines and out of state video rooms and constitute interstate commerce.

the FAA applies, it preempts the SCUAA, and the Employment Agreement need not meet the requirements of the state statute.⁹ Where a transaction involves interstate commerce, "the FAA trumps state common-law." Episcopal Housing Corp. v. Federal Ins. Co., 269 S.C. 631, 636, 239 S.E.2d 647, 649 (1977). In Soil Remediation Co. v. Nu-Way Environmental, Inc., the court relying on a United States Supreme Court decision, held that because section 15-48-10(a) singles out arbitration agreements, it directly conflicts with Section 2 of the FAA. Soil Remediation, 323 S.C. at 459, 476 S.E.2d at 151 (citing Doctor's Assocs. v. Casarotto, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed. 2d 902 (1996)). The Court held that the FAA preempted section 15-48-10(a). See id. at 152; see also Munoz, 343 S.C. at 539, 542 S.E. 2d at 363 n.2.

The South Carolina Supreme Court further discussed this issue in Zabinski, stating that "while the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." Zabinski, 346 S.C. at 591-92, 553 S.E.2d at 116 (citing Volt Info. Sciences, Inc. v. Board of Trs., 489 U.S. 468, 109 S.Ct. 1248 (1989)). Even generic choice of law provisions cannot be used to incorporate into an arbitration agreement a state law which would be preempted by the FAA. See id. While courts can invalidate arbitration provisions on general contract defenses, they may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See id. (citing Doctor's Assoc., 517 U.S. 681, 116 S.Ct. 1652).

⁹ In addition to the FAA's preemption of the SCUAA, the statute itself provides that it does not apply to arbitration agreements between employers and employees unless the agreement states that the SCUAA shall apply:

(b) This chapter however shall not apply to: . . .

(2) Arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply

S.C. Code Ann. § 15-48-10(b)(2).

Therefore, based on the clear precedent of the United States Supreme Court, as outlined in several South Carolina appellate court cases, the requirements of the SCUAA, including the requirement that a notice clause must appear on the first page of the contract, do not apply. See S.C. Code Ann. § 15-48-10(a).

II. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE AND, THEREFORE, ARBITRATION SHOULD BE COMPELLED.

Plaintiff's Motion to Compel Arbitration should be granted because the arbitration provision in the Employment Agreement was freely negotiated, there is insufficient evidence demonstrating any procedural or substantive unconscionability, and the courts should not rewrite binding contracts merely because one party regrets provisions of a contract. In evaluating the enforceability of an arbitration provision, the court is to apply "general contract principles of state law." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007); Munoz, 343 S.C. at 539, 542 S.E.2d at 364 (citing Doctor's Assoc., 517 U.S. at 685, 116 S.Ct. 1652, 134 L.Ed.2d 902; Allied-Bruce, 513 U.S. at 281, 115 S.Ct. 834, 130 L.Ed.2d 753; Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). One such contract principle is that "a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (citing Hood v. Life & Cas. Ins. Co. of Tennessee, 175 S.E. 76 (1934)). Like other contracts, arbitration agreements are enforceable in accordance with their terms. See id. at 539, 542 S.E.2d at 364 (citing Volt Info Sciences, 489 U.S. at 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)).

The arbitration clause in the Employment Agreement provides as follows:

Any disputes arising *in any way related to the matters set forth herein* will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

See Employment Agreement attached as Exhibit A to the Complaint (emphasis added).

Meyer read and signed the Employment Agreement. She is intimately familiar with the terms of the Employment Agreement, as it forms the basis for her counterclaims. Meyer admits that the Employment Agreement is a binding agreement between the parties upon which she bases her claims. See Def.'s Answer, Countercl. & Third-Party Compl. ¶6 ("Defendant admits so much of Paragraph 6 as alleges Amy Meyer and Justin O'Toole Lucey, P.A. . . . entered into a written contract of employment in June of 2006."); ¶ 47 ("Ms. Meyer and Lucey Law Firm entered into a written contract of employment in June of 2006 drafted by Justin Lucey"); ¶ 81 ("On May 2, 2007, Ms. Meyer and the Lucey Firm entered into a written agreement"); ¶ 140 ("The document executed by Ms. Meyer in June 2006 was a contract between Plaintiff Lucey Firm and Ms. Meyer."); ¶ 142 ("The June 2006 Contract was supported by valuable consideration."); ¶ 143 ("The May 2007 Ocean Club Agreement was an amendment to the contract between Plaintiff Lucey Firm and Ms. Meyer.").

However, Meyer argues that the arbitration clause in the employment agreement is unconscionable and is, therefore, unenforceable under South Carolina law. See Def.'s Br., p. 6. In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, *together with* terms that are *so oppressive that no reasonable person would make them and no fair and honest person would accept them.*" Simpson, 373 S.C. at 24–25, 644 S.E.2d at 668 (emphasis added). "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result." Id. at 25.

The majority of jurisdictions hold that both procedural and substantive unconscionability must be demonstrated to negate an arbitration agreement. See, e.g., Strand v.

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U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 924 (N.D. 2005) ("We agree with *the majority of courts* which have addressed the issue and hold that a party alleging unconscionability must demonstrate *some quantum of both procedural and substantive unconscionability*, and courts are to balance the various factors, viewed in totality, to determine whether the particular contractual provision is 'so one-sided as to be unconscionable.'") (emphasis added); see also Ramirez-Baker v. Beazer Homes, Inc., 636 F. Supp. 2d 1008, 1024 (E.D. Cal. 2008) ("Both procedural and substantive unconscionability must be present for a court to refuse to enforce an arbitration agreement under the doctrine of unconscionability."); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 369-70 (N.C. 2008) ("... unconscionability is an affirmative defense, and the party asserting it has the burden of proof. . . . A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability.")

This approach appears to be consistent with the factors that are taken into consideration in South Carolina for determining whether an arbitration agreement is unconscionable or not:

Courts should look at several factors to determine whether there was an absence of meaningful choice, including the nature of the injuries suffered by the plaintiff; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the contract provision; and the conspicuousness of the clause.

Osborne v. Marina Inn at Grande Dunes, LLC, 2009 WL 3152044, at *7 (D.S.C. 2009) (citing Simpson, 373 S.C. at 25, 644 S.E.2d at 669) (unpublished opinion).

For the reasons set forth below, Defendant's argument that the arbitration clause should be voided because it is unconscionable is unavailing.

A. The Arbitration Agreement Is Not Procedurally Unconscionable Because Defendant Has Failed To Show How She Lacked Meaningful Choice To Void The Arbitration Agreement.

Plaintiffs' Motion to Compel Arbitration should be granted because Meyer has failed to demonstrate procedural unconscionability in the formation of the arbitration agreement to

require the arbitration agreement to be voided and negate the favored policy of enforcing arbitration agreements. "Procedural unconscionability focuses upon formation of the contract and fairness of the bargaining process, including factors such as inequality of bargaining power, oppression, and unfair surprise." Strand, 693 N.W.2d at 924.

1. Jeopardizing Employment.

Meyer argues that the arbitration agreement is unconscionable because she had been working for the Firm for six months before getting the employment contract and she essentially had to agree to it or else "jeopardize her existing job." See Def.'s Br., p. 7. Defendant suggests that this left her with no meaningful choice because changing "employment at law firms is a more difficult [task] than changing other types of jobs." See id. This argument is without merit. Defendant was an at-will employee. See, e.g., Barron v. Labor Finders of South Carolina, 384 S.C. 21, 682 S.E.2d 271, 273 (Ct. App. 2009) ("An employee without a contract for a stated period of time is presumptively considered an employee at-will, and employers may terminate such employees at anytime.").

The mere fact that an arbitration clause is presented in a take-it or leave-it manner is not sufficient to demonstrate procedural unconscionability. This issue was addressed by the South Carolina Supreme Court in Munoz, where the debtors contended the arbitration clause was unconscionable because it was part of an adhesion contract and they were not advised it was included in the contract. See Munoz, 343 S.C. at 541, 542 S.E.2d at 365. The court addressed the enforcement of an arbitration clause in an adhesion contract stating:

Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. Under state law, an adhesion contract is not per se unconscionable. Further, a person who can read is bound to read an agreement before signing it. We find the arbitration clause is not unconscionable as an adhesion contract.

Id. (internal citations omitted). In footnote, the court noted that:

Similarly, federal substantive law under the FAA holds an arbitration clause is not invalid simply because it part of an adhesion contract. And that the rule that a person who can read is bound to read an agreement before signing it is consistent with federal cases holding that arbitration agreements governed by the FAA will not be set aside on the grounds that the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it.

Id. (citations omitted); see also, In re Halliburton Co., 80 S.W.3d 566, 572 (Tex. 2002) (Phillips, C.J.) ("Because an employer has a general right under Texas law to discharge an at-will employee, it cannot be unconscionable, without more, merely to premise continued employment on acceptance of new or additional employment terms.").

Therefore, even if the Employment Agreement were an adhesion contract, presented in a take it or leave it fashion, that fact would not make the arbitration provision unenforceable. However, the Employment Agreement was not an adhesion contract. Meyer and Lucey openly discussed the employment provisions of the Employment Agreement, most of which were in place for her benefit. Never once during these discussions or before signing the Employment Agreement did Meyer request that the arbitration provision be removed or otherwise object to its inclusion. Further, the amendment entered into in 2007 was prepared for the purpose of providing bonus opportunities to Meyer in cases she was not spearheading, namely the Ocean Club case. The provisions *benefited* Meyer. She negotiated its terms, striking through certain language. See Def.'s Answer, Countercl., and Third Party Compl. at 13, ¶¶ 80-81.

At best, Meyer is declaring that the normal pressures faced by persons seeking employment compelled her to agree to the arbitration clause, which is insufficient for a finding of procedural unconscionability. See, e.g., Young v. Prudential Ins. Co. of America, Inc., 688 A.2d 1069, 1078 (N.J. Super. Ct. App. Div. 1997) ("The [United States Supreme] Court in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)], left open the possibility that fraud or coercion in obtaining the employee's agreement to

arbitrate might avoid its terms based on contract law in individual cases pursuant to section 2 of the FAA. . . . However, in light of the fact that Gilmer . . . was required to sign the registration application as a condition of his employment, the Supreme Court obviously contemplated avoidance of the arbitration clause *only upon circumstances substantially more egregious than the ordinary economic pressure faced by every employee who needs the job.*") (emphasis added).

2. *The Parties' Relative Sophistication.*

Meyer further declares, in support of her argument of procedural unconscionability, that she was left without any meaningful choice other than to accept the arbitration clause because of her status as "a young associate working for an older and more powerful attorney" and Meyer's lack of sophistication as to the significance of the arbitration clause's limitations on witnesses. Def.'s Br., p. 7. Further, Meyer declares that the arbitration clause is unconscionable, leaving her without any meaningful choice because of an alleged "element of surprise." *Id.* Such an argument is unavailing.¹⁰

"In determining whether a contract was 'tainted by an absence of meaningful choice,' [citation omitted] courts should take into account . . . *the parties' relative sophistication*["] Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (emphasis added). First, Meyer had been licensed as an attorney since November 2002. Second, she was a licensed certified public accountant and practiced public accounting for six years before taking employment as a solicitor with the

¹⁰ Although the contract between Plaintiff and Defendant is not a traditional "commercial" contract, given the sophistication of the parties involved (as further discussed below), the standard that should be employed in determining whether there was any procedural unconscionability should be the heightened one dealing with commercial entities and not those dealing with consumers. See generally Strand, 693 N.W.2d at 924 ("Courts are more likely to find unconscionability in consumer transactions than in contracts arising in purely commercial settings involving experienced parties."); see also In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001) ("In any event, the basic test for unconscionability is whether, given the parties' *general commercial background* and the *commercial needs of the particular trade or case*, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.").

Solicitor's Office in this circuit. See Def.'s Answer, Countercl., and Third Party Compl. at 7, ¶ 44. Third, by her own admission, Meyer "specialized" in white collar crime, a complex area of law. See Def.'s Answer, Countercl., and Third Party Compl. at 7, ¶ 44. Fourth, Meyer clearly had time to review the Employment Agreement for a day. See Def.'s Answer, Countercl., and Third Party Compl. at 12, ¶¶ 80-81 ("On May 2, 2007, Ms. Meyer and Justin Lucey met as a follow up to the April 27, 2007 meeting. At this meeting, Justin Lucey provided Ms. Meyer with a written agreement that he had drafted for her to review and discuss with him on the following day. On May 2, 2007, Ms. Meyer and the Lucey Firm entered into a written agreement...")

Fifth, Meyer clearly had an opportunity to, and did, negotiate the terms in the Employment Agreement. See Def.'s Answer, Countercl., and Third Party Compl. at 12, ¶ 81. ("Ms. Meyer was given the opportunity by Justin Lucey and the Lucey firm to accept a higher fixed income and lower variable income by diversifying her caseload in lieu of an Ocean Club bonus, but Ms. Meyer *rejected that option by crossing out that language* on the May 2007 Ocean Club Agreement. Ms. Meyer also initialed this rejection of that option of changing the ten percent bonus she would receive on the Ocean Club Case on the face of the Ocean Club Agreement.") (emphasis added).

Sixth, Meyer demonstrated her ability to make a risk-based analysis with the terms of the Employment Agreement as a result of some of the negotiated modifications to the Employment Agreement by considering "the opportunity" she was given "to accept a higher fixed income and lower variable income by diversifying her case load in lieu of the Ocean Club case bonus" and then "reject[ing] that option by crossing out the language" in the Employment Agreement. Id.

And, seventh, to the extent that Meyer tries to imply that she was not experienced

enough in legal matters to understand, or be able to research any lack of understanding, this is negated by the fact that Meyer appears to declare that her efforts in the another case were critical in its successful outcome. See Def.'s Answer, Countercl., and Third Party Compl. at 9, ¶¶ 54-57. Meyer claims that she "researched and found a key case that supported the position that a property interest exists for the holder of an issued permit, thus triggering the unconstitutional taking for the inverse condemnation claim," that she "argued the case law for the encroachment permit property interest issue and other jury charges in front of the court," that the "permit property interest case law that Meyer found through her research and efforts and argued before the court was found as the law of the case for the jury instructions," and that the Bees Ferry case "ended in verdicts in favor of the clients." *Id.*¹¹ Meyer points out the complexity and novelty of the issues addressed in the case. See Def.'s Answer, Countercl., and Third Party Compl. at 10, ¶ 61. It is disingenuous for Meyer to emphasize her legal capabilities in connection with complex legal issues and yet to claim that she did not have an understanding of the legal effect of a clearly written arbitration provision.

Based on these facts, it is inconceivable how a seasoned attorney that previously worked in the Solicitor's Office of this circuit can state that she had no idea as to the significance of agreeing to the terms of the arbitration agreement. Rather, the only thing that the evidence shows is that Meyer entered into a binding contract and now regrets the terms to which she reviewed and consented. See, e.g., New England Retail Properties, Inc. v. Maturo, 925 A.2d 1151, 1161 (Conn. Ct. App. 2007) ("The fact that a party to a contract comes to regret one of its provisions does not render the contract unconscionable."). Meyer has failed to demonstrate any bad faith on the part of Plaintiff in having the arbitration clause incorporated into the

¹¹ Meyer's allegations regarding the work she performed in connection with the Bees Ferry case provide additional proof of interstate commerce in that the research was performed on Westlaw. See argument at Section I.B., *supra*.

Employment Agreement. See, e.g., Raper v. Oliver House, LLC, 637 S.E.2d 551, 555 (N.C. Ct. App. 2006) ("In the absence of any evidence of bad faith, inequality, or lack of mutuality described above, the inclusion of an agreement to arbitrate is neither procedurally or substantively unconscionable.").

3. *The Element of Surprise.*

Defendant also has failed to demonstrate how she was surprised by the terms of the Employment Agreement compelling arbitration given the fact that she was provided the Employment Agreement to review, given an opportunity to inquire into the terms of the Employment Agreement, and then "signed off" on the employment contract. See, e.g., Bank of Indiana, Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 109 (S.D. Miss. 1979) ("[t]he doctrine of unconscionability was intended to prevent oppression and unfair surprise, and not to relieve a party from the effect of a bad bargain."). In fact, Meyer had not one, but two, opportunities to object to the arbitration clause and did not do so on either occasion. She had no objection at the time she entered into the original Employment Agreement in June of 2006, nor did she have any objection when she executed, after revising, the amendment in May of 2007.

4. *Disparity in the Parties' Bargaining Power.*

At no point does Defendant argue that there was a *gross inequality* of bargaining power between Plaintiff and herself. See, e.g., Bank of Indiana, 476 F. Supp. at 110 ("[T]he meaningfulness of the choice is negated by a *gross inequality* of bargaining power.") (emphasis added); see e.g., Cleveland v. Mann, 942 So.2d 108, 115-16 (Miss. 2006) ("Further, [defendant] signed the first page of the agreement and initialed beside each term on the second page, denoting his understanding of the terms. [Defendant's] initials on the second page of the agreement also indicate he was provided an opportunity to inquire about the agreement's terms. Plaintiffs may not escape the agreement by simply stating Mann did not read the agreement or

have it read to him or understand its terms.”); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) (“A bargain is not unconscionable *merely because the parties to it are unequal in bargaining position*, nor even because the inequality results in an allocation of risks to the weaker party. But *gross inequality of bargaining power*, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.”) (emphasis added).

Further, Meyer has failed to provide any evidence suggesting that Plaintiffs believed that there was no reasonable probability that Meyer would fully perform the Employment Agreement or that Meyer would be unable to receive substantial benefits from the Employment Agreement. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) (“Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.”).

The Employment Agreement consisted of terms that were primarily for Meyer’s benefit. See discussion under Facts, Section A, supra. The entire purpose of the amendment to the Employment Agreement, which forms the basis of Meyer’s counter-claims, was to describe in writing the manner in which Meyer could obtain a bonus on cases she was not spearheading. This amendment was created for the purpose of giving her something that she was not already

entitled to. It was both parties' intention that she would (and in fact she did) benefit from the provisions in both the original Employment Agreement and the 2007 amendment.

5. *Lack of High Pressure Tactics.*

Finally, Meyer has failed to present sufficient evidence (if any for that matter) demonstrating the Firm (or Lucey) used deception or other high pressure tactics in getting Meyer to consent to the Employment Agreement with the arbitration clause. See, e.g., Motsinger v. Lithia Rose-FT, Inc., 156 P.3d 156, 160 (Or. Ct. App. 2007) ("Apart from a showing of unequal bargaining power, plaintiff has not demonstrated that the circumstances of contract formation carried other indicia of procedural unconscionability. First, plaintiff has not demonstrated that the arbitration clause was the product of deception or compulsion. [citation omitted]. As defendant points out, it did not use high pressure tactics to compel plaintiff to consent to arbitration. To the contrary, defendant asserts that it gave plaintiff time to read through all of the forms and to ask questions, and the record supports that assertion.").

The evidence is clear that the Firm, upon the request of Meyer, provided an Employment Agreement that fully enumerated the terms for employment. Meyer was not coerced in any manner to agree to the terms and, to the extent that there were parts of the Employment Agreement that Meyer wanted to negotiate, she was fully able (and invited) to do so. See Def.'s Br., p. 7 ("Perhaps [Defendant] *could have objected* to the arbitration clause . . .") (emphasis added).

Therefore, for the foregoing reasons and authority cited herein, Meyer has failed to demonstrate how the strong policy favoring arbitration should be negated in this matter as a result of any alleged procedural unconscionability. Accordingly, Plaintiffs' Motion to Compel Arbitration should be granted. See Brownstone Inv. Group, LLC v. Levey, 514 F. Supp. 2d 536, 540 (S.D.N.Y. 2007) ("[T]he strong presumption in favor of arbitration . . . compels *that*

any doubts be resolved in favor of arbitration.”).

B. The Arbitration Agreement Is Not Substantively Unconscionable Because Meyer Has Failed To Demonstrate How The Terms Of The Arbitration Agreement Are One-Sided To The Extent That She Is Not Able To Vindicate Her Claims.

Plaintiffs’ Motion to Compel Arbitration should be granted because Meyer has failed to demonstrate substantive unconscionability to require the arbitration provision to be voided and negate the favored policy of enforcing arbitration agreements. Simply put, Defendant fails to demonstrate how the arbitration provision is substantively unconscionable such that the effect is clearly unequal and/or one-sided.

Substantive unconscionability refers to the undue harshness in the contract terms themselves. See Woods v. QC Financial Services, Inc., 280 S.W.3d 90, 95 (Mo. Ct. App. 2008). In Gilmer v. Interstate/Johnson Lane Corp., the United States Supreme Court explained that although procedures and arbitration may not be as extensive as federal courts, agreeing to arbitrate trade such procedures for simplicity, informality, and expedition of arbitration. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991); see also Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (“[T]he Supreme Court has explained, the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration’s ability to offer ‘simplicity, informality, and expedition,’ . . .”). Meyer *only* appears to argue that because the arbitration agreement limits the total amount of witnesses that can be presented live at the arbitration hearing, she cannot “vindicate” her claims against Plaintiffs. See Def.’s Br., p. 8. And, such a limitation is contrary to public policy. See *id.*, p. 8. For the following reasons, Defendant’s position is unavailing.

Meyer fails to provide any case precedent for her position that an arbitration clause’s limitation to *both parties* on the total number of witness that can be presented at an arbitration hearing is substantively unconscionable. See Nagrampa v. MailCoups, Inc., 469 F.3d 1257,

1285 (9th Cir. 2006) ("Where the party with stronger bargaining power has restricted the weaker party to the arbitral forum, but reserved for itself the ability to seek redress in either an arbitral or judicial forum, California courts have found a lack of mutuality supporting substantive unconscionability."); Covenant Health & Rehabilitation of Picayune, LP v. Estate of Moulds ex rel. Braddock, 14 So.3d 695, 700 (Miss. 2009) ("One example of a one-sided agreement [substantively unconscionable] is one that allows one party to go to court, but restricts the other to arbitration."). It is *Meyer's burden, not Plaintiffs'*, to demonstrate why such a limitation is not acceptable.

Arbitration agreements that have limited litigation procedures that would normally be available have been held to be acceptable. See generally In re Cotton Yarn Antitrust Litigation, 505 F.3d 274, 286 (4th Cir. 2007) (Traxler, J.) ("While discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the 'procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration' that is inherent in every agreement to arbitrate. [citation omitted]. Because limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement."); Gilmer, 500 U.S. at 31 (explaining that although procedures in arbitration may not be as extensive as federal courts, agreeing to arbitrate trades such procedures for simplicity, informality, and expedition of arbitration); Fernandez v. Clear Channel Broad., Inc., 268 F. Supp. 2d 1365, 1368 (S.D. Fla. 2003) (enforcing arbitration agreement limiting depositions to three per side and permitting additional depositions upon showing of "good cause").

The limitations in this matter, which apply to both the Firm and Meyer, do not even go this far. Instead, both the Firm and Meyer have an equal opportunity to develop their respective positions, obtain depositions for publication with relevant testimony, obtain documents needed

for the arbitration hearing, and have the opportunity (via depositions) to impeach witnesses as needed. See generally In re Fleetwood Homes of Texas, L.P., 257 S.W.3d 692, 695 (Tex. 2008) (“We hold that arbitration’s limits on discovery for *both* parties does not make it unconscionable.”); Wilks v. Pep Boys, 241 F. Supp. 2d 860, 864–65 (M.D. Tenn. 2003) (enforcing arbitration agreement limiting depositions to one per side and allowing for additional discovery as ordered by arbitrator). The only apparent limitation being made by the arbitration provision in the Employment Agreement is in the presentment of one’s case, not in the evidence and testimony to provide. Thus, Meyer has failed to present sufficient evidence contradicting the legitimate needs of the Firm in having such limitations in the arbitration proceedings. See Hurlbut v. Gantshar, 674 F. Supp. 385, 392 (D. Mass. 1987) (“Hurlbut’s [plaintiff’s] claim that the arbitration clause is not reasonably related to the legitimate commercial needs of the dominant contracting party is also without merit. Paine Webber has a *legitimate commercial need* to expedite the resolution of disputes and to control the costs of that resolution. A policy which centralizes customer disputes by referral to an arbitral rather than a judicial forum serves both these interests [footnote omitted] and is certainly *consonant with the commercial needs of the defendant company*.”) (emphasis added).

For the foregoing reasons and authority cited herein, Meyer has failed to demonstrate how the strong policy favoring arbitration should be negated in this matter as a result of any alleged substantive unconscionability. Accordingly, Plaintiffs’ motion to compel arbitration should be granted. See MedCam, Inc. v. MCNC, 414 F.3d 972, 975 (8th Cir. 2005) (“The scope of an arbitration agreement is given a liberal interpretation, *with any doubts resolved in favor of arbitration*.”) (emphasis added).

- C. Assuming Arguendo That the Arbitration Agreement Is Unconscionable, the Court Should Compel Arbitration Pursuant to the Severability Doctrine.

Assuming *arguendo* that the arbitration provision's limitations on trial witnesses is substantively unconscionable, this does not make the entire arbitration provision so permeated with unconscionability to justify not severing this provision.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. See Simpson, 373 S.C. at 24-25, 644 S.E.2d at 668. "If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result." Id.

"To assess whether unconscionable terms can be severed from a contract or whether the entire contract should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the contract." 17A AM. JUR. 2D Contracts § 278 (May 2009). "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

Courts may sever the arbitration provision itself, where it determines part of it is unconscionable, and leave the remaining language of the arbitration provision in place. In Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham, the court affirmed the severance of the limitation of liability provision in the arbitration clause so as to enforce the *remainder* of the arbitration provision. Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham, 953 So.2d 574, 579 (Fla. App. Ct. 2007). "The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect." RESTATEMENT

(SECOND) OF CONTRACTS § 208 cmt. a (1981) (emphasis added). “Where a term rather than the entire contract is unconscionable, the appropriate remedy is ordinarily to deny effect to the unconscionable term.” RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g (1981); see, e.g., Dotson v. Amgen, Inc., 2010 WL 189653, at *6 (Cal. App. Ct. Jan. 21, 2010) (“Even if we assume the discovery provision to be unconscionable, which we do not, the trial court abused its discretion by refusing to sever it. Where, as here, only one provision of the agreement is found to be unconscionable and that provision can easily be severed without affecting the remainder of the agreement, the proper course is to do so.”).

As noted in Section II.B, *supra*, Meyer *only* appears to argue that because the arbitration provision in the Employment Agreement limits the total number of witnesses that can be presented live at the arbitration hearing, she cannot “vindicate” her claims against Plaintiffs. See Defendant’s Brief, p. 8. For the reasons set forth herein, if this Court deems that this aspect of the arbitration provision is unconscionable, which Plaintiffs do not believe it is, this Court should still enforce the arbitration provision by merely severing this one part of the arbitration provision and keeping the remaining portions.

III. THE SCOPE OF THE ARBITRATION CLAUSE IN THE EMPLOYMENT AGREEMENT COVERS ALL OF MEYER’S COUNTERCLAIMS.

It is well settled that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem . . . is the construction of the contract language . . . waiver, delay, or a like defense to arbitrability.” Rich v. Walsh, 357 S.C. 64, 69, 590 S.E.2d 506, 508 (Ct. App. 2003) (citing Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000); Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995)); see also Brown v. Green Tree Servs., Inc., 585 F. Supp 2d 770, (D.S.C. 2008) (quoting Volt Info. Sciences, 489 U.S. at 475–76, 109 S.Ct. 1248 (1989)) (“[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to

the scope of the arbitration clause itself must be resolved in favor of arbitration.”). A court should order arbitration unless it can say with positive assurance that the arbitration clause is not susceptible to an interpretation covering the dispute. See Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir.1989); Carolina Care Plan, Inc. v. United Healthcare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

In the present case, the underlying dispute involves the payment of bonus compensation under the Employment Agreement for work Meyer performed on the Ocean Club case, a large, multi-state case. The arbitration provision of the Employment Agreement envisioned just such a dispute, and, thus, such dispute is clearly within the scope of the provision. Given the strong policies of both the state and federal judiciaries favoring arbitration, mandatory arbitration should be compelled for this dispute.

Meyer argues that the arbitration agreement between the parties is inapplicable to several of the causes of action in her counterclaims. See Def.’s Answer, Countercl. & Third-Party Compl. ¶ 4. However, the eight causes of action set forth therein all arise out of the terms of the Employment Agreement. The crux of these claims is Meyer’s allegation that the Firm breached the Employment Agreement by not paying Meyer bonuses she claims were due under the Employment Agreement. Her counterclaims include breach of the Employment Agreement, breach of the Employment Agreement accompanied by fraudulent act, violation of the Payment of Wages Act for failure to pay “wages” under the Employment Agreement, and intentional misrepresentation/fraud/constructive trust based on alleged representations regarding Meyer’s entitlement to the bonuses referenced in the Employment Agreement.

As the court made clear in New Hope Missionary, even when a party argues fraud in the inducement of the contract containing the arbitration provision (as opposed to fraud in the inducement of the arbitration provision itself), arbitration cannot be avoided. See New Hope

Missionary, 379 S.C. at 628, 667 S.E.2d at 4 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (holding that general allegations of fraud in the inducement of a contract are insufficient to prevent the invocation of a contract's arbitration clause); Housing Authority of City of Columbia v. Cornerstone Housing, LLC., 356 S.C.328, 588 S.E.2d 617 (Ct. App. 2003); S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc., 312 S.C. 559, 437 S.E.2d 22 (1993) (holding that fraud as a defense to an arbitration clause must be fraud specifically as to the arbitration clause and not the contract generally)).¹²

In New Hope Missionary, the Court of Appeals found that the FAA applied and preempted state law. See New Hope Missionary, 379 S.C. at 626, 667 S.E.2d at 3. In stressing the importance of ordering arbitration even where a party challenges the contract in which the arbitration provision is located, the court stated "indeed, even Section 15-48-20(a) of the South Carolina Code (2005) notes when a party presents a court with an arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration 'unless the opposing party denies the existence of the *agreement to arbitrate*.'" Id. at 631, 667 S.E.2d at 6 (citing S.C. Code Ann. § 15-48-20(a) (2005)).

Meyer's misrepresentation/fraud/constructive fraud cause of action is based solely on the contract as a whole and alleged misrepresentations related to the Ocean Club bonus. It is not based on any misrepresentations as to the arbitration provision. In fact, there is no evidence in the pleadings or before this Court that there was any discussion of the arbitration provision. Although Meyer discussed with Lucey certain provisions of the Employment Agreement, she never objected to, or took any position with regard to the arbitration provision, other than to agree to it when she signed the Employment Agreement.

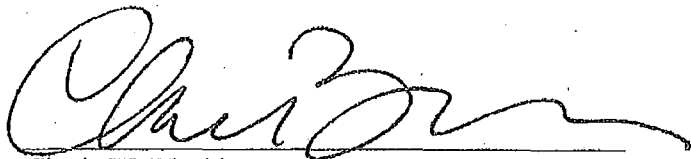
¹² Under South Carolina law, arbitration clauses are separable from the contracts in which they are imbedded. New Hope Missionary, 379 S.C. at 629-30, 667 S.E.2d at 5-6. Therefore, "even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision. Id. (citing Cornerstone Housing, 356 S.C. at 340, 588 S.E.2d at 623).

Thus, all of the causes of action asserted by Meyer arise from the Employment Agreement. However, even if a "dispute does not arise under the governing contract, the dispute is subject to arbitration when the contract contains a broadly worded arbitration clause and a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." Cornerstone Housing, 356 S.C. at 337, 588 S.E.2d at 621 (citing Zabinski, 346 S.C. at 598, 553 S.E.2d at 119 (internal quotations omitted)).

Meyer's argument that Lucey lacks standing to compel arbitration because he is not a party to the Employment Agreement also lacks merit. See Def.'s Answer, Countercl. & Third-Party Compl. ¶¶ 27, 28. Both South Carolina state courts and federal courts have the authority to order parties who are not signatories to a contract to submit to arbitration. See S.C. Pub. Serv. Auth., 312 S.C. at 563, 437 S.E.2d at 24-25 (holding the trial judge erred in denying a party's motion to compel arbitration because he did not sign the contract); U.S. ex rel. Coastal Roofing Co., Inc. v. P. Browne & Assocs., Inc., 585 F. Supp. 2d 708, 714 (D.S.C. 2007) (allowing a nonsignatory to an arbitration agreement to force one of the signatories to that agreement to arbitrate claims against it pursuant to the "intertwined claims" test, wherein a signatory is estopped from "avoiding arbitration with a nonsignatory when the issues the nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed"). Moreover, "an 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." Zabinski, 346 S.C. at 598, 553 S.E.2d at 119. Here, all claims levied by Meyer against Lucey arise out of a dispute over performance of the Employment Agreement. Thus, a significant relationship exists, as described in Zabinski, and the claims against Lucey are also subject to the arbitration agreement of the parties.

CONCLUSION

The arbitration provision contained in the Employment Agreement constitutes a binding and enforceable agreement to arbitrate by the parties. The Federal Arbitration Act, and not the South Carolina Uniform Arbitration Act, applies to this matter because the Employment Agreement involves or affects interstate commerce. Meyer agreed to the arbitration provision, which is not procedurally or substantively unconscionable and even assuming, *arguendo*, that part of it was substantively unconscionable, any such language could be severed and the remainder enforced. Finally, the arbitration provision covers all of Meyer's counter-claims alleged in this case. For these reasons, and based on the case law set forth herein, this Court should grant Plaintiffs' Motion to Compel Arbitration of this dispute.



Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
843.577.9440

Attorneys for Plaintiffs Justin O'Toole Lucey and
Justin O'Toole Lucey, P.A.

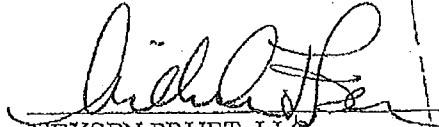
March 1, 2010
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION** has been served upon the following counsel of record by placing the same in the United States mail, first class postage prepaid, addressed to the following as shown below this 1st day of March, 2010.

Nancy Bloodgood, Esq.
The Foster Law Firm, LLP
3875 Faber Place Drive, Suite 204
North Charleston, SC 29405

ATTORNEYS FOR DEFENDANT


NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, South Carolina 29402
Telephone: (843) 577-9440

2010 MAR - 1 AM 11:43
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

FILED

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

JUSTIN O'TOOLE LUCEY and
JUSTIN O'TOOLE LUCEY, P.A.

Plaintiffs,

v.

AMY MEYER,

Defendant and
Third-Party Plaintiff,

v.

LORCAN LUCEY, GMAC MORTGAGE
CORPORATION, CITI MORTGAGE,
INC., AND JOHN DOE FINANCE

Third-Party
Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 09-CP-10-6873

AFFIDAVIT OF AMY K. MEYER

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JULIE M. OF COURT
BY

PERSONALLY APPEARED BEFORE me, Amy K. Meyer, who first being duly sworn,
would depose and testify as follows:

1. I am over the age of eighteen (18) years, competent, and able to give this affidavit.
2. This affidavit is submitted in response to matters raised at the Court's hearing held on March 2, 2010 on Plaintiffs' Motion for Reconsideration filed February 2, 2010 pursuant to Rule 59(a).
3. To the extent the Court is considering any facts in the 44-page brief filed by Justin O'Toole Lucey and Justin O'Toole Lucey, P.A. (hereinafter "Lucey Firm") on March 1, 2010 or those facts argued by Plaintiffs at the hearing based on the three (3) grounds raised in their Motion filed February 2, 2010, this affidavit is being submitted in opposition thereto.
4. This affidavit is further necessary to address Plaintiffs' attempt to introduce several documents at the March 2, 2010 hearing and Plaintiffs' representations to the Court about

an arbitration request filed by Plaintiffs with National Arbitration and Mediation ("NAM") as well as the status of that arbitration request.

5. This affidavit could not be submitted at least two (2) days prior to the hearing as set forth in the South Carolina Rules of Civil Procedure, Rule 6 (d) because Plaintiffs did not serve their brief in support of their Motion on my counsel until an hour and a half before the close of business on the day before the hearing.

6. In order to assist the Court in making a decision on the Plaintiffs' Motion for Reconsideration that there are specific facts to support the Court's previous Order denying arbitration, and that the Court made no mistakes of law or fact when it issued its Order Denying Arbitration on January 25, 2010, I respectfully provide the within information to the Court.

7. The heart of the contract at issue is the provision of legal services by me, a South Carolina licensed lawyer, to a South Carolina Law Firm. My employment contract was a contract between an employer and an employee for legal services to be performed in South Carolina.

8. Though Plaintiffs allege that the terms of the Contract were discussed between myself and Justin Lucey prior to his presenting me with the June 2006 Contract, we had never discussed that arbitration would be used to resolve any issues that arose out of my employment with the Lucey Firm. (See Page 2 of Plaintiffs' Brief.)

9. I had no input into the formulation of the contract or its terms and language, and the contract was presented to me in a manner such that I believed that I was faced with the loss of my job if I did not execute it. The contract had been emailed to me by Justin Lucey, without any discussion whatsoever about arbitration, or for that matter, any discussions that day at all about any written contract. Justin Lucey emailed me the contract, and my signature was requested on the document.

10. I began employment with the Lucey Firm in January 2006, and by the time I was presented with the June 2006 Contract, I had already tried a case to verdict with Justin Lucey in April 2006 (the Cusack matter cited in the June 2006 Contract at Page 2) and been promised a trial bonus from the Lucey Firm for that work. I had also worked on a second matter that went to trial in May 2006 but settled during trial (the Planter's Place matter). As stated in the June 2006 Contract, I had also been promised additional compensation for that trial work. (See June 2006 Contract at Page 2.)

11. In the weeks prior to Justin Lucey emailing the June 2006 Contract to me, I had been witness to his treatment of other staff at the Lucey Firm, been told about the circumstances surrounding the departure of other associate attorneys who had left the employment of the Lucey

Firm, and had been receiving a lower salary in order to earn bonuses for contingency cases that I worked on at the Lucey Firm.

12. In the weeks and days just prior to my receiving the email attaching the June 2006 employment contract from Justin Lucey, I had personally observed two female staff members in tears after meetings with Justin Lucey at which they discussed employment issues with him. I knew that Justin Lucey had given them ultimatums and that they were told that they could accept his terms for their employment or find a new job. In fact, Justin Lucey had relayed one of these discussions to me.

13. At the time I executed the June 2006 employment contract, I believed that if I did not sign the document as presented to me that I would jeopardize the trial bonuses I had already earned and even my job.

14. Justin Lucey, as the Lucey Firm's owner, had all of the bargaining power in this transaction between the Lucey Firm and me because of my circumstances and his position as the owner of the firm. I had no meaningful choice or real alternative based on the circumstances at that time.

15. Approximately six weeks prior to the June 2006 Contract being emailed to me by Justin Lucey, I had been in a car accident and was recovering from neck and back injuries sustained when my vehicle was rear-ended. These injuries had somewhat limited my ability to work and had even resulted in cancellation of depositions in the Harper case cited in the June 2006 Contract. While I was able to work and recovered from the injuries eventually, I was faced with medical bills and an uncertain recovery time and injury at the time the June 2006 Contract was presented to me. The loss of my job was exacerbated by this circumstance, in addition to the normal concerns of being able to pay living expenses.

16. My financial and personal circumstances were such that I believed that I had no choice but to sign the June 2006 Contract or jeopardize my job or bonuses that were promised to me. Therefore, I signed the document the same day that I received it. Furthermore, I did not review the June 2006 employment agreement overnight as alleged by Plaintiffs. (See Brief at Page 30). Plaintiffs incorrectly argue that the May 2007 agreement contained the arbitration clause and allege that I reviewed an arbitration clause contained within it overnight. Additionally, I did not strike through any provisions in the June 2006 Contract. The other allegations on Page 30 of Plaintiff's Brief also occurred *after* execution of the June 2006 Contract.

17. After the June 2006 Contract was signed and while I was waiting for my additional compensation to be paid for work I had performed in the previous cases cited above, my work in the Ocean Club case began.

18. By May 2007, I had already expended substantial hours in the Ocean Club case. At that time Justin Lucey presented me with the Ocean Club Agreement. I was not re-presented with the June 2006 Contract nor does the May 2007 Ocean Club Agreement have an arbitration clause in it. (See Ocean Club Agreement filed under seal with the Court.)

19. I did not ask for the written employment agreement to be drafted in the manner it was or for it to include an arbitration clause, which Plaintiffs imply at Page 34 of their Brief.

20. As a Certified Public Accountant in Kentucky, I had not worked on arbitration issues for my clients. My work primarily focused on income tax return preparation, estate and gift tax return preparation and planning, business valuation issues, and forensic accounting. I also had not taken any specialized Alternative Dispute Resolution (ADR) courses in law school. In addition, while working at the Solicitor's Office, I did not have any work that involved arbitration (and did not work there for five years as incorrectly stated in Plaintiffs' Brief).

21. While Plaintiffs set forth the above facts to establish my sophistication as a party to the June 2006 Contract, the Lucey Firm in its application with NAM claims that I had *no civil* legal experience prior to my employment with the Lucey Firm in its attempt to avoid payment of my earned bonuses. (See NAM "Demand for Arbitration" filed by Plaintiffs under Seal on January 28, 2010.) Additionally, Plaintiffs have presented nothing in support of their Motion filed February 2, 2010 to indicate I had gained experience with arbitration issues between January 2006 and June 2006.

22. My activities and the Lucey Firm's activities for the Cusack, Harper, Shosan, Hanson, and Turner cases cited by Plaintiffs in their briefs and at the hearing were incidental to the completion of my employment contract for legal services in South Carolina. Moreover, at the time of the execution of the Contract, my potential bonuses in those cases doubled (or more) my salary.

23. For the first time, Plaintiffs attempted to define terms and conditions of the arbitration clause in the June 2006 Contract in their brief (see Plaintiffs' Brief at Page 36) and at the Court's March 2, 2010 hearing on this matter to support their contention that the arbitration clause is not unconscionable and in asking that the Court strike down only the exclusion of lives witnesses portion of the arbitration clause.

24. In addition to the "no live witness" provision, the arbitration clause includes a term of "expedited and abbreviated procedures." Since Plaintiffs did not raise this issue in their February 2, 2010 Motion, I cannot respond in full. However, should the Court consider the entirety of the clause which was argued at the March 2, 2010 hearing, I can only submit to the Court the fact that these terms were never defined to me and were part and parcel of the June 2006 Contract presented to me under the circumstances described above. I had no bargaining power to require further definition of these terms.

25. At the two hearings on this matter, Plaintiffs misrepresented to the Court that there is an arbitration pending before NAM in an attempt to have the Court refer this matter to arbitration. Plaintiffs filed a request for arbitration with NAM, but my counsel informed NAM that we did not agree to NAM's arbitration of the matter and requested the file be closed. (See Exhibit A attached hereto.) My counsel nor I have received anything further from NAM, nor have Plaintiffs submitted any documentation that an arbitration is still pending.

26. Additionally, to the extent the Court deems the timing of the filing of Plaintiffs' NAM arbitration request relevant, Plaintiffs did not notify me or my counsel of this arbitration request until filing their Complaint in this matter. Prior to November 2, 2009, I nor my counsel were aware of the NAM arbitration request as Plaintiffs had not served my counsel with the request, nor did we receive anything from NAM until after this action had been filed.

27. The Lucey Firm's request for arbitration sent to my counsel by NAM enclosed an application that the Lucey Firm had submitted. On Page 3 of that request, Lucey Firm states: "[P]er agreement, 'the parties [are] the only witnesses called in person' at the arbitration." To the extent Plaintiffs represented to the Court that the NAM "rules" would apply to any arbitration disregards the language of the arbitration request. (See Exhibit B attached hereto.) This arbitration request form was excluded from the NAM documents under Tab 16 filed by the Plaintiffs with the Court on January 28, 2010.

28. Contrary to the statements made by Plaintiffs' counsel at the hearing in this matter, the attached Exhibit B indicates Plaintiffs intended, and still intend, to limit witnesses at any arbitration. To my knowledge, no amended or supplemental arbitration request has been filed by Plaintiffs with NAM removing the restrictions of an abbreviated and expedited process and no live witnesses at the arbitration. Further, because the arbitration clause is so vague and inadequate on its face, there is no assurance any arbitration pursuant to this clause would be fair to me.

29. The vast majority of the documents submitted to the Court at the hearing on March 2, 2010 only substantiate what my counsel represented to the Court at the December 10, 2010 about domiciles of parties, domiciles of witnesses, payments by insurance companies, and incidental activities necessary to complete the Ocean Club case. However, some are misleading and incorrect. For instance the document entitled "arbitration research" consists of entries for arbitration research that all post-date the execution of my employment contract with the arbitration clause (June 2006). My knowledge and ability to litigate arbitration after the execution of that document do not change the facts and circumstances listed above that existed at the time the June 2006 Contract was executed.

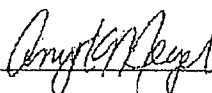
30. To the extent the Court would consider Plaintiffs' assertion that my counsel misrepresented the number of deposition days I was out of state in reaching the decision on the

matter before the Court, I respectfully submit that in the brief filed in December 2009, my counsel indicated that there were six *deposition days* that I attended out-of-state. Plaintiffs now accuse me and my counsel of misrepresenting that fact to the Court by counting *travel days* to imply we grossly understated my out-of-state activities. (See Plaintiffs' Brief at Page 21.) The number of days was proffered to show the *incidental* nature of the out-of-state depositions since hundreds of days of depositions had occurred in the Ocean Club case, not the specific number of days of depositions which Plaintiffs now focus on in their brief.

31. In addition, Plaintiffs have argued in their briefs and at both hearings on arbitration that arbitration is necessary to protect confidentiality. This is hard to believe since Plaintiffs cite to pleadings and documents under seal in their briefs filed with Court which are freely accessible in the public domain. Additionally, Plaintiffs' counsel disclosed detailed facts at both hearings which are now a matter of public record. As set forth in my Affidavit filed November 23, 2009, I believe confidentiality was waived long ago by both Justin Lucey and the Lucey Firm. Further, I have retained a national ethics expert, Nathan M. Crystal, who has advised me and will continue to advise me on any matters relating to my professional responsibilities raised by the nature of this litigation. As such, this case can continue in the court system and any client interests potentially implicated by this case can be properly addressed.

32. Finally, Plaintiffs in their brief and at the hearing failed to cite to any transcript of the hearing on December 10, 2010. My counsel requested a copy of that transcript and attached hereto as Exhibit C is a copy of that transcript. I respectfully submit that I also rely upon the facts argued at the first hearing on arbitration to oppose Plaintiffs' Motion for Reconsideration.

FURTHERMORE AFFIANT SAYETH NOT.



Amy K. Meyer

Sworn to and subscribed before me

this 11 day of March, 2010.



Nancy Bloodgood

Notary Public for the State of South Carolina

My Commission Expires: 8-4-16

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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF CHARLESTON 2009-CP-10-6873

JUSTIN O'TOOLE LUCEY,)
et al.,)
)
) TRANSCRIPT OF RECORD
)
) December 10, 2009
)
) Charleston, South Carolina
AMY MEYER,)
)
) Defendant.)

B E F O R E:

The Honorable J.C. Nicholson, Jr.

A P P E A R A N C E S:

Cherie Blackburn, Esquire
Attorney for Plaintiff Justin Lucey

Nancy Bloodgood, Esquire
Attorney for the Defendant

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

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1 MS. BLOODGOOD: Your Honor, Your Honor, could
2 I approach and hand you a brief?

3 THE COURT: Yes, ma'am.

4 MS. BLOODGOOD: Thank you.

5 THE COURT: All right. Who is here for
6 Lucey?

7 MS. BLACKBURN: I'm Cherie Blackburn. I
8 represent the plaintiffs in this case.

9 THE COURT: And who is here for Meyer?

10 MS. BLOODGOOD: Nancy Bloodgood. I'm here
11 for Amy Meyer.

12 MS. BLACKBURN: It's a plaintiff's motion to
13 compel.

14 MS. BLOODGOOD: Your Honor, just for the
15 record, we also have a motion to seal that should be in
16 the file.

17 THE COURT: Give me a chance to review the
18 file real quick, okay? I believe this affidavit on Amy
19 Meyer regards the seal?

20 MS. BLOODGOOD: Yes, Your Honor.

21 THE COURT: Ms. Bloodgood, is A a copy of
22 this alleged employment agreement?

23 MS. BLOODGOOD: Yes, Your Honor. And that is
24 why I didn't file it with the brief.

25 THE COURT: All right. That is the

1 employment agreement?

2 MS. BLOODGOOD: That's part of it. There is
3 one more part that we agreed, both sides agree, is an
4 amendment to it.

5 THE COURT: Is that correct?

6 MS. BLACKBURN: Yes, Your Honor.

7 THE COURT: Is A the entire --

8 MS. BLACKBURN: No.

9 THE COURT: Where is the rest of it?

10 MS. BLACKBURN: There was an amendment, and I
11 can hand it up, the rest of it. This is an A.

12 THE COURT: This is A plus the amendment,
13 correct? And the parties agree that this is an
14 employment agreement?

15 MS. BLOODGOOD: Yes. I think we both agree.

16 MS. BLACKBURN: Yes, Your Honor.

17 THE COURT: Be glad to hear from you,
18 Ms. Blackburn.

19 MS. BLACKBURN: Your Honor, we're asking that
20 the Court compel arbitration of this matter, and I'll go
21 through briefly the facts and explain how we even got
22 here to begin with.

23 But in January of 2006, my client, the Justin
24 O'Toole law firm, hired Ms. Meyer as an associate
25 attorney, and in June of that year, the parties entered

1 into the employment agreement, the first part of it that
2 I just handed up which is two pages. It doesn't have a
3 date on it, but it is -- actually, may be more than two
4 pages, June of 2006, and that covered the terms of her
5 employment. It discusses salary, it discusses vacations,
6 sick days, holidays, working hours, client
7 confidentiality, termination, and it discusses a way in
8 which she can receive bonuses on cases that she works on,
9 cases that she spearheads.

10 That employment agreement contains a binding
11 arbitration clause, which states that any disputes
12 arising in any way related to the matters set forth
13 herein will be submitted to confidential binding
14 arbitration under expedited and abbreviated procedures
15 with the parties being the only witness that's called in
16 person, and it goes on to say, If we are unable to agree
17 on an arbitrator, I will choose one, you will choose a
18 one, and --

19 THE COURT: Tell me where that is in this
20 agreement.

21 MS. BLACKBURN: Your Honor, look on the
22 third --

23 THE COURT: On the arbitration, is that above
24 the subject?

25 MS. BLACKBURN: If you look at the one that

1 starts Amy, go over to the second page, right before
2 subsequent modifications.

3 THE COURT: Okay. All right. Is that the
4 only portion that's mentioned in the agreement?

5 MS. BLACKBURN: Yes. And in May of 2007,
6 that agreement was amended, which is the last page that
7 you have. It's one page, and it was amended primarily
8 for the purpose of discussing how Ms. Meyer could obtain
9 a bonus on the Ocean Club case. She was spearheading
10 some cases, and in the first agreement had the ability to
11 obtain 10 percent of net fees on cases she spearheaded.
12 She was no longer spearheading the Ocean Club case, so in
13 the amendment -- the firm did the amendment to allow her
14 to obtain between 5 and 10 percent of a bonus on the
15 Ocean Club case and it talks about the timing of that
16 payment. Those two documents together constitute what we
17 both agree on as the employment agreement.

18 Now, in July of this year, her employment
19 terminated, and beginning in August, Ms. Meyer, through
20 her attorney, began making demands for vacation,
21 401K money, and primarily a bonus, bonus money that she
22 claims is due to her under the Ocean Club case. In
23 response to these demands, the law firm, Justin O'Toole
24 Lucey law firm, filed an arbitration proceeding on
25 October 22nd with National Arbitration and Mediation,

1 Inc. It's referred to as NAM, and NAM has rules for
2 employment disputes, and we filed it under those rules.
3 The significance of that is that a lot of the Supreme
4 Court cases talk about arbitration being fair to
5 employees.

6 Under NAM's employment rules, the firm pays
7 for all of the expenses, all the arbitrator's fees,
8 everything, except for a \$60 administrative fee that Ms.
9 Meyer has to pay, so we're under that, and that
10 arbitration is pending right now. Ms. Meyer has not
11 participated, has not answered, and has refused to do so.

12 On October 30th, after we filed the
13 arbitration, Ms. Bloodgood's assistant sent me a draft
14 complaint, saying this is the complaint that is going to
15 be filed by Ms. Meyer, which claims bonus money under the
16 Ocean Club, breach of contract.

17 On October 31st, Ms. Meyer sent -- I'm sorry,
18 Ms. Bloodgood sent an e-mail to me saying she was going
19 to file a draft complaint on Monday morning, along with a
20 lis pendens, and what they had done in the complaint was
21 named mortgage companies that have mortgages on the
22 properties owned by Justin Lucey and the firm, and she
23 was going to file a lis pendens. She has not filed a lis
24 pendens, and we came back and said, That's slander of
25 title. Don't file lis pendens. She hasn't.

1 As you'll see as we get to it, she has named
2 the mortgage companies. So on November 2nd, after
3 getting that draft complaint, we filed the complaint in
4 this lawsuit, and that's how we end up here, and the
5 purpose of filing that was to -- we asked for a temporary
6 retraining order and a preliminary injunction, and we
7 asked for the motion to compel arbitration.

8 The reason we filed the complaint in state
9 court was it was our position that the draft complaint
10 that Ms. Bloodgood had sent to me contained confidential
11 firm information as well as attorney-client
12 communications, protected information, and so we filed
13 that, trying to prevent her from filing the complaint.

14 The information -- there was information
15 contained in that draft complaint about the Ocean Club
16 case about the fences that were put forth, the settlement
17 amounts. The total amount of settlements is not, to my
18 knowledge, anywhere in the public record, and some of
19 those settlements have not been received yet and some of
20 them are under confidentiality provisions.

21 So that's why we filed the complaint, and we
22 were going to seek a temporary retraining order and
23 preliminary injunction. I subsequently talked to Ms.
24 Bloodgood, and she said, We'll file it under seal. The
25 counterclaim -- what she filed is the answer of

1 counterclaim and third party complaint. The third party
2 complaint is only against the mortgage companies, asking
3 for a constructive trust, claiming that the wages that
4 should have been paid to Ms. Meyer under the Ocean Club
5 case were used by my clients to maintain properties and
6 pay taxes.

7 I have never seen that done in a payment of
8 wages case before, but as far as we're concerned, that is
9 over on the side. The crux of this matter is her
10 employment, her claims under the employment agreement.
11 What her complaint or counterclaim alleges there is eight
12 cause of action. One is a declaratory judgment that
13 Justin Lucey, who is the individual owner, primary
14 attorney and owner of the firm, is not a party to the
15 employment agreement and therefore cannot compel
16 arbitration.

17 Now, the only reason that we listed him as a
18 plaintiff in this lawsuit was because her draft complaint
19 had allegations against him, and he has an interest in
20 maintaining the confidential information that we're
21 trying to seek to protect and not have made public.

22 He is not a party to the arbitration
23 proceeding that is before NAM. Of course, if Ms. Meyer,
24 if she is compelled to arbitration and she files an
25 answer and she decides to third party amend, she can

1 certainly do that. The second cause of action was the
2 breach of contract, the breach of good faith and fair
3 dealing.

4 Now, South Carolina doesn't recognize a
5 separate cause of action for breach of good faith and
6 fair dealing, it's all consumed in the breach of
7 contract, and that contract is the employment agreement
8 that you have in front of you that has the arbitration
9 clause. The third was breach of contract accompanied by
10 fraudulent act, again, related to the employment
11 agreement.

12 The fourth is violation of the payment of
13 wages act, where she is claiming the fees, under the
14 Ocean Club case, vacation, and other sums, and the basis
15 of that claim is the employment contract. That is what
16 she points to to say, I'm entitled to this. She has a
17 promissory estoppel claim that my client induced her to
18 stay employed by promising her she would get a higher
19 bonus on the Ocean Club case. That's the amendment to
20 that, the last page of that employment contract.

21 She has an intentional misrepresentation of
22 fraud, constructive fraud case, saying that Justin Lucey
23 and the firm intentionally misrepresented the terms of
24 her bonus as being 10 percent. The only place that 10
25 percent is stated is in the employment contract, so,

1 again, that stems from the employment contract.

2 And then she has an unjust enrichment claim
3 that she worked 56 percent of the hours on the Ocean Club
4 case and therefore she should be able to obtain that
5 percentage of the funds that were received in the case,
6 and the last is constructive trust with the mortgage
7 company. So all of these claims arise out of this
8 employment agreement.

9 Now, it's our position that the federal
10 arbitration act applies to this and not the South
11 Carolina arbitration act because of the fact that
12 interstate commerce is involved and Mignon vs. Green Tree
13 Financial Corps case, the Supreme Court said that unless
14 the parties contract to the contrary, then the federal
15 arbitration act is going to apply, and federal and state
16 courts and any arbitration agreement regarding a
17 transaction that involves interstate commerce.

18 Well, her acting as an attorney for the firm,
19 most of what she did involved interstate commerce, and
20 the -- I would say 90 something percent of her claims in
21 this case arise out of this Ocean Club case, which was
22 clearly a case involving interstate commerce. This was a
23 huge construction case. It involved law firms in
24 California, Chicago, Washington, Virginia, North
25 Carolina; there were 26 defendants, manufacturers from

1 Tennessee, Alabama, Tennessee, California, Ohio; there
2 were homeowners from dozens of states, including Belgium;
3 there were over two dozen expert witnesses from dozens of
4 states. Everything that she was doing for the firm --
5 and I think what lawyers do on a daily basis involves
6 interstate commerce.

7 The Episcopal housing case, which has been
8 cited in a lot of these and it's in our brief, states
9 that where a transaction involves interstate commerce,
10 the federal arbitration act trumps the South Carolina
11 act. It's also important that the parties did not
12 contract that the South Carolina arbitration act would
13 apply.

14 So if you look in that contract, nowhere does
15 it say that it's going to apply. Now, I know that Ms.
16 Bloodgood at one point said, Well, the South Carolina
17 notice is not in all capital letters on the contract.

18 The reason for that is that it doesn't apply,
19 and so therefore we don't have to put the notice on the
20 cover of the contract. Section 15-48-10(b)2, which is
21 part of the South Carolina arbitration act, states, This
22 chapter does not apply to arbitration agreements between
23 employees and employers unless the agreement provides
24 that the chapter shall apply.

25 So that is pretty clear. The South Carolina

1 arbitration act doesn't apply, and we don't have to have
2 any notice in all capital letters on the top of that
3 agreement.

4 South Carolina Courts, as you know, have a
5 strong policy in favor of arbitration. Any doubts
6 concerning arbitration should be resolved in favor of
7 arbitrating the matter, and a Court should enforce the
8 arbitration unless it can say with positive assurance
9 that the clause isn't interpreting -- it isn't
10 susceptible to an interpretation covering suit. In this
11 case, I think it clearly is when you look at the
12 counterclaims that she's alleged.

13 Now, I know that -- let me address a couple
14 of things, and the one is that there are causes of action
15 that Ms. Bloodgood claimed well these are outside the
16 contract. Fraud, we think that the term fraudulently
17 induced her to stay employed by promising her this bonus,
18 even if you decide --

19 THE COURT: The law takes it out of
20 arbitration.

21 MS. BLACKBURN: No, Your Honor. I don't
22 believe it does, because I think even if you say that is
23 separate from the contract, the case law says, and this
24 is Housing Authority of City of Columbia versus
25 Cornerstone, that --

1 THE COURT: You're saying fraudulent
2 inducement of the contract doesn't take it out of
3 arbitration clause, from what you're telling me?

4 MS. BLACKBURN: Yes. That's right, Your
5 Honor.

6 THE COURT: I'm sorry, what?

7 MS. BLACKBURN: They're already in the
8 contract.

9 THE COURT: I understand. But you're telling
10 me fraudulent inducement of the contract doesn't take it
11 out of the arbitration clause?

12 MS. BLACKBURN: Yes, as alleged in the
13 counterclaim.

14 THE COURT: Okay. You may disagree with the
15 facts, but legally it does, if it's a fraudulently
16 induced contract?

17 MS. BLACKBURN: Well, Your Honor, it wasn't
18 the original contract. Her claim is not fraudulent
19 inducement.

20 THE COURT: I understand. I'm not trying to
21 argue the facts with you. I'm not trying to argue the
22 facts with you. I'm just trying to say the law says it's
23 fraudulent inducement. That takes it out of arbitration.
24 I'm not trying to say it applies to this case or doesn't
25 apply to this case.

1 MS. BLACKBURN: Right. I would argue, Your
2 Honor, that that is related to the breach of contract
3 claim and could be arbitrated along with the breach of
4 contract claim.

5 THE COURT: All right. Let me ask you the
6 second question. How do you get interstate commerce from
7 a local attorney, employment of contract? I know you're
8 trying to say the case that she was working on was
9 interstate commerce, but isn't the interstate commerce
10 issue on the contract itself?

11 MS. BLACKBURN: And I think on the services,
12 Your Honor, that she is providing in the contract so I
13 believe that is how you get to the interstate commerce.
14 The services she's providing the firm involve interstate
15 commerce, and in this case, specifically, particularly
16 with regard to the amendment --

17 THE COURT: Do you think the amendment puts
18 it in interstate commerce? Is that what you're telling
19 me? Because the cases -- the services provided on that
20 amendment was involved in interstate commerce.

21 MS. BLACKBURN: Yes, Your Honor. And I would
22 also take the position that the services she has provided
23 originally on the cases that she's working on, because
24 she does, that original contract talks about the 10
25 percent bonus she's going to get on cases she

1 spearheaded, those cases were interstate commerce as
2 well. But I think clearly the amendment does, and the
3 fact that the amendment specifically addresses Ocean Club
4 and the issues in this case are going to be what she did
5 on the Ocean Club case, how she performed on the Ocean
6 Club case, whether she was entitled to 5 percent or 10
7 percent.

8 Our position -- the contract says you're
9 going to get either 5 or 10 percent on the Ocean Club
10 case and the firm actually has paid her right around 7
11 percent, 7 and a half percent of all the fees that have
12 been received today, so this is going to be an issue
13 about whether she's entitled to more than what she has
14 already been paid, the 7 and a half percent under that
15 amendment.

16 THE COURT: Okay. You said you wanted to
17 make some other points. Go ahead.

18 MS. BLACKBURN: I had a couple of other ones.
19 I understand Mr. Lucey is not a signatory to the
20 contract. That wouldn't prevent her from having any
21 dispute regarding him included in the arbitration. The
22 case law is pretty clear on that, that can you require --
23 the Court can require parties to arbitrate even when
24 there is a nonsignatory who would be a party to that
25 arbitration.

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1 There is the intertwined claims test where
2 the claims are intertwined against him and the company,
3 and it basically is the signatory cannot avoid
4 arbitration where a nonsignatory, in this case,
5 Mr. Lucey, with the issues that the nonsignatory is
6 seeking to resolve in arbitration are intertwined with
7 the agreement, and I think here any of her claims against
8 Mr. Lucy are intertwined with this employment agreement.
9 And, Your Honor, for that reason, we are asking that you
10 compel arbitration of the claim, all the claims, in this
11 lawsuit.

12 THE COURT: Okay. Thank you very much. Ms.
13 Bloodgood?

14 MS. BLOODGOOD: Thank you, Your Honor. I
15 just wanted to correct, generally, Ms. Blackburn's
16 recitation of the facts as correct. I just want to point
17 out a few minor issues.

18 Arbitration is not pending. I sent a letter
19 to NAM several weeks ago saying we had no interest in
20 arbitrating and would not participate in that process.
21 For the record, a lis pendens is a privilege when a
22 constructive trust is alleged. There is nothing improper
23 with the lis pendens. As a courtesy we have held off
24 filing them.

25 I am a little bit surprised that there has

1 been such a waiver of confidential client information
2 today by counsel. We've been very careful, which is why
3 I didn't file my brief with the attached employment
4 agreement to you. We may file that afterwards, but I
5 would like to address that the constructive trust is
6 necessary, because as Ms. Blackburn said, this is a
7 controversy where the amount in controversy is a seven
8 figure amount, and it's not true that my client has been
9 paid seven and a half percent. Other than that, the
10 facts are correct.

11 You are absolutely correct that the FAA does
12 not apply to anything other than interstate commerce, and
13 the heart of this transaction, which is what the cases
14 mention, is a contract for personal services. We have a
15 South Carolina lawyer in a South Carolina law firm who
16 has hired another South Carolina lawyer. She is not
17 licensed to practice anywhere else, and she is to provide
18 South Carolina services.

19 There's a business license in South Carolina.
20 My client -- it would be illegal for her to perform legal
21 services other than within the State of South Carolina.
22 So these -- all of those construction cases where people
23 get supplies from out of state, when they're developing
24 land in Hilton Head and you have partners from other
25 states, are irrelevant.

1 The best case probably for the Court to look
2 at, which I've mentioned in the brief, is the Chins case,
3 and that comes closest to the personal services, and it
4 involves a nursing home, and as the Court pointed out, in
5 that instance, the relationship between a patient or
6 employee, which were both covered by that contract, and
7 their employer is a personal relationship and devoid of
8 any type of interstate commerce allegations, and that
9 case specifically distinguished contracts where there
10 were interstate suppliers and materials.

11 This is a transaction. The transaction is
12 between the employer and the employee. The fact that six
13 days out of the over 1,000 days she spent on this lawsuit
14 in the last two years she traveled to take depositions is
15 just incident and immaterial to the transaction which is
16 an employment contract.

17 Now, I have a mother-in-law in Bennettsville.
18 Bennettsville is near North Carolina. If she hires a
19 plumber to come fix her toilet, he may have to stop in
20 the middle of that process and go get a different wrench,
21 and he's going to have to go to North Carolina to find a
22 Lowe's. That doesn't mean that my mother-in-law hired a
23 plumber to fix her toilet is interstate commerce. It's
24 not as broad. It is broad, but it's not broad enough to
25 encompass a personal services contract that not only is

1 performed in South Carolina, it can only be performed in
2 South Carolina.

3 In terms of -- if this Court, however, were
4 to find that somehow this personal service contract for
5 legal services in South Carolina affected interstate
6 commerce, then we would ask that the Court exercise its
7 powers of equity, and, as you said, an arbitration
8 agreement is a contract. A contract can be voided on
9 principles of equity for either fraudulent inducement,
10 duress, or unconscionability.

11 In this case, what I think is most obvious,
12 six months into working for a law firm, a young associate
13 is presented with an agreement where there is one
14 paragraph in regular type on the second page, buried in
15 the middle, saying that not only is any dispute going to
16 be subject to arbitration, but you can't have any
17 witnesses at arbitration, and it's going to be expedited
18 and abbreviated.

19 First of all, there is a clear absence of a
20 meaningful choice. I know she's a lawyer, but if she
21 were a doctor or a rocket scientist, we still had an
22 employer-employee relationship, and an employee, six
23 months into a relationship with an employer, who is
24 trying to be successful in a profession, is at a
25 disadvantage, and it's a one-sided contract, and any

1 reasonable person would see that not being allowed to
2 call witnesses and the abbreviated part of it where, I
3 guess, that means there is not going to be any discovery,
4 is oppressive.

5 I think it's against public policy. In the
6 Simpson case the Supreme Court held that when an
7 arbitration agreement limits damages that are contrary to
8 state laws, it's a violation of public policy. Well,
9 Rule 43 of our South Carolina rules of civil procedure
10 says that witnesses can testify orally and that the
11 competency of witnesses has to be determined in a like
12 manner.

13 I would submit to the Court it's a violation
14 of public policy to enforce an arbitration agreement that
15 even NAM wouldn't approve of, and I think it's oppressive
16 and I think that if for no other reason, for equitable
17 reason, this Court should find that the arbitration
18 agreement is invalid.

19 As to the motion to seal, we have been very
20 careful. We have hired a professor from the law school
21 because we know that this is a funny kind of employment
22 dispute in that it concerns lawyers and clients, and we
23 have not filed anything, and what we would like to file
24 we would like to file under seal. I'm fine with
25 Ms. Blackburn's order. Both sides previously submitted

1 proposed orders to seal the record. I find whether you
2 sign hers or mine, I don't think they're much different.
3 We're willing to do that, we understand, and share the
4 concern that that this not be a public matter and it not
5 affect the clients in any adverse manner.

6 So that is our position, Your Honor.

7 THE COURT: Okay. Thanks very much.

8 Ms. Blackburn, anything you would like to add?

9 MS. BLACKBURN: Just a couple things and I'll
10 be very brief.

11 The arbitration clause doesn't prevent there
12 from being other evidence or discovery or affidavits. It
13 only says that the parties -- we're the only witnesses
14 called in person, and it provides the procedure for
15 agreeing upon the arbitrator, and, as I said earlier,
16 we're paying all the fees for now, so it's certainly not
17 inequitable from her standpoint.

18 The other thing is, one more thing on the
19 interstate state commerce, we have pages in our
20 counterclaim what she claims she did on the Ocean Club
21 case. She's asking for the value of her time, which she
22 claims to be \$1.7 million in this case, all based on the
23 Ocean Club case. That case was clearly interstate
24 commerce. What she was working on was interstate
25 commerce, even if she only did travel six times out of

1 state to take depositions on it. So we disagree this is
2 simply over an employment contract with parties in South
3 Carolina, has nothing do with interstate commerce.

4 And, Your Honor, the only other thing, on the
5 motion -- do you want to hear my motion to seal?

6 THE COURT: If y'all agree on it, just give
7 me the order. I'll be happy to sign it. The case you
8 referred to, do you have a copy of it?

9 MS. BLOODGOOD: Yes, sir.

10 THE COURT: Ms. Blackburn, do you have any
11 cases you would like for me to read?

12 MS. BLACKBURN: Your Honor, I believe --

13 THE COURT: Particularly an interstate
14 commerce issue?

15 MS. BLACKBURN: No, Your Honor, but I will --

16 THE COURT: Any cases you would like to
17 submit to me?

18 MS. BLACKBURN: I would, Your Honor. Could I
19 send them down to you in a few minutes?

20 THE COURT: Yeah. That would be fine.

21 MS. BLACKBURN: Okay.

22 THE COURT: If you'll hand me that order on
23 the seal, I'll be happy to sign it. As far as making a
24 determination of finding of arbitration, I'm going have
25 to take it under advisement and read what y'all have

1 presented to me. Thank you.

2

3 (Whereupon, the proceedings were concluded.)

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1 I, the undersigned Amanda K. Haffenden, RPR, CRR,
2 Official Court Reporter for the Ninth Judicial Circuit of
3 the State of South Carolina, do hereby certify that the
4 foregoing is a true, accurate, and complete transcript of
5 record of all the proceedings had and evidence introduced
6
7 in the trial of the captioned case, relative to appeal, in
8
9 the Circuit Court for Charleston County, South Carolina,
10
11 on the 10th of December 2009.

12
13 I do further certify that I am neither of kin,
14
15 counsel, nor interest to any party hereto.

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17 January 29, 2010
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25 Circuit Court Reporter

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Transcript of Hearing 12-10-09

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	2009-CP-10-6873
JUSTIN O'TOOLE LUCEY AND	)	
JUSTIN O'TOOLE LUCEY,	)	
P.A.,	)	
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	March 2, 2010
	)	
AMY MEYER,	)	Charleston, South Carolina
	)	
DEFENDANT,	)	
	)	
AND LORCAN LUCEY, GMAC	)	
MORTGAGE CORP., CITI	)	
MORTGAGE, INC., AND	)	
JOHN DOE FINANCE,	)	
	)	
THIRD-PARTY DEFENDANTS.	)	

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR., Judge

A P P E A R A N C E S:

CHERIE BLACKBURN, Esquire
Attorney for the Plaintiff

NANCY BLOODGOOD, Esquire
Attorney for the Defendant

MISSY BROWN
Court Reporter

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I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
MOTION HEARING	4			
CERTIFICATE OF REPORTER	47			

EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>

NO EXHIBITS PRESENTED DURING HEARING

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PROCEEDINGS

MARCH 2, 2010

(Whereupon, Court convened with the attorneys present when the following matters were had:)

THE COURT: Ms. Blackburn, I believe it's your motion for reconsideration. It's been a while since we heard the original motion. If I remember it's a dispute between an attorney and her associate over -- a contract dispute over a fee working on a particular case. And the issue was arbitration.

And I believe the arbitration agreement didn't comply with the state rule about putting it in bold letters. And your position was it was a federal arbitration act and it was interstate commerce. I think Ms. Bloodgood's position was it was not.

And I think I ruled initially in her favor and you filed this reconsideration. Is that a very brief summation?

MS. BLACKBURN: That's the synopsis, yes, Your Honor.

THE COURT: Is that the gist of it?

MS. BLACKBURN: That's the gist of it.

THE COURT: Okay. I'll be glad to hear you.

MS. BLOODGOOD: Your Honor, could I hand up a -- or should I wait until it's my turn for a brief?

1 THE COURT: It doesn't matter. I'm going to hear
2 argument from both parties. You can at this time if you
3 want to.

4 MS. BLOODGOOD: Okay.

5 (Ms. Bloodgood handed documents up to the Court.)

6 THE COURT: Thank you.

7 MS. BLACKBURN: Your Honor, I'm going -- I'm just
8 going to hand you some additional documents that I'm going
9 to refer to today.

10 THE COURT: Are these documents that were under
11 seal or are these ---

12 MS. BLACKBURN: These are documents that are not
13 attached to the memorandum. I would have normally, but I
14 was concerned about it not being under seal so I'm just
15 handing them up to you.

16 In addition to the documents we're filing here ---

17 THE COURT: The items under seal at the hearing,
18 I don't think the file is here for me to look at.

19 MS. BLACKBURN: Okay. Thank you, Your Honor. I
20 appreciate you hearing us on the motion for
21 reconsideration.

22 You should have, in addition to the brief that I hand
23 delivered to you yesterday, a stack of documents that were
24 filed under seal. There's 16 different documents. Those
25 were filed -- You allowed us to file those at the last

1 hearing and you put it in your order, actually the order
2 denying the motion to compel arbitration. So they were
3 actually filed after that order since it was the order that
4 gave us the right to file them.

5 We're here today to make -- to make basically three
6 main points. And I'd like to just state those and then
7 spend a little bit of time discussing them.

8 First of all the order that you signed denying the
9 motion to compel arbitration is based on representations
10 made by the Plaintiff that are not accurate. There are
11 misrepresentations about her activities under the
12 employment agreement and whether she was involved in
13 interstate commerce.

14 She led you to believe that she was not at all
15 involved in interstate commerce when she worked for the
16 Lucey firm under the employment agreement. And when ---

17 THE COURT: I guess -- Now see this is my
18 impression if the order was misleading, my impression was
19 that the case that she was working on there was no question
20 that it was interstate commerce if I remember correctly. I
21 don't think I've dealt with ---

22 MS. BLACKBURN: The Ocean Club case is probably
23 the case you're referring to.

24 THE COURT: There wasn't any question that that
25 was interstate commerce. But your argument, I believe, was

1 that because she was working on a case involving interstate
2 commerce the employment contract between herself and her
3 employer should also be interstate commerce if I remember
4 correctly.

5 MS. BLACKBURN: And it was that and a little bit
6 broader than that, ---

7 THE COURT: Okay.

8 MS. BLACKBURN: --- in that the employment
9 agreement itself, which gives her the opportunity to make
10 bonuses under certain cases that she spearheads, those
11 cases and her work for the firm did involve interstate
12 commerce.

13 THE COURT: Well let me state my concerns then
14 you can address it.

15 MS. BLACKBURN: Okay.

16 THE COURT: I'll listen to your argument and your
17 three points and you can present them. But let me tell you
18 my concern as far as how I recollect what transpired and
19 why I ruled the way I ruled.

20 My concern was that we were simply looking at an
21 employment contract between two attorneys here in
22 Charleston, South Carolina, and I did not feel like you
23 could expand it by saying that she's working on cases that
24 were involving out of state information or interstate
25 commerce. That's the reason basically I ruled the way I

1 ruled.

2 Now if you want to address that issue and tell me
3 whether or not there's any cases saying that the subject
4 matter the attorney's dealing with expands it into
5 interstate commerce, therefore covered by the Federal
6 Arbitration Act, I would like to hear that.

7 MS. BLACKBURN: Okay. Yes, Your Honor. And I am

8 ---

9 THE COURT: That's the reason I ruled
10 irregardless of what the order says. Okay.

11 MS. BLACKBURN: Okay.

12 THE COURT: That's the basic reason I ruled the
13 way I ruled.

14 MS. BLACKBURN: Your Honor, and I understand
15 that. I actually understand your ruling. I think if you
16 consider -- And I go back to what the representations were
17 by the Plaintiff at the hearing last time. You would look
18 at this simply as a contract. It's a South Carolina
19 attorney, works for a South Carolina firm, who's sitting in
20 South Carolina doing work at the South -- Charleston County
21 Courthouse, isn't doing anything else. But that's not the
22 case.

23 And I will go over those cases and talk about how you
24 look at the interstate commerce and what a person's doing
25 under the employment contract.

1 THE COURT: Okay.

2 MS. BLACKBURN: That's our -- That's our main
3 issue.

4 Now, I looked at -- In relation to that one, the
5 second one is she does have the burden of proof. Now there
6 is a presumption in favor of arbitration so she has to
7 present some evidence whether it's affidavits, documents,
8 something that says that interstate commerce was not
9 involved and that the FAA, Federal Arbitration Act, should
10 not preempt South Carolina law.

11 THE COURT: Okay.

12 MS. BLACKBURN: And she does -- There's nothing
13 that's been filed so far that gives any evidence of that.

14 The third point is she -- The order that you signed
15 actually rules that the arbitration provision is
16 unconscionable. Now you didn't make that ruling from the
17 bench and you didn't make that ruling in your e-mails to
18 Ms. Bloodgood. But she included a discussion and a finding
19 that it was unconscionable.

20 THE COURT: Okay.

21 MS. BLACKBURN: And it's our position that that's
22 not supported by the evidence or by the case law.

23 Your Honor, if you remember this employment agreement
24 -- And I've got an extra copy of it. Do you have it in
25 front of you?

1 THE COURT: No, ma'am.

2 MS. BLACKBURN: Okay. I'm going to -- Let me
3 hand up a copy of -- What I'm referring to as the
4 employment agreement is actually two different documents.
5 The first one is this letter that starts -- That's the
6 original 2007 -- I'm sorry June of 2006 agreement that the
7 parties entered into. And that was amended with the one-
8 date document that's attached in May of 2007 and we don't
9 have dates on either one of those, but they're basically a
10 year apart.

11 That second document is what the Plaintiff refers to
12 as the Ocean Club agreement. It's the amendment that
13 deals with the Ocean Club bonus.

14 If you look at the first document that deals with the
15 employment contract you'll -- We'll talk about that some.
16 But it basically talks about her right to receive bonus
17 money on cases that she spearheads and it references
18 specifically cases that she's working on.

19 So we view this as not just an employment contract
20 that says you're going to work, you know, you're going to
21 come to work as an associate. You're going to get health
22 insurance. You're going to get this and that. This is,
23 you're going to get bonus money on contingency fee cases
24 that come into this firm and here is six or seven of those
25 and here's how you're going to get your money out of those

1 six or seven cases. And we'll talk about those cases.

2 And I think part of the problem, and when I say that
3 the Plaintiff has made misrepresentations to you, I think
4 part of the problem is there's a lack of understanding on
5 the Plaintiff's part of what constitutes interstate
6 commerce.

7 Interstate commerce can be -- The Courts have defined
8 it as social intercourse between citizens in different
9 states. And I -- Every case I've referred to is a case
10 that deals with arbitration and the Federal Arbitration
11 Act.

12 For example a telephone conversation across state
13 lines, there does not have to be travel across state lines
14 for the Federal Arbitration Act to apply.

15 The US Supreme Court has said when you look at this
16 issue it doesn't matter what the parties contemplated. It
17 doesn't matter that in signing this employment agreement,
18 Ms. Meyer, if she said, You know what, I think I'm just
19 going to be in South Carolina; I'm not going to be doing
20 anything under this agreement outside the state. It
21 doesn't matter what she complicate -- contemplated. The
22 point is actually what happened under the agreement.

23 And the Courts have said the FAA encompasses a wider
24 range of transactions than just in commerce. It's not just
25 something that's in commerce. The FAA doesn't require a

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1 substantial affect on commerce. The cases say that the FAA
2 applies even if the subject matter of dispute, what you
3 look at it, this agreement and her work under this
4 agreement, has even the slightest nexus with interstate
5 commerce.

6 Now, the Plaintiff suggested at the last hearing that
7 she was on the Ocean Club case, she was out of town for six
8 days, traveled out of state for six days.

9 First of all, that's inaccurate. And we've provided
10 and I'll discuss in a moment her time records that shows
11 she was out of town, out of state, more than that. But
12 that's not the issue. It's not just going -- traveling out
13 of state across the state lines.

14 THE COURT: Well I don't doubt the Ocean Club
15 case -- That was a stucco case in Ocean Club at Wild
16 Dunes.

17 MS. BLACKBURN: Right.

18 THE COURT: I don't doubt that they were suing
19 synthetic employers and were all out of state. I don't
20 doubt that that case was involving interstate commerce.

21 My question is when you've got a contract between two
22 parties how do you -- in a law firm, you're trying to say
23 that contract's subject to interstate commerce because of
24 the cases that she handled. I'm sure she handled some
25 other cases that were not involving interstate commerce.

1 But the thing is, that you said is, the particular case,
2 Ocean Club is the one fee that's in dispute; is that
3 correct?

4 MS. BLACKBURN: Ocean Club and there's a small
5 part of Bee's Ferry. Ocean Club's probably 80 percent of
6 the case.

7 THE COURT: Okay.

8 MS. BLACKBURN: Bee's Ferry is another case that
9 she disputes. You know, she ---

10 THE COURT: And I doubt that that case involved
11 clients -- I don't know who they sued so I don't know what
12 it involved, but I don't doubt it involved interstate
13 commerce, the case itself.

14 MS. BLACKBURN: Maybe this would help, Your
15 Honor, ---

16 THE COURT: But I have trouble expanding the
17 local employment agreement just because she's involved in a
18 case that involves citizens outside the state.

19 MS. BLACKBURN: All right. And I think ---

20 THE COURT: Do you understand where I'm coming
21 from?

22 MS. BLACKBURN: I do understand what you're
23 talking about.

24 THE COURT: I'm not trying to belabor that point,
25 but that's my difficulty with your argument.

1 MS. BLACKBURN: If you look at -- Probably the
2 case that's out there in South Carolina law that's closest
3 to this case is that Towles v. United Healthcare case. And
4 I did, actually in that folder, I included an extra copy
5 for you.

6 That's where the employee worked as a medical director
7 for the company. And if you -- It caused a lot of stir
8 because the arbitration provision was actually in the
9 handbook acknowledgment receipt form. So the employee gets
10 the handbook and in the acknowledgment receipt form it
11 says, Any dispute related to your employment will be
12 arbitrated.

13 And the employee said, Wait a minute; I'm not involved
14 in interstate commerce. And the whole issue was whether
15 the FAA applied so as to preempt -- preempt the state law
16 because there was no notice provision in all capital
17 letters and all.

18 So the Court looked at what the employee did. And the
19 Court said, and it's in one paragraph where the Court
20 analyzes how do we look at this, and the Court says, The
21 employee participated in out-of-state telephone calls,
22 reviewed claims from out-of-state providers, and attended
23 out-of-state conferences.

24 And the Court said, and this is a quote, That these
25 activities provided sufficient evidence of interstate

1 commerce to invoke the FAA. The FAA applied and displaced
2 the Uniform South Carolina Act.

3 So there's a situation with the Court saying what does
4 an employee do in his job. And because he's having
5 conversations across state lines and dealing and
6 communicating with people across state lines he's involved
7 -- it's interstate commerce.

8 Now, in this employment agreement, -- So we set aside
9 the Ocean Club amendment for a minute.

10 THE COURT: Okay.

11 MS. BLACKBURN: Just looking at the employment
12 agreement there are several cases referenced that give her
13 a right to the bonus, that give her a right -- I mean
14 that's the whole purpose of Mr. Lucey writing the letter is
15 to give her something she wasn't already entitled to, which
16 was how can you make some money in addition to her salary.
17 Because her salary was not as high as some salaries might
18 be for associates so she gets this additional monies, the
19 bonus monies.

20 One of those cases was Harper, the Harper case. That
21 employment agreement said given various factors present in
22 the Harper case I'm going to bump your bonus up to 15
23 percent on that case. If our co-counsels still receive the
24 full 50 percent cut of the gross fee I'll bump your bonus
25 further to 20 percent. That's part of her work under the

1 employment agreement. She received a bonus on Harper.
2 Harper was immersed in interstate commerce. And one of the
3 sets of documents that I provide to you, that I just handed
4 up to you are the Harper -- some of the Harper documents,
5 including the firm's expenses for out-of-state -- out-of-
6 state service providers.

7 Harper was -- involved an unnamed physician in Florida
8 who was deposed in Florida. The firm's primary liability
9 expert resided and was deposed in Georgia by Ms. Meyer.
10 Another firm's expert resided and was deposed in
11 California. The firm secured their logical analysis from
12 physicians in Florida and North Carolina.

13 This is a different type of contract than just a -- a,
14 you know, one-page you're employed. This was here's how
15 you perform like this. You perform A, B, and C under this
16 contract, you're going to receive bonus monies from these
17 cases. And the issues for, we hope the arbitrator, is
18 going to be did Mr. Lucey -- did the partners breach the
19 employment agreement by not providing her a high enough
20 percentage on contingency fee cases that she was to receive
21 a bonus on. That's the issue.

22 And our defense is, No, we gave her everything -- We
23 gave her more than she was supposed -- We paid her \$370,000
24 on the Ocean Club case alone, which was approximately seven
25 percent. She wants ten percent. The issue is -- Our

1 position is her performance didn't justify the ten percent.
2 That all involves what she was doing on this case. It's
3 not, you know, an issue of did she get the hours that she
4 was supposed to work sitting here in Charleston. It's did
5 she get the money on the cases that she claims she was
6 entitled to a bonus on.

7 And most of the documents that were -- well pretty
8 much all of the documents that were filed under seal do
9 deal with the Ocean Club case. But -- And I just mention
10 that briefly to say that the homeowners were in effect the
11 clients. I handed up to you all of their assignments of
12 their rights over to the property regime and their
13 agreement to allow the firm to represent them. They're in
14 states all over. I mean they're all over the place. Those
15 are the clients who Ms. Meyer was dealing with. She
16 traveled out of state to various depositions in that case.

17 If you look at the documents that are filed under
18 seal, tab 2, Mr. Lucey asked Ms. Meyer to prepare a summary
19 of travel in Ocean Club in February of 2009. So she does a
20 summary and she talks about the travel to North Carolina,
21 to Florida, to Georgia, to DC, to Knoxville, to Kingsport,
22 to Baltimore, to Charlotte. It's basically they're
23 traveling all over the place on this case.

24 Tab 7 on those documents is a list -- it's called an
25 Ocean Club Emergency Contact List. It shows the residences

1 of all these homeowners which are all over the United
2 States.

3 Probably the most critical document on this issue is
4 behind tab 1 which showed that she was traveling and taking
5 depositions. And again, it's not just the travel. It's
6 the phone conversations, the communications with clients.
7 It's the correspondence across state lines.

8 She takes the position that the traveling shouldn't
9 matter because they could have done it by video deposition.
10 Well, first of all it doesn't matter what they could have
11 done. You know, she was traveling. But also, the video
12 deposition, you're taking a video deposition out of state
13 that -- and remember all you'd have to show is just the
14 slightest nexus and that it affects interstate commerce.
15 It's not this typical commerce, you know, in commerce, like
16 a good going across state lines.

17 And there's one case that says that the -- The US
18 Supreme Court said, We created this definition of
19 interstate commerce to prevent the state courts from
20 refusing to enforce arbitration clauses. We -- This is a
21 broad interpretation.

22 The Bee's Ferry case, I want to mention it briefly.
23 It was another case that she worked on because it did
24 reference in her complaint. She claimed that she should
25 have received more of a bonus on that case under the

1 employment agreement. She also claims that the research
2 that she did on that case, she found a case that, during
3 the trial, that created a jury charge that basically won
4 the case. That research was done on Westlaw. They were
5 out-of-court states -- no, out-of-state cases, not local
6 South Carolina cases. That's Westlaw. She's affecting
7 interstate commerce.

8 Again, not the typical employee who sits in South
9 Carolina and never communicates in interstate commerce.
10 But more so even than the medical director in the Towles
11 case. I mean there's an argument that what she's doing
12 involves interstate commerce more than what the employee
13 involved did in the Towles case.

14 Again, she's got the burden to show why arbitration
15 should not be granted. She simply hasn't met that burden.

16 There are some other cases. Crawford v. West Jersey
17 Health System is one that I reference in the brief. That
18 was where a physician's employment agreement -- This is
19 actually a New Jersey case. But this physician's
20 employment agreement was found to be an interstate commerce
21 because it said the employment facilitated the practices'
22 interstate business activities.

23 There is a case, Thornton v. Trident, that's a South
24 Carolina case. Now that's a physician at Trident Medical
25 Center. The physician says, I'm a -- I'm a physician in

1 South Carolina; this doesn't affect interstate commerce.
2 The Court says, No, your work, it does involve interstate
3 commerce. He happened to be recruited from a different
4 state, came here, worked here for like years, and then
5 didn't continue as long as he was supposed to work and got
6 sued. And he says, I'm not -- I was just practicing -- you
7 know, treating patients here. The Court said interstate
8 commerce -- commerce, the FAA applies.

9 Episcopal Housing, it is a construction case, but
10 what's interesting is it's the construction of an 18-story
11 building. And the Court says basically it's virtually
12 impossible to construct an 18-story building without
13 getting involved in interstate commerce and using things
14 from out of state.

15 Well it's impossible for Ms. Meyers to perform under
16 this original employment agreement or the Ocean Club
17 agreement -- amendment without affecting interstate
18 commerce.

19 Your Honor, that's the basis -- I do want to point
20 that Ms. Meyer cites the Timms v. Greene. Timms, as far as
21 I can tell, is the only case that you could even try to
22 fight against the premise that interstate commerce was
23 involved and it's completely distinguishable, different.

24 That was the nursing home case where the resident of
25 the nursing home gets injured, sues the nursing home. The

1 nursing home says my contract with you, our contract with
2 you had an arbitration provision; you have to arbitrate.
3 And the Court looked at it, and the Court said, Well, the
4 nursing home is involved in interstate commerce; here are
5 the boarders' names from out of state and all. But, the
6 relationship between the nursing home and the individual
7 residents did not involve or affect interstate commerce
8 because, I mean basically, the resident didn't do anything.
9 She was just there in the nursing home.

10 Completely different here. That relationship, which
11 is what the Court looked at in Timms, in this case most
12 definitely affects interstate commerce. The Plaintiff
13 can't look at this case with blinders on and say, I'm a
14 South Carolina attorney working for a South Carolina firm
15 and therefore I don't do anything in interstate commerce.
16 Because that's just not the case.

17 Your Honor, I'd like to also address the issue of the
18 unconscionability which is in the order.

19 THE COURT: Don't worry about that, okay?

20 MS. BLACKBURN: Okay.

21 THE COURT: Don't worry about that. I -- I
22 understand it's in the order, but, I can correct that.

23 MS. BLACKBURN: Okay.

24 THE COURT: I'm not concerned about that.

25 MS. BLACKBURN: All right.

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1 Well for the reasons ---

2 THE COURT: I understand I signed the order, but
3 I don't view it as unconscionable, okay.

4 MS. BLACKBURN: Okay.

5 The last thing I want to say, I do want you to
6 understand why Mr. Lucey put this arbitration provision in
7 this contract. It wasn't to be avoiding back pay, it
8 wasn't to say, aha, I got you now. The arbitration
9 provision is fair to both sides and he did it because he
10 wants, a, wanted to protect his clients' confidentiality
11 because if we have a dispute it's going to involve these
12 cases which she's working on which is exactly what's
13 happened.

14 And, two, he quite frankly didn't want to air any
15 dispute in the Charleston County Courthouse. And, you
16 know, I think we all know the bench and the bar does not
17 like disputes among attorneys. This was a way to have a
18 private, confidential, expeditious way of handling this
19 matter and that's why it's in there. And we -- we would
20 avoid the situation which we have right now where we're
21 filing documents under seal and handing things up and not
22 being able to have it tagged as an exhibit. I just think
23 it's important for the Court to know that, that this wasn't
24 trying to pull anything over on the Plaintiff. It would
25 have -- It benefits both sides.

1 Thank you, Your Honor.

2 THE COURT: You know it might be litigated again
3 if that stucco that they put on there, the drainage system
4 behind it doesn't work. But they'll know that in, what,
5 ten or twelve years. I can't believe they put stucco back
6 on it, but that's neither here nor there.

7 MS. BLOODGOOD: Your Honor?

8 THE COURT: Yes, ma'am.

9 MS. BLOODGOOD: Two things I need to start out
10 with. First of all, my client's the Defendant. She's not
11 the Plaintiff.

12 Secondly, we're here on a motion under 59(a), not
13 59(e). There's -- They're entirely different. And a 59(a)
14 motion, which is the motion before the Court and the only
15 motion before the Court, no 59(e) was ever timely filed, is
16 a request to the Court for a rehearing. I have put in my
17 brief the cases regarding 59(a).

18 But, generally, a Court ruling on a 59(a) motion looks
19 at issues such as whether its decision was against the
20 weight of evidence, whether it was inadequate or excessive,
21 whether there was error or improper conduct by the Court.

22 THE COURT: To be honest with you I haven't
23 looked at the motion itself.

24 MS. BLOODGOOD: If you'll look at the face of the
25 motion, Your Honor, it's a 59(a), not a 59(e). And I know

1 the memo sounds like a 59(e) and the last argument you
2 heard for 15 minutes.

3 THE COURT: Have you got a copy?

4 MS. BLOODGOOD: I do.

5 THE COURT: Have you got a copy of the motion?

6 If you could provide me a copy I need to look at that.

7 MS. BLACKBURN: Yes, Your Honor.

8 MS. BLOODGOOD: Well actually I have a copy of
9 our brief. I don't know that I have a copy of the motion.

10 THE COURT: Have you got a copy of it?

11 MS. BLACKBURN: Yes.

12 THE COURT: Okay. Go ahead.

13 MS. BLOODGOOD: If you look at the grounds on
14 59(a) motion they are very limited. There are only three
15 grounds for the 59(a) motion. Much, if not all, of what
16 has just been argued is not before the Court.

17 The grounds that this motion was filed on is whether
18 or not the Court in determining whether the Federal
19 Arbitration Act applies incorrectly focused on my client's
20 activities rather than the activities of the firm, whether
21 the Court improperly delegated the ruling on the issue of
22 arbitration was unconscionable to me, and whether the Court
23 failed to recognize and evaluate the factors which render
24 arbitration clauses reasonable and conscionable especially
25 as between sophisticated parties.

1 It appears from the memorandum they've dropped the
2 second ground which alleges that there was something
3 improper, I guess, about the way that the order was
4 prepared.

5 But I do want to point the Court's attention to the
6 fact that this -- this hearing was argued in early
7 December, December 10th, counsel was present, briefs were
8 filed and submitted. After the fact you permitted
9 additional submissions, all of which were done six weeks
10 before you ever signed an order in this case. The order,
11 proposed order went to the other side. They had plenty of
12 opportunity to change the order, to file a motion to amend
13 or alter, which they never did. Instead they filed a
14 limited Rule 59(a) motion.

15 It's our position that there's no reason for you to
16 rehear this matter. The issues that were before you were
17 well presented, documented well, taken under advisement by
18 you for six weeks. And all this is today is an attempt to
19 have a second bite at the apple. You had all the law in
20 front of you. And to the extent that I now hear you say
21 ---

22 THE COURT: Here's your -- the motion. Thank
23 you.

24 MS. BLOODGOOD: That's -- Maybe the order should
25 have ---

1 THE COURT: I appreciate your argument and I
2 understand what you're saying, but let me hear you on the
3 basis for the merits of her argument.

4 MS. BLOODGOOD: Okay.

5 THE COURT: What's your position on the
6 interstate commerce issue?

7 MS. BLOODGOOD: On the interstate commerce issue,
8 as I argued before, this is a contract for personal
9 services between a lawyer, licensed to practice only in
10 South Carolina, and a law firm, licensed to practice, who
11 only has law offices in South Carolina.

12 I -- I respectfully object to some of the new facts
13 that have been submitted today. A lot of the material
14 handed up to you was work that was done by my client prior
15 to the time the arbitration clause was presented to her and
16 therefore irrelevant to this issue.

17 To the extent we already argued in the other hearing
18 that there were e-mails, there were some videotape, and
19 that she did do a little bit of out-of-state work
20 associated with the case that she was handling, in my
21 opinion and in the cases we've already cited to the Court
22 and are cited in the order, that alone is not enough to
23 turn a contract for personal services into a -- something
24 that affects interstate commerce.

25 Your Honor, there's got to be a distinction between

1 inter and intra. They're two different words. And I know
2 inter is broad.

3 THE COURT: What's the distinction?

4 MS. BLOODGOOD: The distinction is ---

5 THE COURT: From your perspective because Ms.
6 Blackburn's position is very clear that because she was
7 involved with clients and involved in phone calls and
8 activities in and out of the state that interstate commerce
9 was affected. Intrastate is just local.

10 MS. BLOODGOOD: Right. And the distinction, Your
11 Honor, is we're not talking about a contract between the
12 law firm and a client. We're talking about a contract to
13 perform -- an employment contract to perform services as an
14 associate to a law firm in South Carolina.

15 THE COURT: What about the cases? I don't
16 remember you citing the case of the health-care facility
17 and the employee dealing on the phone with the clients out
18 of state.

19 MS. BLOODGOOD: The ---

20 THE COURT: Why isn't that the same thing we have
21 here?

22 MS. BLOODGOOD: The Towles case, which is the New
23 York case, is distinguished on the basis that the employee
24 -- the headquarters of that corporation was outside the
25 state and therefore the employee actually was reporting

1 outside the state.

2 THE COURT: I'm not trying to be smart with you,
3 but if I made a mistake I'll correct it irrespective of
4 whether it's 59(a) or 59(e). Okay? So base your argument
5 on that, okay. That's my concern if whether I made a
6 mistake and that's what the motion for reconsideration --
7 generally, it's for the Courts to correct themselves. And
8 I have done that on, I won't say several occasions, but I
9 have corrected myself on some motions.

10 MS. BLOODGOOD: The -- The case that we cited ---

11 THE COURT: So don't give up any of your
12 arguments for appellate, okay?

13 MS. BLOODGOOD: The case that was cited for the
14 employee in the nursing home, the Thornton case, the South
15 Carolina case, that employee was recruited from out of
16 state as Ms. Blackburn said. I think that's -- that's
17 different.

18 Here we have an employee who's licensed, only licensed
19 to practice in South Carolina, and a law firm only doing
20 business in South Carolina. There's no -- It's not like
21 the law firms that are -- have business licenses outside of
22 the state. Mt. Pleasant is the only place that law firm
23 can practice law. And what my client was doing is
24 providing legal services to her employer in Mt. Pleasant.

25 Now, yes, she may have to get on the Internet and she

1 may have to check a case. You know I guess you could argue
2 that when you use Lexis you somehow ---

3 THE COURT: Well when you litigate the argument
4 on Westlaw's -- It's all on computer now.

5 MS. BLOODGOOD: That's right, Your Honor. And
6 that's my -- my -- my -- my problem with this case. This
7 is a case, an employment case between people who generally
8 employment might be more apt to be performed outside of
9 the state, but in this case we are significantly limited
10 because the only employment that my client can do, she was
11 licensed to do in South Carolina, and the only work the law
12 firm can do, he's licensed and got a business license to do
13 in South Carolina.

14 So the other -- the other ancillary, insignificant
15 work that she does is just that. It is not enough to say
16 that an associate practicing law in Mt. Pleasant, taking
17 directions from a partner in that law firm, is affecting
18 interstate commerce. There is no South Carolina case on
19 point that says that, Your Honor.

20 And the cases that are cited from New York and the
21 other places are all distinguishable based on the fact that
22 the facts are different. And they're not lawyers and
23 they're not practicing law. So that's the difference
24 between -- between this situation and an employment
25 situation such as the one in Towles where the person

1 actually reported to a member company that had offices
2 outside of South Carolina.

3 If you've already decided on the unconscionable I
4 wouldn't address that. I would still like to ---

5 THE COURT: On the what?

6 MS. BLOODGOOD: On the issue of
7 unconscionability. Do you want me to address that or not?

8 THE COURT: Yeah, that's fine.

9 MS. BLOODGOOD: Your Honor, -- And I -- And I --
10 It's -- I see it like this. I know that we have two
11 sophisticated lawyers. On the other hand it's a power ---

12 THE COURT: We do have a South Carolina case that
13 says arbitration clauses generally aren't unconscionable.
14 That came down about five or six years ago if I'm not
15 mistaken.

16 MS. BLOODGOOD: Off the top of my head, Your
17 Honor, I'm not really sure.

18 THE COURT: I won't say unconscionable. I think
19 the case said they were not cohesion contracts. You've
20 got to have a cohesion contract before you get into
21 unconscionability. I think it said it was not a cohesion
22 contract.

23 MS. BLOODGOOD: I think -- There is language
24 about cohesion in the cases that talk about arbitration.

25 But what I would like to present to the Court is that

1 as -- And I stated this at the first hearing. Whether you
2 have two engineers or two doctors or two lawyers, when you
3 have somebody in a position of being the employee and the
4 employer, the employer yields power over the employee and
5 puts them in a position of have -- of being able to coerce
6 or require behavior. That's -- That's just how it is.

7 In this case, six months after she had already been
8 working there she's presented with an arbitration clause.
9 Should she have said I'm not going to sign that, I'm not
10 going to agree that I'm never going to have witnesses at my
11 arbitration, which as -- if you recall that's what the
12 arbitration clause says, no witnesses. Yes, maybe she
13 should have. And would she have been without a job? Yeah,
14 probably. And that's -- that's what I'm saying.

15 There is an element of unconscionability by any
16 employer saying to an employee six months into employment
17 when they have left a job, have a lot of things going, sign
18 this arbitration clause. I -- I think there is an element
19 of unconscionability about that. And -- And they meet
20 cohesion or coercion.

21 THE COURT: Is it cohesion or adhesion? Let me
22 hear you.

23 MS. BLOODGOOD: I don't know, Your Honor.

24 MS. BLACKBURN: I can grab that, Your Honor.
25 I've got that case.

1 THE COURT: All right.

2 Well what was the facts in that case? I mean I've
3 always said that these Verizon contracts and these
4 automobile contracts where people buy cars are adhesion
5 contracts. There's no such animal.

6 MS. BLACKBURN: Your Honor, this was a financing
7 agreement case. That's in Munoz v. Green Tree and the
8 employment agreement contained an arbitration provision and
9 the other side claimed, hey, this was an adhesion contract.

10 THE COURT: Right.

11 MS. BLACKBURN: And the Court said, it doesn't
12 matter. Even if it's an adhesion contract the arbitration
13 provision is enforceable and it can't -- And I -- I won't
14 take over Ms. Bloodgood's argument, but that was the case
15 that was looked at.

16 THE COURT: So they've got no consciounability
17 argument.

18 MS. BLACKBURN: Well that was the issue they were
19 looking at. They were trying to say it was unconscionable
20 and the Court said even an adhesion contract is not
21 unconscionable because, and what they cite, the case law in
22 South Carolina that if you sign an agreement you're bound
23 to have read that agreement and it doesn't matter that -- I
24 mean you sign -- you signed it; you could have -- you could
25 have not, you know, refused to sign it.

1 THE COURT: Thank you very much.

2 Go ahead.

3 MS. BLOODGOOD: Your Honor, one of the things I
4 argued at that first hearing in December is it is
5 unconscionable as a matter of law to say that you can't
6 have witnesses at an arbitration because our rules of court
7 allow witnesses at hearings. And so I guess -- That was
8 all in front of you ---

9 THE COURT: Where is that in the contract? I had
10 it just a second ago.

11 MS. BLOODGOOD: If it's been handed up to you, I
12 can point it out to you.

13 THE COURT: Here it is.

14 MS. BLACKBURN: Your Honor, I think it's on the
15 second page.

16 THE COURT: Thank you.

17 MS. BLACKBURN: And it's a limitation on live
18 witnesses at the arbitration.

19 THE COURT: Okay.

20 So basically your position is when the arbitration
21 agreement limits it to just the parties in the litigation
22 and not witnesses that makes it unconscionable.

23 MS. BLOODGOOD: When it takes a process that
24 should be fair and tries to twist it into something that is
25 inherently unfair that is unconscionable.

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1 THE COURT: Okay.

2 Anything else?

3 MS. BLOODGOOD: No, Your Honor. The only thing I
4 would point out is that in the 44-page memorandum that
5 Plaintiff has filed yesterday afternoon there are a lot of
6 facts that were not before you at the first hearing and
7 that are not supported by affidavits or anything in the
8 file. And to that extent I would ask you not consider
9 those facts.

10 THE COURT: Okay.

11 MS. BLOODGOOD: Because I don't think this is a
12 rehearing. I think it's -- Under either (e) or (a) it's
13 based on what's already in the record and before you. And
14 everything that is in the record was already in the record
15 six weeks before you issued your order so there shouldn't
16 be anything new. The documents that were handed up today
17 aren't correct and I would object to those statements
18 there.

19 THE COURT: Well, some of the cases say that you
20 can't -- the parties cannot raise prior-to-judgment issues.
21 You can't raise issues that weren't raised at the first
22 hearing. But I don't -- Do you have a case that says they
23 can't come in with proper affidavits and raise facts that
24 weren't raised at the first hearing as to the same issues
25 that were raised?

1 MS. BLOODGOOD: I think I ---

2 THE COURT: I understand there are some cases
3 that say you raise your issues initially on your motion to
4 reconsider; you can't add new issues to it. But I don't
5 know anything that says they can't add additional facts as
6 to the issues that were raised in the first hearing. Is
7 that right or is that wrong?

8 MS. BLOODGOOD: Under 59(a) ---

9 THE COURT: That's under 59(e), those cases.

10 MS. BLOODGOOD: Under 59(e) for motion to alter
11 or amend judgment ---

12 THE COURT: Right. That's under 59(e) those
13 cases -- involving those cases ---

14 MS. BLOODGOOD: What the appellate court ---

15 THE COURT: 59(a) ---

16 MS. BLOODGOOD: Well the cases I've read on the
17 59(e), what the appellate courts say is that if the issue
18 was not raised and considered by the judge or the jury,
19 then on appeal it cannot be raised for the first time.

20 THE COURT: I agree with that.

21 MS. BLOODGOOD: And I what I think they're trying
22 to do is to insert additional facts after -- without having
23 filed, timely filed, a 59(e) motion. So to the extent
24 those affidavits include additional facts I think that's
25 just an end around what they're -- what the process is. We

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1 had a hearing. We had plenty of opportunity -- You were
2 more than generous in allowing the record to be
3 supplemented after the fact. And to the extent that they
4 had that opportunity and failed to bring up any of these
5 facts we're hearing today I do have a problem with that.

6 THE COURT: Okay. Thank you very much.

7 Ms. Blackburn?

8 MS. BLACKBURN: Your Honor, with regard to these
9 -- to the issue of the facts not before you, one thing
10 that's not in the timing of all this is at the last hearing
11 there were two things we were going to do. We asked if we
12 could submit documentation and file that under seal and we
13 got some cases to you on the interstate commerce issue.

14 The document -- you said, yes, we could file the
15 documents under seal. Your order though -- We didn't file
16 it until after your order. That makes -- Because we
17 couldn't file it until we had your order. So from a timing
18 standpoint there are documents and there are discussions
19 about facts that were filed after your order because that's
20 the order that gave us the right to file that.

21 All these other issues we had addressed, and quite
22 frankly, one of the reasons we had to file all this stuff
23 or get it to you is because of the representations that Ms.
24 Bloodgood made on behalf of her client at the last hearing
25 that she didn't do anything in interstate commerce.

1 I -- I mean I'm sure this is naivety on my part, but I
2 was a little surprised that she was going to sit there and
3 say she didn't -- she wasn't involved in interstate
4 commerce on all -- any of these cases.

5 So my argument would be this was before you. I mean
6 it was addressed. The issues were addressed at the last
7 hearing. And the documents, a lot of them were filed
8 afterwards, but under your order that allowed us to file
9 them.

10 Let me just mention one thing. She made a couple of
11 statements I want to address. Work that was done prior to
12 the employment agreement. There may have been some work on
13 cases that she did in those six months prior to the June
14 2006 employment agreement, but I'm only talking about cases
15 that are specifically referenced in the employment
16 agreement.

17 So although she might have done some work on them, she
18 didn't have a right to a 15 percent bonus on them until
19 that employment agreement was signed and that's why it's
20 relevant because the cases are addressed in the employment
21 agreement. For example, Harper. Harper's in the
22 employment agreement and she had a bonus on that one.

23 I think I can correct the problem on the cases. Ms.
24 Bloodgood said I'm citing cases from other jurisdictions.
25 The only time I cited a case from another jurisdiction I

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1 told you it was a New Jersey case. The case that -- The
2 Towles case is a South Carolina Court of Appeals case. And
3 I think she's just gotten the cases mixed up. This was not
4 the recruiting agreement with out-of-state commission.

5 This was a case where the Court said, All right, we're
6 looking at whether the FAA applies, the Court of Appeals.

7 The Court said the phrase, Evidencing a transaction in
8 interstate commerce only requires the transaction and facts
9 involve interstate commerce even if the parties did not
10 contemplate an interstate commerce connection.

11 And then the Court says, To ascertain whether a
12 transaction involves commerce within the meaning of the FAA
13 the Court must examine the agreement, the complaint, and
14 the surrounding facts.

15 And the next sentence is it's finding, which is,
16 Towles responsibilities included helping to establish
17 medical policy, overseeing utilization review and quality
18 management for plan participants, attending out-of-state
19 conferences, participating in telephone conferences with
20 United's corporate medical affairs staff in Minnesota,
21 reviewing claims from out-of-state providers and specialty
22 providers located in North Carolina and Georgia.

23 That's their finding. They're saying these things,
24 you know, in South Carolina that he's doing all this stuff,
25 other than going to out-of-state conferences, and Ms.

1 Meyers certainly went out of state, but the point is, he's
2 in South Carolina doing this and this -- and the Court of
3 Appeals said interstate commerce is involved, the FAA
4 applies, and displaces the South Carolina Uniform
5 Arbitration Act.

6 So that's the main case that I was saying was so
7 similar to this case.

8 Oh, if I -- Oh, do you have a question?

9 THE COURT: No. Go ahead.

10 MS. BLACKBURN: Okay. My -- My next -- I was
11 just going to address very briefly the unconscionability.

12 THE COURT: Well that's what I was going to ask
13 you. Let me retract what I told you earlier.

14 MS. BLACKBURN: Okay.

15 THE COURT: Let me hear you on her argument about
16 whether, you know, ---

17 MS. BLACKBURN: Okay. Your Honor, ---

18 THE COURT: --- in the agreement it says the
19 parties can be the only witnesses called in person. Why
20 doesn't that make it unconscionable? Why shouldn't she be
21 able to call witnesses on her behalf?

22 MS. BLACKBURN: Well, let me -- I'm going to back
23 into that argument if I can.

24 THE COURT: Okay.

25 MS. BLACKBURN: First of all, it's clear under

1 South Carolina law, the cases are cited in the brief, you
2 can sever any part of an arbitration agreement that's
3 unconscionable. If you say, I don't think that's right
4 that they can only call one witness, you can sever that and
5 enforce the rest of the arbitration provision and Courts
6 have done it over and over. So that's clearly the law of
7 the state.

8 Secondly though, the whole point is to avoid, just
9 have one witness at trial. It doesn't prevent her from
10 taking depositions, doing written discovery, getting
11 affidavits, and bringing all that to the hearing. It's a
12 way of expediting things. It's a way of having the primary
13 ---

14 THE COURT: Well, you're saying that's one
15 interpretation. But another interpretation would be you're
16 going to have one witness, period, at trial, and that's
17 going to be up to the arbitrator I would assume.

18 MS. BLACKBURN: Actually, Your Honor, we ---

19 THE COURT: I mean so I can -- you can -- That
20 cuts both ways.

21 MS. BLACKBURN: Well we had filed, you know,
22 before the lawsuit was filed the claims were originally
23 made, which is why I keep calling -- calling her the
24 Plaintiff because she's making the claims. But we filed an
25 arbitration.

1 There is an arbitration pending right now before the
2 National Arbitration and Mediation, NAM. And in the
3 documents that we filed under seal tab thir -- 14 are the
4 employment rules and procedures and that's what it's filed
5 under. And they specifically allow for discovery,
6 depositions, written discovery.

7 In fact NAM, because they're employment rules, NAM is
8 so concerned about making sure it's fair to the employee,
9 the employee pays a \$60 filing fee. Initially the firm
10 pays for everything else, all the arbitrator fees, I mean,
11 it's everything. The arbitration fee I think is six-
12 hundred-and-something dollars on our side. She pays a \$60
13 fee. That's it.

14 And so the NAM rules control. I mean if we filed
15 under the American Arbitration Association those rules also
16 are very fair to the employee.

17 This provision -- And you can't read into something
18 that's not there. In fact we go to the arbitration, Ms.
19 Meyer has every right to say, I want discovery, I'm going
20 to bring affidavits. It's just that the witnesses that
21 would be called at the arbitration would only be Mr. Lucey
22 and Ms. Meyer since the dispute is over this employment
23 agreement that the firm and Ms. Meyer entered into.

24 Again though, if you -- And there is no doubt that if
25 you wanted to sever that provision, you could sever that

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1 provision and cite the -- There's an extreme cite of cases
2 for that.

3 You know, Your Honor, for the rest of the
4 unconscionability argument, what this is is somebody who's
5 very sophisticated who's been to law -- college, graduated
6 from college, law school, graduated from law school, has
7 her cert -- or license, she's a licensed CPA. She
8 practiced certified public accounting for several years.
9 She was four years with the Solicitor's Office before she
10 came to work for Mr. Lucey, specializing in white-collared
11 crime, not exactly a, you know, unsophisticated area of the
12 law, and she entered into this arbitration agreement, this
13 employment agreement. She never objected to the
14 arbitration clause. Never.

15 And the case law says if you're going to point to
16 unconscionability, it's got to be unconscionability as to
17 the arbitration clause, not as to the entire employment
18 agreement.

19 Judge Duffy looked at that, this whole -- this issue,
20 in a case that is Brown v. Green Tree Services, and I think
21 I've handed that case up to you too. There the Plaintiff
22 who was trying to get out of the arbitration clause was
23 illiterate, Plaintiff was illiterate. And Judge Duffy said
24 -- And see Plaintiff said, I didn't have a meaningful
25 choice; I couldn't read the agreement.

1 And Judge Duffy concludes, and this is a quote, Even
2 though the Plaintiff was illiterate, he is bound to have
3 the paper read to him before signing it, just as a person
4 who can read it is bound to read it before signing it.

5 She just doesn't like the fact that she got stuck with
6 an arbitration provision. Now she wants to be in Court.
7 But she wants to enforce the remainder of the contract,
8 which she claims allows her hundreds of thousands of
9 dollars on contingency fees that the firm received.

10 So this is a case where somebody looks back and says,
11 Hmm, I only like that part of the deal; I think I'm going
12 to say that wasn't fair, I didn't really have a meaningful
13 choice, but I did have a meaningful choice as to this bonus
14 that I'm demanding that you pay me.

15 THE COURT: Okay. Thank you very much.

16 MS. BLOODGOOD: Your Honor?

17 THE COURT: I appreciate those arguments.

18 Ms. Bloodgood, in fairness to you I am going to
19 consider what's been submitted. I will not consider any
20 new issues. If there's anything that you want to submit to
21 counter that I'll be happy to give you a certain timeframe
22 to get it to me.

23 MS. BLOODGOOD: The only thing I'd like to
24 present, Your Honor, is I do have a document from the --
25 from when we were first asked to arbitrate, which clearly

1 states no witnesses. So we were never in a position to say
2 we want a fair arbitration.

3 THE COURT: Okay. I'll give you ---

4 MS. BLOODGOOD: I'll find that document.

5 THE COURT: I'll give you -- How much time do you
6 need to submit whatever you want to submit to me by
7 affidavit or document or whatever?

8 MS. BLOODGOOD: Tomorrow is fine, Your Honor.

9 THE COURT: Tomorrow?

10 MS. BLOODGOOD: It's in my box somewhere.

11 THE COURT: Pardon me?

12 MS. BLOODGOOD: It's in this box somewhere.

13 THE COURT: Okay. All right. I'll give you ten
14 days. Okay.

15 MS. BLOODGOOD: Okay.

16 MS. BLACKBURN: Your Honor, just one other thing,
17 those documents that I handed up to you have retainer
18 agreements with clients and all and I don't know if those
19 might somehow end up being filed, but I just want to make
20 sure they were under seal if they are.

21 THE COURT: Which ones ---

22 MS. BLACKBURN: I had to file ---

23 THE COURT: --- are you talking about?

24 MS. BLACKBURN: --- separately.

25 The ones that I gave you in the blue folder.

1 THE COURT: Yeah, that is -- This is not taped
2 up, but it should be taped, you know.

3 THE CLERK: They have it in a separate file.

4 MS. BLACKBURN: Yeah, that would be -- It's just
5 ---

6 THE COURT: They had it in a separate file for
7 me.

8 MS. BLACKBURN: That's stuff that's in your -- in
9 your folder. This is the stuff, Your Honor, that I have
10 ---

11 THE COURT: You need to put some kind of seal on
12 it.

13 MS. BLACKBURN: Okay.

14 THE CLERK: They've got the sealed documents in a
15 locked cabinet.

16 THE COURT: Okay. All right.

17 MS. BLACKBURN: Okay. I just wanted to make
18 sure.

19 THE COURT: It's under seal.

20 MS. BLACKBURN: Okay.

21 THE COURT: Thank y'all very much.

22 MS. BLOODGOOD: Your Honor, just one other point,
23 I thought we weren't going to have new facts as of today.
24 And that's what those documents are that she handed up to
25 you.

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1 THE COURT: All right. I'm giving you an
2 opportunity to give me any facts you want to give me that
3 you didn't give me last time. That's what I'm giving you
4 ten days for. Okay?

5 MS. BLOODGOOD: Okay.

6 THE COURT: All right. I'm not going to consider
7 any new issues. I'll be happy to receive any facts that
8 you want to present to me on those issues. Okay?

9 MS. BLOODGOOD: All right. Thank you.

10 THE COURT: All right. Thank you very much.

11 ***END OF REQUESTED TRANSCRIPT OF RECORD***
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CERTIFICATE OF REPORTER

I, the undersigned Missy Brown, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Charleston County, South Carolina, on the 2nd day of March 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

July 15, 2010

Missy Brown

Court Reporter

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Amy:

As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalize, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

I have offered you a job where you will be paid a monthly salary, beginning at 3k per month during training; and increasing to 50k per year after training. *It has already increased to 50k.*

You will additionally be paid a bonus based upon fees earned on contingency cases spearheaded by you.

Your bonus on your contingency cases will generally be ten percent of the net fee earned by the firm. Net means net; if there is a reduction in fees for un-recouped expenses or fee sharing with another firm, your cut shall be calculated on the reduced fee. The percentage of your bonus may be increased or decreased by prior agreement (for matters such as staffing or case size)

There is no post departure bonus of any kind unless the case settles pre departure and pays within thirty days of departure.

I will pay for your legal CLE's; to the extent that you can make them overlap with your accounting CLE's, that is fine. In theory, you are generally expected to do your CLE's and personal professional obligations on your own time by making up time. However, if you are typically working 45 hours per week, and more on trial weeks, there won't be any time to make up.

I pay your health insurance, your mal practice insurance, employer payroll taxes, and deposition school. You may add dependants to the health policy at your expense. I will pay for your Setla membership and your bar membership. I will also pay for you to attend the SCATLA convention in Hilton Head once every three years. You will pay for any benefit not listed herein.

You will get two weeks off per year; three after five years. There is up to five sick days per year as needed for illness. Paid holidays total an additional ten business days (two weeks) per year off in addition to vacation time. (You are aware that we do some forced vacation at Christmas).

I will provide a laptop for your use..

You are generally expected to be in the office during office hours, which in the past have run from 8:30 to 5:30, with a one hour break for lunch; but which currently run from 9-5 with lunch eaten at desks. Unless up for trial or behind schedule, we try to close at 3pm on Fridays. You are also expected to spend 1-2 hours organizing your week sometime between late Friday and early Monday. It is anticipated that you will need to do project work one nite per week (more if in deposition or in trial). You should generally anticipate a forty five hour work week, exclusive

of breaks. Obviously, trial and trial preparation weeks are more hours.

Now for some legalize:

You agree that client confidentiality, and the activities within our firm are absolutely confidential; and that you will maintain that confidentiality at all times, absent a lawfully issued subpoena. If you are subpoena'd, you will promptly provide me with notice of the subpoena and an opportunity to contest it.

Until or unless we agree otherwise, I have sole client/case acceptance and assignment responsibility.

You agree not to moon light or accept compensation from any other source. You agree not to refer out clients without my express instruction.

This agreement may be terminated by either one of us on thirty days written notice without cause. After two years, the notice period will be increased to six weeks.

You agree that the office clients and files belong to my firm and that should a separation occur, you will not attempt to take any files or clients with you. For any files and clients you end up with for any reason, I will be entitled to payment of 75% of all fees earned on the case, and reimbursement of all expenses.

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on a arbitrator, I will chose one, you will choose one, and the two will chose a third.

Subsequent Modifications

As we prepared for the Cusack trial, I provided you with an additional compensation term to compensate you for extra time spent in trial prep or trial on my cases. I communicated to you that you would be paid a bonus on my cases which you try to a verdict with me of 5% of the net fee recovered after verdict.

Secondly, I have been meaning to tell you that given various factors present in the Harper case, I am bumping your bonus to 15% on that case. If our co-counsel still receives a full 50% cut of the gross fee, I will bump your bonus further to 20%.

The continency cases you are currently spearheading include Harper, Shoshan, Hanson, and Turner.

You are currently eligible for a trial bonus on Cusack to the extent we collect. You will have other trial bonus opportunities in the coming year.

Since we did not go to verdict on Planters Place, I am working on doing something(s) for you for

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your help in that case. On a semi-related matter, I think we have previously discussed some sort of retirement benefit. I am working on that now and will address it separately.

Lastly, I am working on modifying your trial bonus formula on my cases so that you will (1) give me candid trial assessment even if it jeopardizes your bonus; and (2) not feel let down if the case settles before verdict. I anticipate that so long as you are employed here, you would be participating in any case I try.

- Therefore, I propose to give you a bonus of 1% of the fee earned on any settlement which occurs after the case is called to trial (date certain or top of the roster) and is ready for trial if you have shared the load with me in getting the case ready for trial. Being ready for trial will be defined as having filed the trial brief, voir dire, jury charges, initial publication, and motion in limine; and having the first day's witness's and the expert ready to testify.
- This amount of the bonus will increase to 2% on fees earned after the jury is sworn and will increase to 3% on fees earned after the plaintiff rests.
- Should we go to verdict before recovery, the bonus is the original 5%.
- Should an appeal be necessary, you will spearhead that effort to defend our verdict.
- As always, these bonuses are only on amounts actually collected during your employment (or agreed to during your employment and collected within 30 days thereafter).

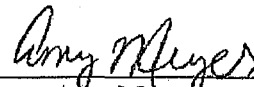
Separately, I am now adding a 5% bonus to the 5-6 collection matters you are handling for me. This is intended to give you an opportunity for some extra bonus money while we are building your pipeline.

I will compute your bonus each time a client disbursement is prepared and add it into the following paycheck.

I am also ready to send you to the one week Nita Trial seminar; or the longer one in Bolder Colorado. There are two one week sessions in June and the National session in July (10-12 days). Please go to Nita.com and take a look. While I am paying your expenses and salary during this seminar, your attendance does require that you have your other work sufficiently under control in advance; and may be preempted by any trial, although I think we can schedule around that.

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by countersigning below and returning to me at your convenience. If you first need a meeting to discuss, just let me know. I still want to meet with you about workplace arrangements to see if any improvements to your situation would enhance your job performance or enjoyment.

Justin Lucey


Amy Meyer

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Amy:

Thank you for meeting with me Friday on job issues. Its my perception that part of your recent concern is probably motivated by me having to take over the spear heading of the Ocean Club case; and the potential affect of this on your commission arrangement. Conversely, if you are not spearheading the Ocean Club case, you are concerned that you are not getting enough time in on definite bonus files. Here is what I would suggest.

First of all, I am willing to agree on a definite Ocean Club bonus percentage that does not depend on you spearheading the case. The amount of the bonus can be 6% if you intend to reduce your hours and commitment somewhat; or it can be the original 10% if you continue to give the case your energetic commitment (and agree to allow me to focus your efforts). As an aside, while I have taken all but the Courtney deposition so far, I have tried to give you some of the depositions; and I would like for you to be taking some of the future depositions. I also feel that our growth curve is such that its not necessary for us to be both sitting in the depositions; that is a luxury we can save for the most important depositions.

Secondly, with regards to the length of time prior to payout, prior to these issues arising, in early April, I had already made arrangements to deliver to you a \$10,000 advance on your Ocean Club work; I went to the bank to get the check last Monday morning prior to our meeting; but I did not broach it with you on Monday when I perceived on Monday that you had other issues which apparently needed to be aired. If you are going forward under the above arrangements, you are welcome to this check, which is in my office. If for any reason you leave prior to Ocean Club being resolved, you have no obligation to repay this.

Additionally, you have a trial bonus of 6% coming this month on the Cusack settlement; as the fee is \$52,632 (36% of 146.2k), the 6% results in a bonus check of \$32,632 to you (before taxes).

Additionally, you have a spearheading commission of 20% in Harper; my tentative calculation of this bonus from memory is this: 250k settlement; 34% fee totaling 85k; 50% split with Vernida Hill results in a fee to our firm of 42.5k; 20% to you results in a bonus of \$8,500 (this needs to be checked).

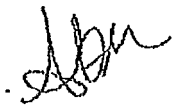
Including the advance on Ocean Club, this would result in bonus payments to you of \$21,132 over the next four weeks or so. This is in addition to the 401k contribution from Bees Ferry. It appears to me that you have a number of other cases which will bonus this year that will boost your pre Ocean Club compensation to over \$90,000 for the year. I expect some partial Ocean Club settlements this year and the final resolution by early next year. This appears to me to be a reasonable compensation package. Please let me know if you disagree.

~~If you would prefer a higher fixed income and lower variable income than the current set up, I am happy to consider your suggestions. FYI, I do anticipate Sallie subcontracting services to us in the near future, so she may be able to lighten our load just a bit. If she does not, I will continue to look for another qualified candidate.~~

If you would prefer to diversify your case load, please let me know.

Regardless of the above, I need you 100% on board if you stay here. I can't have dissent in the office. Please prioritize resolving this. I am glad you took Monday off and I hope you are refreshed.

Justin



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HOLD DOCUMENT UP TO THE LIGHT TO VIEW TRUE WATERMARK

OFFICIAL CHECK

HOLD DOCUMENT UP TO THE LIGHT TO VIEW TRUE WATERMARK

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To Citibank, N.A., Buffalo, NY 10-867220

DATE 04/11/2007

\$10,000.00

DOLLARS

PAY Ten Thousand and 00/100*****

PAY TO THE JUSTIN O'TOOLE LUCEY, PA
ORDER OF

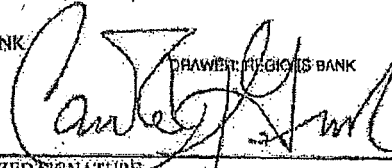
CYG2040

NAME OF REMITTER JUSTIN O'TOOLE LUCEY, PA

REGIONS BANK

DRAWN: REGIONS BANK



BY 
AUTHORIZED SIGNATURE

*Paid to my sister as advised
L on Owen Club*

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REGIONS 
BANK

DATE 04/11/2007

\$10,000.00

DOLLARS

PAY Ten Thousand and 00/100*****

PAY TO THE JUSTIN O'TOOLE LUCEY, PA
ORDER OF

CYG2040

NAME OF REMITTER JUSTIN O'TOOLE LUCEY, PA

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PURCHASER'S COPY
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Received

5/4/07

Anthony M. Lucey

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National Arbitration and Mediation ("NAM")
Employment Rules and Procedures
990 Stewart Avenue, First Floor
Garden City, NY 11530
Telephone: 1-800-358-2550
Fax: 516-794-8971
www.namadr.com

NAM EMPLOYMENT RULES AND PROCEDURES
DEMAND FOR ARBITRATION/ARBITRATION REQUEST FORM

EMPLOYER (CLAIMANT) INFORMATION

Name(s): Justin O'Toole Lucey, P.A.
*Contact Person or Counsel: Cherie W. Blackburn
Address: Nexsen Pruet, LLC
Post Office Box 486, Charleston, SC 29402
Phone: 843-720-1728
Fax: 843-414-8236
Email Address: cblackburn@nexsenpruet.com

EMPLOYEE (RESPONDENT) INFORMATION

Name(s): Amy K. Meyer
Social Security #: _____
*Contact Person or Counsel: Nancy Bloodgood
Address: The Foster Law Firm, LP
3875 Faber Place Drive, Suite 204, North Charleston, SC
29405
Phone: 843-744-7828
Email Address: nbloodgood@fosterfoster.com
Fax: 843-577-0434

*if applicable

RESPONDENT(S): Please take notice that pursuant to NAM's Employment Rules and Procedures which provide for Arbitrations of disputes arising thereunder, the Claimant identified above hereby demands Arbitration of a claim against you. These Rules and Procedures shall apply to all matters referred to NAM as a result of a pre-dispute Arbitration contract provision entered into by mutual agreement between the parties. You have twenty-one (21) days to serve the Claimant and NAM with a Reply to this Demand for Arbitration/ Arbitration Request Form by messenger service, overnight delivery service by a nationally recognized courier company or by certified mail. If you do not serve the Claimant and NAM with a Reply within 21 days of service of this Notice, the Arbitrator may enter an award against you.

This matter is to be resolved by arbitration. Such arbitration is to be conducted as an oral, in-person arbitration.

*The cost of the Arbitration is as follows: a filing fee, an administrative fee and hourly arbitrator fees. The Employer shall be responsible for all fees relating to the administration and hearing of this matter other than the filing fee. The administrative fee is non-refundable and shall be sent to NAM by the Employer with the completed Demand for Arbitration/ Arbitration Request Form. The Employee is responsible for the filing fee (such fee is currently \$60) and shall be sent to NAM along with the completed reply to the Demand for Arbitration/ Arbitration Request Form. As such, NAM's Fees and Costs for Employment Disputes Schedule is a part of this agreement. **FEES AND COSTS ARE EFFECTIVE AS OF 07/01/09. ALL FEES WILL AUTOMATICALLY INCREASE BY 2.75% ANNUALLY AS OF JULY 1ST OF EACH YEAR.**

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EMPLOYER SECTION:

Please fill out the information requested below.

Position of Employee: Associate

Status: (full or part time) full time

Date of Hire: January 2006 Date of Incident: July 22, 2009

Location of Employment: Mt. Pleasant, SC

CLAIM & RELIEF SOUGHT: (PLEASE DESCRIBE & ATTACH ADDITIONAL SHEET IF NECESSARY)

Claimant (Employer) asserts the following claim and seeks the following relief (include amount in controversy, if applicable):

See attached Demand for Arbitration.

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Please include the names of witnesses to this matter, as applicable:

See Exhibit A, Page 2, to attached Demand for Arbitration - Per agreement,
"the parties [are] the only witnesses called in person" at the arbitration
hearing.

Please state how you would like your dispute to be resolved. Please attach additional sheets if necessary.

See attached Demand for Arbitration.

If you will be represented by an attorney, please identify that person and his/her firm in the Employer (Claimant) Information space on the first page of this form.

I hereby submit the above-described dispute for Arbitration. I agree that the decision and award of the Arbitrator will be final and binding as to all claims relating to our employment relationship with the Employee that have been or could have been raised under our Arbitration Agreement with the Employee. I understand that I am responsible for all NAM fees relating to the administration and hearing of this matter (other than the filing fee). However, in the event the Employee does not pay the filing fee, I agree to pay same to NAM.

EMPLOYER by: (signature)

Name: Cherie W. Blackburn

Title: Attorney for Claimant

Date 10/29/09

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EMPLOYEE SECTION: REPLY TO DEMAND FOR ARBITRATION/ARBITRATION REQUEST FORM

The Employee hereby responds to the demand made by the Employer as follows (the Employee should provide a response herein and attach any evidence to support such position):

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

If you will be represented by an attorney, please identify that person and his/her firm and their contact info below:

I hereby submit my response to the above-described dispute for Arbitration. I agree that the decision and award of the Arbitrator will be final and binding as to all claims relating to my employment relationship with the Employer that have been or could have been raised under the Arbitration Agreement with the Employer. I understand that I am responsible for the fees billed to me by NAM. Additionally, unless the Arbitrator rules otherwise, I acknowledge that I am responsible for the fees of my own attorney, should I retain one, subject to the limitations in these Rules.

EMPLOYEE by: (signature)

Name: _____

Date / /

The parties are hereby notified that the Employer has filed copies of the Arbitration Agreement and this Demand for Arbitration/Arbitration Request Form at NAM's headquarters.

Either party may contact the NAM Employment Administrator indicated below in writing at NAM, 990 Stewart Avenue, First Floor, Garden City, New York 11530 or by telephone with questions regarding the Arbitration process or NAM's Employment Rules and Procedures or to request a copy thereof.

Contact the NAM Administrator, _____ at

1-800-358-2550 ext. _____.

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ARBITRATION PURSUANT TO
THE EMPLOYMENT RULES OF THE NATIONAL
ARBITRATION AND MEDIATION

Justin O'Toole Lucey, P.A.,

Complainant,

vs.

Amy Meyer,

Respondent.

DEMAND FOR ARBITRATION

Justin O'Toole Lucey, P.A. ("the Firm") files this Demand for Arbitration and otherwise seeks relief against Amy K. Meyer ("Meyer") and alleges as follows:

BACKGROUND

1. The Firm maintains a law practice located at 415 Mill Street, Mount Pleasant, South Carolina 2946.
2. In or about January 2006, the Firm hired Meyer as an associate attorney.
3. At that time, Meyer had been practicing law approximately five years and had no civil trial experience.
4. In the spring of 2006, the Firm and Meyer entered into an agreement setting forth the terms of her employment.
5. This agreement was amended with regard to the payment of bonuses by letter agreement in the summer of 2007 (the "Bonus Amendment").
6. The original employment agreement and subsequent Bonus Amendment are referred to collectively herein as the "Employment Agreement" and are attached hereto and incorporated herein as Exhibits A and B respectively.

7. Among other things, the Employment Agreement specifies that all disputes related to the Employment Agreement are subject to mandatory, binding arbitration as follows:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

8. Pursuant to the Employment Agreement, Meyer and the Firm agreed, among other things, that Meyer would work for a monthly salary beginning at \$3,000.00 per month and increasing to \$50,000.00 per year after training.

9. Pursuant to the Employment Agreement, the parties further agreed that Meyer would be eligible for bonuses based upon net fees earned on contingency fee cases which she spearheaded. This bonus was agreed to generally be ten percent of the net fee earned by the Firm and could be increased or decreased by prior agreement.

10. The Employment Agreement further provides that "there is no post departure bonus of any kind unless the case settles pre departure and pays within thirty days of departure."

11. In August 2006, the Firm accepted a large piece of litigation ("the Ocean Club case") and initially assigned primary responsibility for spearheading the case to Meyer.

12. As the Ocean Club case progressed, Lucey, the Firm's owner and principal attorney, had to spearhead the Ocean Club case because it proved to be beyond Meyer's experience level.

13. In the summer of 2007, Lucey and Meyer discussed issues pertaining to payment of bonuses to Meyer.

14. Lucey memorialized the content of that discussion in the Bonus Amendment.

15. Pursuant to the Bonus Amendment, with regard to the Ocean Club case, the Firm and Meyer agreed that Meyer would be paid a bonus percentage on the Ocean Club case that did

not depend on her spearheading the case. Specifically, the Bonus Amendment provided that "the amount of the bonus can be 5% if you intend to reduce your hours and commitment somewhat; or it can be the original 10% if you continue to give the case your energetic commitment (and agree to allow me to focus your efforts."

16. Based upon this language, the amount of bonus was in the Firm's discretion depending on Meyer's commitment level and desire to follow Lucey's instructions.

17. As set forth in the Bonus Amendment, by the time of its execution, Lucey had already made arrangements to deliver to Meyer a \$10,000 advance on her bonus payment related to the Ocean Club case.

18. The Firm also paid Meyer bonuses on other cases she worked on and made excess contributions to her 401(k) account.

19. Meyer continued working for the Firm pursuant to the terms of the Employment Agreement.

20. However, Meyer reduced her hours and commitment to her work and the Firm. She failed to give the Ocean Club case her complete energetic commitment.

21. Meyer refused to allow Lucey to focus her efforts and failed to follow his directives.

22. Meyer reduced the number of hours she worked, failed to timely complete memos and other tasks given her, and was often unavailable to Lucey by e-mail or other means of communication during the hours she was not at the office.

23. As a result of the foregoing, on July 21, 2009, Lucey met with Meyer to discuss her employment and inquire as to whether she wanted to make a fresh start and was willing to be committed to the Firm and her duties as an associate or whether she wanted to sever her employment relationship.

24. Lucey formalized his discussions in a letter to Meyer dated July 21, 2009, in which he states: "If you would like a fresh start, please put that request in writing to me and include in it specifics as to what you will change if I give you a fresh start. If you prefer to sever the relationship, pls [sic] turn in your unconditional resignation tomorrow by noon; barring such, this is notice that you are terminated at noon tomorrow."

25. Meyer responded to Lucey by letter dated July 22, 2009, in which she stated that she was not resigning and was unsure of what he had in mind with regard to a fresh start or even why a new beginning was necessary. Meyer did not include any of the specifics requested by Lucey.

26. As such, Meyer's employment terminated at noon on July 22, 2009.

27. The Firm paid Meyer six weeks severance with her final paycheck.

28. To date, the Firm has paid, and Meyer has accepted, \$245,000 in bonus monies from net fees received on the Ocean Club case.

29. On September 18, 2009, the Firm, by and through its attorneys, sent to Meyer's attorney a bonus check in the gross amount of \$120,000 and in the net amount of \$69,939.53 (after taxes) made payable to Meyer and representing a bonus on a disbursement that was paid to the Firm on the Ocean Club file within thirty (30) days of Meyer's departure. This check resulted in Meyer being paid approximately 7.5% on all net fee disbursements received by the Firm on the Ocean Club case through August 21, 2009, said date being thirty (30) days from Meyer's departure.

30. Meyer refused to accept the check sent to her attorney on September 18, 2009, and returned it, through her attorney, to the Firm's attorney on October 13, 2009.

31. The Firm was under no obligation at any time to pay Meyer any more than 5% of the net fees received on the Ocean Club case.

32. Meyer maintains that the Firm owes her 10% of the net fees received on the Ocean Club case, as well as other sums, and has demanded \$499,475 from the Firm.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

33. The Firm repeats and realleges each of the paragraphs above, as if fully set forth verbatim herein.

34. The Employment Agreement is a valid and binding agreement supported by consideration.

35. The Firm has complied with each of its obligations under the Employment Agreement and has paid to Meyer all compensation, vacation, wages, retirement funds, benefits and any other sums, including all bonus monies, due to her under the terms of the Employment Agreement or as a result of her employment relationship with the Firm.

36. The Firm was under no obligation, at any time, to pay to Meyer any more than a 5% bonus on the net fees earned on the Ocean Club case and received prior to or within thirty (30) days of Meyer's departure.

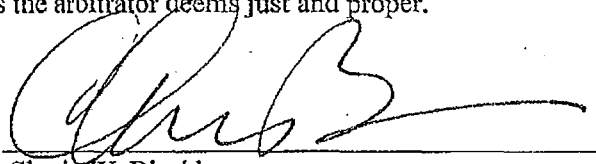
37. The Firm is entitled to a declaratory judgment by the arbitrator pursuant to South Carolina Code Ann. Section 15-53-10, as requested herein.

WHEREFORE, the Firm requests that the arbitrator award the following relief:

A. Declaratory Judgment in favor of the Firm and against Meyer ordering and declaring that:

- (1) The Firm has paid all compensation, vacation, wages, bonuses, retirement funds, benefits and any other sums due to Meyer as a result of her employment relationship with the Firm;
- (2) The Firm has not violated the terms of the Employment Agreement with Meyer;
- (3) The Firm does not owe to Meyer any compensation, vacation, wages, retirement funds, bonuses, benefits or other sums;
- (4) The Firm is not required to pay to Meyer any additional bonus monies on the Ocean Club case or any other case.
- (5) The Firm has no obligation to pay to Meyer any portion of any funds received on the Ocean Club case or any other case after August 21, 2009 (said date being thirty days from the date of Meyer's departure).

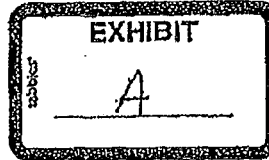
B. Such other and further relief as the arbitrator deems just and proper.



Cherie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29402)
Post Office Box 486
Charleston, South Carolina 29401
Telephone: 803.577.9440
Facsimile: 843.720.1777

October 29, 2009
Charleston, South Carolina

Attorneys for Complainant
Justin O'Toole Lucey, P.A.



Any:

As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalize, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

I have offered you a job where you will be paid a monthly salary, beginning at 3k per month during training; and increasing to 50k per year after training. *It has already increased to 50k.*

You will additionally be paid a bonus based upon fees earned on contingency cases spearheaded by you.

Your bonus on your contingency cases will generally be ten percent of the net fee earned by the firm. Net means net; if there is a reduction in fees for un-recouped expenses or fee sharing with another firm, your cut shall be calculated on the reduced fee. The percentage of your bonus may be increased or decreased by prior agreement (for matters such as staffing or case size)

There is no post departure bonus of any kind unless the case settles pre departure and pays within thirty days of departure.

I will pay for your legal CLB's; to the extent that you can make them overlap with your accounting CLB's, that is fine. In theory, you are generally expected to do your CLB's and personal professional obligations on your own time by making up time. However, if you are typically working 45 hours per week, and more on trial weeks, there won't be any time to make up.

I pay your health insurance, your mal practice insurance, employer payroll taxes, and deposition school. You may add dependants to the health policy at your expense. I will pay for your SCtla membership and your bar membership. I will also pay for you to attend the SCATLA convention in Hilton Head once every three years. You will pay for any benefit not listed herein.

You will get two weeks off per year; three after five years. There is up to five sick days per year as needed for illness. Paid holidays total an additional ten business days (two weeks) per year off in addition to vacation time. (You are aware that we do some forced vacation at Christmas).

I will provide a laptop for your use..

You are generally expected to be in the office during office hours, which in the past have run from 8:30 to 5:30, with a one hour break for lunch; but which currently run from 9-5 with lunch eaten at desks. Unless up for trial or behind schedule, we try to close at 3pm on Fridays. You are also expected to spend 1-2 hours organizing your week sometime between late Friday and early Monday. It is anticipated that you will need to do project work one nite per week (more if in deposition or in trial). You should generally anticipate a forty five hour work week, exclusive of

breaks. Obviously, trial and trial preparation weeks are more hours.

Now for some legalize:

You agree that client confidentiality, and the activities within our firm are absolutely confidential; and that you will maintain that confidentiality at all times, absent a lawfully issued subpoena. If you are subpoena'd, you will promptly provide me with notice of the subpoena and an opportunity to contest it.

Until or unless we agree otherwise, I have sole client/case acceptance and assignment responsibility.

You agree not to moon light or accept compensation from any other source. You agree not to refer out clients without my express instruction.

This agreement may be terminated by either one of us on thirty days written notice without cause. After two years, the notice period will be increased to six weeks.

You agree that the office clients and files belong to my firm and that should a separation occur, you will not attempt to take any files or clients with you. For any files and clients you end up with for any reason, I will be entitled to payment of 75% of all fees earned on the case, and reimbursement of all expenses.

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

Subsequent Modifications

As we prepared for the Cusack trial, I provided you with an additional compensation term to compensate you for extra time spent in trial prep or trial on my cases. I communicated to you that you would be paid a bonus on my cases which you try to a verdict with me of 5% of the net fee recovered after verdict.

Secondly, I have been meaning to tell you that given various factors present in the Harper case, I am bumping your bonus to 15% on that case. If our co-counsel still receives a full 50% cut of the gross fee, I will bump your bonus further to 20%.

The contingency cases you are currently spearheading include Harper, Shoshan, Hanson, and Turner.

You are currently eligible for a trial bonus on Cusack to the extent we collect. You will have other trial bonus opportunities in the coming year.

Since we did not go to verdict on Planters Place, I am working on doing something(s) for you for

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your help in that case. On a semi-related matter, I think we have previously discussed some sort of retirement benefit. I am working on that now and will address it separately.

Lastly, I am working on modifying your trial bonus formula on my cases so that you will (1) give me candid trial assessment even if it jeopardizes your bonus; and (2) not feel let down if the case settles before verdict. I anticipate that so long as you are employed here, you would be participating in any case I try.

- Therefore, I propose to give you a bonus of 1% of the fee earned on any settlement which occurs after the case is called to trial (date certain or top of the roster) and is ready for trial if you have shared the load with me in getting the case ready for trial. Being ready for trial will be defined as having filed the trial brief, voir dire, jury charges, initial publication, and motion in limine; and having the first day's witness's and the expert ready to testify.
- This amount of the bonus will increase to 2% on fees earned after the jury is sworn and will increase to 3% on fees earned after the plaintiff rests.
- Should we go to verdict before recovery, the bonus is the original 5%.
- Should an appeal be necessary, you will spearhead that effort to defend our verdict.
- As always, these bonuses are only on amounts actually collected during your employment (or agreed to during your employment and collected within 30 days thereafter).

Separately, I am now adding a 5% bonus to the 5-6 collection matters you are handling for me. This is intended to give you an opportunity for some extra bonus money while we are building your pipeline.

I will compute your bonus each time a client disbursement is prepared and add it into the following paycheck.

I am also ready to send you to the one week Nita Trial seminar; or the longer one in Bolder Colorado. There are two one week sessions in June and the National session in July (10-12 days). Please go to Nita.com and take a look. While I am paying your expenses and salary during this seminar, your attendance does require that you have your other work sufficiently under control in advance; and may be preempted by any trial, although I think we can schedule around that.

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by countersigning below and returning to me at your convenience. If you first need a meeting to discuss, just let me know. I still want to meet with you about workplace arrangements to see if any improvements to your situation would enhance your job performance or enjoyment.

Justin Lucey

Amy Meyer

EXHIBIT

B

Amy:

Thank you for meeting with me Friday on job issues. Its my perception that part of your recent concern is probably motivated by me having to take over the spear heading of the Ocean Club case; and the potential affect of this on your commission arrangement. Conversely, if you are not spearheading the Ocean Club case, you are concerned that you are not getting enough time in on definite bonus files. Here is what I would suggest.

First of all, I am willing to agree on a definite Ocean Club bonus percentage that does not depend on you spearheading the case. The amount of the bonus can be 5% if you intend to reduce your hours and commitment somewhat; or it can be the original 10% if you continue to give the case your energetic commitment (and agree to allow me to focus your efforts). As an aside, while I have taken all but the Courtney deposition so far, I have tried to give you some of the depositions; and I would like for you to be taking some of the future depositions. I also feel that our growth curve is such that its not necessary for us to be both sitting in the depositions; that is a luxury we can save for the most important depositions.

Secondly, with regards to the length of time prior to payout, prior to these issues arising, in early April, I had already made arrangements to deliver to you a \$10,000 advance on your Ocean Club work; I went to the bank to get the check last Monday morning prior to our meeting; but I did not broach it with you on Monday when I perceived on Monday that you had other issues which apparently needed to be aired. If you are going forward under the above arrangements, you are welcome to this check, which is in my office. If for any reason you leave prior to Ocean Club being resolved, you have no obligation to repay this.

Additionally, you have a trial bonus of 5% coming this month on the Cusack settlement; as the fee is \$52,632 (36% of 146.2k), the 5% results in a bonus check of \$2,632 to you (before taxes).

Additionally, you have a spearheading commission of 20% in Harper; my tentative calculation of this bonus from memory is this: 250k settlement; 34% fee totaling 85k; 60% split with Vernida Hill results in a fee to our firm of 42.5k; 20% to you results in a bonus of \$8,500 (this needs to be checked).

Including the advance on Ocean Club, this would result in bonus payments to you of \$21,132 over the next four weeks or so. This is in addition to the 401k contribution from Bees Ferry. It appears to me that you have a number of other cases which will bonus this year that will boost your pre Ocean Club compensation to over \$80,000 for the year. I expect some partial Ocean Club settlements this year and the final resolution by early next year. This appears to me to be a reasonable compensation package. Please let me know if you disagree.

~~If you would prefer a higher fixed income and lower variable income than the current set up, I am happy to consider your suggestions.~~ FYI, I do anticipate Sallie subcontracting services to us in the near future, so she may be able to lighten our load just a bit. If she does not, I will continue to look for another qualified candidate.

If you would prefer to diversify your case load, please let me know.

Regardless of the above, I need you 100% on board if you stay here. I can't have dissention in the office. Please prioritize resolving this. I am glad you took Monday off and I hope you are refreshed.

Justin

Justin

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National Arbitration and Mediation (NAM)

Case Submission Form: FAX TO : (516)-794-8518

Plaintiff	Justin O'Toole Lucey, P.A.			File No.	
Contact	Cherie W. Blackburn			Extension	
Firm	Nexsen Pruet, LLC				
Address	Post Office Box 486				
City	Charleston	State	SC	Zip Code	29402
Telephone#	843-720-1728	Fax#	843-720-1728		

Defendant	Amy K. Meyer			Claim No.	
Contact	Nancy Bloodgood			Extension	
Firm	The Foster Law Firm, LLP				
Address	3875 Faber Place Drive, Suite 204				
City	North Charleston	State	SC	Zip Code	29405
Telephone#	843-744-7828	Fax#	843-577-043		

Counsel				File No.	
Contact				Extension	
Firm					
Address					
City		State		Zip Code	
Telephone#		Fax#			

Venue	State	SC	County	Charleston		
Date of Loss	n/a		At Issue	Damages X - Liability Both		
In Suit	Yes	X - No	Pre-Agreed	X - Yes Arbitration Agreed Upon Per Contract No		
Process	X - Arbitration Mediation UM Arbitration UIM Arbitration Paper Arbitration					
Medicals Exchanged	Yes	No	X - N/A	Date Medicals Exchanged		
Parameters	Yes	No	X - N/A	High	Low	

Additional Parties or Notes (parameters, judges, scheduling, medicals, films, etc.)

See Attached -- Demand for Arbitration.

[for internal purposes only; do not complete]

Written By		Written On			
Entered By		Entered On		NAM ID#	

Additional Defendant(s) / Plaintiff(s) / Counsel(s) (D/P/C) Form

D/P/C			File No.	
Contact			Extension	
Firm				
Address				
City		State	Zip Code	
Telephone#		Fax#		

D/P/C			File No.	
Contact			Extension	
Firm				
Address				
City		State	Zip Code	
Telephone#		Fax#		

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Firm				
Address				
City		State	Zip Code	
Telephone#		Fax#		

Written By		Written On		
Entered By		Entered On		NAM ID#

**ARBITRATION PURSUANT TO
THE EMPLOYMENT RULES OF THE
AMERICAN ARBITRATION ASSOCIATION**

Justin O'Toole Lucey, P.A.,

Complainant,

vs.

Amy Meyer,

Respondent.

DEMAND FOR ARBITRATION

Justin O'Toole Lucey, P.A. ("the Firm") files this Demand for Arbitration and otherwise seeks relief against Amy K. Meyer ("Meyer") and alleges as follows:

BACKGROUND

1. The Firm maintains a law practice located at 415 Mill Street, Mount Pleasant, South Carolina 2946.
2. In or about January 2006, the Firm hired Meyer as an associate attorney.
3. At that time, Meyer had been practicing law approximately five years and had no civil trial experience.
4. In the spring of 2006, the Firm and Meyer entered into an agreement setting forth the terms of her employment.
5. This agreement was amended with regard to the payment of bonuses by letter agreement in the summer of 2007 (the "Bonus Amendment").
6. The original employment agreement and subsequent Bonus Amendment are referred to collectively herein as the "Employment Agreement" and are attached hereto and incorporated herein as Exhibits A and B respectively.

7. Among other things, the Employment Agreement specifies that all disputes related to the Employment Agreement are subject to mandatory, binding arbitration as follows:

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14. Lucey memorialized the content of that discussion in the Bonus Amendment.

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24. Lucey formalized his discussions in a letter to Meyer dated July 21, 2009, in which he states: "If you would like a fresh start, please put that request in writing to me and include in it specifics as to what you will change if I give you a fresh start. If you prefer to sever the relationship, pls [sic] turn in your unconditional resignation tomorrow by noon; barring such, this is notice that you are terminated at noon tomorrow."

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FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

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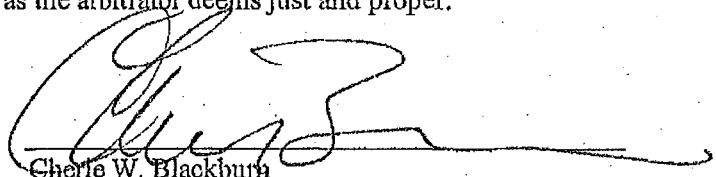
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WHEREFORE, the Firm requests that the arbitrator award the following relief:

A. Declaratory Judgment in favor of the Firm and against Meyer ordering and declaring that:

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- (2) The Firm has not violated the terms of the Employment Agreement with Meyer;
- (3) The Firm does not owe to Meyer any compensation, vacation, wages, retirement funds, bonuses, benefits or other sums;
- (4) The Firm is not required to pay to Meyer any additional bonus monies on the Ocean Club case or any other case.
- (5) The Firm has no obligation to pay to Meyer any portion of any funds received on the Ocean Club case or any other case after August 21, 2009 (said date being thirty days from the date of Meyer's departure).

B. Such other and further relief as the arbitrator deems just and proper.



Charlie W. Blackburn
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29402)
Post Office Box 486
Charleston, South Carolina 29401
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Facsimile: 843.720.1777

October 27, 2009
Charleston, South Carolina

Attorneys for Complainant
Justin O'Toole Lucey, P.A.

EXHIBIT

tabbies

A

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You will get two weeks off per year; three after five years. There is up to five sick days per year as needed for illness. Paid holidays total an additional ten business days (two weeks) per year off in addition to vacation time. (You are aware that we do some forced vacation at Christmas).

I will provide a laptop for your use.

You are generally expected to be in the office during office hours, which in the past have run from 8:30 to 5:30, with a one hour break for lunch; but which currently run from 9-5 with lunch eaten at desks. Unless up for trial or behind schedule, we try to close at 3pm on Fridays. You are also expected to spend 1-2 hours organizing your week sometime between late Friday and early Monday. It is anticipated that you will need to do project work one nite per week (more if in deposition or in trial). You should generally anticipate a forty five hour work week, exclusive of

breaks. Obviously, trial and trial preparation weeks are more hours.

Now for some legalize:

You agree that client confidentiality, and the activities within our firm are absolutely confidential; and that you will maintain that confidentiality at all times, absent a lawfully issued subpoena. If you are subpoena'd, you will promptly provide me with notice of the subpoena and an opportunity to contest it.

Until or unless we agree otherwise, I have sole client/case acceptance and assignment responsibility.

You agree not to moon light or accept compensation from any other source. You agree not to refer out clients without my express instruction.

This agreement may be terminated by either one of us on thirty days written notice without cause. After two years, the notice period will be increased to six weeks.

You agree that the office clients and files belong to my firm and that should a separation occur, you will not attempt to take any files or clients with you. For any files and clients you end up with for any reason, I will be entitled to payment of 75% of all fees earned on the case, and reimbursement of all expenses.

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

Subsequent Modifications

As we prepared for the Cusack trial, I provided you with an additional compensation term to compensate you for extra time spent in trial prep or trial on my cases. I communicated to you that you would be paid a bonus on my cases which you try to a verdict with me of 5% of the net fee recovered after verdict.

Secondly, I have been meaning to tell you that given various factors present in the Harper case, I am bumping your bonus to 15% on that case. If our co-counsel still receives a full 50% cut of the gross fee, I will bump your bonus further to 20%.

The contingency cases you are currently spearheading include Harper, Shoshan, Hanson, and Turner.

You are currently eligible for a trial bonus on Cusack to the extent we collect. You will have other trial bonus opportunities in the coming year.

Since we did not go to verdict on Planters Place, I am working on doing something(s) for you for

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your help in that case. On a semi-related matter, I think we have previously discussed some sort of retirement benefit. I am working on that now and will address it separately.

Lastly, I am working on modifying your trial bonus formula on my cases so that you will (1) give me candid trial assessment even if it jeopardizes your bonus; and (2) not feel let down if the case settles before verdict. I anticipate that so long as you are employed here, you would be participating in any case I try.

- Therefore, I propose to give you a bonus of 1% of the fee earned on any settlement which occurs after the case is called to trial (date certain or top of the roster) and is ready for trial if you have shared the load with me in getting the case ready for trial. Being ready for trial will be defined as having filed the trial brief, voir dire, jury charges, initial publication, and motion in limine; and having the first day's witness's and the expert ready to testify.
- This amount of the bonus will increase to 2% on fees earned after the jury is sworn and will increase to 3% on fees earned after the plaintiff rests.
- Should we go to verdict before recovery, the bonus is the original 5%.
- Should an appeal be necessary, you will spearhead that effort to defend our verdict.
- As always, these bonuses are only on amounts actually collected during your employment (or agreed to during your employment and collected within 30 days thereafter).

Separately, I am now adding a 5% bonus to the 5-6 collection matters you are handling for me. This is intended to give you an opportunity for some extra bonus money while we are building your pipeline.

I will compute your bonus each time a client disbursement is prepared and add it into the following paycheck.

I am also ready to send you to the one week Nita Trial seminar; or the longer one in Bolder Colorado. There are two one week sessions in June and the National session in July (10-12 days). Please go to Nita.com and take a look. While I am paying your expenses and salary during this seminar, your attendance does require that you have your other work sufficiently under control in advance; and may be preempted by any trial, although I think we can schedule around that.

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by countersigning below and returning to me at your convenience. If you first need a meeting to discuss, just let me know. I still want to meet with you about workplace arrangements to see if any improvements to your situation would enhance your job performance or enjoyment.

Justin Lucey

Amy Meyer

EXHIBIT

B

Amy:

Thank you for meeting with me Friday on job issues. Its my perception that part of your recent concern is probably motivated by me having to take over the spear heading of the Ocean Club case; and the potential affect of this on your commission arrangement. Conversely, if you are not spearheading the Ocean Club case, you are concerned that you are not getting enough time in on definite bonus files. Here is what I would suggest.

First of all, I am willing to agree on a definite Ocean Club bonus percentage that does not depend on you spearheading the case. The amount of the bonus can be 5% if you intend to reduce your hours and commitment somewhat; or it can be the original 10% if you continue to give the case your energetic commitment (and agree to allow me to focus your efforts). As an aside, while I have taken all but the Courtney deposition so far, I have tried to give you some of the depositions; and I would like for you to be taking some of the future depositions. I also feel that our growth curve is such that its not necessary for us to be both sitting in the depositions; that is a luxury we can save for the most important depositions.

Secondly, with regards to the length of time prior to payout, prior to these issues arising, in early April, I had already made arrangements to deliver to you a \$10,000 advance on your Ocean Club work; I went to the bank to get the check last Monday morning prior to our meeting; but I did not broach it with you on Monday when I perceived on Monday that you had other issues which apparently needed to be aired. If you are going forward under the above arrangements, you are welcome to this check, which is in my office. If for any reason you leave prior to Ocean Club being resolved, you have no obligation to repay this.

Additionally, you have a trial bonus of 5% coming this month on the Cusack settlement; as the fee is \$52,632 (36% of 146.2k), the 5% results in a bonus check of \$2,632 to you (before taxes).

Additionally, you have a spearheading commission of 20% in Harper; my tentative calculation of this bonus from memory is this: 250k settlement; 34% fee totaling 85k; 50% split with Verinda Hill results in a fee to our firm of 42.5k; 20% to you results in a bonus of \$8,500 (this needs to be checked).

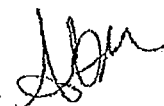
Including the advance on Ocean Club, this would result in bonus payments to you of \$21,132 over the next four weeks or so. This is in addition to the 401k contribution from Bees Ferry. It appears to me that you have a number of other cases which will bonus this year that will boost your pre Ocean Club compensation to over \$90,000 for the year. I expect some partial Ocean Club settlements this year and the final resolution by early next year. This appears to me to be a reasonable compensation package. Please let me know if you disagree.

~~If you would prefer a higher fixed income and lower variable income than the current set up, I am happy to consider your suggestions.~~ FYI, I do anticipate Sallie subcontracting services to us in the near future, so she may be able to lighten our load just a bit. If she does not, I will continue to look for another qualified candidate.

If you would prefer to diversify your case load, please let me know.

Regardless of the above, I need you 100% on board if you stay here. I can't have dissent in the office. Please prioritize resolving this. I am glad you took Monday off and I hope you are refreshed.

Justin



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Blackburn, Cherie

From: Amanda Kramer [AKramer@fosterfoster.com]
Sent: Friday, October 30, 2009 11:10 AM
To: Blackburn, Cherie
Subject: Amy Meyer
Attachments: 20091030_111026.pdf

Ms. Blackburn, attached please find a copy of the draft Complaint which Attorney Bloodgood is intending on filing next week.

Amanda Kramer
Assistant to Nancy Bloodgood, Esquire
Foster Law Firm, LLC
3875 Faber Place Drive, Suite 204
North Charleston, S.C. 29405
office: 843-744-3033
fax: 843-577-0434
akramer@fosterfoster.com